

Legal Principles, Law, and Tradition

Felipe Jiménez*

Legal reasoning and legal discourse take place within historical traditions that develop over time. Law is characterized by the authoritative presence of those historical traditions. This observation vindicates the basic positivist insight that law is ultimately grounded in social facts. These social facts include the history of the legal tradition, the work and shared understanding of legal scholars, and the moral reasoning of legal participants—all of which have been mistakenly left aside by many legal positivists and their usual focus on coercive institutions.

I use the Hart-Dworkin debate as a starting point for reclaiming the notion of law as a historically grounded practice. The Hart-Dworkin debate highlights that philosophical reflection about law becomes impoverished without history. A closer look at history shows that both Dworkin and Hart were partially right. As Dworkin argued, law is not only a matter of purely source-based legal rules, but also incorporates principles with weight and a less straightforward connection to social facts. However, the ubiquity of legal principles and their operation show that a socially grounded conception of law, as the one defended by legal positivism, is entirely consistent with the existence of legal principles.

At a deeper level, positivism is entirely consistent with moral reasoning taking place within legal institutions. But realizing this requires seeing law as a backward-looking social practice that is partially constituted by the work of legal scholars, depends on genealogy, and constitutes a depository of human societies' moral reflections. It also requires questioning the usual picture of morality in contemporary jurisprudence. Taking the historicity of law seriously, this Article focuses on recent jurisprudential debates regarding the rule of recognition and one-system views about law. While law is not a model of rules that rests on a simple master criterion of legal validity, and legal reasoning isn't discontinuous with moral reflection, it nevertheless is, as Hart argued, ultimately grounded in social facts.

* Assistant Professor of Law and Philosophy, University of Southern California. Profesor Adjunto Extraordinario, Universidad Adolfo Ibáñez (Chile). Many thanks to Charles Barzun, Mitchell Berman, Sam Erman, James Gordley, Paul Gowder, Adil Haque, Greg Keating, Martin Krygier, Brigitte Leal, Dan Priel, Marcela Prieto, Arie Rosen, David Simon, Nomi Stolzenberg, and workshop participants at the USC Center for Law, History, and Culture for their comments, and to the editors at the *Yale Journal of Law and the Humanities* for their comments and editorial work.

INTRODUCTION	60
I. Contemporary Jurisprudence and the Hart-Dworkin Debate	62
II. Legal Principles.....	64
III. Tradition and Genealogy	67
A. The Inescapability of Legal Tradition.....	67
B. Law Professors as Lawmakers	73
C. Genealogical Comfort	78
IV. Rethinking Jurisprudence	79
A. The Rule of Recognition	79
(1) Disagreement in Constitutional Interpretation.....	81
(2) Law Professors, Again.....	84
(3) Recognition, Dynamism, and Convergent Practice	85
B. One-System Views	87
CONCLUSION	90

INTRODUCTION

Legal reasoning and legal discourse take place within historical traditions that develop over time. This Article argues that an adequate understanding of law needs to put this fact front and center. A focus on the historical and traditional character of law vindicates the basic positivist insight that law is a matter of social fact.¹ At the same time, this focus highlights the connection between ostensibly moral reflection and legal practice, even if law is ultimately grounded in social facts.² A focus on law’s historical and

1. See LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW 23–31 (2014).

2. I use the adverb “ultimately” to distinguish two separate questions about law as a social institution. First, one can ask what makes law what it is. Given that law is not a fundamental feature of reality, its existence depends on other facts. Law is ultimately grounded, in this sense, in those facts on which its existence depends and which constitutively explain and determine it. See Samuele Chilovi & George Pavlakos, *Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence*, 25 LEGAL THEORY 53, 54, 59–60 (2019); David Plunkett, *Negotiating the Meaning of “Law”: the Metalinguistic Dimension of the Dispute over Legal Positivism*, 22 LEGAL THEORY 205, 208 (2016). Yet one can also ask what conception of law best explains the historically contingent institution of law that we happen to have (our historical legal practices). The statement that law is *ultimately* grounded in social facts is an answer to the first question, which is compatible with the social facts being such that the best conception of *our* social institution “law” refers to more than social fact alone. I will return to this point below.

traditional character also leads to the recognition that legal knowledge is mediated. We learn about the legal past and the standards that arise from it by learning from others, including law professors and the books and articles they write. In this process, legal scholars contribute to the development of law. This contribution is crucial to understand how law is grounded in social facts—and has been mistakenly left aside by legal positivists and their usual focus on coercive institutions.

While the argument I will offer vindicates the positivist claim that law is based in social facts, it also expands it in three ways. First, the historical tradition of legal practices and the values and attitudes they foster are part of the relevant social facts. Second, because of legal scholars' role in transmitting, systematizing, and reconstructing legal knowledge, their work and activities are also part of the facts that ground the content of law. Third, because of these two features, our legal practices usually incorporate forms of moral reasoning. But moral reasoning, particularly when carried out by participants in legal practices, is influenced and mediated by legal tradition.

Thus, legal participants' moral reasoning is a trait of legal practices that can be integrated within a positivist view of law. But seeing this requires problematizing the usual jurisprudential view of morality. According to that usual view, characteristic of classical legal positivism, morality is a self-standing template that can fully determine the legitimate content of law, without any input from legal institutions. Against this view, I will argue that law is a source of moral learning that generates norms, evaluative attitudes, and structures of thought that shape the moral commitments of legal participants and, to a lesser extent, the population at large.

Here is the roadmap for the rest of the Article. Part I offers a snapshot of the current state of jurisprudence in the wake of the Hart-Dworkin debate. Part II traces a brief genealogy of the notion of legal principles in the Western legal tradition and explores their connection to legal history. I take *Riggs v. Palmer*,³ one of the cases Dworkin used in his early criticism of Hart's legal positivism,⁴ as an illustration. Part III explains how the connection between legal principles and the historical record reflects a more general fact: legal practices are historical traditions that rely heavily on genealogical arguments. Because we learn about the past through the mediation of—among others—law professors and legal scholarship, a grounding of law in social facts should not ignore, as much contemporary jurisprudence does, the relevance of legal scholarship as a source of law. Part IV connects these considerations to two discussions in general jurisprudence that were at stake in the Hart-Dworkin debate or arose from it: Hart's rule of recognition and the one-system view. I close the argument with some considerations about the connection between jurisprudence and

3. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

4. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 23 (1978).

the history of ideas, and about the implications of my view for jurisprudence.

Ultimately, the argument advanced in this Article shows that we should not see jurisprudence as detached from political and conceptual history.⁵ Jurisprudential questions should be pursued in connection to the actual contingent histories of the practices and concepts we aim to theorize. This Article attempts to contribute to the revitalization of general jurisprudence by taking the historicity of law and our images of it seriously.

I. CONTEMPORARY JURISPRUDENCE AND THE HART-DWORKIN DEBATE

I will take as my point of departure an important debate in twentieth-century Anglo-American jurisprudence. In *The Model of Rules* I and II,⁶ Dworkin formulated a powerful critique of Hartian legal positivism. According to Dworkin, Hart ignored the role that legal principles play in the adjudication of hard cases. That discussion, usually called the “Hart-Dworkin debate,”⁷ followed a complicated path. The path led to a division within positivism between inclusive and exclusive versions—with the inclusive version arguing that the grounds of law *might* be connected to morality (depending on the relevant social facts) and the exclusive version arguing that the grounds of law and morality are necessarily separated.⁸ Dworkin later moved on to argue that law is an interpretive concept and legal reasoning turns as much on questions of political morality as it does on social facts.⁹ By the time of his death, Dworkin had moved from this view as well and had gone further, arguing for what he called a “one-system view”: the view that law, properly understood, is just a specific part of morality.¹⁰

General jurisprudence is not what it used to be, and it is certainly not what it was in the wake of the Hart-Dworkin debate. Some scholars have even claimed that general jurisprudence is no longer interesting or worth much

5. Dan Priel, *Is There One Right Answer to the Question of the Nature of Law?*, in PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 322, 322 (Wilfrid J. Waluchow & Stefan Sciaraffa eds., 2013). See also Arie Rosen, *Law as an Interactive Kind: On the Concept and the Nature of Law*, 31 CAN. J.L. & JURIS. 125, 125 (2018).

6. DWORKIN, *supra* note 4.

7. For an overview, see Scott J. Shapiro, *The “Hart–Dworkin” Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22–55 (Arthur Ripstein ed., 2007).

8. For inclusive legal positivism, see Jules L. Coleman, *Negative and Positive Positivism*, 11 J. L. STUD. 139 (1982); E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977); W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994). For exclusive legal positivism, see JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37–52 (2009).

9. RONALD DWORKIN, LAW’S EMPIRE (1986).

10. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 400–409 (2011). Note that whether Dworkin’s views in *Justice for Hedgehogs* were in fact a departure from his earlier views is a contested interpretive question (which I can mostly set aside for my purposes). See Hillary Nye, *The One-System View and Dworkin’s Anti-Archimedean Eliminativism*, 40 LAW & PHIL. 247 (2021).

attention.¹¹ The general sentiment seems to be that general jurisprudence is at a dead end.¹² General jurisprudence has certainly become more philosophically rigorous and has increased its ability to dialogue with other fields of philosophy—but its relevance within law schools and its ability to dialogue with other forms of legal scholarship have significantly declined. The considerable expansion in areas of special jurisprudence—such as private law theory—in the past few years seems to suggest that most of the contemporary theoretical attention is focused on specific areas of law,¹³ rather than in law in general.¹⁴ Finally, the recent developments in “experimental jurisprudence”¹⁵ suggest that the future of jurisprudence might involve abandoning the analytic style of twentieth-century jurisprudence.

This situation parallels changes in the status of the Hart-Dworkin debate within jurisprudence. While the debate was a central part of Anglo-American jurisprudence during the last decades of the twentieth century, by the early 2000s scholars were questioning the debate’s significance.¹⁶ A few years later, Scott Hershovitz argued that the debate was a fly bottle we should open and do without.¹⁷ We no longer inhabit the intellectual world of Hart and Dworkin. Their debate has lost the central place that it once had

11. David Enoch, *Is General Jurisprudence Interesting?*, in DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 65–86 (David Plunkett, Scott J. Shapiro, & Kevin Toh eds., 2019). *But see* Julie Dickson, *Why General Jurisprudence Is Interesting*, 49 CRÍTICA: REVISTA HISPANOAMERICANA DE FILOSOFÍA 11–40 (2017).

12. *See* Andrei Marmor, *What’s left of general jurisprudence? On law’s ontology and content*, 10 JURISPRUDENCE 151, 151 (2019) (noting, though not sharing, this widespread sentiment).

13. This raises a question, though. Can we engage in the project of special jurisprudence, of talking about specific areas of law, without general jurisprudence? For a negative answer, see John Gardner, *Law in General*, in LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 270, 279 (2012).

14. There is still, of course, interesting and even ground-breaking work being done in general jurisprudence. *See, e.g.*, Michelle Madden Dempsey, *Why We Are All Jurisprudes (or, at Least, Should Be)*, 66 J. L. EDUC. 29 (2016); KENNETH M. EHRENBERG, THE FUNCTIONS OF LAW (2016); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014); Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015); David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 128 ETHICS 37 (2017); Kevin Toh, *Jurisprudential Theories and First-Order Legal Judgments*, 8 PHIL. COMPASS 457 (2013).

15. *See, e.g.*, Raff Donelson & Ivar R. Hannikainen, *Fuller and the Folk: The Inner Morality of Law Revisited*, in 3 OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY 6–28 (Tania Lombrozo, Joshua Knobe, & Shaun Nichols eds., 2020); Joshua Knobe & Scott J. Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165 (2021); James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019); Roseanna Sommers, *Commonsense Consent*, 129 YALE L. J. 2232 (2020); Kevin P. Tobia, *Testing Ordinary Meaning: An Experimental Assessment of What Dictionary Definitions and Linguistic Usage Data Tell Legal Interpreters* (2019), <https://papers.ssrn.com/abstract=3266082> (last visited Feb 28, 2020); Kevin Tobia, *Experimental Jurisprudence* (2021), <https://papers.ssrn.com/abstract=3680107> (last visited Mar 2, 2021).

16. *See* Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 170 (2004). Some people argue that this state of affairs is good, and the debate should no longer play the role it played a few decades ago. *See, e.g.*, Hershovitz, *supra* note 14; Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17 (2003).

17. Hershovitz, *supra* note 14. *But see* Keith Culver, *Leaving the Hart-Dworkin Debate*, 51 U. TORONTO L.J. 367 (2001).

in jurisprudence—and jurisprudence itself is somewhat in crisis.

Still, I take the debate as a starting point for my argument that law's historicity should be at the center of jurisprudential reflection. This starting point might seem paradoxical. The Hart-Dworkin debate tended to be somewhat ahistorical, particularly on Dworkin's side (Dworkin's approach as a theorist was generally ahistorical).¹⁸ But the paradox is only apparent. The Hart-Dworkin debate is a useful starting point *precisely* because it highlights that philosophical reflection about law becomes impoverished without history. A more historically aware version of the debate would have been more tractable and, perhaps, would have led jurisprudence down a different path.

A closer look at history shows that both Dworkin and Hart were partially right. As Dworkin argued, law is not a matter of purely source-based rules, because law has at times incorporated purported moral principles with weight and a less straightforward connection to social facts than posited rules.¹⁹ But there is a way in which Hart had the better of the debate. The ubiquity of principles and their routine operation in legal reasoning shows that they have always been part of law and that they have been subject to validation by practices of social identification, such as the rule of recognition,²⁰ in Western legal systems. Legal positivism's socially grounded conception of law is consistent with the existence of legal principles and, at a deeper level, the practice of moral argument within legal institutions. What legal positivism denies is that the presence of moral argument in legal practice entails that law is grounded in moral facts.

II. LEGAL PRINCIPLES

Dworkin's original critique started from the observation that, against the positivist "model of rules," legal reasoning also involves more open-ended norms, called *principles*. These principles are typically not canonically posited and have a dimension of weight: they provide reasons to decide in one direction rather than another, without dictating a specific decision.²¹ Once we acknowledge that legal principles exist as a separate category from rules, Dworkin argued, "we are suddenly aware of them all around us. Law teachers teach them, law books cite them, legal historians celebrate them."²²

18. Several scholars have pointed out this issue before me. See, e.g., Michael Walzer, 'Spheres of Justice': An Exchange, THE NEW YORK REVIEW (1983), <https://www.nybooks.com/articles/1983/07/21/spheres-of-justice-an-exchange/> (last visited Aug 5, 2020). Mark D. Walters, *Legal Humanism and Law-as-Integrity*, 67 CAMBRIDGE L.J. 352, 352 (2008).

19. DWORKIN, *supra* note 4, at 24, 28–31.

20. The rule of recognition is a "secondary rule" that represents the complex set of social facts that settle the ultimate and supreme criteria determining which primary norms are *valid* and count as part of the legal system. See H.L.A. HART, THE CONCEPT OF LAW 100–110 (1994). See *infra* Part III.

21. DWORKIN, *supra* note 4, at 22–26.

22. *Id.* at 28.

Dworkin's observation is correct. Legal principles have been a central part of Western legal traditions at least since Roman law.²³ Nevertheless, Dworkin failed to acknowledge that *awareness* of the presence of legal principles existed well before him. While the precise understanding, at any given point in time, of what counted as a principle depended on deeper conceptions about law and justice, different conceptions of the same concept²⁴ were already familiar to legal systems and their participants—and not just to non-positivists like Aquinas.²⁵ European codifications since as early as the late seventeenth century and until as late as the early nineteenth century referred to legal principles as part of the legitimate legal norms that could be applied by judges.²⁶

This awareness is not a peculiarly civilian phenomenon. In the late medieval common law,²⁷ and at least since Fortescue,²⁸ “legal maxims” were typically identified as fundamental legal principles.²⁹ These maxims were seen as the foundational grounds of the common law³⁰ and as self-evident principles of legal reasoning.³¹ Even if self-evident, maxims were usually connected in legal argument to pre-existing authority.³² Francis Bacon, one of the founding figures of the practice of collecting these legal maxims, conceived his work as the compilation of the principles underlying the common law's historical tradition and allowing for its development.³³ The classical English treatises of Pollock and others were presented as

23. Many scholars analogize the contemporary notion of legal principles to the Roman notion of *regulae iuris*. ALEJANDRO GUZMÁN BRITO, *EL ORIGEN Y LA EXPANSIÓN DE LA IDEA DE PRINCIPIOS DEL DERECHO* 279 (2014); Peter Stein, *Civil Law Maxims in Moral Philosophy*, 48 *TUL. L. REV.* 1075, 1075 (1973–1974). See also GUIDO ALPA, *LA CULTURA DELLE REGOLE: STORIA DEL DIRITTO CIVILE ITALIANO* 27–35 (2000). For an overview of the role of general principles in Roman law, see Laurens Winkel, *The Role of General Principles in Roman Law*, 2 *FUNDAMINA*, 103 (1996). Many of these Roman *regulae* included notions that modern common lawyers would characterize as equitable principles. A. M. Honore, *Legal Reasoning in Rome and Today*, 4 *CAMBRIAN L. REV.* 58, 62 (1973) (giving examples of recovery on the basis of natural equity). One example of a *regulae* that looks very much like a contemporary principle, for instance, is found in Dig. 50, 17, 206.

24. On the concept-conception distinction, see DWORKIN, *supra* note 9, at 71–72.

25. On the notion of “principles” in Aquinas's legal philosophy, see GUZMÁN BRITO, *supra* note 23, at 77–80.

26. *Id.* at 23, 233.

27. See Fritz Pringsheim, *The Inner Relationship Between English and Roman Law*, 5 *CAMBRIDGE L.J.* 347, 352 (1935) (discussing the similarities between Roman *regulae* and common law maxims).

28. JAMES W. TUBBS, *THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS* 173 (2000).

29. See, e.g., CHRISTOPHER SAINT GERMAN, *THE DOCTOR AND STUDENT, OR, DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND* 25–26 (1886).

30. A. W. B. SIMPSON, *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 283 (1987).

31. Ian Williams, *The Role of Rules: Legal Maxims in Early-modern Common Law Principle and Practice*, in *LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* 188, 191 (Maksymilian Del Mar & Michael Lobban eds., 2016).

32. *Id.* at 192.

33. Andrea Padovani & Peter G. Stein, *The Age of Sir Edward Coke*, in 8 *A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE: A HISTORY OF THE PHILOSOPHY OF LAW IN THE COMMON LAW WORLD, 1600–1900* 29, 38–40 (Michael Lobban, Andrea Padovani, & Peter G. Stein eds., 2007).

works explaining the basic principles of law.³⁴ In the heyday of American legal formalism, Langdell believed that correct solutions to legal problems could be achieved by applying a few fundamental legal principles.³⁵ More recently, Roscoe Pound emphasized distinctions between legal precepts—such as legal concepts, doctrines, and standards—and received ideals, in a way that loosely anticipated Dworkin’s distinction.³⁶

In fact, the precise distinction between rules and principles had been made before Dworkin.³⁷ Now, Dworkin was aware that principles had a long tradition in the common law, and his criticism against positivism was that it was unable to account for the role of principles in legal reasoning. But the brief discussion so far illustrates how common it had been for legal commentators to consciously recognize the existence of principles as a central part of law. The assumption that Hart used the language of “rules” in a way that excluded principles from the domain of law is implausible.³⁸ More importantly, the relatively extended awareness of legal principles in the Western legal tradition seems to suggest that a view of law that grounds it in social and historical facts could accommodate their existence.

One of Dworkin’s main examples against Hartian positivism was *Riggs v. Palmer*.³⁹ The case involved the question of whether an heir—named in his grandfather’s will—could inherit even though he had murdered his grandfather. The court held that, because of the “fundamental maxims of the common law,” including that “no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong,”⁴⁰ the heir could not inherit.

This type of decision, according to Dworkin, cannot be accommodated by Hart’s view that legal validity is ultimately determined by social facts.⁴¹ But *Riggs v. Palmer* is not entirely helpful for Dworkin’s argument.⁴² The principle the court applied is an equitable principle, with a clear historical pedigree, which governs the conditions under which judges can block the effect of legally valid titles.⁴³ The case was decided at a time when

34. SIMPSON, *supra* note 30, at 306–307.

35. Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 5, 11 (1983).

36. Martin Krygier, *Thinking Like a Lawyer*, in *ETHICAL DIMENSIONS OF LEGAL THEORY* 67, 70 (Wojciech Sadurski ed., 1991).

37. According to Simpson, one of the few commentators who have delved on this point, Dworkin’s rule-principle distinction “is of extreme antiquity.” SIMPSON, *supra* note 30, at 282. Guzmán Brito, for instance, identifies a similar distinction in the work of Spanish theologian Francisco Suárez. See GUZMÁN BRITO, *supra* note 23, at 160. And a similar distinction is made, in American legal writing, by Joseph W. Bingham, *What Is the Law*, 11 MICH. L. REV. 1 (1912); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908).

38. As Hart himself suggested later. HART, *supra* note 20, at 263.

39. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

40. *Id.* at 511. For Dworkin’s account, see DWORKIN, *supra* note 4, at 23.

41. *Id.* at 39–43.

42. Timothy Macklem, *The Ideal and the Everyday*, 10 JURISPRUDENCE 532, 538 (2019).

43. Kenneth Henley, *Abstract Principles, Mid-Level Principles, and the Rule of Law*, 12 LAW PHIL. 121, 128–129 (1993).

American judges were struggling with the fusion of law and equity. Still, equitable principles were undoubtedly part of the socially recognized sources of judicial decision-making. The specific principle that “no one should profit from their own wrongdoing” had a long history. In the seventeenth century, Henry Finch mentioned it as one of the principles of common law jurisprudence.⁴⁴ One can also find antecedents of this principle in Roman law: “no one can argue before a court their own turpitude” (*nemo auditor turpitudinem suam allegans*), and “no one can go against their own deeds” (*nemo contra factum proprium potest*).⁴⁵ *Riggs* itself cites authorities from comparative⁴⁶ and American law⁴⁷ to justify the claim that no one can base a cause of action on an illegal act.

Dworkin’s own example, thus, seems to suggest that a theory that sees law as grounded in social facts can account for the use of legal principles.

III. TRADITION AND GENEALOGY

A. *The Inescapability of Legal Tradition*

Because of these considerations, it is tempting to agree with those who think that Dworkin was wrong, because legal positivism can accommodate the existence of legal principles, and the language of “rules” does not exclude other legal standards.⁴⁸ After all, legal principles have been a central aspect of many Western legal systems and their participants’ understandings. It would be surprising if Hart had been committed to the implausible view that law is a model of *only* rules.

But this response would be too quick.⁴⁹ Dworkin’s objection was not that Hartian positivism denied the existence of legal principles. Rather, the claim was that Hartian positivism struggled to accommodate the presence of these principles in legal reasoning within its central tenets. Legal principles cannot be easily connected to formal tests of validity based on social facts alone.⁵⁰ Thus, legal principles question the idea of a socially grounded master test of legal validity, like the rule of recognition.⁵¹

There is a distinction between “principles” as extra-legal normative standards and “principles” as legal standards that operate differently from a

44. SIR HENRY FINCH, *LAW, OR, A DISCOURSE THEREOF: IN FOUR BOOKS* 46 (1627). Cited in Walters, *supra* note 18, at 371.

45. See Winkel, *supra* note 23, at 116.

46. The court refers to the English case *Holmann v. Johnson* (1775), and to several civil law codes and historical antecedents such as the Spanish *Partidas*. *Riggs v. Palmer*, 115 N.Y. 506, 507 (1889).

47. Such as *Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591 (1886), cited in *Riggs* 115 N.Y. at 512 (1889).

48. See, e.g., Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 845 (1972). See also HART, *supra* note 20, at 263.

49. Shapiro, *supra* note 7, at 29.

50. DWORKIN, *supra* note 4, at 43.

51. *Id.* at 44.

rule that becomes relevant here.⁵² For contemporary readers, as for Dworkin, the notion of a normative standard that could be applied to questions of institutional and social organization without a legal source is straightforward. Consider the principle that social welfare ought to be maximized or Rawls's two principles of justice.⁵³ They are examples of extra-legal principles that provide a template for institutional design.

The principles that, as I have argued, were recognized as part of law and legal reasoning in Western legal traditions would not have been understood as these extra-legal standards—at least until the advent of modern legal positivism. As Martin Stone has argued, historically, the theoretical novelty of positivism was not (just) its original view of law, but rather its connection to a certain picture of a fully determined morality that stands apart from law.⁵⁴ As Stone explains, the whole idea that moral reflection could be carried out with complete independence from law would have been unfamiliar to classical natural law theorists and even to modern thinkers like Kant.⁵⁵ If Stone is right, when Austin famously argued that the existence of law is independent from its merit,⁵⁶ his point was not merely that law can always be morally evaluated (something no classical natural lawyer would have disagreed with). More importantly, Austin's point seemed to be that there is a fully autonomous entity called "morality," which stood independently from law, could be determined without it, and could be called upon for the normative evaluation of legal norms and legal systems.⁵⁷ This autonomous morality might require public institutions and laws to be implemented—it would be hard to maximize social welfare or ensure that economic differences improve the position of the worst-off without laws and legal institutions. But the classical idea in Western legal thought was not simply that achieving certain moral aims might, under sufficiently complex social circumstances, require legal institutions. It was rather that parts of morality, certain genuinely moral principles, can only be applied or used through their embodiment in positive law.⁵⁸

This offers a paradoxically Dworkinian critique of Dworkin's argument that legal principles cannot ultimately be grounded exclusively in social facts and that the "grounds of law"—the facts and considerations that make a legal proposition true—also include moral facts. This argument assumes that there is a separation between moral facts and social facts and that the place of moral argument in legal practices cannot be explained unless we assume that law is partly grounded in moral considerations. I do not want

52. See, e.g., MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* 76 (1988).

53. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

54. Martin Stone, *Legal Positivism as an Idea About Morality*, 61 U. TORONTO L.J. 313, 321 (2011).

55. *Id.* at 325.

56. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (1998).

57. Stone, *supra* note 54, at 327.

58. *Id.* at 319.

to deny that we *can* (and, in fact, a lot of political philosophy is an attempt to) come up with normative principles that are not connected to, or depend on, the contingent history of legal practices.⁵⁹ But when legal scholars and judges within the Western legal tradition argued that a certain proposition was a legal principle, they made that proposition within a certain historical tradition to which the proposition was connected. The proposition itself might have moral content, and—as Dworkin argued—its connection to authoritative texts might not be as straightforward as in the case of legal rules. But the existence of the proposition as a legitimate justificatory source for a judge was ultimately a matter of social fact—and, specifically, social facts about the history and tradition of the practice. Remember *Riggs v. Palmer*.

This means that Dworkin’s observation that the institutional relevance of legal principles is partly a matter of moral reasoning is not a fatal blow against legal positivism. These arguments made by legal participants acting within legal institutions are part of the ongoing discursive traditions of the relevant legal system and are made relevant by the tradition itself.

The relevance of historical tradition in law is not just based, as Krygier notes, in the fact that law is centrally concerned with the past.⁶⁰ The tradition is itself a source of substantive norms, models, linguistic practices, ways of speaking and inhabiting the world that legal participants or “insiders” (in Hartian terms, “those who assume an internal point of view”⁶¹) adopt as their own perspective towards the world and its evaluation.⁶²

It is well known that moral reflection cannot generate the determinate conclusions that a legal system needs to reach.⁶³ But my claim here goes even further. Moral reflection about the specific questions legal institutions deal with is typically carried out by legal participants within legal institutions, and therefore as part of the history of those institutions.⁶⁴ This leads to a set of ostensibly moral norms, evaluative attitudes, and ways of thinking about political morality that are held particularly by those legal insiders. These norms and attitudes will sometimes be problematic and even immoral. Perhaps significant parts of the practice will be perceived even by the insiders as unjust or illegitimate. But, even in those situations, legal

59. Still, as much as we might want to break free from the weight of legal tradition, moral reasoning is indebted to it—particularly in areas of morality that are also areas of legal regulation. See *infra* Part IV.b.

60. Martin Krygier, *Law as Tradition*, 5 *LAW PHIL.* 237, 241 (1986).

61. HART, *supra* note 20, at 89–92.

62. Krygier, *supra* note 60, at 244. See also Charles Fried, *Artificial Reason of the Law or: What Lawyers Know*, 60 *TEX. L. REV.* 35, 37 (1981); E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263* (1975).

63. See Fried, *supra* note 62, at 54. See also (on the natural law notion of *determinatio*) JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 284–289 (1980); Tony Honoré, *The Dependence of Morality on Law*, 13 *OXFORD J. LEGAL STUD.* 1, 2–4 (1993).

64. See MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 21 (1993).

insiders will tend to feel the conflicting pull of their stance as participants (for instance, judges) who have adopted values and attitudes inculcated by the legal practice and their moral stance as critical citizens, laypersons, etc.⁶⁵ The right moral decision in these situations might be to ignore the internal values of the practice, to ignore the obligations that purportedly come with the office of the judge or the lawyer, in pursuit of justice.⁶⁶ However, this critical engagement with legal institutions is still influenced by the moral standards and evaluative attitudes cherished by the legal practice.

Even moral reasoning that attempts to transcend the constraints of legal tradition tends to be influenced by legal texts and practices. For instance, even though rationalist natural law theorists of the seventeenth and eighteenth centuries intended to develop natural principles of justice derived from pure reason, they relied heavily on Roman law.⁶⁷

The values and attitudes of the legal tradition might be morally corrupt and might reinforce or facilitate domination and alienation.⁶⁸ Perhaps, acquiring legal expertise within deeply corrupt or unjust legal systems actually undermines our capacity for moral deliberation. Yet, if this is the case, it is because acquiring legal expertise requires not just learning rules and doctrines, but also immersing oneself within a practice with its own moral vocabulary, values, habits, and standards,⁶⁹ as part of a history and as a bearer of a tradition.⁷⁰ In more prosaic terms, our moral judgments as judges, scholars, and lawyers are partly endogenous—partly derived from institutional norms, practices, and traditions.⁷¹ That's why understanding a legal system is not a matter of collecting rules or empirical facts, but rather of acquiring the ability to think like a lawyer who is part of that system.⁷² The standards of thought and value that the legal tradition endorses should be subject to critical scrutiny.⁷³ But, as participants in these practices, we cannot even begin to engage with them and the problems they deal with without accepting at least some of the standards internal to the practice so far.⁷⁴

Moral reflection about law is, in this way, influenced by the legal

65. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 119 (1975).

66. *Id.* at 198.

67. GUZMÁN BRITO, *supra* note 23, at 166–167. I come back to this point *infra* Part IV.b.

68. THOMPSON, *supra* note 62, at 259.

69. See Jessie Allen, *Doctrinal Reasoning as a Disruptive Practice*, 6 J.L. & CTS. 215, 222 (2018).

70. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 206 (1981).

71. Regarding judges, see Christopher Kutz, *The Judicial Community*, 11 PHIL. ISSUES 442, 448 (2001).

72. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PENN. L. REV. 1889, 1896 (1995).

73. Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 988 (1990).

74. MACINTYRE, *supra* note 70, at 177.

tradition. Moreover, within legal institutions and legal discourse, the tradition has a hold over those who take in part in it, limiting their interpretive freedom.⁷⁵ Legal concepts are historical artifacts.⁷⁶ Understanding them requires interpreting the authorized institutional tradition.⁷⁷ It also requires adopting certain ideals and standards that the tradition values. Unsurprisingly, then, our critical reflection about legal concepts and institutions is heavily influenced by those ideals and standards.

Traditions have certain distinctive features. They are backward-looking: the contents of the tradition are originated in the past. In the present, that past has an *authoritative presence*. Moreover, traditions are social. They depend on shared habits and customs.⁷⁸ Because traditions are social and depend on contingent social facts, they are also amenable to change.⁷⁹ An important part of their internal discourse is about the direction in which the traditions should go.⁸⁰ Because of this, the tradition also allows for internal innovation.⁸¹ Acquiring legal knowledge, in other words, is both about coming to know the pre-existing past and creating something new from within it.⁸²

Acknowledging the fact that law is a tradition does not imply a normative judgment about this trait.⁸³ It should not be confused with traditionalism as an approach to legal interpretation⁸⁴ or conservatism. It is compatible with the relative openness to change and innovation that characterizes legal discourse. Still, participants in the legal practice who recognize its authority will tend to accept—as legal positivism argues—that “[t]o the question, ‘why are these the marks of legality?’ it is a sufficient answer that ‘that’s

75. DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 6 (1990); Jarkko Tontti, *Law, Tradition and Interpretation*, 11 INT’L J. SEMIOTICS L. 25, 29 (1998). Regarding the common law, see R. C. VAN CAENEGEM, *JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY* 8 (1993). At a more general level, see HANS GEORG GADAMER, *TRUTH AND METHOD* 280 (1989).

76. NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 340 (Fatima Kastner & Richard Nobles eds., Klaus Ziegert tran., 2004).

77. Krygier, *supra* note 60, at 245.

78. Here I follow *Id.* at 240.

79. Harold J. Berman, *Introductory Remarks: Why the History of Western Law Is Not Written*, 1984 U. ILL. L. REV. 511, 514 (1984).

80. MACINTYRE, *supra* note 70, at 206. I return to this point *infra* Part IV.a.

81. Krygier, *supra* note 36, at 68–69; Tontti, *supra* note 75, at 30.

82. Paolo Becchi, *German Legal Science: The Crisis of Natural Law Theory, the Historicisms, and “Conceptual Jurisprudence”*, in A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE: VOL. 9: A HISTORY OF THE PHILOSOPHY OF LAW IN THE CIVIL LAW WORLD, 1600-1900 185–224, 209 (Enrico Pattaro et al. eds., 2009); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 180 (1993).

83. Similarly, Irit Samet, *On Tradition and the Conservation of Equity*, 65 AM. J. JURIS. 109, 116–117 (2020).

84. On traditionalism as an approach to constitutional interpretation, see Brown, *supra* note 82; Marc DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME LAW REVIEW 1123 (2020).

how we do things around here.”⁸⁵ At the same time, and as legal positivism also argues, the mark of legality does not settle the question of how one ought to act.⁸⁶ Yet lawyers, law students, judges, and legal scholars asking those questions will be heavily influenced by the moral ideals and values that are part of legal practice.

There is a tension here. Law accords to the past an authority that critical moral reflection does not.⁸⁷ From the perspective of moral reflection, we can never be bound to honor the past just because it is the past.⁸⁸ Sometimes, lawyers and judges feel this tension. As Holmes wrote:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁸⁹

This is a serious concern. One must answer why we ought to follow the tradition even in the instances we think the tradition is mistaken. This will require moral argument *about* the tradition and our attitudes towards it. But, as long as we think the overall practice is justified, when we act *within* the tradition,⁹⁰ we will mostly take it for granted that the norms and values of the tradition are a valid guide for action. For legal participants, critical moral reflection about aspects of human interaction that we have come to think about with the help of that tradition (“Should the promisor perform her promise?”) will be influenced and mediated by the standards, categories, and patterns of thought and talk that characterize the tradition. We might want to ask when specific mistakes made in the legal tradition warrant changing it. We might even want to argue that considerations, values, and concerns that have not been part of the tradition should be incorporated. But, at least partially, these debates will turn on criteria of correctness that are embodied in and emerge out of that tradition.⁹¹

Dworkin’s observations about the presence of ostensibly moral standards in our legal practices were, thus, entirely correct. Dworkin was also right in thinking that legal and moral argument can coexist in complicated ways. This, however, does not constitute an argument against the positivist insight that law is ultimately grounded in social facts.

85. Kutz, *supra* note 71, at 445.

86. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958).

87. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1034 (1990).

88. *Id.* at 1037.

89. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 991, 1001 (1997).

90. For the distinction about questions about and within social practices, see John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955). See also Felipe Jiménez, *Two Questions for Private Law Theory*, 12 JURISPRUDENCE 391 (2021).

91. See ALASDAIR C. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 7 (1988).

B. Law Professors as Lawmakers

The relevance of the past is not fatal for the non-positivist view. Non-positivists could argue that, of course, if we can find institutional support for our moral commitments in pre-existing sources, we will use them to bolster our arguments. The legal tradition and its past might be a useful guide to find the moral principles that judges use in adjudication. More strongly, in the terms of *Law's Empire*, perhaps the principles judges ought to use to show the legal tradition in its morally best light⁹² should be supported by the past record of that tradition. But, as Dworkin would argue, while principles need to *fit* the authoritative past, their force is not dependent on social fact alone but is also a matter of how well they *justify* the pre-existing record.⁹³ Even if legal argument is backward-looking and depends on tradition, it requires moral evaluation. While the legal rules arising out of statutes, code provisions, and other formal enactments might be easily connected to social facts, the identification of legal principles also requires moral evaluation.

This potential response rests on a somewhat crude view of legal knowledge. A crucial question here is how exactly it is that we (lawyers and judges) get to learn about the legal past. The answer, for most contemporary legal participants, is that we learn about the legal past and the rules and standards that arise from it through law professors and the books and articles they write. This fact is crucial to understand how law is ultimately grounded in social facts—and has been mistakenly left aside by legal positivists and their usual focus on coercive institutions, like legislatures and courts.⁹⁴ Legal scholars are not merely the passive recipients or communicators of legal materials.⁹⁵ On the contrary, they shape our understanding and construction of those materials.

Legal enactments, such as statutes, have a communicative content (i.e., a linguistic meaning)⁹⁶ and a legal content—legal implications in terms of the legal rights, obligations, authorities, privileges, remedies, and defenses they produce.⁹⁷ As Greenberg has argued, the communicative content of legal

92. DWORKIN, *supra* note 9, at 225.

93. On fit and justification, *see Id.* at 65–68.

94. Some theorists have argued in favor of a focus on coercion. *See* FREDERICK SCHAUER, *THE FORCE OF LAW* (2015).

95. Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 *VAND. L. REV.* 401, 402 (2007).

96. I use the term “interpretation” in a wide sense, not exclusively restricted to cases of semantic vagueness or unclear meaning. Similarly, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 53 (2012). *But see* ANDREI MARMOR, *THE LANGUAGE OF LAW* 108 (2014).

97. *See* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 *COLUM. L. REV.* 833, 833–35 (1964); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95 (2010); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 *NOTRE DAME L. REV.* 479 (2013); Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 *WASH. U.L. REV.* 1095, 1097 (1995).

texts does not necessarily settle their legal impact.⁹⁸ Because of this, everyday concepts with a certain linguistic meaning take on specialized legal “meanings” within different areas of law.⁹⁹ There is always a gap between the linguistic meaning of legal texts and their legal content.¹⁰⁰ Ascertaining the law requires closing that gap, transitioning from communicative to legal content. Non-positivists explain this transition by resorting to moral considerations. In Greenberg’s terms, the law is just the moral impact of the relevant actions of legal institutions.¹⁰¹ I want to suggest a different possibility. It could be that the transition from communicative content—from the linguistic meaning of texts—to legal content is explained by further social facts. Those facts might include, for instance, the interpretive and reconstructive work of legal participants, such as law professors and legal scholars.

Think about the typical process for finding out what the legal rule or standard governing a certain situation is—particularly when you know almost nothing about a legal subject. We want to know what “the rule” for any situation is—yet at the outset all we have is a mass of formally authoritative legal materials. At the end of the process, the civil lawyer might say that “the rule is found in the code,” and the common lawyer might say that the rule is stated in a certain case. But we will first learn the rule from, amongst others, law professors and the work of legal scholars.¹⁰² In other words, legal knowledge is mediated. We do not, in the first instance, learn the law directly from formally authoritative legal texts. Instead, we typically rely on others’ (and, paradigmatically, law professors’) reconstruction.

Legal participants’ reliance on the work of law professors has a relatively long history in civil law jurisdictions. In France, for instance, at least since Domat and Pothier students were expected to learn law not by studying naked legal rules (or, in Domat and Pothier’s case, Roman texts), but rather by learning scholarly principles systematizing them.¹⁰³ The phenomenon also exists in the common law. In American legal culture, judicial opinions are processed and simplified into a principle or rule in law school classrooms,¹⁰⁴ edited in casebooks,¹⁰⁵ and further manipulated by professors

98. Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217–256 (Andrei Marmor & Scott Soames eds., 2011).

99. See Ralf Poscher, *The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate*, in CONCEPTS IN LAW 99–115 (Jaap C. Hage & Dietmar von der Pfordten eds., 2009).

100. Cfr. HRAFN ASGEIRSSON, *THE NATURE AND VALUE OF VAGUENESS IN THE LAW* 9–13 (2020).

101. Greenberg, *supra* note 14, at 1290.

102. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. OF COM. L. 1, 22 (1991).

103. JAMES GORDLEY, *THE JURISTS: A CRITICAL HISTORY* 145 (2013).

104. Thomas McSweeney, *English Judges and Roman Jurists: The Civilian Learning behind England’s First Case Law*, 84 TEMP. L. REV. 827, 858 (2011–2012).

105. Frederick Schauer, *Opinions As Rules*, 62 U. CHI. L. REV. 1455, 1472 (1995).

and students in restatements, articles, and even students' outlines.¹⁰⁶

Beyond legal education, judicial decisions commonly rely on the scholarly construction of legal materials. A long tradition of influence of academic doctrinal writing on judicial activity, dating back to at least 1900, exists in the United States.¹⁰⁷ The tradition has been in crisis for a few decades.¹⁰⁸ But it has nevertheless existed,¹⁰⁹ even if not with the strength it has existed within certain civil law jurisdictions.¹¹⁰ Even in civil law systems that do not place a premium on judicial justification, such as France,¹¹¹ and in common law systems with a traditional reluctance towards citing living scholars, such as England,¹¹² legal scholarship can have an important influence on adjudication. This makes sense. Today's judges are yesterday's law students.¹¹³

Because of this, as Sacco argues, no realistic account of legal practices can ignore that legal reasoning relies on sources and texts beyond those with formal authority.¹¹⁴ These sources and texts include the contributions of many legal participants beyond law professors, such as legal advocates and social movements focused on law reform.¹¹⁵ All of these groups—and others—are part of the relevant interpretive community. But because of their central role in contemporary legal education, scholarly writings and university teaching materials are particularly important.¹¹⁶ While Weber's claim that the prevailing type of legal education is the most important factor explaining legal development¹¹⁷ seems an exaggeration, he was onto something. Legal education and legal scholarship are forms of socially

106. McSweeney, *supra* note 104, at 860.

107. NEIL DUXBURY, *JURISTS AND JUDGES: AN ESSAY ON INFLUENCE* 24, 27, 28 (2001).

108. See, e.g., Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); Edward L. Rubin, *What Does Prescriptive Legal Scholarship Say and Who is Listening to It: A Response to Professor Dan-Cohen*, 63 U. COLO. L. REV. 731 (1992); Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419 (1992); Steven D. Smith, *In Defense of Traditional Legal Scholarship: A Comment on Schlegel, Weisberg, and Dan-Cohen*, 63 U. COLO. L. REV. 627 (1992).

109. EISENBERG, *supra* note 52, at 97.

110. VAN CAENEGEM, *supra* note 75, at 53.

111. DUXBURY, *supra* note 107, at 47–59.

112. *Id.* at 61–115.

113. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343, 349 (1991). See also FÁBIO SHECAIRA, *LEGAL SCHOLARSHIP AS A SOURCE OF LAW* 44 (2013).

114. Sacco, *supra* note 113, at 344. As Nils Jansen notes in the European context, “European private law has long been developed on the basis of texts that were largely independent of any political domination.” NILS JANSEN, *THE MAKING OF LEGAL AUTHORITY: NON-LEGISLATIVE CODIFICATIONS IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 138 (2010).

115. Assaf Likhovski, *The Intellectual History of Law*, in *THE OXFORD HANDBOOK OF LEGAL HISTORY*, 161–163 (Markus D. Dubber & Christopher Tomlins eds., 2018).

116. FERNANDA PIRIE, *THE ANTHROPOLOGY OF LAW* 73 (2013); Sacco, *supra* note 113, at 344.

117. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 776 (1978).

recognized expertise, with a distinct form of epistemic authority¹¹⁸ that is not formally recognized in legal sources.¹¹⁹ Perhaps the most radical example of this is classical Roman law, in which the institutional influence of professional jurists was quite significant.¹²⁰ Something similar might be going on in international law, with its reliance on the opinions of highly regarded scholars.¹²¹ But even in American law there are examples. In contract law, for instance, the distinction between the expectation, reliance, and restitution interests¹²² and the notion of “efficient breach”¹²³ are ideas that come from legal scholarship yet are, in an important sense, part of our law. Catharine MacKinnon’s argument that sexual harassment is a form of sex discrimination is a similarly good example.¹²⁴

Law is centrally concerned with formal authority. We normally rely, particularly in domestic law, on source-based, rather than content-based, tests for determining what counts as a valid legal argument.¹²⁵ And we have become used to thinking that authority must be *entirely* independent from content.¹²⁶ But legal scholars’ work, their “intellectual output,”¹²⁷ has a form of authority—even when it has not been formally adopted by authoritative sources.¹²⁸ Most importantly, this form of authority is a matter of social fact.¹²⁹

It is not my aim to provide a comprehensive account of legal scholarship as a source of law. What I want to highlight is the following. Legal knowledge is mediated by (*inter alia*) legal education and legal scholarship. Any view of law that sees it as ultimately grounded in social facts would be

118. With reference to classical Roman law, see ÁLVARO D’ORS, *DERECHO PRIVADO ROMANO* 61, 63 (2004).

119. This is usefully highlighted by the Roman distinction between *auctoritas* and *potestas*. See *Id.* at 42.

120. See PIRIE, *supra* note 116, at 81; ALAN WATSON, *THE SPIRIT OF ROMAN LAW* 57, 207 (1995); Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B. C. INT’L & COMP. L. REV. 257, 267 (1981). See also James Bernard Murphy, *The Lawyer and the Layman: Two Perspectives on the Rule of Law*, 68 REV. POL. 101, 108 (2006).

121. See Mark Tushnet, *Academics as Law-Makers?*, 29 U. QUEENSL. L.J. 19, 19 (2010).

122. Lon Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936).

123. Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970).

124. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). See also Charles Barzun, *Catharine MacKinnon and the Common Law* (Sept. 2020) (unpublished manuscript) (on file with the University of Virginia School of Law).

125. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1934 (2008).

126. Hence, Schauer argues that there is something inherently contradictory about the idea of “persuasive authority.” *Id.* at 1943–1944.

127. PIRIE, *supra* note 116, at 103.

128. Murphy, *supra* note 120, at 125.

129. A clear example of this phenomenon in American law is the American Law Institute’s Restatements. For historical overviews, see John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615 (1998); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1 (1997). On the status of Restatements as legally authoritative, see JANSEN, *supra* note 114, at 54–55.

impoverished if it ignored this feature of legal practices. The process by which legal content is derived from legal sources depends on the practices and techniques of those who engage with them,¹³⁰ which turn on the set of traditions, values, and habits inculcated by legal education and other forms of legal socialization,¹³¹ and the practices and unwritten standards governing the activities of the relevant “expert legal class.”¹³² Because of this, the relatively sophisticated legal systems that rely on these processes of acculturation and education will tend to adopt at least some normative standards that resist rule-like formulation and canonical statement. This will be the inevitable upshot of the complex process by which legal texts lead to legal rights and obligations. Teaching the law in complex legal systems requires a certain degree of systematization, and this systematization requires going beyond just reporting formally authoritative legal rules.¹³³ It requires going, to use Roscoe Pound’s words, from legal to *juristic* conceptions.¹³⁴ In this process, scholars will come up with, discuss, and refine legal principles, will reorganize legal doctrine, and will attempt to incorporate social norms and moral demands into legal reasoning. Yet this scholarly innovation is just one more of the social facts that ground law in Western legal systems. Getting to learn law entails learning from legal scholars and the principles and standards they produce. As Dworkin argued, then, law is not a model of rules. But this assertion is compatible with law’s grounding in social facts.

Other actors play important roles in the constitution and reconstruction of legal knowledge. In the history of the common law, legal practitioners—rather than law professors—introduced beginners into the values and standards of legal practice.¹³⁵ In American law, more recently, bar associations, legal advocates, public interest lawyers, corporate law firms, non-governmental legal organizations, and social movements have also contributed to the transmission, articulation, and development of legal knowledge. I have focused on law professors precisely because in Anglo-American analytic jurisprudence their contribution has been undertheorized (even law professors as a class seem to have forgotten that they play this role; the doctrinal expert is a dying breed).¹³⁶ Positivist theorists ought to

130. See Patterson, *supra* note 73, at 947. (referring to the “community consensus” interpretation of Wittgenstein’s considerations on rule-following).

131. MARK VAN HOECKE, *LAW AS COMMUNICATION* 58 (2002). See also JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 165 (5th ed. 2019).

132. Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 543 (2019).

133. See SEAN COYLE, *FROM POSITIVISM TO IDEALISM: A STUDY OF THE MORAL DIMENSIONS OF LEGALITY* 96–97 (2007).

134. ROSCOE POUND, *JURISPRUDENCE* 42–44 (1959).

135. See, e.g., THOMAS J. MCSWEENEY, *PRIESTS OF THE LAW: ROMAN LAW AND THE MAKING OF THE COMMON LAW’S FIRST PROFESSIONALS* (2019). See also BAKER, *supra* note 131, at 181–83; James Gordley, *The State’s Private Law and Legal Academia*, 56 AM. J. COMP. L. 639, 640 (2008).

136. See Gordley, *supra* note 135; Posner, *supra* note 108.

incorporate law professors' contributions to legal content within their account of the social facts that ground law.

C. Genealogical Comfort

The Dworkinian might want to argue that, to the extent legal participants try to connect their moral arguments to pre-existing texts and they adopt certain values as a consequence of their acculturation into legal practice, this is just a causal account of the process by which the demands of political morality are incorporated into legal discourse. It does not change the fact that they are demands of political morality that ground legal propositions.

There is an important asymmetry between legal and moral discourse that should be noted here. Genealogical inquiries about our moral conceptions can show that they are the consequence of a complex combination of forces that have shaped them.¹³⁷ Being aware of this fact is also being aware of the radical contingency of our moral beliefs. There is, naturally, something unsettling about uncovering the genealogy of our moral commitments.¹³⁸ This “genealogical anxiety” derives from the fact that an account of the causal mechanisms behind our moral beliefs could be seen to undermine our confidence about their soundness.¹³⁹ Causal explanations of moral beliefs are an acknowledgement of their contingency: if the causal mechanisms had been otherwise, so would our beliefs.

However, some genealogies can be vindicatory. They can support, rather than undermine, our confidence in the truth of our conclusions.¹⁴⁰ This is precisely what happens in legal practice, where genealogical support for legal arguments is common.¹⁴¹ As Watson explains, in the case of law, lawyers appeal to genealogy to bolster their arguments.¹⁴²

If there is any anxiety in legal practice, then, it is the anxiety to show that novel decisions and innovations are already present in pre-existing legal sources.¹⁴³ Law is a *genetically justified practice*.¹⁴⁴ Engaging in legal practice involves appealing to its history.¹⁴⁵ Some appeals are genuinely consistent with that history; others might just be disingenuous, using history

137. BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY 20 (2002).

138. *Id.* at 20–21.

139. Amia Srinivasan, *Genealogy, Epistemology and Worldmaking*, 119 PROC. ARISTOT. SOC. 127, 128 (2019).

140. WILLIAMS, *supra* note 137, at 36.

141. As noted by Charles L. Barzun, *The Genetic Fallacy and a Living Constitution*, 34 CONST. COMMENT. 101, 104 (2019); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817, 820 (2015). See also EDWARD SHILS, TRADITION 191 (1981).

142. ALAN WATSON, LEGAL TRANSPLANTS 99 (1974).

143. Edgar Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion*, 11 GA. L. REV. 1143, 1163 (1977).

144. MATTHIEU QUELOZ, THE PRACTICAL ORIGINS OF IDEAS: GENEALOGY AS CONCEPTUAL REVERSE-ENGINEERING 215 (2021).

145. Patterson, *supra* note 73, at 983. See also WATSON, *supra* note 142, at 95.

as a “grab-bag” of selectively picked out principles.¹⁴⁶ But good lawyering requires, among other things, showing the historical record in a light that puts one’s position as the genetically justified one.¹⁴⁷ Genealogy in legal argument does not aim at causal explanation but at justification. The practice of genealogical argument is a concrete marker of law’s grounding in social facts.

Now, we can come back to Dworkin’s claim that law is not grounded solely in social fact. If the relevance of history were limited to questions of formal authority, as Dworkin seemed to assume,¹⁴⁸ then Dworkin would be right. Under this assumption, a standard like “no one should profit from their own wrongdoing,” which lacks a canonically formulated, rule-like structure laid down in a formally enacted source, must seem to come from abstract morality. But the principle has a specific meaning that can only be understood historically and on the basis of certain facts about the legal past.¹⁴⁹

The claim is not just that, as Dworkin argued, if we were asked to justify the legal status of a principle, we would reference cases or statutes illustrating the principle.¹⁵⁰ The principle itself, as a standard of behavior or decision, would not be recognizable as a legally available standard but by its incorporation into the complex set of patterns of thought and talk that have been part of the legal past. True, the legal past will be open to doctrinal innovation. But we should not lose sight of the fact that—as positivism has historically argued—what legal argument looks like will ultimately be a matter of fact about the social world. Our legal practices might refer to general principles without canonical formulation, and lawyers might engage in moral reasoning. Whether this is the case, and the relevance and meaning of principles, are always contingent facts about the history of legal practices. In law, genealogy is not a source of anxiety but of comfort.

IV. RETHINKING JURISPRUDENCE

What does all of this imply for general jurisprudence? In the next two sections I will answer this question by referring to two central discussions in Anglo-American jurisprudence: Hart’s rule of recognition, and the one-system view articulated by Dworkin’s later work, and by Greenberg, Hershovitz, and Kornhauser.

A. The Rule of Recognition

According to Hart, the rule of recognition is a secondary rule, a “rule

146. *Lucas v. S. C. Coastal Council*, 112 S. Ct. 2886, 2917 (1992) (Blackmun, J., dissenting).

147. Krygier, *supra* note 60, at 244; Sachs, *supra* note 141, at 865.

148. Henley, *supra* note 43, at 131–132.

149. *Id.* at 132.

150. DWORKIN, *supra* note 4, at 40.

about rules” that addresses the problem of uncertainty about which normative standards are legally binding in a given society. The rule of recognition is a “master rule” in the legal system. It allows agents to identify which rules are part of that system,¹⁵¹ by setting out a test of legal validity.¹⁵² In this way, the rule of recognition settles normative questions within the legal system without requiring people to engage in endless discussion and negotiation.¹⁵³ In other words, the rule of recognition picks out the *legal* norms of a particular system. The law in a particular jurisdiction is, as a consequence, the set of norms validated by the rule of recognition.¹⁵⁴

A familiar example shows how the rule of recognition is supposed to work. Imagine you are a lawyer, and you tell your client that his contract for the sale of an interest in land should be written down. If your client asks why, you will direct them to the Statute of Frauds. If your client asks why the Statute of Frauds is applicable, you will point to the specific provision regarding sales of interests in land, and to the fact that the Statute of Frauds was duly enacted by the legislature following the rules governing legislative enactment. If your client insists on asking “why,” you will explain how your jurisdiction’s constitution establishes the power of the legislature to enact general laws, how the constitution was enacted, etc. The client might keep asking “why,” and you will eventually have to start talking about jurisprudence. One possible answer would be: “well, the constituent assembly [or the legislature] is just the sovereign.”¹⁵⁵ If you were a German lawyer, your answer might be that we just have to imagine, at the bottom of the legal system, a hypothetical basic norm empowering the first legislature or constituent assembly.¹⁵⁶ Hart’s own answer is the rule of recognition. The rule of recognition is a standard that is accepted as a matter of fact by legal officials, as an authoritative guide that allows for the identification of the rules of the legal system.¹⁵⁷ If in answering your client you wanted to take Hart’s route, you would just point to the fact that judges in your jurisdiction identify valid statutes by reference to the texts enacted by the legislature, to the constitution having empowered the legislature to enact statutes in this way, and so on. As the example illustrates, the rule of recognition’s existence and content are matters of social fact,¹⁵⁸ such as the attitudes and

151. HART, *supra* note 20, at 95, 100.

152. Scott Shapiro, *What Is the Rule of Recognition (And Does It Exist)?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, 238 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

153. HART, *supra* note 20, at 94. In this characterization, I follow Shapiro, *supra* note 152, at 237–238.

154. Stephen Finlay & David Plunkett, *Quasi-Expressivism about Statements of Law: A Hartian Theory*, in *OXFORD STUDIES IN PHILOSOPHY OF LAW VOLUME 3*, 54 (John Gardner, Leslie Green, & Brian Leiter eds., 2018).

155. AUSTIN, *supra* note 56.

156. See Joseph Raz, *Kelsen’s Theory of the Basic Norm*, 19 *AM. J. JURIS.* 94 (1974).

157. HART, *supra* note 20, at 100–110.

158. SCOTT SHAPIRO, *LEGALITY* 84 (2011).

practices of legal officials.

Because it is not an explicit rule written down anywhere, the precise form of the rule of recognition is uncertain.¹⁵⁹ The criteria of recognition might not be fully fleshed out. Think, for instance, about the process of figuring out the rules arising out of common law decisions.¹⁶⁰ Even statutory interpretation and the endless debates around it show that figuring out exactly what legal proposition one can extract from any given formally authoritative source is difficult.

This raises a problem for the rule of recognition. The complex and somewhat messy legal systems we are familiar with do not actually have a clear master test of legal validity. But perhaps placing this demand on the rule of recognition is misguided. As Dworkin shows, not all legal standards have a clear formulation that could be found in a “rulebook.”¹⁶¹ Perhaps a better interpretation of the rule of recognition as a rule for recognizing *sources of law*, as opposed to *legal rules*, would do the trick.¹⁶² Hart sometimes equated the rule of recognition and sources of law (“[w]e may say that a criterion of legal validity or source of law is supreme . . .”¹⁶³) and characterized the rule of recognition as the rule “specifying the sources of law.”¹⁶⁴ According to Burazin and Ratti, the rule of recognition’s function is best seen as only guiding agents in the identification of the linguistic artifacts that *prima facie* belong to a legal system—the “sources of law” from which legal standards are derived.¹⁶⁵

(1) *Disagreement in Constitutional Interpretation*

This interpretation of the rule of recognition also seems able to avoid Dworkin’s argument from theoretical disagreement. According to that argument, given the fact that lawyers sometimes disagree about what counts as valid law even though they don’t disagree about the underlying social facts, the rule of recognition cannot play the role of establishing the criteria of legal validity.¹⁶⁶ If the rule of recognition only picks out the sources of legal rules, disagreement about the specific rules generated by those

159. Shapiro, *supra* note 152, at 239.

160. See Krygier, *supra* note 36, at 69; Jeremy Waldron, *Who Needs Rules of Recognition?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, 335 (Matthew D. Adler & Kenneth Einar Himma eds., 2009). Waldron’s own intuition is that a clear rule of judicial legal change would solve this problem and render the rule of recognition unnecessary.

161. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 9–32 (1985).

162. See Waldron, *supra* note 160, at 336. For an earlier distinction between positivism as a claim about legal sources and positivism as a claim about legal norms, see Danny Priel, *Were the Legal Realists Legal Positivists?*, 27 *LAW & PHIL.* 309, 342 (2008).

163. HART, *supra* note 20, at 106.

164. *Id.* at 266. I owe both references to Luka Burazin & Giovanni Battista Ratti, *Rule(s) of Recognition and Canons of Interpretation* 3 (2018), <https://papers.ssrn.com/abstract=3126356> (last visited Feb 25, 2020).

165. Burazin and Ratti, *supra* note 164, at 4–5.

166. DWORKIN, *supra* note 9, at 5.

sources, or their interpretation, is not problematic.

Let's ignore, for now, the interpretation of the rule of recognition as a rule about sources and treat it as a rule about rules. Disagreement can seem to undermine some uses of the rule of recognition thus understood. For example, in recent years, Sachs and Baude have offered a positivist and broadly Hartian defense of originalism as the legally valid interpretive methodology in American constitutional law. According to Baude, asking whether any interpretive standard is part of the law is to ask a question about social facts.¹⁶⁷ The question about the right approach in constitutional interpretation is therefore empirical—a question about what interpretive standards are followed by legal officials. Given the complexity of our legal practices, the empirical task will be demanding.¹⁶⁸ Moreover, figuring out what interpretive approach legal officials follow requires looking at the implicit premises of legal argument.¹⁶⁹ But the hope is that, once we look at those implicit premises and try to ascertain which interpretive approaches are followed by legal officials, we will reach the conclusion that originalism is the interpretive approach prescribed by American law.

The first potential problem with this approach is, precisely, the problem of theoretical disagreement about constitutional interpretation. If judges and lawyers disagree—as they seem to do—about interpretive methodology, then they clearly don't agree on whether any interpretive methodology is part of the law and satisfies the criteria set out in the rule of recognition.¹⁷⁰ As Greenberg argues, because the rule of recognition is supposed to be straightforwardly determined by convergent judicial practices, nothing that is *uncertain* or *controversial* for judges can be part of the rule of recognition.¹⁷¹ If judges do not agree about interpretation, then the rules of interpretation cannot be fully determined by the rule of recognition.

Greenberg refers to two distinct features of interpretive norms that would be a problem for their membership in, or consistence with, the rule of recognition: uncertainty and controversy. The problem of uncertainty is somewhat mitigated, however, by the fact that not all positive law is necessarily posited.¹⁷² Uncertainty is just an upshot of this trait of positive law, in general, and not just regarding interpretive criteria.¹⁷³ Some parts of positive law might be uncertain but still ultimately determinable through careful consideration of the relevant facts.

167. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2364 (2015).

168. *Id.* at 2365. See also Chilovi and Pavlakos, *supra* note 2, at 72.

169. Sachs, *supra* note 141, at 820.

170. Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1357 (2017).

171. Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 115 (2017).

172. Sachs, *supra* note 132, at 534.

173. Moreover, as Waldron argues, the need for certainty in legal practice might just be a theoretical overstatement. Waldron, *supra* note 160, at 337.

The question of controversy, however, is a central problem for the positivist grounding of originalism. If judges and lawyers disagree about the legal status of originalism, then—if the whole vindication of originalism depends on its consistency with the rule of recognition—originalism, it seems, simply cannot be part of our law.

There are different ways in which Baude and Sachs could respond to this objection.¹⁷⁴ But the question I want to raise is whether, assuming Greenberg is right and there is too much interpretive disagreement in American constitutional law for Baude and Sachs to succeed, originalism could *ever* be part of American positive law—even if *today* it is not. From this dynamic perspective, the answer must be “yes.” The practices of judges might fully converge towards the collective acceptance of originalism as the legally correct approach to constitutional interpretation. There is nothing in the notion of a rule of recognition or in the nature of interpretive disagreement that would prevent such a process from taking place.¹⁷⁵ The status of a standard as a legal authority is the result of an informal, evolving, and complex social process.¹⁷⁶ At any point in time, legal argument is also about figuring out, determining, and settling the content of the rule of recognition,¹⁷⁷ and defining its implications for more specific issues—including constitutional interpretation.

From this perspective, the existence of disagreement about interpretive methodology in American constitutional law is not a problem for the rule of recognition or for a social grounding of legal practices. Instead, it is just a contingent feature of American constitutional law as it exists today. Legal practice rests on shared understandings about the domain of acceptable arguments. Creating these conventions is part of what professional legal culture does.¹⁷⁸ The lack of a settled interpretive standard is merely a contingent deficit in American legal culture, in terms of its (insufficient) ability to reach a stable understanding of the appropriate legal authorities and interpretive standards in constitutional law.¹⁷⁹

Even in areas of greater legal determinacy a similar phenomenon might occur, because the rule of recognition is a complex social practice.¹⁸⁰ As a consequence, arguments about interpretive methodology in American constitutional law—and about other unsettled legal issues—could be read as arguments about the refinement and determination of the exact contours

174. See William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019).

175. See Mitchell Berman, *For Legal Principles*, in MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 241–259, 254 (Heidi Hurd ed., 2018).

176. Schauer, *supra* note 125, at 1957.

177. Sean Coyle, *Practices and the Rule of Recognition*, 25 LAW & PHIL. 417, 423–24 (2006).

178. Honore, *supra* note 23, at 65.

179. By saying that this is a deficit I only mean a failure or a deficit in terms of the ability to reach settled criteria for interpretive standards.

180. COYLE, *supra* note 133, at 115.

of the criteria set out by the rule of recognition,¹⁸¹ as attempts to answer the question as to in which direction the law should develop.¹⁸² The fact of disagreement within legal practice is not an embarrassment for a positivist account. Nor does it entail that legal practices necessarily involve moral standards that cannot be traced back to social facts. The rule of recognition rests on a complex set of patterns and social regularities the upshots of which are difficult to determine.¹⁸³ Disagreement should thus be unsurprising. At any given point in time, some aspects of the rule of recognition will be unclear because the underlying social facts are changing and there is just no legally correct answer about the subject matter of disagreement. This might be unacceptable for Dworkin¹⁸⁴—but it is unclear why it should be an embarrassment for positivism. Even when treated as a rule about rules, the rule of recognition can accommodate the fact of disagreement.

(2) *Law Professors, Again*

So far, I have been talking about the content and structure of the rule of recognition. What about the agents whose practices determine that content?¹⁸⁵ Given what I have argued above regarding the role of legal scholars as lawmakers, I would include legal scholars as part of the relevant population, as well as legal practitioners more generally. All of them contribute to the constitution of the “cognitive structure” of the legal system, i.e., the web of beliefs, ideals, justifications, principles, techniques, and reasons that structure the rule of recognition.¹⁸⁶ As Eisenberg argues, in the case of the United States, for instance, law is not just the upshot of judicial activity, but also of the activity of legal scholars and professional-academic institutions like the American Law Institute.¹⁸⁷ A proper characterization of the rule of recognition should also refer to the attitudes and practices of legal scholars—as well as the wider legal community, beyond judges.¹⁸⁸

Any law student—and anyone who usually reads legal treatises or law

181. See Coyle, *supra* note 177, at 424.

182. John Gardner, *Can There Be a Written Constitution?*, in OXFORD STUDIES IN PHILOSOPHY OF LAW: VOLUME 1, 190 (Leslie Green & Brian Leiter eds., 2011).

183. This possibility was acknowledged by Hart himself. HART, *supra* note 20, at 94.

184. Given his commitment to the right answer thesis. See Ronald Dworkin, *No Right Answer*, 53 N.Y.U. L. REV. 1 (1978). See also Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630–72, 641 (1958).

185. Hart was equivocal about this. Barzun, *supra* note 170, at 1346. See also Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law*, 100 NW. U. L. REV. 719 (2006).

186. Ewald, *supra* note 72, at 1947–1948.

187. Melvin A. Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 FLA. ST. U. L. REV. 1229, 1231 (2002).

188. *Id.* at 1246–1247.

review articles—will be able to identify familiar legal propositions that don't arise out of authoritative sources like federal statutes.¹⁸⁹ Law is a product of the broader legal culture, of an ongoing discursive practice that involves scholars, professional institutions, judges, and lawyers.¹⁹⁰ Part of the task of legal scholars, judges, and legal culture more broadly is to determine the contours of the rule of recognition.

Given the extension of the relevant group whose convergent attitudes determine the content of the rule of recognition, disagreement should be unsurprising. Social facts, such as the number, heterogeneity, political commitments, shared positive morality, and lesser or greater cohesion of the population of legal practitioners, explain that disagreement. Moral facts as such need not figure in the explanation.

(3) Recognition, Dynamism, and Convergent Practice

This takes me to the second concern that could explain why some theorists want to say that the rule of recognition is just about sources and not about legal standards: the worry that it's impossible to summarize the validity criteria employed by a legal system in a rule-like formulation. I do not think we should worry too much about this issue. Claims of legal validity in any relatively mature legal system will involve implicit chains of reasoning and complex sets of social facts.¹⁹¹ The rule of recognition is not a "rule," but rather a complex norm that can be inferred from social regularities that give rise to normative attitudes.¹⁹² Legal systems don't have a rule of recognition, but rather several rules of recognition,¹⁹³ several "focused understandings" shared by members of the legal culture.¹⁹⁴

At times, as the discussion about originalism suggests, the shared understandings will not be as focused as we would want them to be. This is not, however, necessarily a problem for a positivist account. These disputes can be seen as "quasi-expressivist disagreement[s] in prescription,"¹⁹⁵ i.e., disagreements about what the best understanding of legal materials is or about the way in which the meaning of the relevant legal sources should be determined when they are to some extent indeterminate. In these cases, while participants in legal discourse might take themselves to be arguing about the content of the law, their disagreement might also be interpreted as a disagreement about what certain previously indeterminate legal terms

189. *Id.* at 1232.

190. *Id.* at 1262–1263.

191. Richard H. Fallon, *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1127–1128 (2008). See also Coyle, *supra* note 177, at 432.

192. Fallon, *supra* note 191, at 1132–1133.

193. JOSEPH RAZ, PRACTICAL REASON AND NORMS 146–148 (1999).

194. Coyle, *supra* note 177, at 426. See also H. Patrick Glenn, *A Concept of Legal Tradition*, 34 QUEEN'S L.J. 427, 438 (2008–2009).

195. Finlay and Plunkett, *supra* note 154, at 66.

should mean. Because there is always the possibility of indeterminacy, legal argument sometimes requires determining and settling the meanings or the legal upshots of the relevant legal texts.¹⁹⁶

With this in mind, we can go back to the Hart-Dworkin debate. Dworkin acknowledged that formal pedigree was relevant even for legal principles.¹⁹⁷ He acknowledged that, when challenged to justify principle-based claims, we would mention previous cases in which the principle figured, and that principle-based arguments without institutional support will typically fail.¹⁹⁸ That's why legal principles don't come out *ex nihilo* and make an entrance into legal argument "from the outside." They are "taken up" in legal reasoning.¹⁹⁹ They are not made part of law by a single decision, but through an evolutive process.²⁰⁰

What Dworkin overlooked is that, precisely because of this, the fact that a certain legal principle has no canonical formulation in a valid source making it formally authoritative is not enough to falsify legal positivism. The rule of recognition, based as it is on social facts, can incorporate criteria beyond formal enactment.²⁰¹ And, as inclusive legal positivists argue, there is no conceptual reason why moral considerations could not be among those criteria.²⁰² Inclusive positivists go wrong, however, when they assume that the law's adoption of moral concepts—and its invitation to moral reasoning by legal interpreters—means that law *incorporates* morality as such. One can accept the phenomenon of moral reasoning's presence in legal reasoning without accepting the ontological claim about morality's incorporation into the grounds of law.²⁰³ But at the phenomenological level, given how complex the rule of recognition can be, how it is constructed over time by a relatively large and complex population, we should expect the rule of recognition to incorporate criteria that ask legal interpreters to engage in moral reasoning.²⁰⁴ Such moral reasoning, however, will be made relevant by the convergent practices that make the rule of recognition. Whether moral standards are relevant in legal practice will ultimately depend on the criteria of recognition set out in any given jurisdiction.²⁰⁵ It all depends, ultimately, on how things are done around here.²⁰⁶

196. David Plunkett & Tim Sundell, *Antipositivist Arguments from Legal Thought and Talk*, in *PRAGMATISM, LAW, AND LANGUAGE* 56–75, 72 (Graham Hubbs & Douglas Lind eds., 2014).

197. As noted by Shapiro, *supra* note 7, at 28.

198. DWORKIN, *supra* note 4, at 40.

199. Berman, *supra* note 175, at 253. See also Stephen R. Perry, *Two Models of Legal Principles*, 82 IOWA L. REV. 787, 797 (1997).

200. Raz, *supra* note 48, at 848.

201. RAZ, *supra* note 8, at 95.

202. See WALUCHOW, *supra* note 8.

203. Here, I build on Thomas Adams, *Criteria of Validity* (unpublished manuscript).

204. See H. L. A. Hart, *The New Challenge to Legal Positivism* (1979), 36 OXFORD J. LEGAL STUD. 459, 471 (2016).

205. See Chilovi and Pavlakos, *supra* note 2, at 72.

206. See Liam Murphy, *Law Beyond the State: Some Philosophical Questions*, 28 EUR. J. INT'L L.

B. One-System Views

A potential response to the argument so far is that, as a matter of fact, at any given point in time there is simply no clear line that demarcates legal from moral standards. If anything, the complexity of the rule of recognition shows this. Criteria of validity are never determined by social facts to an extent that can make recourse to moral considerations unnecessary. Legality, the potential critic might argue, is always an upshot of moral norms. The authoritative past, the actions and enactments of legal officials and institutions, will be relevant—perhaps fundamentally relevant—to determine how disputes should be resolved, how power should be allocated, the limits of that power, etc. But this should not confuse us: whatever effects these authoritative enactments and actions have will depend on moral considerations.²⁰⁷

Something like this turned out to be Dworkin’s view towards the end of his career. He recognized that he had once articulated his account of law in terms of a “two-systems view,” according to which there are two different normative systems—law and morality—that could interact in different ways.²⁰⁸ But according to late Dworkin, law is the branch of political morality that is properly enforceable by adjudicative and coercive institutions.²⁰⁹

There are immediate potential responses to this picture.²¹⁰ For instance, the picture seems to ignore the existence of vast swaths of law that are not typically enforceable.²¹¹ And the picture might also be turned upside down: it could be the case that the best account of political morality requires separating law from morality—a positivist framework might be vindicated by moral considerations.²¹²

Nevertheless, the picture is elegant and simple, and other theorists have defended views along similar lines.²¹³ Kornhauser, in particular, has argued

203, 209 (2017).

207. This is, basically, Greenberg’s argument in Greenberg, *supra* note 14.

208. DWORKIN, *supra* note 10, at 402.

209. *Id.* at 405–407. It’s unclear how much this really is a departure from Dworkin’s previous views. See Hillary Nye, *The One-System View and Dworkin’s Anti-Archimedean Eliminativism*, LAW & PHIL. (2021).

210. For a recent general critique, see Hasan Dindjer, *The New Legal Anti-Positivism*, 26 LEGAL THEORY 181 (2020).

211. See Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Lawrence Sager, *Putting Law in Its Place*, in THE LEGACY OF RONALD DWORKIN 117 (Will Waluchow & Stefan Sciaraffa eds., 2016).

212. For versions of this argument, see Neil MacCormick, *A Moralistic Case for A-Moralistic Law*, 20 VAL. U. L. REV. 1 (1985); Liam Murphy, *The Political Question of The Concept of Law*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO ‘THE CONCEPT OF LAW’ (Jules L. Coleman ed., 2001); Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO ‘THE CONCEPT OF LAW’ (Jules L. Coleman ed., 2001). *Cfr.* Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088 (2008).

213. See Greenberg, *supra* note 14; Mark Greenberg, *The Standard Picture and its Discontents*, in OXFORD STUDIES IN PHILOSOPHY OF LAW (Leslie Green & Brian Leiter eds., 2011); Hershovitz, *supra*

that a one-system view affords us a better understanding of how legal reasoning actually works. In Kornhauser's view,

In the standard model, every decision maker engages in a two-step process: first determine what the law requires; then consult other reasons for action that might weigh against doing what the law requires. In fact, however, each decision maker need only undertake a one-step decision procedure: weigh all reasons one has at that step. In this one-step procedure, the agent consults legal materials through which all agents coordinate their activity; these legal materials, however, are not legal norms in the conventional sense.²¹⁴

There is something true about the phenomenology of legal reasoning that Kornhauser's description captures. Legal reasoning is akin to a one-step process: judges don't ask, separately, what is the best resolution of a dispute, all things considered, and how to apply law to resolve it. But the reason for this is that the process of decision—or, at least, of justification—starts, from the outset, from legal and doctrinal categories provided by the legal tradition.²¹⁵ Cases will, in many cases, be decided (or justified) by reference to the surface level of the legal system. In other cases, judges will have to dig deeper. They might need to go beyond the formally authoritative materials and look at the rich set of resources provided by their legal tradition.²¹⁶ At the extreme, the judge might need to innovate in order to determine the legal upshots of what until that point are legal materials with an unclear upshot. Yet confronted with this type of complex problem, the judge (and the lawyer) will resort to her knowledge of legal doctrines and categories to make sense of the problem. Legal categories and doctrines, from this perspective, are not a constraint on moral reasoning but a guide. We learn how to decide cases by learning about the problems law deals with, through the legal categories supplied by our legal tradition.²¹⁷

This brings us to the unstated premise of most of what we have learned to think about the relationship between law and morality. That premise is that we can determine what morality requires without law, and that morality sets a self-sufficient blueprint from which we can evaluate law, decide when to follow it, and figure out what to do.²¹⁸

note 14; Lewis Kornhauser, *Doing Without the Concept of Law* (2015).

214. Kornhauser, *supra* note 213, at 15.

215. Another interesting possibility, which I don't explore here, is that law and morality are distinct normative orders, but that discourse about legal moral norms is not similarly separated. See Benjamin C. Zipursky, *Jurisprudence in Justice for Hedgehogs: Metaphysical, Not Political* 4 (2019), <https://www.law.nyu.edu/sites/default/files/ZipurskyJurisprudenceinJFH.pdf> (last visited Jul 30, 2020).

216. On these two types of situations and the value of a form of judicial reasoning that ordinarily refrains from digging deeper, see Mitchell N. Berman, *Of Law and Other Artificial Normative Systems*, in *DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE*, 152 (David Plunkett, Scott J. Shapiro, & Kevin Toh eds., 2019).

217. FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 164 (2017). See also SHECAIRA, *supra* note 113 at 53; Tontti, *supra* note 75, at 33.

218. See Tony Honoré, *The Dependence of Morality on Law*, 13 OXFORD J. LEGAL STUD. 1, 1

Such a conception would make sense in a world where we had a clear picture of the demands of pre-legal morality and a relatively thin set of legal materials and doctrines. Utilitarianism provides such a clear picture of morality.²¹⁹ And the usual examples of legal interpretation and disagreement in legal philosophy sometimes suggest a relatively thin legal normative structure—“no vehicles in the park,”²²⁰ or “SPEED LIMIT 35.”²²¹ But understanding a legal system and acting as a participant within it requires knowing how to think like a lawyer, a knowledge that depends on much more than knowing legal rules.²²² Legal systems, as Cover writes, “present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited.”²²³

Those worlds to be inhabited have a crucial role not just in socializing us as lawyers, judges, and scholars. They also bear witness to our moral reflection²²⁴ and guide it.²²⁵ While we can, in theory, make distinctions between critical (or true) morality, positive morality, and legal norms, in actual practice the distinction will always be fuzzy. Moral standards, in particular, will always make their appearance as someone’s contingent view. They will only become legally relevant if taken up by the convergent attitudes of legal officials. And they will be influenced in their content by the values of the legal tradition.

The very language we use to talk about morality is partly, and at least sometimes, derived from law itself²²⁶—even when the substance of our moral conceptions diverges from those held by the people who originally developed the language we use. This is particularly true in the areas of moral reflection that are more connected to legal regulation or are in special need of determination by legal institutions. And it is most true in the case of legal practitioners, judges, and scholars. For us, law itself is a school of moral language, frameworks, and principles. Moral questions are always “pursued within a tradition of moral discourse,”²²⁷ and that tradition is itself reflected in our legal institutions and practices.

Because of this, it is not enough to say—like the inclusive legal positivist—that legal validity can sometimes, depending on what the

(1993).

219. See Stone, *supra* note 54.

220. See Fuller, *supra* note 184; Hart, *supra* note 86.

221. Hershovitz, *supra* note 14, at 1163.

222. Ewald, *supra* note 72, at 1896.

223. Robert M. Cover, *The Supreme Court, 1982 Term - Foreword: Nomos and Narrative*, 97 HARV. L. REV 4, 6 (1983).

224. Holmes, *supra* note 89, at 992.

225. NIGEL E. SIMMONDS, *THE DECLINE OF JURIDICAL REASON: DOCTRINE AND THEORY IN THE LEGAL ORDER* 9 (1984).

226. See Charles Taylor, *Interpretation and the Sciences of Man*, 25 REV. METAPHYSICS 3, 24 (1971).

227. WALZER, *supra* note 64, at 23.

relevant social facts are, turn on moral considerations.²²⁸ The phenomenon is true. It is also consistent, in my view, with the basic positivist commitment to the grounds of law being *ultimately* a matter of social fact. But we should not ignore that the linguistic and conceptual practices of lawyers, judges, and legal scholars around those moral considerations will themselves be mediated by law and legal concepts. Even the moral reflections of laypeople will tend to be influenced—even if to a lesser extent—by law and legal concepts.

It is not surprising then, that so much of moral reflection in modernity has been characterized by a “law conception” of ethics.²²⁹ Perhaps Nietzsche exaggerated when he argued that *Recht* is a creature of *Gesetz*,²³⁰ for there is always a moral question about whether law is or is not just, legitimate, and fair. To that extent, law’s authority depends on morality.²³¹ However, the very forms of talk and thought that we will use to make this judgment will be partly provided by legal institutions and practices.²³² This can sometimes be a problem, because the influence of law on our moral reflection might sometimes deceive us about morality.²³³ But the influence will nevertheless be there—and particularly for lawyers.

CONCLUSION

Law is a way of making our collective and individual experience intelligible. It institutionalizes arguments about what we ought to do.²³⁴ In this way, law is both a product and a generative force of our moral convictions.²³⁵ Because of this, Dworkin was right to highlight the widespread presence of moral argument in legal reasoning in modern Western democracies. But he was mistaken to assume that this falsified an account of law that is ultimately based on social facts. Another way of saying this is that law is partly a consequence, and partly a generative force,

228. WALUCHOW, *supra* note 8, at 82.

229. G. E. M. Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1, 5 (1958).

230. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS II, 11 (2008). Cited in Philippe Nonet, *What Is Positive Law?*, 100 *YALE L. J.* 667, 669 (1990). *See also id.* at 669.

231. Joseph Raz, *Incorporation by Law*, 10 *LEGAL THEORY* 1, 6–7 (2004).

232. This explains why, in the case of law, the standards generated by legal traditions avoid the reductive dilemma described (although ultimately rejected) by Scheffler in Samuel Scheffler, *The Normativity of Tradition*, in *EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY* 281–311 (2012). According to that dilemma, traditional reasons seem to be stuck between implying the absurdity of acting in a certain way simply because people have acted that way in the past and becoming irrelevant because traditional reasons are only valuable as instances of values, principles, and ideals the tradition exemplifies. In the case of law, the tradition is itself partly constitutive of the values, principles, and ideals. One cannot explain the value of those principles without reference to the tradition.

233. *See* Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, U. TORONTO L.J. (2020).

234. Patterson, *supra* note 73, at 981.

235. The relationship is similar to the one that exists between the concept of law and legal practices. *See* Rosen, *supra* note 5, at 130.

of our moral and political ideals (this is the important grain of truth in Dworkin's early work); thus, theorizing legal practice requires theorizing political and moral considerations (this is the important truth in Dworkin's latter work). Yet all of this, as I have tried to show, is compatible with the claim that law is ultimately grounded in social facts.²³⁶

In an important paper, David Plunkett and Scott Shapiro have argued that we should think of general jurisprudence as an activity aimed at understanding how legal thought and talk fit into overall reality.²³⁷ This is a suggestive framing. However, if we are persuaded that general jurisprudence involves this question, we first need an accurate understanding of the character and content of legal thought and talk as they actually exist. That understanding, as I have tried to show in this Article, depends on seeing how legal thought and talk take place within historical traditions that develop over time.²³⁸ It also depends on seeing those traditions as the record of our attempts to find out how to arrive at right answers,²³⁹ which structure a moral and practical world which we inhabit.²⁴⁰ It depends, finally, on seeing clearly how much of legal content is built, constituted, and articulated by the work of individuals without formal legal authority, including—amongst others—legal scholars. Our concept of law is not a model of rules. Yet law is, still, ultimately grounded in social facts.

236. There is an important sense in which my vindication of legal positivism deprives it of normative appeal. Part of the appeal of legal positivism was, historically, its promise of an escape from moral questions. While I see the appeal of this promise, I do not think it fits our actual legal practices. Because of this, the relatively open-ended picture about legal practice I have provided in this Article, which vindicates the positivist view that law is ultimately grounded in social facts, needs—if the purpose is to fully vindicate the positivist tradition—to be supplemented with a normative argument. That normative argument would show why we should adopt a more narrow, *exclusive* positivist concept of law, not as a description of our practices—but on normative grounds.

237. Plunkett and Shapiro, *supra* note 14, at 39.

238. See Maksymilian Del Mar, *Philosophical Analysis and Historical Inquiry: Theorizing Normativity, Law, and Legal Thought*, in THE OXFORD HANDBOOK OF LEGAL HISTORY (Markus D. Dubber & Christopher Tomlins eds., 2018).

239. Ewald, *supra* note 72, at 1949.

240. Cover, *supra* note 223, at 5.