Legal Rules and Legal Reasoning: On the Nature of Legal Validity

by

Sari Kisilevsky

A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy

Graduate Department of Philosophy

University of Toronto

© Copyright by Sari Kisilevsky (2009)
LEGAL RULES AND LEGAL REASONING: ON THE NATURE OF LEGAL VALIDITY

SARI K. KISILEVSKY

PHD 2009
DEPARTMENT OF PHILOSOPHY
UNIVERSITY OF TORONTO

ABSTRACT

In this dissertation, I propose a solution to Ronald Dworkin’s challenge from hard cases. Hard cases are cases in which the judges agree on the facts of the case and on what the posited law requires, but they disagree on what the law on the matter is. It is commonly thought that hard cases are decided on moral grounds, and that this problem raises the problem of explaining how the law can include unposited moral considerations. Dworkin argues that this problem generalizes, and that a theory of law must explain how all attempts to determine what the law is must make appeal to moral considerations.

I argue that existing attempts to solve this problem fail. On the one hand, Dworkin argues that every attempt to determine what the law is must include an appeal to all moral considerations. This overstates the role of morality in law. Legal positivists, on the other hand, hold that moral considerations can be legally binding only when they are anticipated by the posited law. This understates the role of morality in law. By making the validity of moral considerations depend on the posited rules, inclusive positivists remain vulnerable to the possibility that a new hard case will arise that is not anticipated by the posited rules, but that the law can resolve nonetheless. And by excluding all moral considerations from law, exclusive positivists fail to explain law as we know it.
Instead, I propose an alternative positivist solution to Dworkin’s challenge. First, legal positivists need not accept Dworkin’s understanding of source-based considerations as excluding all appeals to morality in their applications. By reconfiguring this problematic distinction, positivists can explain who the law can require frequent appeal to morality in the application of its rules. Secondly, I argue, the problem of hard cases is best understood as an instance of the prior problem of distinguishing legal rules from all other rules to which people are subject. And, I hold that Hart’s solution to this prior problem solves this problem as well. I thus conclude that the problem of hard cases poses no special threat to legal positivism.
ACKNOWLEDGMENTS

First and foremost, I want to thank Arthur Ripstein for guiding me through this project. He worked tirelessly to help me formulate what I was trying to say, and then told me how to say it better.

I would also like to thank Sergio Tenenbaum, Gurpreet Rattan, and Ernie Weinrib for the acuity and depth of analysis with which they approached my work. Their exacting rigour and encouragement helped me make this dissertation much richer than I could have imagined.

Wayne Sumner generously read an early draft of my dissertation.

Jonathan Peterson, Sandra Raponi, Doug Mackay, Marta Jimenez, Chad Horne, Phil Kremer, Jane Friedman, Ben Caplan, Abbie Levin, Laliv Clenman, and Charlene Wiseman lent me all manner of support, philosophical and non-philosophical, and my family loved and supported me even when I was insupportable. I owe all of them an immense debt of gratitude as well.
# Table of Contents

Abstract .................................................................................................................. ii

Acknowledgements ............................................................................................ iv

Introduction ........................................................................................................ 1

Chapter I: Austin’s Legal Positivism .............................................................. 12

Chapter II: Hart’s Objection ............................................................................. 36

Chapter III: Dworkin’s Challenge ................................................................. 75

Chapter IV: Coleman’s Inclusive Positivism .................................................. 124

Chapter V: Raz’s Exclusive Positivism ........................................................... 167

Chapter VI: Hard Cases and Legal Validity .................................................... 212

Bibliography ....................................................................................................... 245
Legal philosophers aim to provide a theory of law. In other words, legal philosophers aim to provide an analysis of the concept of law, or a set of conditions that are necessary and sufficient for determining in what law consists. The main issue in providing a theory of law is to determine the precise nature of the relationship between law and morality. Legal positivists think that law is fundamentally social. Legal rules are those rules that arise from things people do, and nothing more than enacting, or positing, a rule in the relevant way is needed in order for a rule to be law. As a result, they hold that although there might be a connection between law and morality, there need not be one, and whether or not such a connection exists depends on social facts about the system. Natural law theorists, on the other hand, think that there is a necessary connection between law and morality.

There are three main contemporary views on the nature of law. *Inclusive positivists* think that law can include moral considerations, though it need not. *Exclusive positivists*, on the other hand, argue that although it might appear that law sometimes includes some moral considerations, this is an illusion, since law can never include morality. Finally, Ronald Dworkin and his followers think that there is a necessary connection between law and morality, and that a complete theory of law must explain how it can include moral considerations in addition to the posited law.

The focal point of this debate is the problem of hard cases. Hard cases are cases in which the judges agree on the facts of the case and on what the posited law requires, but they disagree on what the law on the matter is. Consider *Riggs v. Palmer*, the case at the
centre of this debate.\(^1\) *Riggs* is a case in which a grandson, Elmer Palmer, murdered his grandfather in order to expedite his inheritance. Here, the Court held that the posited law clearly dictated that Elmer should inherit. Nonetheless, the majority held that, even though it had no posited source, it was a fundamental principle of law that no one should profit from his own wrong, and for this reason denied Elmer his inheritance. The intuitive plausibility of the majority’s decision in this case suggests that the law can sometimes be determined by unposited moral considerations. A theory of law must thus explain how, if law is fundamentally social, as positivists insist, it can include unposited moral considerations as well.

I will argue that this problem, and the debate that it generates, is best understood as a problem of *legal validity*, or bindingness. Questions of legal validity, or bindingness, include questions about the conditions under which a given rule is valid; when a rule is a rule of the system; what it means to say that it is binding, or that it applies to a case; what it means to be *subject* to a rule; what it means to say that a given rule *requires* a result or that a result is the one *dictated* by the rule, and so on. These questions are distinct from questions of whether one ought to follow the law, whether legal rules settle questions of what one ought to do, whether they give people a reason to act or decide a case in a given way, and so on. Moreover, a determination of when a legal rule is binding, what the law requires of a given case, and so on, does not imply that people will do as the law directs them to, or apply the legal rules correctly. Rather, it is merely to determine the ways in which, when legal rules do impose rational constraints on people’s deliberations, they can do so.

\(^1\) 115 N.Y. 506, 22 N.E. 188 (1889). [Hereinafter *Riggs*.]
I will argue that once we understand the problem of hard cases as a problem about the nature of legal validity, we can see that none of the proposed solutions to it, or the resulting theories of law, succeed. On the one hand, as I will argue, inclusive and exclusive positivists both underestimate the extent of the challenge posed by hard cases, though, as we shall see, they do so in different ways. Ronald Dworkin, on the other hand, overstates the role of morality in law. As a result, I will argue, we must also reject his alternative theory of law. Instead, once we see the problem of hard cases in terms of a problem about the nature of legal validity, we can see that it supposes a solution to a conceptually prior problem, namely the problem of distinguishing the posited law and its requirements from all other rules and considerations to which people are subject. H. L. A. Hart solves this problem by conceiving of law as the union of primary and secondary rules, and as founded in an ultimate rule of recognition. I will argue that Hart’s solution to this prior problem is sufficient to solve the problem of hard cases as well.

I will begin by setting out what I mean by legal validity, and the constraints that I take this notion to impose on a theory of law. I will then examine John Austin’s command theory of law. I will argue that despite its intuitive appeal, Austin’s theory fails as an account of law. But, Austin’s failures are instructive: they show us why, as Hart argues, a complete theory of law must explain the validity of primary and secondary rules. Intuitively speaking, Austin’s failures show us why a theory of law must be capable of explaining why, unlike other social rules and practices, law must be institutional. I will argue that this argument provides a better justification for Hart’s concept of law than the one that Hart himself provides.

---

I will then turn to Ronald Dworkin’s challenge to legal positivism from hard cases. Dworkin rejects legal positivism wholesale. The mere attempt to found a theory of law on social facts alone renders positivism vulnerable to his problem of hard cases, for Dworkin. Instead, he argues, a complete theory of law must explain the legal validity of all of morality as well. Dworkin thus proposes an alternative theory of law. But, I will argue, Dworkin’s alternative theory of law fails. This is because Dworkin takes every application of a legal rule to require an appeal to all of morality, or an all-things-considered moral judgment. As a result, I will conclude, it must be possible to provide a positivist account of law.

Existing positivist accounts likewise fail, however. On the one hand, inclusive positivism cannot provide a complete response to the problem of hard cases. In mounting his challenge from hard cases, Dworkin does not aim to show that positivists have not as yet fully explained the role of morality in law. Rather, his problem of hard cases is meant to show that positivists can never fully capture the role of morality of law; it is in principle impossible for positivists to provide a complete theory of law, for Dworkin. Inclusive positivists cannot explain how the law can dictate an outcome for the next hard case, that has not been anticipated by the posited rules.

On the other hand, exclusive positivism fails for lack of motivation. This is so for two reasons. First, Dworkin’s challenge from hard cases does not lie merely in the possibility that morality can sometimes enter law. Rather, judges must appeal to moral considerations in hard cases because they must appeal to them in every case; the challenge of hard cases suggests that every application of a rule to a case requires judges to make a moral judgment as well. Exclusive positivist argue however that moral
considerations can *never* be legally valid; law must exclude all appeals to morality from its purview. If moral judgment is everywhere in law, however, then exclusive positivism fails to explain law as we know it. Exclusive positivism is also unmotivated for another reason. Exclusive positivists argue that it follows from the nature of law’s authority that it must exclude all appeals to moral judgment from determinations of what the law is. But, I will argue, this only excludes appeals to all-things-considered moral judgments; this is not sufficient reason to exclude every moral consideration from law.

Instead, I will argue, we need appeal to nothing more than Hart’s initial solution to the problems that Austin encountered in order to defend positivism from the challenge of hard cases; Hart’s solution to the problem of distinguishing law from all other considerations solves the problem of hard cases as well. In order to see this, we need to be clear about the significance of secondary rules, and the key role that they play in a theory of law. We must also reconsider the source-merits distinction that Dworkin sets out, and that positivists inherit, and the nature of hard cases. With these important notions in place, however, we can see why the problem of hard cases poses no special problem for a theory of law, over and above the initial question of distinguishing law from all other rules and considerations, subject to the constraints of legal validity, as set out at the beginning of the discussion. And, as I shall argue, by solving this conceptually prior problem, Hart solves this contemporary problem as well. Let us begin, however, by specifying the nature of legal validity, and the constraints that this notion imposes on a theory of law.

1. Legal Validity
To say that a rule is valid is to say that it is binding; it applies to someone and tells her what, according to the rule, she must or must not do. It is different then from the expression of a mere wish or desire that someone do or refrain from a given act, and a corresponding inclination or incentive to accord this desire weight. Consider, for example, the rules of a club. If the board at my club validly passes a rule stating that all club members must wear only white on the tennis courts, then I am bound to wear only white when I play tennis, and I am violating the rule if I arrive in red. But, if a fellow member simply announces that members should wear only white on the tennis courts from now on, then, although I might decide to comply to please her, I am not bound to do so, nor am I violating a rule if I choose to wear red. This is so even if my fellow member, e.g., posts her announcement on the bulletin board where all new club rules are posted, or if she sits on the board of the club, and so on. All there is here is the expression of a wish or desire that others behave in a given way, and their inclination or disinclination to accord weight to this wish. Unless the rule is passed using the appropriate procedures, it is not a valid rule of the club, and it is not binding.

A rule is legally valid if it is legally binding; it is a legally recognized rule, and it carries legal, rather than, say, moral or religious weight in people’s deliberations. People often distinguish between legal considerations and other kinds of considerations in their reasoning. They take the fact that something is the law as a factor in their deliberations and weigh it independently of other types of considerations. This might be obscured by the fact that legal considerations frequently overlap with other types of concerns that people have, as in the case of, say, laws against murder, theft, assault, and so on, which are also socially, morally, religiously, and often prudentially prohibited. However, legal
considerations can also conflict with other considerations that people might have. For example, laws regulating traffic can often diverge from people’s concerns for expediency and getting to work on time (even though traffic laws might indeed coincide with their concerns for safety, even when they fail to give them proper weight). Similarly, laws restricting the gambling or drinking, for example, might diverge from people’s social reasons to engage in these practices. This shows that people do indeed distinguish between legal reasons and other kinds of reasons that they might have.

Legal rules are imperatives in the manner described above: they do not merely consist in the wishes or desires that people act in a given way, and they bind people whether or not they wish to be bound. Where there is law, then, people are subject to a system of rules that are distinct from the whims and inclinations of any particular person or group, and whose force persists whether or not anyone wants to be bound.

When someone is subject to a legal rule, she is subject to a *constraint*; she is prevented, by the rule, from doing, or deciding, whatever she wants. Legal rules thus bind judges to decide in accordance with the rules of the system, rather than on their personal whims and desires, and they bind the subjects of the system to act in accordance with these rules, constraining what people can do as well. To be sure, these constraints are rational ones; it is always open to people to disregard the law, or to refuse to accord it weight altogether. But, where a legal system is in force, it imposes a set of legal constraints on people’s deliberations and action. These constraints, however, are *merely* legal; they only dictate what, as a matter of law, people ought to do or decide. They do not purport to be overriding or all-things-considered. It is therefore always possible that,
even though the law requires that people do or refrain from a given action (or that a judge
ought to decide in a given way), on a balance, reason requires otherwise.3

Legal rules remain valid, or continue to exist, whether or not people comply with
them. The mere fact that a legal rule is widely ignored, or that it is frequently violated
does not extinguish it or render it invalid. So, for example, rules that are rarely enforced
(or, perhaps, that most officials forgot about, or are unaware of), or rules like, say, the
rule against jaywalking, that are frequently violated, are nonetheless rules of the system.
Of course, as we shall see below, if none of the rules are enforced, and people violate all
of them, then the legal system would cease to exist. But, for any given rule, the mere fact
that it is not enforced, or that it is frequently violated does not render it invalid. Instead, it
must be removed from “the books” in accordance with fixed procedures in order to
extinguish it; inspection of people’s habits or practices cannot tell us directly what the
rules of the system are.

Legal rules are also fundamentally social. Whether or not a legal system exists,
and, if so, which one, is a matter of social fact; its existence depends on things that people
do, and nothing more than an appeal to things people do is needed in order to explain the
existence of law. This raises a puzzle for a theory of law. If, as we saw above, law binds
people independently of their whims and inclinations, and whether or not they comply,
then how can it consist in social rules? Social rules are those rules that arise from
people’s practices and behaviours. They are those rules to which people are subject

3 Note that it is also possible that the law provides people with no reason, or constraint at
all, as when the law is wicked. My aim here is just to explain how the law can impose
legal constraints or give people legal reasons to act or decide; I do not aim to explain the
relationship between legal reasons and reasons, simpliciter. I will say more this point in
what follows.
precisely because they engage in certain activities and adopt certain attitudes towards them. If, as we saw above, law consists in a set of rules that are distinct from people’s whims and inclinations, and that bind people whether or not they comply, then it seems that it cannot consist in social rules. The first task for a theory of law, then, is to solve this puzzle and provide a social theory of law that can explain its possession of the features described above. In short, the first task for a theory of law is to explain the distinction between, as John Austin puts it, a society subject to the rule of law and one held together by “mutual intercourse,” or whim and sentiment alone.

There is one important caveat that we must consider before moving on to Austin’s theory of law. When I say that legal rules bind people, that they impose legal rights or duties, give people legal reasons to act or decide in a given way, that they exert legal force, and so on, I mean only that, from a legal perspective, legal rules provide these reasons, confer rights and duties, exert this force, etc. I am not providing a theory of how legal rights, duties, reasons, etc. relate to other rights and duties or reasons that people might have, or whether they impose duties or provide reasons simpliciter. So doing would require an examination of the precise content of law, and providing a theory of the relation between law and other reasons people might have, and this is not my aim here. Instead, I aim only to examine how legal rules can confer legal rights and duties; how the law can require a given outcome; what it means to say that a legal rule applies to a case, and so on, distinct from the requirements of all other rules and considerations.

One might object at the outset that this set of questions is uninteresting, in the sense that wondering how legal consequences follow from legal rules is trivial. From the
perspective of deciding what people ought to do, this is entirely correct; a determination of what the law requires alone tells us nothing about the reasons that people actually have. However, the question is still worth pursuing. This is so for a number of reasons. First, that legal rules can ground conclusions about people’s legal rights and duties can be meaningfully denied. Legal Realists have argued that legal rules provide no special constraints on judges to decide cases one way rather than another, or on people to act in given ways, beyond their interest in avoiding the sanctions threatened.\(^4\) Law can thus, for some Legal Realists, at least, be wholly understood from the perspective of the “bad man.”\(^5\) Even if one thinks that the Realist program is mistaken, the fact that it can be meaningfully advanced suggests that the question of whether we can derive any legal conclusions at all from the existence of legal rules is, at the very least, a substantive one.

More importantly, however, as I hope I have shown, even this narrow question raises a philosophical difficulty. It is unclear how any combination of social facts, and the rules that they generate, can bind people the way that legal rules do, and generate the kinds of conclusions that people draw at law. At the very least then, philosophers have reason to inquire into this initial puzzle.

The philosophical significance of this difficulty is much deeper than it first appears, however. As I discussed above, analytic jurisprudence, or debates about philosophical theories of law, is currently dominated by the problem of hard cases. The main question at issue in these contemporary debates is the question of how morality can

\(^4\) Or, at least, this is the position that is often attributed to Legal Realists. There is some question as to whether any legal realists actually held this view. For a discussion of this issue, see Brian Leiter, “American Legal Realism,” in The Blackwell Guide to Philosophy of Law and Legal Theory, ed. W. Edmundson and M. Golding (Oxford: Blackwell, 2003).

enter law, given its social nature. As I have mentioned, this question supposes a solution to the problem just described; that is, it assumes that we can distinguish between posited legal rules, and the consequences that follow from these, from all other rules and considerations to which people are subject. It is thus worth inquiring whether this supposition is indeed correct, and, if it is, determining precisely how we can ground this distinction.

Finally, and most importantly, as I will argue, the solution to this philosophical puzzle has surprising consequences. Once we fully understand how social rules can bind people in the manner described above, we can solve the problem of hard cases as well. If this is correct, then an examination of Hart’s solution to this initial problem is certainly worth careful consideration. I will thus begin with John’s Austin’s theory of law, and Hart’s reasons for rejecting it. I will argue that it is because it corrects the failures of Austin’s theory, rather than remedying the defects of pre-legal societies, that law is best understood as the union of primary and secondary rules. And, I will argue that no existing theory of law solves the problem of hard cases, but that we need appeal to nothing more than Hart’s understanding of law as the union of primary and secondary rules in order to solve this problem. Let us now turn to a detailed examination of Austin’s command theory of law.

---

6 For an alternative argument for why it is worth inquiring into the ways we can draw legal conclusions from legal considerations, see John Gardner, “The Legality of the Law,” Ratio Juris, 17, no. 2, (June 2004):168-81.
I. Austin’s Legal Positivism

1.0 Introduction

John Austin’s central aim in articulating his positivist view of law is to distinguish the positive law from all other rules and considerations to which people are subject. In particular, Austin aims to distinguish positive law from natural law, religious or moral rules, the rules of positive morality, and the laws of nature. Because many of these rules have the same content, Austin distinguishes between them by virtue of their sources. For Austin, the positive law consists in commands issued by a sovereign to its subjects. Or, more formally, Austin argues that a positive law is a law that is

set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author.

Consider each element in turn.

1.1 Commands

A command is the expression of a wish by one person to another that the latter do or forebear from a given act, and that is backed by the threat of harm. Commands differ from requests, pleas, and other mere expressions of desire by the threat of harm for non-compliance. The distinction between a command and the mere expression of a wish or desire that a person behave in a given way does not lie in the outward features of the expression. A command may be issued in the form of a request or a desire, and an

---

8 Austin, The Province of Jurisprudence Determined, Lecture V, 132 (page citations are to the reprint edition). Cf. also, e.g., Lecture 1, 9; Lecture VI, 193; 201; 202; and passim.
expression of a wish can be issued in the form of an imperative. But, if the person expressing her desire that another do or forebear from a given act cannot or will not impose a harm for non-compliance, the she has not issued a command, even if she expresses her desire in the form of an imperative. On the other hand, if the person expressing her wish is able and willing to harm its subject for non-compliance, then her expression amounts to a command, even if, as a matter of courtesy, she expresses it in the form of a request. A given mode of expression thus cannot make a desire into an imperative. Instead, an expression of a wish amounts to a command if the person issuing it intends, and has the power to, inflict an evil on the subject of the command should she fail to comply. This is so regardless of how the expression is phrased.

When someone is subject to the threat of harm for failure to comply with the threat, she is under a duty or obligation to obey, for Austin. And, if she fails to do so, then she is in violation. Absent the threat of sanction, all someone has is a motive or incentive to comply.\(^\text{10}\)

1.2 Sanctions

The threat of an evil must be a meaningful one if one is to issue a genuine command rather than a mere wish, and if the person threatened is to be subject to a genuine duty, rather than a mere incentive. That is, the person issuing the command must have the power to inflict the evil at the time the command is issued in order for the command to be more than the expression of a mere wish. Otherwise, she has failed to issued a genuine

\(^{10}\) We will return to the question of whether the mere idea of a command backed by a threat of sanction is sufficient to explain the notion of a duty in the discussion of Hart’s objections to Austin, below.
command, and her target is under no duty to comply; all we have in this case is the expression of a mere wish that someone do or forbear from a given conduct. Hence, the threat of a sanction is necessary for the existence of an imperative command and a corresponding duty to comply. It is also sufficient to make a given expression of a desire into a command, and to give rise to a corresponding duty to obey; nothing more is needed to transform the expression a person’s desire into a command, and to make another’s incentive to comply a duty.

A sanction must take the form of an evil or a harm in order to discourage non-compliance. The offer of a reward to encourage compliance with a wish can at best give rise to a permission, but it cannot, on its own, constitute a sanction and render the expression of a wish a command. We might say, in such a circumstance, that the promise of a reward gives its target a right to it if she acts accordingly, and puts the person commanding under an obligation to fulfill her promise, but the suggestion that a reward can render the expression of a wish a command and can put another under an obligation to obey distorts the ordinary meaning of these terms. All we could say in such a circumstance is that one person has promised another a reward and that she has an incentive or is persuaded to comply. Hence, we might say that a person has an incentive to comply, through both the fear of incurring an evil if she fails, or through the hope of receiving a reward if she does comply. But, it is only in the case of the fear of harm that we could sensibly claim that she is under an obligation, and that the expression of someone’s wish is a command.

It is also unnecessary for the sanction to be particularly violent or intense, or the chances of incurring it to be particularly great, in order for it to give rise to a duty. It is
true that the greater the harm predicted and the greater the chance of incurring it, the
greater the likelihood that the command will be obeyed and the obligation will be
fulfilled. Of course, there is never a guarantee that an obligation will certainly be
fulfilled, regardless of how severe or how likely it is to be imposed. There is nothing the
person commanding can do to make obedience inevitable. The idea (that Austin attributes
to Paley\(^{11}\)) that a sanction must guarantee compliance in order to count as such (and thus
render a wish a command, and an incentive a duty) results in the suggestion that either
genuine commands or duties are impossible, or else that they are never disobeyed or
broken. This is because, on this view, the mere existence of a command or a duty requires
some kind of guarantee that they will be followed, and this is, of course, impossible. The
magnitude of the harm threatened and the chance of suffering it are indeed relevant to the
strength of the obligation and to the efficacy of the command, since they increase the
chances that the obligation will be obeyed and that the obligation will be fulfilled.
However, they are irrelevant to the determination of whether or not a sanction is present.
All that is necessary for the existence of a sanction is the chance of imposing it in case
the commander’s wishes are thwarted. Even “the smallest chance of incurring the
smallest evil”\(^{12}\) is sufficient to render the expression of a wish a command and thereby
impose a duty to comply.

The notions of command, duty, and sanction are thus correlate notions for Austin:
Someone who intends to inflict a harm when the expression of his desire is disregarded
issues a command, and the person liable to the threat of harm is subject to a duty or
obligation to comply. Together, these three notions are meant to explain the imperative

\(^{11}\) Austin, *The Province of Jurisprudence Determined*, Lecture I, 15.

nature of law, as compared to mere requests, pleas, and other expressions of desires, on
the one hand, and mere inclinations or incentives to accord them weight, on the other.

1.3 Sovereignty

The positive law, then, consists in the commands of the sovereign issued to its subjects.
The notions of sovereignty and subjects are correlate notions: the sovereign is just the
person or body who receives the habitual obedience of the bulk of the population and
who is not in the habit of obeying anyone else, and its subjects, in turn, are just the
members of the population in question who habitually obey this determinate person or
body.¹³

We can thus see, first, that a sovereign authority exists if and only if we have an
independent political society, and second, there are two conditions for the existence of a
sovereign authority and a corresponding independent political society: (i) There is the
positive requirement that the bulk of the population habitually obey a determinate and
common superior or body. And (ii), we have the negative requirement that this person or
body is not in the habit of obeying anyone else. The union of these two conditions
renders a given individual or body a sovereign or a supreme government, and it renders a
given population (including the members of the sovereign body) an independent political
society. When these two conditions hold, the commands of this sovereign body constitute
the positive law.

¹³ Or, as Austin puts it, “If a determinate human superior, not in the habit of obedience to
a like superior, receives habitual obedience from the bulk of a given society, that
determinate superior is sovereign in that society, and the society (including the superior)
is a society political and independent” (The Province of Jurisprudence Determined,
Lecture VI, 194, original emphasis).
When we have an authority whom the bulk of the population habitually obey and who, in turn, is not in the habit of obeying anyone else, we have a sovereign authority upon whom the rest of the population is dependent or subject. That is, their habitual obedience to a given individual or body renders the members of a given society subject to its commands. As a result, when we speak of an independent political society, we are really referring only to those members of the society who make up the sovereign body, and whose commands the rest of the population habitually obey. The bulk of the population, then, are dependent, or in a state of subjection.\textsuperscript{14} An independent political society ought to be understood in contrast to a society that is a mere limb or member of a greater political society. A society is a mere limb or member of a greater political society if its rulers are, in turn, in the habit of obeying a further sovereign. It is only if the leaders of a community (i.e., those whom the bulk of the population are in the habit of obeying) are not themselves in the habit of obeying anyone else that they are truly supreme, and that the population over which they rule can be considered to be an independent political society.

There is one further condition that distinguishes a sovereign power and an independent political society from all other types of social organizations: the population of the society must consist at least of a considerable number of persons. At the very least, it must not be, as Austin remarks, “extremely minute.”\textsuperscript{15} This condition is necessary in order to distinguish political societies (including their respective sovereign authorities) from other kinds of society, like, say, a family. If we consider the organization of a family, we can see that, first, it is an independent society, insofar as the head of the

\textsuperscript{14} Austin, \textit{The Province of Jurisprudence Determined}, Lecture VI, 194.
\textsuperscript{15} Austin, \textit{The Province of Jurisprudence Determined}, Lecture VI, 210.
family is not in the habit of obeying anyone else, so far as questions relating to the family itself are concerned, and second, that its members are in the habit of obeying its chief. It is, in this sense, then, not merely the limb or member of another society, and might thus be considered to be an independent political society. However, it would be absurd to conclude that a family constitutes an independent political society, suggesting that the father or the mother (whoever the chief might be) is a monarch or a sovereign, and that the children are subjects. Moreover, so concluding would also obscure the difference between civil society and the state of nature, since the state of nature would be made up of many small independent political societies, each consisting of a family. We must thus conclude, Austin argues, that it is also necessary that a given population must be of a considerable size in order for it to be considered a political society at all, even if we cannot put a precise number on this size.

Austin draws on this simple model of law as orders issued by a sovereign to its subjects in order to explain the more complex types of legal systems, and legal rules, that are familiar in modern states. In addition to orders issued by the sovereign directly, the positive law can also include orders issued by subjects who occupy subordinate political offices, and orders issued by subjects in their capacity as private persons, in pursuance of legal rights. These orders are law, for Austin, because they can themselves be traced back to the commands of the sovereign, in its political capacity.

---

17 As Austin explains, “every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign number
First, Austin acknowledges that law can be hierarchical; a legal system can consist of superior and inferior, or subordinate rules. A hierarchical legal system consists in a hierarchy of legal offices: the officials of the system can hold superior or subordinate offices, and the orders of the subordinate officers are legally inferior to those of the superior officers. There are many reasons why a sovereign body might delegate some of powers to subordinates, or representatives of its office: the population of the state or its territory might be too large for the sovereign to govern them directly; the governance of the state might be too complex for the sovereign to manage without the assistance of ministers; there might be certain offices of the sovereign body that are elected or issues that are settled by popular vote; the sovereign body might be inept or incompetent to decide certain issues—say, if they require special expertise, or special attention to detail. Alternately, members of the sovereign body might be incompetent to decide certain issues because they have private interest in them; the members of the sovereign body might themselves be widely dispersed, and so on.\textsuperscript{18} The orders of subordinate legal officials remain law, however, for Austin. As he explains, they are “clothed with legal sanctions, and impose legal duties.”\textsuperscript{19} They are legally binding on Austin’s view, because they are issued by the sovereign “circuitously or remotely.”\textsuperscript{20} That is, even though the orders are issued immediately by the subordinate legal officers, they are made pursuant to legal rights conferred on them by the sovereign directly to issue such rules. As Austin

\textsuperscript{18} Austin, \textit{The Province of Jurisprudence Determined}, Lecture VI, 227.

\textsuperscript{19} Austin, \textit{The Province of Jurisprudence Determined}, Lecture V, 136.

\textsuperscript{20} Austin, \textit{The Province of Jurisprudence Determined}, Lecture V, 136.
explains, the right to issue legal rules is held by those holding subordinate legal offices on trust, or “as mere trustees for the granters.”

Austin also acknowledges the familiar possibility that private citizens can issue legal rules to one another. So, for example, people can contract with one another, or transfer their property to each other. Or, to take Austin’s examples, a guardian might, while acting in trust for his pupil or ward, have a legal duty to issue legal order to his pupil or ward for the latter’s benefit. When he does, it is as if the order is issued from the state (or, more precisely, as if the guardian is a subordinate political officer of the state), and the guardian is acting as an instrument of the state. Alternately, masters have legal rights over their slaves to issue legal orders for the master’s benefit. These rights are different from the legal duties that a guardian has over his pupil or ward since masters are not under a legal duty to issue these orders. The resulting orders are thus, as Austin explains, mixed rules of positive law and positive morality. They are rules of positive law since they impose legal duties, and are backed by legal sanctions. But they are rules of positive morality since the master is not legally bound to issue them, and they are for his own benefit. Unlike the case of the guardian, when a master issues a legal order to his servant, he is not acting as an instrument of the sovereign. Instead, his order is issued by the sovereign but at the pleasure of the master, and it is issued by the sovereign “circuitously,” rather than directly. These are thus the two ways in which private citizens can issue legal rules to one another, for Austin, while remaining in their capacity as private citizens.

---

22 See Austin’s discussion of this possibility in The Province of Jurisprudence Determined, Lecture V, 137f, fn.7.
The sovereign might also consist of a body or group of people, rather than a single individual, for Austin. So, for example, he acknowledges that the sovereign body might consist in multiple officers, as when the powers of the state are divided amongst multiple offices. Or, for example, he considers states in which the sovereign office is held by multiple persons at once, as when many people sit in the legislature, or, say, when the different branches of the sovereign body each themselves consist of multiple persons, as is the case in most modern states. Alternately, he considers the possibility that multiple people hold a single sovereign office. This is how we can make sense of the expression “the king never dies.”

When the sovereign consists in multiple persons or offices, rather than one natural person, sovereignty resides in the corporate body, taken as a whole. Recall that a command consists in the expression of someone’s wish or desire that another person or group do or refrain from a given action. As Austin explains, a law is a rule that is “laid down for the guidance of an intelligent being by an intelligent being having power over him.” Commands, or laws in general, require an intention or a purpose behind them. There must therefore be a bearer of with or desire, or the purpose, being expressed. It is for this reason that where the sovereign consists in multiple persons, sovereignty must reside in the group, taken as a whole; if we are to make sense of the idea that it can issue

---

23 As Austin explains, when someone says “the king never dies,” she means that “though an actual occupant of the kingly office is human, mortal, and transient, the duration of the office itself has no possible limit which the British Constitution can contemplate. And on the death of an actual occupant, the office instantly devolves to that individual person who bears the generic character which entitles to take the crown: to that individual person who is then heir to the crown, according to the generic description contained in the Act of Settlement.” Austin, _The Province of Jurisprudence Determined_, Lecture V, 147.

24 Austin, _The Province of Jurisprudence Determined_, Lecture I, 10.

25 Austin, _The Province of Jurisprudence Determined_, Lecture V, 133.
commands, and that these commands express its wishes, then we must suppose that there is some unified agent that is issuing them.

A group of individuals form a unified whole, or as a corporate body, when they form what Austin calls a “determinate body.”\(^{26}\) A determinate body consists in a group whose membership can be fully specified. That is, a group or body is determinate, for Austin, when we can conclusively identify all of its members. There are two ways in which a group might form a determinate body. First, people might be members of a group by virtue of possessing specific personal characteristics, even though we might also describe them as possessing certain general characteristics as well. Or, secondly, people might belong to the group by virtue of possessing certain general characteristics, and the group is composed of all the people who possess these characteristics.\(^{27}\) So, for example, a firm that consists of persons A, B, and C consists in a determinate body of the first kind; we can conclusively identify all of its members, and their membership to the group

---


\(^{27}\) Austin explains the distinction thus: “A determinate body of one of those kinds is distinguished by the following marks: - 1. The body is composed of persons determined specifically or individually, or determined by characters or descriptions respectively appropriate to themselves. 2. Though every individual member must of necessity answer to many generic descriptions, every individual member is a member of the determinate body, not by reason of his answering to any generic description but by reason of his bearing his specific or appropriate character.

A determinate body of the other of those kinds is distinguished by the following marks: - 1. It comprises *all* of the persons who belong to a given class, or who belong respectively to two or more of such classes. In other words, *every* person who answers to a given generic description, or to any of the two or more given generic descriptions, is also a member of the determinate body. 2. Though every individual member is of necessity determined by a specific or appropriate character, every individual member is a member of the determinate body, not by reason of his bearing his specific or appropriate character, but by reason of his answering to the given generic description.” *The Province of Jurisprudence Determined*, Lecture V, 145.
is determined by their personal characteristics.\textsuperscript{28} Alternately, the British Parliament consists in a determinate body of the second kind: we can conclusively identify all of its members, but their membership depends on their answering to certain descriptions, rather than their possession of certain personal characteristics. More specifically, the British Parliament consists in all those people who were appointed or elected to sit in it in accordance with the procedures specified in the Constitution.\textsuperscript{29} This is so even though all these people also possess various personal characteristics by which they can be identified.

An indeterminate body, in contrast, consists in a group whose members cannot be fully specified. In other words, where we have a group or body whose membership we cannot fully identify, the group or body is indeterminate. For example, a group that consists only of some of the people who answer to a certain description, or who bear a certain characteristic, where there is no further specification of which people these are, the group is indeterminate.\textsuperscript{30} So, e.g., the members of the legislature, club, profession, etc. who hold a certain view constitute an indeterminate group of this kind. Alternately, a group might be indeterminate because its criteria for membership are vaguely specified. The group of gentlemen is like this.\textsuperscript{31}

In order to be capable of acting as a unified whole, a given group must be determinate because, as Austin explains, only a determinate body is capable of, e.g., “meeting at determinate times and places; of issuing expressly or tacitly a law or other command; of choosing and deputing representatives to perform its intentions or wishes;

\textsuperscript{28} Austin, \textit{The Province of Jurisprudence Determined}, Lecture V, 146.
\textsuperscript{29} Austin, \textit{The Province of Jurisprudence Determined}, Lecture V, 146f.
\textsuperscript{30} Austin, \textit{The Province of Jurisprudence Determined}, Lecture V, 145f.
\textsuperscript{31} Austin, \textit{The Province of Jurisprudence Determined}, Lecture V, 148.
of receiving obedience from others, or from any of its own members,\(^\text{32}\) and so on. An indeterminate body cannot act as a whole since, for Austin, it is impossible to specify which actions of which of its members constitute the actions of the group, much less which expressions constitute commands issued in the capacity of a sovereign, or which members are habitually obeyed.

The sovereign body can thus be arbitrarily complex, for Austin, so long as it is determinate. As we saw above, Austin acknowledges that the sovereign body might be divided into different offices, and that these offices might stand in a hierarchy towards one another. In explaining the heterogeneity of a sovereign power, Austin notes,

> the sovereign number, for example, may consist of an oligarchical or narrower, and a democratical or larger body: of a single individual person styled an emperor or king, and a body oligarchical, or a body democratical: or of a single individual person bearing one of those names, and a body of the former description, with another of the last-mentioned kind. And in any of these cases, or of numberless similar cases, the various constituent members of the heterogeneous and sovereign body may share the sovereign powers in any infinite modes.\(^\text{33}\)

As we have seen, however, where the sovereign power consists in multiple offices, sovereignty resides in these multiple bodies, taken as a whole; no office is alone sovereign, on these models. More importantly, however, no single member of the sovereign body, taken on her own, is sovereign. Instead, the members of the sovereign body, considered severally, or in sub-groups, are themselves likewise subject to the sovereign body as a whole.\(^\text{34}\)

\(^{\text{32}}\) Austin, \textit{The Province of Jurisprudence Determined}, Lecture V, 149.

\(^{\text{33}}\) Austin, Lecture \textit{The Province of Jurisprudence Determined}, VI, 221.

\(^{\text{34}}\) Austin, Lecture \textit{The Province of Jurisprudence Determined}, VI, 218.
Indeed, the sovereign body might even include all, or almost all the members of a given state, as is does in the case of a democracy.\(^\text{35}\) Where it does, the electorate typically delegate their sovereign powers to a group of representatives, so that governance does not become too unwieldy. When the electorate elects representatives to form a governing body, they can delegate their sovereign powers absolutely, or else they can delegate them, but entrust their representatives to represent their interests, or to carry out certain tasks.\(^\text{36}\) In neither of these cases, however, are the representatives bound by positive legal duties. At best, the representatives are bound by moral considerations, or the fear that they will offend their electorate. Alternately, the electorate can retain sovereign law-making powers, and subject their representatives to positive legal constraints. But, when they do, the electorate remains the ultimate sovereign legislature, rendering the official legislative body an inferior source of law.\(^\text{37}\)

Austin thus argues that the positive law just consists in the sovereign’s commands to its subjects, whatever they are, where the sovereign, its subjects, and its commands are, in turn, also identifiable by social considerations. We thus have a purely social account of legal validity. Austin’s analysis thus grounds two fundamental legal positivist tenets: first, it leads to the sources thesis which claims that social sources are necessary for legal validity, and second, the separation thesis, which claims that social sources are sufficient for legal validity, also follows. Consider each conclusion in turn.

\(^{35}\) As Austin notes, it is unlikely that all the members of a society are competent to exercise sovereign powers. (\textit{The Province of Jurisprudence Determined}, Lecture VI, 216.)

\(^{36}\) Austin, \textit{The Province of Jurisprudence Determined}, Lecture VI, 229.

\(^{37}\) Austin, \textit{The Province of Jurisprudence Determined}, Lecture, VI, 233.
1.4 The Sovereign is Legally Unlimited

It follows from the foregoing account of the necessary and sufficient conditions for legal validity that first, there must be an ultimate source for all positive law, and, second that this source is not itself capable of legal limitation. If, as we have seen, social sources are necessary for legal validity, then it follows that there cannot be a legally valid rule whose authority does not derive from a social source. Here we have the sources thesis, or the claim that all valid law must come from a source.

It also follows from this claim that this ultimate source – the sovereign authority, for Austin – is itself legally unlimited. The sovereign authority is legally unlimited on Austin’s account since, if, *per impossible*, we imagined that the sovereign authority of a given independent political society was legally constrained, then this would suggest the existence of a further sovereign to whom our initial sovereign is subject, contrary to the hypothesis. This is not to say that there are no constraints on the sovereign’s authority whatsoever. As we saw above, legal considerations are merely one type of consideration among many. The sovereign may well be (and indeed likely is) subject to a variety of religious, moral, social and political, etc. constraints, and these constraints might be of considerable weight. Hence, to say that the sovereign authority is legally unlimited is not to say that sovereign authority is unlimited *tout court*. Rather, it is simply to say that there is nothing the sovereign can do that can be considered to be illegal.

*(a) Unconstitutionality vs. Illegality*
The freedom of the sovereign body from legal limitation does not, for Austin, preclude the possibility that an act of a member of a sovereign body, taken severally or as a mere member, be considered to be unconstitutional, insofar as it violates a law that governs the constitutional structure of the sovereign government. Say, e.g., a member of a complex sovereign government attempts to issue a law that exceeds the bounds of her authority. In this sense, it seems, that the sovereign is capable of legal limitation, since, members of a complex sovereign authority, considered on their own, are indeed (legally) bound by constitutional laws dictating the structure of the government. However, this case does not constitute a genuine counter-example to the claim that the sovereign authority is legally unlimited since the idea behind this claim is that the sovereign authority, considered as a whole, is legally unlimited insofar as there is nothing further to the positive law than the decrees of this sovereign authority, taken as a whole. That is, the positive law just is whatever the sovereign, as a body, says it is. It is in this sense that Austin concludes that the sovereign is legally unconstrained. There is thus no further sense in which an act of a sovereign can be considered to be unconstitutional or illegal.

Consider, e.g., a government consisting of multiple persons or offices. In such cases, we need laws establishing the structure of the various governing authorities, vesting each of its constituent members or parts with the relevant authority. These laws are part of the constitutional laws of the community. They are part of the positive law, properly so-called insofar as they are legally, not just morally or socially, binding as against the members of this composite sovereign or government, when considered individually or severally. They are enforced judicially, and are backed by legal sanctions.
Insofar as members of the sovereign body are subject to these laws, then, they are in this sense capable of legal limitation.

This does not merely mean that members of the government might only be subject to the positive law when considered as private citizens, though this is also true. So, for example, members of the government are still subject, e.g., to the criminal law should they perform a criminal act. However, members of a composite government are also constrained by the constitutional law – that is, laws determining the structure of the governing bodies – even in their public functions, when considered as the constituent members of these governing bodies. For example, constitutional laws (legally) constrain the individual members from e.g., usurping the authority of members of other offices, or from abusing their authority. When we use the term “unconstitutional” to describe violations of laws of this type, we are referring to violations of the positive law.

Unlike the case where we take are faced with a monarchy of one, or when we take a composite sovereign body as a whole, the constituent members of a sovereign body might properly be said to be subject to the positive law, and their violations of these laws might properly be said to be illegal, Austin argues, because as constituent members of a sovereign body are themselves subordinate to the body as a whole. It is the sovereign body considered as a whole, which is properly taken to be the author of the positive law, and, as such, cannot itself also be made to be subject to it. When considered severally, then, the constituent members of the sovereign body are merely its component parts; as such, they are also subject to the supreme authority of the sovereign body, as a whole. Insofar as we can (legally speaking) distinguish between the sovereign body, taken as a whole, and its constituent members or offices, we can properly say that even though the
sovereign body, taken as a whole, cannot be made to be subject to the positive law, its constituent members can indeed be. It is therefore also only insofar as we consider the constituent members of the sovereign authority severally, that we can properly say that they done something unconstitutional or illegal.

This is the only sense, however, in which one might say that a sovereign has done something unconstitutional, and hence illegal. Because all positive law must come from a sovereign source, there can be no further, substantive legal constraints on those laws issued by this sovereign source. If, therefore, we take constitutional rules to be substantive constraints in this further sense, then the rules constitutional law are merely rules of positive morality, and departures from these rules are considered to be immoral rather than illegal.

It follows from the foregoing that to the extent that there is no legal distinction between the sovereign body, taken as a whole, and its constituent parts, we cannot draw the conclusion above that a given member of the sovereign body is subject to the positive law, even though the body as a whole is not. It is for this reason that Austin argues that, for example, in a monarchy, it is impossible for the king to commit an illegal act and that the expression “constitutional law” refers only to rules of positive morality that pertain to the structure of the government. This is because in a monarchy there is no legal distinction between the office of the king and the supreme authority.\footnote{Note that we will be lead to question this conclusion later.} However, as we have seen, we can indeed draw this distinction in more complex forms of government.
Note also that because, as we have seen, the sovereign body, taken as a whole, is properly considered to be the ultimate the author of the positive law, it is not itself subject even to the constitutional law when considered as a whole. This means that the sovereign authority is free to change the structure of the government at any given time. So doing would not be considered to be unconstitutional in the sense of being illegal, or in violation of the positive law, when done by the supreme body as a whole. Hence, although changes in the structure of the government itself might contravene the rules of positive morality or of God, say, and might thus be called “unconstitutional” in this weaker sense, they are not unconstitutional in the sense of being violations of the positive law. This is because the freedom of the sovereign authority from positive legal constraints extends even to the constraints of constitutional law.

We can thus see that, when considered as a whole, the sovereign authority is indeed incapable of legal limitation. It is, in short, impossible for the sovereign body, as a whole to do something illegal, since, as Austin argues, the law is just whatever the sovereign says it is. This conclusion is not undermined by the fact that an individual member of the sovereign body, considered on her own, can be subject to the positive law because the authority of the various offices composing a sovereign government is itself subsumed under the authority of the sovereign body as a whole, and it is the sovereign body as a whole that is the ultimate author of the positive law. This conclusion that the sovereign is legally unlimited therefore, Austin argues, holds “universally or without exception.”

---

(b) The sovereign is incapable of binding itself

It is clear from the foregoing that a sovereign is incapable of binding its successor, since, as the new ultimate sovereign authority, the successor to the sovereign is itself incapable of being legally constrained, including being constrained by laws issued from its predecessor. Hence, although a given sovereign authority might attempt to issue prospective laws binding future governments, and although the successor to the sovereign might be compelled by popular sentiment or religious considerations to conform to these laws, they impose no genuine legal obligations.

It also follows from the foregoing, however, that a sovereign is incapable of legally binding itself. This is because, as Austin explains, a sovereign that is the author of a law binding itself may “abrogate the law at pleasure,” and the possibility that one might change or discharge a law at will is inconsistent with the notion of being under a legal obligation. The difficulty with a sovereign binding itself does not arise from the mere fact that every legal obligation must traceable back to some sovereign command, since this fact, on its own, is not sufficient to ground the conclusion that a legal obligation must be traceable back to the command of some other sovereign. That is, it is not just because there must be some ultimate sovereign authority at the end of every legal obligation that the party issuing the command must be distinct from the party subject to it. The possibility that a sovereign bind itself is consistent with the requirement that all obligations must come from a source.

The difficulty with a sovereign issuing a command to itself is that, if the law is whatever the sovereign says it is, then there is no legal difference between, on the one

---

40 Austin, *The Province of Jurisprudence Determined*, Lecture VI, 255.
hand, the sovereign doing something at pleasure, and being legally obliged to do it, and, on the other, between the sovereign violating the command and changing the law. The problem is not simply that we cannot tell the difference, or that there is no outward difference. Rather, the difficulty is that there is no legal consideration that can ground this difference. As we have seen, Austin argues that there is nothing further to the notion of legal validity than that the sovereign commanded it. This means that it is always, legally speaking, open to the sovereign to issue a new law or command. There may, of course, be other kinds of constraints on the sovereign’s ability to alter the law – e.g., there may be moral or political reasons for the sovereign to refrain from changing the law. However, as we know, these are distinct from legal constraints, and, though they might be weighty, they are not legally binding. Hence, so far as the law is concerned, there is nothing further constraining the sovereign from changing the law at whim. And, because there are no further legal considerations constraining the sovereign from changing the law at whim, it is always, legally speaking, open to the sovereign to do so.

Two difficulties with the idea of a sovereign constraining itself follow from this fact that it is always, legally speaking, open to the sovereign to change the law at whim or pleasure. First, because nothing more than mere whim is legally required for the sovereign to change the law, there is no legally relevant distinction between the violation of an existing law, and the creation of a new one. Any purported violation of an existing law might equally constitute the creation of a new law (or, equivalently, an alteration to the existing law). Legally speaking, these two acts are indistinguishable. Moreover, from the fact that the sovereign can, at any moment, change the law at pleasure, it follows that, at any given moment, it is mere pleasure by which the sovereign refrains from changing
the law. So far as the law is concerned, there is no further legally relevant reason for the sovereign to so refrain. In particular, the sovereign is under no legal obligation to so refrain. Insofar, then, as the sovereign’s actions conform with a purported law or decree, she is just acting as if she were subject to an obligation. We can thus see that if, legally speaking, it is open to the sovereign to change or discharge a law at pleasure, then it is impossible to say that the sovereign is bound by a law, or is in violation of a law. In short, if the law ultimately is whatever the sovereign says it is, then it is impossible for the sovereign to bind itself.  

1.5 There is a distinction between what the law is and what it ought to be

This brings us to the second consequence of Austin’s claim that social sources are necessary and sufficient for legal validity, and the second fundamental tenet of legal positivism: there is a distinction between what the law is and what it ought to be. As we have seen, the fact that sovereign authority is legally unconstrained follows from the claim that social sources are necessary and sufficient for legal validity. Another way of understanding the claim that the sovereign is legally unlimited is that there is no further legal question of sovereign governance over and above the question of what the sovereign does command. Any further question is merely a question of what the law ought to be, and this question, though important, is not on its own a question of positive law. That is, unless the sovereign, through some positive command, deems it to be legally

---

Note that it also follows from the foregoing that the sovereign cannot have legal rights against its subjects. As a result, when it appears before a court or tribunal, either as a claimant or as a defendant, it is merely acting as if it were subject to a legal right or duty, for Austin. See his discussion in *The Province of Jurisprudence Determined*, Lecture VI, 277ff.
relevant, the question of what the law ought to be has no bearing on what the law is; it is not itself a legally binding question. As a result, we can see that there is a strict distinction between what the law is and what it ought to be. Nothing about what the law is follows from the fact that it ought to be so, and nothing about what law ought to be follows from the fact that it is so. We thus also have the separation thesis. As a result, as Austin famously remarks, “the existence of law is one thing; its merit or demerit is another.”

We can thus more clearly see the consequences of Austin’s claim that social considerations are necessary and sufficient for legal validity. It follows from this claim that, first, the sovereign is legally unlimited – the law is just whatever the sovereign says it is, and second, that there is no further legal question of sovereign governance that we can ask after the sovereign has pronounced. All we can ask is what the law ought to be, and this question, though important, is not one that is legally relevant. That is, facts about what the law ought to be, above and beyond facts about what the sovereign has commanded, are not, properly speaking, legal considerations and they carry no weight in our legal deliberations. There is thus a strict separation between what the law is and what it ought to be.

We can thus see how the two fundamental tenets of legal positivism follow from Austin’s initial supposition that law can be wholly explained by social facts. In particular, Austin attempts to provide a complete explanation of law in terms of commands, sanctions, and habits of obedience. H. L. A. Hart, however, argues that Austin’s basic ingredients of habits of obedience, commands, and sanctions cannot fully explain law.

---

This is because not just any system of coercively enforced rules can count as law. Instead, it is distinctive of law that it is issued from an authorized source, it confers legal rights and duties, and it is backed by state power. A complete account of law must explain its possession of these distinctive features. And, Hart shows, in order to explain these distinctive features of law, we must conceive of law as the union of primary and secondary rules. Let us consider Hart’s argument in more detail.
II. Hart’s Objections

2.0 Introduction

Hart provides two arguments in favour of his theory of law as the union of primary and secondary rules. He argues for this conclusion directly by comparing a society with law to pre-legal societies. Where there is no law, he argues, there is no certainty with respect to the scope and content of legal rules; no efficient means of creating, amending, and extinguishing legal rules; and no conclusive and authoritative way to resolve disputes. Members of societies that lack the basic legal institutions like a legislature, courts, and other officially recognized individuals or bodies responsible for enacting, interpreting, and enforcing laws must rely on social pressure alone to enforce the basic primary, duty-imposing rules necessary for the maintenance of the society. These include rules prohibiting gratuitous violence, theft and deception, those requiring its members to make certain contributions to the community, and so on. This leads to the problems mentioned above, namely, disputes with regards to the precise scope and content of the rules, reliance on a “slow process of growth” in order to create or change these rules, and no efficient way of resolving disputes and upholding and enforcing these primary rules. The difficulties with this are mitigated, according to Hart, by the fact such pre-legal societies tend to be closely-knit smaller communities that are marked by “ties of kinship, common sentiment, and belief, and placed in a stable environment.”

43 Hart, Concept of Law, 92.
44 Hart, Concept of Law, 92.
conclusive criteria for identifying the rules of the system, these problems will persist. He thus concludes that in addition to primary rules telling people what, according to the law, they can and cannot do, a legal system must also include secondary rules conferring powers on the members of the community to legislate and adjudicate the rules of the system, and giving people private powers to alter their legal statuses with respect to one another, and rules for conclusively setting out the criteria for validity for the system.

There are a number of difficulties with the argument presented above. First, it is based on dubious anthropological considerations. Although it is possible that pre-legal societies tend to be close-knit communities bound by ties of kinship and common sentiment and belief, this need not be the case, and Hart has provided no evidence in support of this view. More importantly, however, this line of argument misses the central difficulty with societies that lack an independent rule of recognition. The problem with grounding determinations of legal validity on people’s practices and habits directly is not that this requires that people live together in small closely-knit communities where questions of enforcement, legislation, and adjudication do not frequently arise. Indeed, we might imagine, with Austin, a society with a sophisticated government with separate legislative and executive branches and a well-developed judicial system, whose orders all derive their authority from the fact that they can be traced back to the sovereign’s commands, and where the sovereign is just the person or body who is habitually obeyed by the bulk of the population. As we have seen, Austin intends for his theory to explain very complex and sophisticated societies, and legal systems. Here, we can clearly identify the rules of the system: the law is whatever the sovereign says it is. Moreover, we can in turn identify the sovereign: the sovereign is just the person or body (however complex)
who is habitually obeyed but who obeys no one in return. In addition, we need not suppose a generally peaceful and harmonious society; we can indeed explain, on this view, how people can be subject to the law regardless of their tendencies to comply. Nevertheless, Hart shows that insofar as the validity of these rules, including the validity of these more sophisticated rules for the maintenance of the primary rules of the community, is dependent on social pressure alone—i.e., insofar as the validity of these rules is ultimately dependent on people’s inclinations to comply with them—then we must conclude that there is no authoritative legal system giving rise to legally valid rules. Indeed, no system of rules that is enforced by social pressure, or whim and inclination, alone can be considered to be a legal system; in order to transform mere social rules and customs into a legal system properly so-called, Hart argues, we must posit secondary rules, and, ultimately, a rule of recognition. Consider, then, Hart’s alternative argument against Austin.

2.1 How Austin’s theory is like the gunman scenario

Recall again Austin’s theory of law. A rule is legally valid for Austin if and only if it is a command issued by a sovereign to its subjects, where (i) a command is an order backed by a sanction, (ii) a sovereign is a person or body that is habitually obeyed and that habitually obeys no one in return, and (iii) its subjects are just those who are in the habit of obeying the sovereign. The union of these factors, Austin argues, gives rise to an authoritative legal system composed of binding legal rules, backed by sanctions for disobedience.
At first glance, this theory seems promising. It can explain the existence of a society with a sophisticated government with separate legislative and executive branches and a well-developed judicial system, whose orders all derive their authority from the fact that they can be traced back to the sovereign’s commands, and where the sovereign is just the person or body who is habitually obeyed by the bulk of the population. Moreover, Austin’s account of law escapes the difficulties that Hart raised for pre-legal societies. Where the law consists in the sovereign’s commands, we can clearly identify the precise scope and content of its rules, we need not rely on changes in the practices of the general population in order to create or change the rules of the system, and officials can be appointed to efficiently adjudicate disputes and uphold and enforce the rules. In addition, we need not suppose a generally peaceful and harmonious society; we can indeed explain, on this view, how people can be subject to the law regardless of their tendencies to comply, and whether or not they want to be bound. Austin thus need not suppose a close-knit society bound by ties of kinship and common sentiment.

The difficulty that Hart raises for Austin’s view is that it effectively renders law indistinguishable from a scenario in which a gunman orders a bank clerk to hand over her money, or get shot, “writ large.” Under Austin’s understanding of commands, both the sovereign’s and the gunman’s orders constitute commands, rather than the expression of mere wishes. The difference between the gunman scenario and Austin’s conception of a legal system does thus not lie in the form of the orders themselves. What makes the sovereign’s, but not the gunman’s, orders law must be the fact that they are issued by the sovereign, then.

---

45 Hart, Concept of Law, 82.
There are three further ways in which the sovereign’s orders to its subjects differ from a single command issued by a gunman. First, the sovereign issues orders to a given class of people that they do or refrain from given type of act, whereas the gunman orders a single person to perform a unique action. Second, unlike the victim in the gunman scenario, the sovereign’s subjects remain bound to comply even when the threat is not imminent; that is, they remain subject to the command even when they do not have a gun pointed at them. Finally, the sovereign’s authority to issue such orders, and its corresponding threat to punish violations, is enduring, unlike the fleeting power of the gunman. We can imagine, however, expanding on the gunman scenario in these three ways in order to complete the analogy between the gunman scenario and the notion of a legal system as envisioned by Austin. So, for example, we might imagine, as Hart does, that the gunman’s orders hold for a class of people and dictate that they do or refrain from a given type of conduct; that they remain binding until they are withdrawn or repealed, even when the threat of sanction is not imminent; and that they are generally obeyed by the bulk of the population. So understood, however the gunman scenario is indistinguishable from law on Austin’s account. And, as Hart argues, even the gunman scenario “writ large” falls short of a legal system, as it is commonly understood.

(a) The Gunman Scenario “Writ Large”

We might imagine, first, the gunman’s orders hold for a general class of persons and dictate a general class of conduct. This would bridge one of the gaps between our initial gunman scenario and law. Unlike our initial gunman scenario, in which a specific person is ordered to perform a specific act on a given instance, legal rules are general in two
ways: they enjoin or permit a given type of behaviour and they apply to a general class of persons. This double sort of generality of law explains the fact that people are bound by the law, and subject to its sanctions, even when they are not each faced with a police officer issuing orders and enforcing every law at every moment, as would be necessary under a strict analogy with the gunman scenario. Such a system would obviously be unworkable. This is not to say that we do not need a police force to uphold and enforce our laws; however, our need for a general police presence to prevent occasional violations does not undermine the fact that legal rules, unlike the orders of the gunman, need not be addressed to each person individually on every occasion in which they apply, nor need they be enforced directly and literally with a threat of sanction. Hence, in order to make the gunman scenario more like a legal system, we must imagine that the gunman’s orders hold for a given type of action, in general, and apply to a class of persons.

This brings us to the second way in which we must expand on the initial gunman scenario in order to make it more like a legal system. Unlike the gunman’s orders, validly enacted laws have a standing or enduring character; that is, they remain binding (and the threat of sanction for violation remains in place) until they are withdrawn or repealed, and this may happen long after the initial order is issued. Similarly, the sovereign’s authority to issue orders remains intact even absent an immediate threat to its subjects. The gunman’s order, on the other hand, has force only so long as the gunman is pointing the gun at the teller; that is, it is binding only so long as the threat remains imminent, as does the gunman’s authority over the teller. Hence, again, in order to make our initial gunman scenario more like a legal system, we must also posit something like a general
belief on the part of those subject to the laws that the sovereign’s threats are credible, and that disobedience will likely be met with a sanction, not only in the moments following the initial issuing of the order, but continuously until it is revoked or withdrawn. It is only if we posit this continuing belief on the part of the subjects that the sovereign’s orders can have the standing or enduring character of law.

Finally, we must suppose that most of the orders issued by the sovereign are generally obeyed by the bulk of the population if we are to capture the stable and enduring character of a legal system, as opposed to the “mere temporary ascendency of one person over another” that is, as Hart remarks, “naturally thought of as the polar opposite of law.”46 In other words, if we are to explain the relative stability and persistence of the sovereign’s reign over its subjects as opposed to the mere fleeting power that the gunman has over the teller, then we must also assume that the bulk of the population obey the sovereign most of the time.

With these three assumptions in place we can explain how Austin’s account of law in terms of the sovereign’s orders backed by threats builds on the initial gunman scenario of a single order backed by a threat in an attempt to provide an account of law. And, as we know, there is nothing more to a legal system for Austin, than commands backed by threats that hold for the bulk of the population in general, by a person or body who is habitually obeyed for fear of being subjected to a sanction. This just amounts to the initial command issued by a gunman, coupled with the three expansions discussed above, or, as Hart argues, the gunman scenario writ large. The difficulty, however, is that

the gunman scenario writ large still falls short of a full-fledged legal system. In particular, it fails to capture key aspects of law, and central forms of government.

2.2 It fails to explain more complex kinds of law

(a) It fails to explain laws conferring private powers

On the one hand, Hart argues, there are a variety of other kinds of laws that are also uncontroversially part of a legal system that cannot plausibly be explained in terms of orders backed by threats. Although one aim of a legal system might be to promote order amongst members of a community, another end of a legal system is provides people with the means for arranging their affairs on their own by altering their legal status with respect to one another. Hence, for example, in addition to laws laying out our initial rights and obligations with respect to one another we also have laws setting out the conditions for buying and selling property, making a gift, entering into contract, making a will, entering a marriage, getting a divorce, and so on. Such rules are equally canonical instances of laws.

It is mistaken, however, to describe such rules as orders. These rules do not impose duties or obligations to engage in a given type of behaviour. Instead, they facilitate certain kinds of arrangements amongst citizens by empowering them to enter into various kinds of relations with respect to one another by legally protecting or enforcing certain interests.

Nor further can we describe compliance or non-compliance with these rules in terms of obedience or violation, or the resulting nullity of our actions as a sanction or punishment. Just as a rule that says that a will must be signed by two witnesses in order
to be valid does not, properly speaking, impose any *obligation* on me to do so, my failure to do so, either because I have tried to form a valid will but failed, or because I did not attempt to draw up a will in the first instance, does not properly constitute a *breach* or a *violation* of a rule, nor am I *disobeying* the rule. It might indeed be correct to say that both cases of rules as orders and in cases of enabling rules constitute standards by which we measure correct or incorrect behaviour. However, this similarity is suggested by the mere fact that both are rules; the important differences between them outlined above remain. Similarly, we might also say that the two kinds of rules are alike in that both kinds are capable of imposing duties that one might otherwise not have; however, although the use of enabling or power-conferring rules might *result* in the creation of duties that one might otherwise not have, the rules themselves are more like “recipes for creating duties”\(^47\) rather than rules that impose duties directly.

Finally, one might argue, as Austin might, that the two kinds of rules are alike in that, just as the violation of a duty-imposing rule results in a sanction or punishment, so too does the legal nullity of my actions that results from my failure to properly comply with enabling rules constitute a sanction or punishment. However, again we run into the same problems that we encountered above: it seems mistaken to construe this legal nullity as a sanction. Again, the legal nullity that results from a failure to properly comply with the requirements listed in enabling rules might be *like* a sanction or a punishment insofar as in both cases the threat of negative consequences for nonconformity might provide people with an incentive to conform to the rules set out by the law. Hence, I might be moved to comply with the Statute of Wills by the concern that my attempts to

\(^{47}\) Hart, *Concept of Law*, 33.
transfer my estate upon my death will have no legal affect should I fail to do so, just as I am moved to comply with the criminal law by the concern that I will be faced with a punishment should I fail to do so. However, such psychological considerations are not sufficient to ground the conclusion that nullity constitutes a sanction.

In the first instance, there is no guarantee that such psychological similarities obtain. I might be moved in one instance but not the other. In addition, whereas one might properly say that sanctions are imposed for the violation of duty-imposing rules in an attempt to discourage us from engaging in certain types of behaviour, the same cannot be said of the nullity that results from a failure to conform to power-conferring rules. The fact that, e.g., my promise to you is not legally binding, or that our cohabitation does not constitute a marriage is not, on its own, meant to discourage such activities. Instead, as we saw above, power-conferring rules are meant primarily to facilitate certain kinds of relations amongst citizens, namely, those that effect changes in their legal status with respect to one another, rather than to influence our behaviour directly, and the nullity that results from a failure to comply with these rules, unlike the sanctions attached to duty-imposing rules, merely leaves the initial distribution of our rights and duties intact.

Finally, nullity does not bear the same logical relation to an enabling rule that a sanction bears to a duty-imposing rule. In the case of a duty-imposing rule, as in those that are found in the criminal law, there is a logical distinction between the conduct prohibited by the rule and the sanction imposed for the violation of the rule. We can imagine a scenario in which we had rules prohibiting certain kinds of conduct, but where there was no sanction attached to the violation of these rules. Though it might be difficult to imagine such a scenario, and it is perhaps implausible that a criminal law would be so
structured, it is nonetheless logically possible. There is thus a conceptual distinction between the rule prohibiting certain kinds of behaviour, and the penalties imposed for the violation of such a rule. In this sense, Hart argues, we can “subtract the sanction and still leave an intelligible standard of behaviour which it was deigned to maintain.” This is so even if, we might deny that such a rule can constitute a legal rule.

However, the same cannot be said of the relation between nullity and a power-conferring rule. In the case of a failure a power-conferring rule, there is no distinction between the conditions set out in the rule and the nullity that results from a failure to meet them. The legal nullity that results from a failure to meet the conditions specified just is another way of putting the requirement that the conditions be met in order for our actions to carry legal weight. That is, to say that there is a rule requiring, e.g., that my will be signed by two witnesses in order to have legal effect, and to say that my attempts to create a valid will will be null and void should I fail to do so is just to say the same thing. Unlike the case of duty-imposing rules and their corresponding sanctions, then, a power-conferring rule could not properly be said to exist in the first instance if a failure to comply with it did not result in nullity. There is thus no conceptual distinction at all between the power-conferring rule itself and the resulting nullity for nonconformity, as there is between the concept of a duty-imposing rule and its sanction.

In sum, we cannot meaningfully describe power-conferring rules as orders imposing duties, and to characterize the consequences for non-conformity to such laws as sanctions. Rather, it is more plausible to describe such laws as empowering or enabling people to effect changes in their legal status, thereby facilitating their management of

---

48 Hart, *Concept of Law*, 35.
their affairs with respect to one another. Not only does the law aim to order civil society
directly by influencing people’s behaviour by imposing constraints or liberties on
people’s conduct, but it also aims to order civil society indirectly by providing people
with the means of arranging people’s relations amongst one another by effecting changes
in people’s legal statuses with respect to one another. Establishing the initial distribution
of the (legal) rights and duties of its citizens, and setting out the conditions for subsequent
alterations and redistributions these rights and duties amongst each other are equally
canonical functions of a legal system. To the extent, then, that Austin’s account of law
can only explain one of these functions, it fails to be a complete theory of law.

(b) It fails to explain laws conferring public powers

In addition to laws conferring power to private citizens to create legal duties or alter their
legal statuses with respect to each other, the law also canonically contains rules
conferring powers on public officials empowering them to exercise their official duties,
or act in an official capacity. These rules include laws in all three branches of government
conferring judicial, legislative, and executive powers on members of government. So, for
example, the law contains rules specifying the subject matter and content of a judge’s
jurisdiction, or conferring on a judge the “power to try” certain kinds of cases. It also
contains rules specifying judges’ manner of appointment or qualifications for, and tenure
of judicial office. Alternately, it also contains rules laying down the canons of correct
judicial behaviour, or those setting out the procedures to be followed in the court. It is
ture that it might be good to comply with such rules, or that a person ought to conform to
them if she wants her orders to have judicial or legal effect. It is also true that the law
might perhaps also contain rules prohibiting judges from engaging in certain behaviour, on pain of some penalty or sanction, or imposing on them a duty to act in a certain way, over and above those rules setting out the jurisdiction of judges. But, as above, it is mistaken to construe rules that do confer jurisdiction, or setting out the manner of appointment or procedures for giving legal effect to one’s orders as orders to a judge that she do or abstain from doing something, or non-conformity with such rules as an offence. Such power-conferring rules do not aim in the first instance to deter judges from engaging in improprieties; they merely define the conditions or limits under which an official’s decisions are law.\(^{49}\) So, for example, a rule conferring the jurisdiction on county courts to try actions for the recovery of land cannot properly be described as an order to judges to issue certain kinds of judgments.\(^{50}\) This is so even though non-conformity with such rules does not necessarily result in a nullity, as in the case of private power-conferring rules, since orders of a court in excess of jurisdiction are typically valid until quashed by a higher court, rather than merely being of no legal force or effect at all.

\((c)\) It fails to explain rules conferring powers on subordinate legislative authorities

Recall that, as we saw above, law consists in those orders issued by the sovereign either directly or circuitously, for Austin. Austin includes circuitous orders of the sovereign in his understanding of law in order to account for the possibility of a complex legal system, consisting in many officers capable of issuing legally binding edicts. The orders of these

\(^{49}\) Hart, *Concept of Law*, 29.

\(^{50}\) Hart gives the example of the County Courts Act (1959, as amended, s. 48 (I)) here, which reads “A county court shall have jurisdiction to hear and determine any action for the recovery of land where the net annual value for rating of the land in question does not exceed one hundred pounds.” Hart, *Concept of Law*, 29.
subordinate legislative officers count as law, for Austin, since, on his view, since they are made pursuant to some previous command of the sovereign backed by a sanction that their orders should count as law. The difficulty with this, however, is that the idea of an order backed by a threat is likewise insufficient to explain those rules conferring the authority on subordinate officers to legislate. The rules conferring legislative power on subordinate officers are even more various than those conferring jurisdiction on a court. They include those rules specifying the subject-matter over which officers can exercise their power; rules specifying the qualifications or identity of the members of the legislative body; rules specifying the manner and form that legislation must take, and the procedures that must be followed in order to enact valid law; and so on. As Hart argues, it is grotesque to say that, say, members of a legislature who vote in favour of a measure have “obeyed” a rule requiring a majority vote in order for a rule to become law, and that those who voted against it have “disobeyed” this rule, or that the majority have “disobeyed” the rule if the measure fails. Instead, he argues, it is best to abandon the idea that all legal rules can be understood on the model of orders backed by threats.

(d) It fails to explain the possibility that some customs can be law even before they are enacted by the courts

In addition to taking the criminal law as his model, Austin’s theory of law as the sovereign’s commands also begins with the idea of law as legislation. Legal validity depends on a deliberate, datable act for him. This need not be the case, however. Although, as Hart notes, customary law is often a subordinate source of law, in the sense

---

51 Hart, *Concept of Law*, 31f.
that it can be overridden by statute, it is always possible that a given custom is law, even before it is enacted as a statute or applied by a court. This possibility raises a counter-example to Austin’s view that all law must consist in a command of the sovereign. It is true that there must be some rule of the system recognizing one custom, rather than another, as law in the system. But to hold that the custom is law because the sovereign has so “ordered” is, as Hart notes, “to adopt a theory which can only be carried through if a meaning is given to ‘order’ so extended as to rob the theory of its point.” On the one hand, it is clear that the legal recognition of a custom as law does not consist in an express order issued by the sovereign or one of its subordinates. On the other hand, however, nor can we say that a given custom is law because the sovereign has tacitly ordered it by refraining from legislating against it. This is because, first, it would be implausible to infer any kind of knowledge or intentions towards the custom from the sovereign’s failure to interfere with it. Secondly, however, if we took the sovereign’s failure to legislate against a custom when it could have as a tacit recognition of this custom’s status as law, then all customs that are not ruled against would count as law, which is absurd. We can thus see, then, that Austin’s theory of law as the commands of the sovereign also fails to account for the status of customary law.

2.3 It fails to explain complex forms of government

Recall that, as we have seen, although Austin begins with the idea of a unitary sovereign’s orders in order to build his theory of law, he does not limit his theory to explaining such cases; he intends to explain more complex forms of government, and

---

52 Hart, *Concept of Law*, 45.
legal systems, based on this simple model. So, for example, orders issued by subordinate legal officials are legally valid, for Austin, because they are “circuitously” issued by the sovereign. Or, e.g., the sovereign might consist in multiple persons or offices, so long as, taken as a whole, its orders are the law of the land. Austin thus does indeed contemplate the possibility of more complex forms of government, and society, and he thinks that these more complex forms of government can be understood on the model of the simple one. The difficulty, however, is that in these more complex forms of government, a mere habit of obedience is not sufficient to distinguish those rules issued by the sovereign body as law, from all other rules of positive morality. Consider each case in turn.

(a) It can’t explain the possibility of legal limitations on the sovereign legislature

Recall again Austin’s theory of law. For Austin, law consists in the orders of the sovereign, and all law comes from the sovereign; there can be no further source for law. This is because, for Austin, all law must come from a social source.

It thus follows from Austin’s account that the sovereign power must itself be legally unlimited. This is because, as we have seen, if, per impossible, we imagined a sovereign authority that was legally constrained, then this would suggest the existence of a further sovereign authority to which the initial sovereign is subject, contrary to our hypothesis. It thus follows from the mere fact that, for Austin, law consists in the commands of the sovereign that the ultimate sovereign authority in a given community must itself be legally unlimited. Moreover, for Austin, this follows merely by considering the nature of law. That is, for Austin, it follows just from the fact that law must come from a sovereign authority that this authority must itself be legally unlimited.
But, as Hart notes, there is no incoherence with the notion of a sovereign lawgiver that is itself legally limited. Indeed, the idea of a sovereign that is itself legally limited is easy to imagine, since there are many familiar examples of such cases. The supreme legislative powers of many modern states are themselves legally limited, if not substantively, than at least with respect to the manner and form that legislation must take, and by limiting the jurisdiction over which the legislature has competence to legislate. Such rules are indeed laws, rather than, say, rules of political morality: they are the proper concern of the courts, and disregard of such rules is not merely immoral or imprudent, but renders legislation void. A legislature that is subject to such constraints is thus surely subject to legal limitations. Nonetheless, there is no incoherence in holding that the rules that the legislature enacts that fall within the scope of these rules are law; the legislature, even a supreme legislature, remains competent to legislate within the scope of these rules, even though it is legally limited.

Such restrictions are best understood as disabilities rather than duties. A legislature that is limited by rules constraining the area in which it is competent to legislate is not under a duty to legislate within its area of competence, nor is it liable to a sanction for exceeding its jurisdiction. Rather, legislation that falls outside these rules is void. The limits imposed by these rules consist in the absence of a legal power, then, rather than a duty.

Nor does the existence of such constraints suggest that the legislature is in the habit of obeying some other sovereign. A sovereign may well be subject to such restrictions, and remain in conformity with them, without being in the habit of obeying someone else. Similarly, he may violate these restrictions and attempt to legislate outside
his jurisdiction without disobeying anyone, or violating a legal duty. Here, he merely fails to issue a valid law. On the other hand, the fact that a legally *unconstrained* legislature habitually obeys some other sovereign does not make it subject to this sovereign’s authority, or rob it of its power to legislate. There is thus no incoherence with the existence of a legally constrained legislature, and the mere existence of legal constraints on a legislature does not render it incapable (because incompetent) to legislate.

(b) *It can’t explain the possibility that law is founded on an ultimate legal rule, rather than person*

As we saw above, Austin explains democracies, like the one found in the U.S. where the supreme legislature is constrained by law, as societies in which the electorate, rather than the legislature, is sovereign, and by whose whim the constitution is law. This is a plausible line of reasoning, and it accords well with the facts in this case, since it is true that in modern constitutional democracies, the legislature is indeed subject to legal constraints, and the people, rather than the elected are sovereign.

The difficulty is that Austin’s conception of a sovereign as one who is habitually obeyed but obeys no one in return cannot explain a society in which the people are sovereign but they impose legal constraints on the legislature. Recall again Austin’s theory. For Austin, the sovereign is the person or body who is habitually obeyed but obeys no one in return. In a democracy, it is the people who are sovereign. On the one hand, one might think that when people elect representatives in a democracy, they are *delegate* a portion of their sovereignty to their elected representatives to act and decide on their behalves. On this understanding, the only residual sovereignty that the people
maintain over their elected representatives is the power to of the vote, exercised periodically; between elections, however, elected representatives are free to act and decide as they wish, subject only to the moral and political limitations on their actions, and to the risks of not being re-elected. In addition to being an impoverished view of democracy, and the idea of popular sovereignty, this understanding of democracy cannot explain how the legislature are constrained by substantive and procedural legal limitations in a constitutional democracy, as in the case of the United States, discussed above. In order to subject the legislature to legal constraints, the people must retain full sovereignty over it. Unlike a democracy in which people delegate their sovereign power to their elected representatives, in this case, as Hart explains, the people constitute an “‘extraordinary and ulterior legislature’ superior to the ordinary legislature.”

Austin’s theory cannot explain societies in which people retain this ultimate power without obliterating the notion of an order, and a habit of obedience, however. To say that the electorate is both sovereign and subject is to say that they issue orders to themselves, and that they habitually obey them. This is a far cry from the model of a community habitually obeying the commands of a person or body, who habitually obeyed no one further, with which Austin began. Austin’s simple model of law begins with the idea of a society in which the bulk of the society habitually obey the orders of a determinate person or body who has the power to enforce its orders, and who habitually obeys no one in return. On this understanding of orders and habitual obedience, there is a clear distinction between the person or group issuing the orders, and those who are

---

53 Hart, *Concept of Law*, 74.
subject to them, and habitually obey them. This distinction is intuitive because it helps to capture the ways in which law often binds people to do things that they might not otherwise do, or do not want to do, on pain of suffering a harm. Where the law consists in the orders backed by threats of a person or group with the power to enforce them, people have reason habitually to obey, whether or not they want to. Regular compliance with these orders is also appropriately described as habitual obedience in this scenario since, in carrying out these orders, people are acting as they might not otherwise act, had they not been so ordered. Where the sovereign and subject are one and the same, however, these notions begin to lose their grip. It would be misleading to describe people’s behaviour as habitually obeying orders that they give to themselves. Both the intuitive aspect of “orders” and of “obedience” are lost here.

One might try to explain this possibility by distinguishing between members of the electorate acting in their private capacity, and people acting in their official capacities as electors and legislators. So, for example, one might argue that in a constitutional democracy, people issue orders, and, ultimately, exercise their sovereignty over the legislature, when acting in their official capacity, while they habitually obey their laws in their private capacity. This is an important distinction, and goes a long way towards explaining how people can be both sovereign and subject to a given set of laws. An appeal to a habit of obedience is not sufficient to explain this distinction, however. The main advantage of Austin’s understanding of sovereignty in terms of a habit of obedience is that it allows us to identify the sovereign in a given community just by inspecting the

---

54 Indeed, Austin suggests as much when he describes an independent political society as “divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject.” See The Province of Jurisprudence Determined, Lecture VI, 216.
practices of the members of that community: as we know, the sovereign is the person or body whom the bulk of the population habitually obey, but who obeys no one in return. Where the sovereign consists in the bulk of the population, acting in their official capacities, there is no pattern of behaviour in that community that can constitute a habit of obedience such that it could serve to identify the sovereign power, as distinct from its subjects. As a result, the appeal to the distinction between people acting in their official capacity, and the same people acting in their private capacities cannot help to explain constitutional democracies on Austin’s theory.

It is likewise implausible to suggest that the limitations on the legislature consist in the orders of the electorate. As above, the advantage of conceiving of law as an order is that conceiving of law as derivable from some determinate and public event helps to identify the legal rules, as compared to all other rules and considerations to which people are subject. But the rules of the constitution do not plausibly continue to limit the legislature because the electorate has so ordered, as required by Austin’s theory. The failure of the notion of an order is even more vivid when we consider the possibility of constitutional restrictions that even the electorate cannot amend: here the electorate has no sovereignty over these rules. Austin’s theory of law as an orders issued by one who is habitually obeyed thus fails to explain the more complex, but familiar notion of a constitutional democracy.

(c) It can’t explain a composite sovereign body

Finally, although Hart does not discuss this difficulty directly, Austin encounters the same problems in his attempts to explain societies in which the sovereign is composite, or
sovereign power resides in multiple persons or offices, rather than in a single individual. As we have seen, Austin attempts to explain the possibility of a composite sovereign office, or multiple persons having sovereign authority by taking sovereignty to reside in the body as a whole, rather than in its component parts. As a result, for Austin, the individual members of the sovereign power are themselves subject to it when considered on their own, or in subgroups. In particular, as we have seen, they are subject to those constitutional rules conferring the power of their offices on them, and setting out their jurisdiction. They are also subject to, e.g., the criminal law and the other laws of the state, when taken on their own. It is thus only the body taken as a whole that is sovereign, for Austin, and that is the ultimate source of law.

The difficulty with a composite sovereign is that the notion of a habit of obedience cannot distinguish those rules issued by the sovereign from all other social rules and practices in which the members of the community engage. The central advantage of designating the sovereign by appeal to the existence of a habit of obedience is that the existence of such a habit can help to distinguish the legal rules of the community from all other social rules. On this understanding, the legal rules are those rules that are commanded by the person or body who is habitually obeyed but obeys no one in return. However, like the case of a democracy, discussed above, where the sovereign consists in a composite body, appeal to the existence of a habit of obedience to one who obeys no one further cannot serve this function. This is because a habit of obedience can only be exhibited by particular people at particular times, and the members of the sovereign body must themselves exhibit a habit of obedience towards the sovereign’s commands. There is thus no observable habit or pattern of behaviour that can
serve to distinguish the sovereign body from its subjects. The appeal to a habit of obedience thus cannot ground the distinction between those acts that the body does “as a whole,” and the habits and actions of the individual members of the body, considered severally.

2.4 Austin’s Theory Fails Even in the Basic Case

Austin’s failures to explain these more complex societies and legal systems are instructive, because they reveal the ways in which his theory fails to explain law even in what he takes to be the basic case. As we saw above, Austin takes the case of a unitary sovereign or monarch issuing laws to its subjects directly as his model for a legal system, and attempts to build on this in order to explain more complex and familiar cases of law. As we know, however, Austin’s theory cannot handle these more complex cases. The reason he cannot explain these more complex instances of law, however, is because his theory fails even in the simple case of a unitary sovereign issuing laws to its subjects directly. This is because, as we shall see, none of the notions of a habit of obedience, command, or threat of harm are sufficient to explain law. Instead, as Hart charges, Austin’s conception of law can at best amount to the gunman scenario “writ large,” and, as we shall see, this does not amount to law. Let us consider each feature in turn.

(a) Sanctions revisited

As we have seen, the difference between imperative rules and all the expressions of mere wishes and desires lies in the existence of a sanction. The threat of a sanction for non-compliance transforms the expression of a mere wish or desire into a command, and
makes an incentive to comply into a duty. The difficulty, however, is that a sanction is not just any harm that follows from an action; it is a harm that is inflicted for non-compliance. The mere fact that a given harm coincides with the prohibited conduct is not sufficient to render it a sanction. Rather, just as we can distinguish between a punishment and other kinds of harms on the grounds that a punishment is a harm that is incurred for the commission of a moral wrong, so too can we distinguish between a legal sanction and other kinds of harms on the grounds that a legal sanction is a harm that is incurred for non-compliance with a legal rule. Insofar as we can draw this distinction, then, the notion of a sanction presupposes rather than grounds the notion of a rule, properly so-called. Let us examine these distinctions.

First, just as we can distinguish between different kinds of rules or considerations, so too can we distinguish between different kinds of sanctions. Consider Austin’s discussion of this point:

If a man were smitten with blindness by the immediate appointment of the Deity, and in consequence of a sin he had committed against the Divine law, he would suffer a religious sanction through his physical or bodily organs. The thief who is hanged or imprisoned by virtue of a judicial command suffers a legal sanction through physical or material means. If a man of the class of gentlemen violates the law of honour, and happens to be shot in a duel arising from his moral delinquency, he suffers a moral sanction in a physical or material form.\textsuperscript{55}

Austin’s examples here illustrate that we can (and do) distinguish between different kinds of sanctions, depending on which kind of rule they violate: a religious sanction is one that is imposed for the violation of a religious rule; a legal sanction is one that is imposed for the violation of a legal rule; and a moral sanction is one that is imposed for the violation

\textsuperscript{55} Austin, \textit{The Province of Jurisprudence}, Lecture V, 181. Austin is here trying to illustrate the fact that all these sanctions take the form of a physical harm does not make them all sanctions of the same kind, namely, physical sanctions.
of a moral rule. These distinctions hold even though all three kinds of sanctions take the form of a physical harm.

Indeed, these distinctions would hold even if all three types of sanction took the identical form. Imagine that the loss of one’s hand was at the same time a religious, legal and moral punishment for theft; say, God punished thieves by causing them to lose a hand, the law cut off the hands of convicted thieves, and the members of the community also cut off thieves’ hands where the law, and perhaps God, failed to do so. Here, even though the three kinds of punishments are identical in form, we can still distinguish between the legal, moral, and religious sanctions. This remains so even if one and the same person were charged by God, the law, and the community with the task of meting out the punishments. The very same act, then, involving the very same people, can thus simultaneously constitute a legal, moral, and religious sanction. Just as the distinctions between different kinds of considerations remain intact even when the considerations themselves overlap or have the same content, so too do the distinctions between different kinds of sanctions remain intact even when the sanctions themselves are identical in form. The foregoing examples suggest that there are indeed different kinds of sanctions, and that what makes a given harm a sanction of a given sort depends on which kind of rule has been violated, not on the form that the sanction happens to take.

Most importantly, for our purposes however, a given harm does not constitute a sanction at all unless it is imposed pursuant to a rule. The mere fact that a given harm takes the same form as a sanction of a given type is not sufficient to make it that type of sanction. Imagine I steal from you and you cut off my hand in return. You are not legally justified in so doing, even if the legal punishment for theft is losing a hand. This holds
even if you are the legal official charged with meting out sanctions. In general, neither merely coincident harms nor merely consequent harms constitute sanctions. That your cutting off my hand happened to follow my theft, or that it followed because of my theft are not sufficient grounds to make the loss of my hand a sanction. Even an intentional harm that is inflicted on the basis of a rule is not sufficient to constitute a sanction; so, even if you cut off my hand because this is the legal sanction for theft, this still is not sufficient for your actions to constitute a legal sanction. Unless you are acting in your official capacity charged with meting out this punishment for this theft, your cutting off my hand does not constitute a legal sanction; your act is only like the legal sanction. The same holds for moral and religious sanctions: unless a person is meting out the punishment as charged by the community or God, she is not imposing a moral or religious sanction. This point is often obscured in the context of moral sanctions since, in the case of moral sanctions, everyone is typically licensed to carry out the sanction, dissolving the distinction between the infliction of a moral sanctions and merely acting as if one is imposing a sanction. Nonetheless, in general, even though one’s actions are identical to the ones prescribed by the legal, moral, or religious rules, without the authority to impose a given sanction for a given harm, one is merely acting as a vigilante.

How, then, can we distinguish between the actions of a renegade engaging in vigilante justice, and those of an official meting out a sanction, if the two are empirically indistinguishable? Surely such a distinction must be possible if we are to preserve the notion of a sanction, and, with it the distinction between different kinds of possible sanctions. In order to draw these distinctions, Hart argues, we need to invoke a further, secondary rule that sets out the conditions under which a particular act constitutes a
sanction for the violation of a given rule. Without such a secondary rule establishing the
criteria a given act must meet in order to constitute a legal sanction, we cannot draw the
distinctions that we do between different kinds of sanctions, nor can we distinguish the
imposition of a sanction from the vigilante justice of a renegade. The mere existence of a
sanction cannot therefore ground the distinction between a genuine command and the
expression of a mere wish or desire. Rather, in relying on the existence of a sanction in
order to distinguish between commands and mere wishes and desires, Austin thereby
presupposes the existence of a further, secondary rule establishing the criteria that a given
act must meet in order to constitute a sanction.

(b) Habits of Obedience

Austin similarly runs into difficulties explaining the succession of sovereignty, or the
persistence of law issued by a sovereign who has departed. On the one hand, if
sovereignty just consists in being habitually obeyed while obeying no one in return, then
in virtue of what is the sovereign’s successor sovereign ab initio? What makes its first
order law? The early stages of sovereignty raise a problem for Austin because there is as
yet no established habit of obedience. However, it is clear that it is possible for a
sovereign to transfer authority to a successor, and that it is not necessary that the
population establish a habit of obedience before the successor issue its first law. Rather,
the first order of a new sovereign is, as Hart notes, already law, even before it has
established a habit of obedience by the population.\textsuperscript{56} These are features of sovereignty
that Austin cannot explain.

\textsuperscript{56} Hart, \textit{Concept of Law}, 62.
On the other hand, Austin runs into the converse of this problem in attempting to explain how the laws issued by a deceased or departed sovereign can continue to be binding, since again, there is no meaningful sense in which there is a continued habit of obedience to a former sovereign. Absent a continued habit of obedience, in virtue of what do a former sovereign’s orders continue to be law? The appeal to the idea of the tacit acceptance of the validity of a law, either in terms of a tacit order issued by the reigning sovereign, or in terms of the tacit obedience by the population to the law is of no help here. This is because if tacit acceptance was sufficient to render an order of a past sovereign legally binding, then so too would every other rule that the sovereign and the population “tacitly accept” (i.e., fail to reject) be legally binding. On this view, then, every social custom, practice, and even every illicit activity that the sovereign or the public fails to explicitly reject, for reasons of indifference, ignorance, or whatnot, is also thereby tacitly accepted and hence legally binding. This, of course, is absurd.

Moreover, the idea that it is simply by the acquiescence of the reigning sovereign or the public that the orders of a past sovereign continue to be law fails explain the distinction between a law that was issued by a long-departed sovereign, yet continues to be law, and a law that was issued by a long-departed sovereign, but repealed by a more recently, but still departed sovereign, and is thus no longer law. The attitude of the current sovereign and the public towards the law is identical in both cases, and hence, on its own, cannot explain these opposite legal outcomes. It cannot, on its own, tell us in the latter case which act of the departed sovereign reigns: that of the initial sovereign who issued the law, or that of the more recently departed sovereign who repealed it. In all of
these very commonplace scenarios, the notion of a habit of obedience proves insufficient to explain the idea of sovereignty.

(c) Commands

Austin’s understanding of law as the commands of the sovereign is intuitive as it captures the way in which law binds people to do things that they might not otherwise do, or want to do. This of course is not true of all laws: many legal rules prohibit people from doing things that they would not have done, even without the legal rule. But even these rules bind people whether or not they want to be subject to them, and require people to do or refrain from certain actions whether or not they want to perform them. The idea that law consists in commands backed by threats helps to capture this idea because when people are commanded to do something, or else suffer a harm, they are more likely to do it, and, in a sense, they have to do it, even when they do not want to.

However, this idea does not fully capture the way in which law binds people. The imperative nature of a command is essentially tied to the accompanied threat of force for non-compliance. Their imperative nature either stems from people’s feelings of being bound to comply, or having no choice in the matter, or from objective predictions of the likelihood that people will suffer a harm should they fail to comply. So, on the one hand, commands might compel people to comply with them because people sufficiently fear the harm threatened, and believe that they are sufficiently likely to incur it, to make compliance a better option for them. The difficulty with understanding legal obligations on this model is that people are subject to legal obligations regardless of their beliefs.
about the likelihood that they will be punished for violation, and regardless of how much they fear, or don’t fear, the harm threatened.

Alternately, one might attempt to divorce the notion of a command from the particular mental states that it might induce in those subject to it by suggesting that its force derives from the likelihood that people will incur a harm should they fail to comply. The difficulty with this, however, is that there is no contradiction in saying that someone is subject to a legal obligation but she is unlikely to suffer a harm for violation, say, because she is likely to get away with her act, or because, say, she has bribed the police or the judge.57

More importantly, however, as Hart argued, the violation of a legal obligation is a reason for the imposition of a sanction, not as predictions of its likelihood, or descriptions of people’s mental states with respect to it. It is because someone has violated a rule that the law imposes a sanction on her; the likelihood of punishment is not what makes the rule binding. So far, then, as the imperative force of a command depends on the people’s feelings towards the harm threatened for non-compliance, or the likelihood that a sanction will follow, it cannot explain the imperative force of legal rules. Instead, there must be some further feature of law that can explain its binding nature.

We can thus see that Austin fails to explain more complex instances of law because the basic ingredients of his theory – commands, sanctions, and habits of obedience – are insufficient to explain even the simple case of law issued from a unitary sovereign to subjects under its rule. Rather, as Hart argues, Austin’s theory of law amounts to nothing

57 Hart, Concept of Law, 84.
more than the gunman scenario writ large, or the arbitrary exercise of power, and this, as we can see, does not amount to a legal system. Instead, as the foregoing shows us, there must be some further features of law, over and above the mere exercise of force by one with the power to do so, over those who habitually obey, that can explain, the authority to issues law, that confers rights and obligations, and that it backed by a public sword. As Hart argues, this lies in of law as the union of primary and secondary rules, and as founded in an ultimate rule of recognition. Let us now turn to a more detailed examination of Hart’s alternative, and see why it solves the problems that Austin’s theory encountered.

2.5 Hart’s Alternative

Hart concludes that in addition to primary action-guiding rules, law also include secondary rules conferring power on people to create, amend, and extinguish the other rules of the system, and setting the criteria for so doing. Most importantly, Hart concludes that law must be founded on a rule of recognition setting the ultimate criteria for validity for the system. Consider Hart’s alternative conception of law.

Primary rules concern people’s actions; they tell people what they can and cannot do. Secondary rules confer powers. They set out the conditions under which people can create, amend, or extinguish rules of the system. Power-conferring rules have two important functions. First, power-conferring rules confer private powers on citizens, or subjects to the law, to alter their legal status with respect to one another. As we saw above, in addition to rules imposing duties on people to do or refrain from certain action, law also includes rules for facilitating certain legal operations, or allowing people to enter
into certain legally-recognized relationships with one another. So, for example, the law includes rules governing the transfer of property, the creation of wills, rules for getting married or divorced, incorporating, and so on. And, as we have seen, these rules cannot properly be said to impose duties on people, even though they allow people to create or amend their duties towards one another. Instead, as Hart notes, they are best understood as providing “recipes,” or facilitating legal relationships or operations. Private power-conferring rules provide the conditions for the execution of these operations.

Secondary power-conferring rules also set out the conditions under which members of a community can exercise public legal powers. As we have seen, not only does law include rules setting out the conditions for the private exercise of power. As Hart’s criticisms of Austin’s theory show, the conditions under which members of a community can exercise public powers is also a question for the system; whether or not someone is an official of the system, whether she has acted in her official capacity, and whether she has succeeded in effecting legal change all depend on whether someone has acted in accordance with fixed procedures, and these procedures are in turn set by the rules of the system. As a result, a complete theory of law must explain the validity of these further rules too. In particular, law must include secondary rules of change, setting out the procedures for creating, amending, and extinguishing the rules of the system, and rules of adjudication, conferring on certain members of the community the power to settle disputes in the application of the rules authoritatively.

Finally, law must be founded in an ultimate rule of recognition, for Hart. That is, it must rest in an ultimate rule listing the authoritative and conclusive criteria for validity for all other rules of the system. The rule of recognition is the ultimate rule of the system,
and it sets out the conclusive criteria for validity in that the criteria listed in the rule of recognition are the final criteria for the system; there is no further standard to meet.

This explanation of the rule of recognition is metaphysical, not epistemic. The fact that it might be difficult to identify the rule of recognition in a complex legal system in no way undermines Hart’s claim that it is necessary for the existence of a legal system. The rule of recognition need not identify a particular, unified body or individual like, e.g., the Parliament or the sovereign as the source of law. It might list something as diffuse as, say, the will of the people, as it might be in a democracy, or something as abstract as the principles embodied in a constitution, as is the case in many countries with constitutions, as the ultimate criteria for validity. Modern legal systems are intricate systems of rules arising from a complex variety of sources. Legal rules are rendered valid rules of the system through a variety of disparate, and often conflicting sources. As a result, it might be more difficult to identify the rule of recognition than it would be in, say, a legal system where the rule of recognition is the will of the sovereign, or the list of rules posted in the marketplace. The important point here is that the rule of recognition in a modern legal system is the ultimate rule listing the supreme criteria for validity of a system, whatever they are.

To say that a rule is a valid rule of a system is just to say that it has passed the tests set out in the rule of recognition. The criteria for validity set out in the rule of recognition are supreme insofar as rules that satisfy these criteria remain valid rules of the system even if they conflict with other (lower) rules. When two or more rules of the system conflict, those rules that satisfy the criteria for validity listed in the rule of recognition itself will remain valid rules of the system whereas those that fail to meet
these criteria, either because they do not meet any criteria for validity listed anywhere in the system, or because they satisfy the criteria listed in some subordinate rule but not the rule of recognition, are overridden.

The rule of recognition is itself is neither valid nor invalid, since validity on this understanding is simply a matter of meeting the criteria laid out in the rule of recognition. Rather, the rule of recognition is accepted or not accepted by officials in a community, or it holds or does not hold in a given community. Whether or not a given rule of recognition holds in a given community (and, hence, whether or not a given legal system is or is not the system of the community) depends on whether or not it is accepted by the officials of the community; it is only if the majority of legal officials – the judges, legislatures, lawyers, and so on – in a community take the criteria listed in the rule of recognition to be the criteria for identifying the rules of the system that these are indeed the correct criteria, and that the rule of recognition is in place for this community. The rule of recognition is thus unlike all other rules of the system. For any other rule, its validity (or, in Hart’s terms, existence) is a matter of its satisfaction of the criteria set out in the rule of recognition. It is only the rule of recognition whose existence depends on its acceptance by the members of the community.

The rule of recognition is thus a social rule in the standard sense of the term: it is a rule that arises from the existence of a widespread social practice or custom, and the attitudes that people adopt towards these practices or customs. But it is the only legal rule whose existence is social in this respect. The other rules of the system are social rules insofar as whether or not they are valid depends on things that people do – they must be positively enacted in order to be rules of the system. But, they are not social rules in the
sense that they need not be practiced in order to be rules of the system. They need only be enacted in a legally recognized way for this.

The introduction of the rule of recognition introduces the notion of legal validity in the familiar sense described in our opening discussion, namely as referring to rules that bind people regardless of the attitudes that they adopt towards the rules, and whether or not they comply with them. It does so by allowing us to understand validity in terms of the satisfaction of criteria listed in the rule of recognition, rather than in terms of people’s practices and attitudes.

The rule of recognition also unifies the primary rules into a single system of rules. Absent a rule of recognition, the primary rules of a community form a set of separate standards, united only by the fact that they happen to be those standards that a given community accepts. In this respect, Hart argues, they are like rules of etiquette – a collection of rules that are not ordered with respect to one another, and that have no common standard for adjudicating conflicts between them. The introduction of a rule of recognition introduces the notion of a system, and allows people to unite the primary rules under a single, unified scheme. It does so by providing a unified set of criteria for conclusively determining whether or not a given rule is a rule of a system, and by imposing a hierarchy on the rules of the system, thereby providing a way of settling conflicts between them. It thus orders the rules of the system and provides a way of rendering them coherent with one another.

Officials of the system accept the rule of recognition when they adopt an internal point of view towards the rule and take its criteria to be the criteria of validity for the system.
Consider Hart’s example of the rules of traffic. Any outsider who observes people’s driving patters for long enough will notice that they tend to stop driving when they are faced with a red light. The observer might thus conclude that the presence of a red light is a signal that people are likely to stop driving. She might also notice that when people do drive through a red light, they are often subjected to a fine or further reproach, that they slow down on the yellow, that when the light is red, people drive in a perpendicular direction on their green light, and so on. She might also notice that there are certain exceptions to this tendency. So, e.g., she might notice that ambulances or police cars sometimes do drive through a red light, and their actions are generally not met with such reproach. She might even be able to determine the reasons people cite for their behaviour, for the exceptions to the rules, and so on. If she is sufficiently well-versed in the intricacies of people’s practices, she might even be able to enter the community and act as if she were a participant. However, this does not amount to adopting the internal perspective of one who takes the rules to be reasons for actions. In order to adopt the internal perspective of a participant of a practice, one must take its rules to be one’s reasons for action.

Hart thus distinguishes between the external perspective of one who is merely observing people’s practices, and the internal perspective of a participant to the practices. One who merely observes people’s practices can only report on what people do. She can describe the things people tend to do, the reactions of approval or disapproval that tend to follow, facts about what people take as reasons for their behaviour or their reactions, and so on, but she is not a participant in the practices, and does not adopt the relevant critical

---

58 Hart, Concept of Law, 90.
attitudes towards them. In this respect, her perspective remains external to the practices, and attitudes themselves. Rather than merely observing people’s behaviour, a participant takes the existence of the practices and the attitudes that people adopt towards them to be her reasons for action. Her perspective is thus internal to the practice itself. Hart argues that there is a distinction between merely reporting on people’s practices, including practices of adopting certain attitudes and taking certain considerations to be reasons, and actually engaging in the practice, including adopting the attitudes and taking these considerations to be reasons. Neither perspective, for Hart, is reducible, or can be understood in terms of the other.

The rule of recognition exists when the officials of the system take its criteria to be the criteria for validity for the system, and adopt an internal point of view towards this practice; that is, they engage in this practice because they think they ought to, and they criticize officials who fail to do so. Officials take the criteria of validity to be the criteria for validity for the community when they exercise their official capacities. So, e.g., when judges apply the rules of the system to a case; when lawyers distinguish a case from a set of precedents; when the police enforce the law, and so on, they are thereby adopting an internal point of view towards the rule of recognition and supposing the validity of the rules in accordance with the criteria listed in the rule of recognition. An assertion or assumption of the validity of a given rule as a rule of the system by any member of the community also involves the adoption of an internal perspective towards the rule of recognition.

It is a necessary condition for the existence of a legal system that the officials of the system adopt an internal point of view towards the rule of recognition in the manner
described above. That is, it is necessary for the existence of a legal system that the officials of the system uphold and enforce those rules that satisfy the criteria for validity that are listed in the rule of recognition in the execution of their official duties.

Note that it is not necessary for the officials of the system to adopt an internal point of view towards all the rules of the system, insofar as they need not accept all the rules of the system as good ones or critically endorse them. So, for example, judges need not think the rule she is enforcing is a good one, lawyers need not agree with the line of precedents handed down by the court, and so on, in order for a legal system to exist in a given community. Instead, all that is needed for the existence of a legal system is that the officials charged with upholding the system uphold the rules, whatever they are.

It is also unnecessary for the subjects of the law to take the primary rules of the system to be valid or authoritative. The legal subjects of a given community may well think that the primary rules are bad ones, and deny that they, and those around them, have any reason at all to comply with them. Indeed, it is possible for the subjects to be in frequent violation of the primary rules of the system without concluding that the system ceases to exist. However, the subjects of a legal system must adopt an internal point of view towards the secondary rules establishing the offices and authority of the officials of the system. That is, it is necessary that the subjects take the officials to be the officials of the system, and that they take their announcements to be authoritative. Should those subject to the law fail to do even this, then we would indeed have reason to think that the system in question is not the authoritative system for this society. This is because we could not say of a given system that it is in place if its officials did not exercise any authority over the subjects of the system. However, the mere fact that the legal subjects in
a community take the officials to be the authoritative officials of the system – that, say, the citizens continue to identify the officials of the system as its officials, they submit to punishment when it is imposed, that they submit to the judgment of the officials, that they, say, take official pronouncements to be authoritative, and so on – is sufficient to ground the authority of the officials of the system. Habitual obedience to its primary rules is not necessary. In short, then, in order for a given legal system to exist, or to be the authoritative system for a given community, the officials of the system must take the criteria for validity to be the conclusive ones, and the citizens of the community must take the officials to be the officials of the system.

Hart’s account of law thus marks a sharp break from Austin’s in that Hart takes law fundamentally to consist in a system of rules that is not reducible to, and cannot be understood in terms of a set of social facts understood purely from an external point of view. Instead, Hart advances a conception of law that fundamentally consists in the union of primary and secondary rules. Crucially, however, Hart requires that one adopt an internal point of view at least towards the rule of recognition, in order to identify the rules of the system as such, and to distinguish them from all other rules and considerations.

59 Note that this analysis diverges from Hart’s own account of the two necessary conditions for a given rule of recognition to hold or a given legal system to exist in a community. As Hart would have it, in order for a given rule of recognition to hold (or for a given legal system to exist), first, the officials of the community must accept the criteria listed in the rule of recognition as the correct criteria for legal validity, and second, the members of the community must exhibit a general habit of obedience towards the laws validated by this rule of recognition. However, this second conditions seems too strong to me, and is not required by his theory. Rather, all that is needed is the weaker condition discussed below. For Hart’s discussion of the two necessary conditions for the existence of a legal system, see Concept of Law, 112ff.
III. Dworkin’s Challenge

3.0 Introduction

Orthodox natural law challenges the legal positivist tenet that the law is exhausted by social facts by insisting on a moral test for legal validity: a given rule, on this approach, is legally binding only if it conforms with certain moral requirements for law. Positivists have handily replied to this objection. First, the insistence on a moral test for legal validity rules out the possibility of wicked law, and we know that there is such a thing. Positivists have thus rejected natural law as incapable of accounting for this basic empirical fact. Secondly, however, it collapses the conceptual distinction between what the law is and what it ought to be. Regardless of the many ways in which law and morality may well be related – and we will examine some of them below – positivists have long insisted that, as a conceptual matter, what the law is and what it ought to be are two different questions. And, they insist, any approach that collapses this fundamental conceptual distinction thereby fails as a theory of law.

More recently, Ronald Dworkin has launched a novel attack on legal positivism from a natural law perspective. Unlike orthodox natural law theorists, Dworkin does not posit an ultimate moral test for legal validity; he concedes with positivists that the fact that a given rule has been posited by a legally recognized source can make it a rule of the system. Instead, however, Dworkin argues for a necessary connection between law and morality by examining the nature of legal reasoning. Legal reasoning, for Dworkin, is inextricably moral. The application of a legal rule to a case requires an appeal to moral considerations, and every application of a legal rule to a case requires such an appeal. A complete theory of law must include all of morality as well, for Dworkin, and any
attempt to rest the distinction between law and morality on an ultimate social rule must therefore fail. Dworkin thus concludes that it is in principle impossible to advance a positivist theory of law. He thus proposes an alternative account of law.

I will argue that Dworkin’s alternative theory of law must fail, and, that it follows from its failure that a positivist conception of law must be correct. In particular, I will argue that despite his efforts to maintain the conceptual distinction between law and morality, and avoid the mistakes of orthodox natural law theory, Dworkin’s alternative approach runs afoul of this distinction, and ultimately collapses the two. I will argue for this conclusion by examining some of the more complex verdicts that invoke moral considerations that the law might return, and I will argue that Dworkin cannot explain these. Moreover, I will argue, it follows from the fact that Dworkin cannot explain these more complex verdicts that he cannot explain the more basic cases as well. That is, I will argue, the reason that Dworkin cannot explain the complex morally robust verdicts that the law can return is precisely because he cannot explain simple cases of applying a law to a case; his account of legal reasoning as invoking all of morality as well must therefore be mistaken. But, I will argue, Dworkin is committed to advancing such a view of legal reasoning. This is because it is only if he advances this strong thesis about the nature of legal reasoning that he can mount his in-principle objection to legal positivism. Absent the commitment to this strong thesis, Dworkin can only object that legal positivists have not as yet developed a complete theory of law, and this weak conclusion runs counter to his anti-positivist program. As a result, I will conclude, his theory of law must fail.

I will begin by setting out the main tenets of legal positivism, including an account of the ways in which positivists think that law is fundamentally social, and by
outlining some of the ways in this is consistent with some connections between law and morality. I will then turn to Dworkin’s objection from hard cases, and his reasons for concluding that a complete theory of law must include all of morality, and that every application of a legal rule to a case requires that a judge invoke all moral considerations as well. I will then set out Dworkin’s alternative account of legal validity and the ways in which he takes it simultaneously to explain legal reasoning, as he understands it, yet keep the ultimate distinction between law and morality intact. Following this, I will set out my objection to Dworkin’s alternative theory, and argue that it follows from the failure of his approach that it must be possible to provide an positivist account of law. I will conclude by briefly setting out some ways of developing such an account that can avoid the difficulties that he poses for positivism, though I will not offer such a complete account here. I will begin, however, by making a few clarificatory remarks before launching in to the account of legal positivism.

3.1 Preliminaries

We must keep a few caveats in mind as we proceed through this argument. First, recall that what is at issue in this debate are questions of applying legal rules to cases; the legal grounds for a given decision or outcome, how legal rules figure in people’s reasoning, and so on. These are questions of how to determine particular legal outcomes from general legal rules; they are not questions about how people deliberate about what they ought to do, whether legal rules give rise to obligations, how they figure in people’s practical reasoning, etc. They are thus only questions of determining what the law requires in a given case.
Secondly, in considering the nature of legal reasoning and people’s deliberations about what the law requires or how to apply a rule to a case, I am concerned with the rational bases of people’s reasoning, not the psychological ones. Judges are likely influenced by a host of factors, only a small proportion of which are legal ones when they render legal decisions. So, for example, it is no doubt true that various social and economic factors, political commitments, and brute psychological tendencies greatly influence the decisions that judges draw when they reason about law. For the purposes of examining this debate, however, I will set these aside and consider only what, legally speaking, judges ought to conclude when they reason about what the law requires of a particular case.

Thirdly, when Dworkin argues that morality enters into legal reasoning, he is assuming that one is reasoning from a just legal system, that is justly applied. This is a benign assumption for the purposes of this debate. It is true that the possibility of wicked law is a point of contention between legal positivists and nature law theorists. However, just law is paradigmatic of law, and, in order to succeed, a theory of law must at least be capable of explaining this. To the extent then that Dworkin is correct in asserting that legal positivists cannot explain just law, his objection to this theory is well-founded.

Finally, in discussing the nature of legal reasoning, I will focus on judges’ reasoning in particular. From the point of view of a theory of law, there is nothing special about judges’ reasoning; the problems of legal reasoning that I am concerned with arise for anyone’s attempt to determine what legal rules require in a given case. The reason I focus on judges’ reasoning is simply because we have a written record of it, and so it serves as a useful point of departure. The theoretical difficulties at stake here are
completely general, however. With these qualifications in mind, let us now turn to the question at hand.

3.2. Legal Positivism

Legal positivists begin with the idea that there is a distinction between law and morality. Although there can be many ways in which law and morality can relate to one another—and positivists can admit a number of these—there is a strict distinction between questions of what the law is and questions of what it ought to be, for positivists, and the mere fact that one has answered questions of one type cannot, on its own, provide an answer to the other.

Positivists thus hold that law is exhausted by source-based rules. A social source is a law-creating act. A source-based (or posited) rule is a rule that can be traced to a law-creating act. So, for example, when the members of Parliament pass a bill, when a judge renders a judgment, etc., they engage in acts that produce law. Intuitively speaking, source-based law is the law that is written in the books, where “the books” are broadly construed.

Positivists think that these conditions are necessary and sufficient for legal validity. They are necessary for legal validity in that a given consideration must be posited by a legally recognized source in order to be a valid rule of the system. \(^{60}\) This gives rise to the sources thesis, or the view that all law must come from a (social) source. Social facts are sufficient for legal validity, for positivists, since nothing more than being posited by a recognized source is needed for legal validity. In particular, no further appeal

---

\(^{60}\) Note that inclusive positivists deny that they are committed to this claim. I argue that they are committed to it in the weak form that I defend in Chapters 4 and 5.
to morality is needed in order to determine what the law is. Hence, positivists also endorse the separation thesis, which says that there is no necessary connection between law and morality. It is the task of a legal positivist, then, to identify those social acts or practices that generate a legal system.

This characterization of law is consistent with a number of clear connections between law and morality. First, positivists of course recognize that the law can overlap with morality. It does so whenever a posited rule has the same content as a moral rule. So, for example, posited rules prohibiting murder, theft, assault, and so on are not instances of morality determining the law, nor are judges applying moral rules when they reason from these rules in deciding particular cases. Instead, there are two sets of rules in such cases: posited legal rules and moral rules. These sets of rules just happen to have the same content. The fact that many legal rules have the same content as moral rules is thus not a counter-example to legal positivism.

Alternately, positivists also admit that the law can sometimes explicitly invoke moral considerations and direct judges to morality in order to determine a given legal outcome. So, e.g., positivists of course recognize that the law can, say, require employers to pay a fair wage; that it might enforce only reasonable terms of a contract; that it will refuse to enforce grossly unfair contracts, etc. They also acknowledge that the law can include constitutional provisions guaranteeing, say, equal protection and benefit of the law; that the law will operate in accordance with the principles of fundamental justice, and so on. Unlike the rules above that are posited rules that happen to overlap with morality, these rules are all posited rules that invoke further moral considerations, and
that do indeed require judges to reason morally in order to render a legal decision. Positivists diverge as to whether these moral considerations are thereby incorporated into the law when the law makes such appeals. But all agree that such appeals are consistent with positivism so far as whether or not the law does invoke further moral considerations, and which considerations it invokes, remains a question of the posited law. Questions of what the law is and what it ought to be thus remain distinct since, where a determination of what the law is requires an appeal to moral considerations, this itself is a function of further, posited considerations.

Finally, positivists also admit that morality can determine what the law ought to be, and whether or not judges ought to apply the law. It is of course true, for positivists, that legal systems ought to be just, and that judges ought only to apply the law when so doing is, on a balance, best. But, positivists insist, this connection between law and morality is no threat to positivism, because positivism is a theory of what the law is, not what it ought to be, and such appeals to morality can only determine what it ought to be.

Positivists can thus also readily admit that judges must sometimes engage in complex moral reasoning in order to decide whether or not to apply the law. This can require determining what the law on a matter is, and how this weighs against other considerations. This is not to say that judges ought never to apply bad law, or that they ought always to decide each case on its moral merits, decided independently of what the law on the matter is. There may be plenty of reasons for judges to uphold and apply the law even when it is not perfectly good. So, e.g., concerns for stability, democracy, or, as Dworkin puts it, “integrity”, and so on might swing the balance in favour of judges upholding the posited law, even when it does not dictate the morally best outcome. More
generally, judges (and other officials) can also have moral reasons for upholding a system as a whole, or some portion of it, etc., which, while morally imperfect, is better than no system at all. This relation between law and morality is no threat to positivism, however, because when judges do engage in such reasoning, they are deliberating about what they ought to do, not about what the law is. The distinction between these two questions thus remains intact.

This distinction persists even when the law includes an appeal to moral considerations, as in the cases discussed above. As we have seen, in addition to overlapping with morality, the law can also make explicit appeal to moral considerations in the formulation of its rules. So, for example, as we have seen, the law can require employers to pay a fair wage, sellers to charge a reasonable rate, and so on. Nonetheless, legal determinations in such cases remain questions of what the law is, and not what it ought to be; when judges apply these rules to particular cases, they are making decisions about what the law on the matter is, not what it ought to be. The mere inclusion of such considerations in legal reasoning does not settle the question of what judges ought to do, however; it is always open to a judge to make a legal determination under such a rule, but decide that, on a balance of reasons, she has countervailing reasons to render some other decision. (Say, e.g., the employer paid a fair wage but had racist hiring practices.) As a result, questions of what the law ought to be, whether judges ought to apply the law as it is, and so on remain further questions; the mere inclusion of some moral considerations in law does not settle the questions of what judges ought to do. The ultimate positivist distinction between law and morality thus remains, even when we combine these various ways in which the law might be related to morality.
Legal positivism thus allows for fairly robust connections between law and morality, despite its insistence on the separation between the two, and on the social nature of law. So long as what the law is ultimately remains a matter of social fact, and so long as the mere fact that a given law is positively enacted by a legally recognized source is sufficient to make it law, without appeal to a further moral test, connections between law and morality remain no threat to legal positivism.

Ronald Dworkin rejects the positivist approach wholesale. No combination of source-based rules, no matter how broadly construed or how carefully crafted can ground a theory of law, on his view. Instead, he argues, source-based rules must be underwritten by moral considerations in order to determine a given legal outcome, and it is just to the extent that they are underwritten by moral considerations that source-based rules can carry weight in legal deliberations. Dworkin thus proposes an alternative theory of law, one that can account for the role of moral considerations in legal reasoning as well. Let us consider Dworkin’s argument in more detail.

3.3 Dworkin’s Objection

Dworkin argues that in addition to source-based considerations, the law must also include rules that are binding because they *ought* to be, or merits-based considerations. This is because, for Dworkin, appeal to source-based considerations alone trivializes the nature of legal reasoning.
Dworkin provides two different formulations of this conclusion. In “Model of Rules I,” he distinguishes between rules and principles, where rules are those considerations that are binding in virtue of their sources, and principles are (legally) binding in virtue of their merits. Source-based rules determine their outcomes “automatically,” and apply in an “all-or-nothing” fashion. There can be no meaningful sense in which we can say that two (or more) posited rules conflict, and, although they might admit of exceptions, their exceptions must be capable of being enumerated. Although it might appear as though more than one rule applies to a given case, all but one relevant rule must be invalid, and any apparent conflict between two or more rules must be resolved with reference to some further rule of the system specifying the procedure for resolving such conflict. This is because rules, unlike principles, lack a dimension of “weight.” It is therefore impossible to resolve conflicts by weighing posited rules against one another directly. This is because on the positivist account, source-based considerations have no weight independent of that accorded to them by further rules of the system. In other words, there is no further fact telling people to how they ought to weigh a rule beyond the relevant facts of the system, like, e.g., where they are within a hierarchy of the system, which considerations better advance the aims of the system, and so on, coupled with further posited rules of the system specifying which considerations can resolve such conflicts. In the absence of such a further rule, there is no fact to which judges can appeal in order to resolve conflicts. They must therefore conclude that there

63 Dworkin, Taking Rights Seriously, 24.
64 Dworkin, Taking Rights Seriously, 24f.
can be no meaningful conflict between posited considerations in the sense that there can be no conflict between two posited rules of the system such that can be decided by examining them directly.

Principles, on the other hand, carry weight in judges’ deliberations about what the law requires in a given circumstance because they ought to. They are observed for their own sakes, and their validity arises from their appropriateness to the circumstances. They can incline a judge towards one outcome or another without necessarily providing a conclusive reason in either direction.

Dworkin’s idea, then, is that a given rule or posited consideration applies just to the extent that it is backed by underlying principles. Absent an appeal to these further merits-based considerations, the legal force of posited rules is trivial. Dworkin thus explains:

Consider, therefore, what someone implies who says that a particular rule is binding. He may imply that the rule is affirmatively supported by principles the court is not free to disregard, and which are collectively more weighty than other principles that argue for a change. If not, he implies that any change would be condemned by a combination of conservative principles of legislative supremacy and precedent that the court is not free to ignore. Very often, he will imply both, for the conservative principles, being principles and not rules, are usually not powerful enough to save a common law rule or an aging statute that is entirely unsupported by substantive principles the court is bound to respect. Either of these implications, of course, treats a body of principles and policies as law in the sense that rules are; it treats them as standards binding upon the officials of a community, controlling their decisions of legal right and obligation.65

In other words, what it means to say that a rule is legally binding is to say either that the principles underlying the rule itself outweigh the countervailing principles in favour of changing the rule, or that, if the principles underlying the rule itself are not sufficient, the combination of these principles plus institutional principles that speak against changing the rule (e.g., those that favour legislative supremacy, those favouring reasoning from

65 Dworkin, Taking Rights Seriously, 38.
precedent, etc.) outweigh those principles that support changing the rule. In either case, however, it is the legal force of the underlying principles that gives a posited rule its weight; the legal force of the rule itself is trivial. He then concludes that “unless at least some principles are acknowledged to be binding upon judges, requiring them as a set to reach particular decisions, then no rules, or very few rules, can be said to be binding upon them either;”\(^{66}\) that is, we can only account for the binding force of source-based rules by positing the validity of further normative considerations.

Dworkin advances a similar conclusion in *Law’s Empire*, where he launches his later attack on legal positivism.\(^{67}\) There, he argues that positivism’s commitment to the existence of shared social rules for determining what counts as law renders it incapable of explaining the kinds of theoretical disagreements that judges have when they disagree about the grounds of law. The grounds of law are those facts that make it true that a given proposition is legally valid, or a proposition of law. Dworkin argues that positivists think that these consist in a set of “plain facts.” That is, Dworkin argues, for positivists, law “is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past,”\(^{68}\) and it is exhausted by these considerations; there is nothing further to law than that which is written in “the books,” namely, those books “where the records of institutional decisions are kept.”\(^{69}\) Questions of law, then, on Dworkin’s understanding of positivism, can thus either be settled by inspection of the relevant facts,

\(^{68}\) Dworkin, *Law’s Empire*, 7.
\(^{69}\) Dworkin, *Law’s Empire*, 7.
or else they are questions of what the law ought to be; on Dworkin’s understanding of positivism, there can be no further questions of what the law is than those that can be settled by inspection of the relevant social facts that make law.

The difficulty with this is that it forces positivists either to dismiss disagreements that judges have about the grounds of law as disputes about what the law ought to be, or to relegate them to mere disputes about the meanings of legal terms in borderline cases. This is because, for Dworkin, where the grounds of law are a matter of plain fact, the only questions about what the law is that can arise are questions about the meanings of legal terms; all other questions must be questions of what the law ought to be. But, it is implausible to construe judges’ disagreements about the grounds of law as disputes about what the law ought to be. So holding is both unmotivated, and it fails to account for the ways in which judges and lawyers actually do describe their disagreements and argue for their conclusions.\(^{70}\) This leaves positivists with the option of holding that such disputes are disputes about how to settle borderline cases. And, Dworkin argues, so holding trivializes the significance of the theoretical disagreements that judges can engage in about the grounds of law.

Dworkin argues for the conclusion that positivism is incapable of explaining the nature of legal reasoning by examining the ways in which judges reason in hard cases. Hard cases are cases where judges agree on the facts of the case and on what the positive rules require, but they continue to debate what the law on the matter is. Consider, for example,

---

\(^{70}\) See Dworkin, *Law’s Empire*, 37.
Riggs v. Palmer.\textsuperscript{71} Elmer Palmer murdered his grandfather in order to expedite his inheritance. He was charged, and found guilty of murder, but he then came before the Court and asked to receive his inheritance. Even though Elmer was clearly set to inherit under the Statute of Wills that governed the case at the time, and even though there were no contravening posited laws overriding the Statute, the Court split in its judgment, with the majority siding against Elmer. It is true, the majority argued, that under the posited law, Elmer stood to receive his grandfather’s inheritance. The judges also conceded that this was the law governing the matter, and that there were no further posited considerations that bore on the issue. However, this alone did not settle the question. Instead, they argued, it was a “fundamental maxim of the common law”\textsuperscript{72} that is grounded in the “universal law administered in all civilized countries”\textsuperscript{73} that no one should be permitted to profit from his own wrong, and that this principle superseded Elmer’s entitlement to inherit under the governing statute. In other words, they argued, despite its lack of recognized pedigree, and despite the fact that the posited law points to the opposite conclusion, the principle governing the issue in this case is that no man should profit from his own wrong, and that it is legally binding because of its appropriateness to the circumstances.

The controversy that the Court encountered in rendering a judgment in Riggs did not arise from gaps in the law, or because the law on the matter was unclear. There were no omissions or mistakes in language in the governing statute. Nor was Riggs a borderline case where the court had to decide where to draw the line on an issue. The

\textsuperscript{71} 115 N.Y. 506, 22 N.E. 188 (1889) [Hereinafter Riggs.] For Dworkin’s discussion of Riggs, see “Model of Rules I,” in Taking Rights Seriously, ch.2.
\textsuperscript{72} Riggs at 511; 190, as per Earl, J.
\textsuperscript{73} id. at 511f; 190.
facts in *Riggs* clearly fell under the statute, and the wording of the statute was clear on the matter: the will was a valid one, and Elmer was designated as the beneficiary. In all these respects, *Riggs* is an easy case. Rather, the difficulty that the Court encountered in *Riggs* is that the posited law did not, on its own, settle the matter. Dworkin’s point here is that there must therefore be some further considerations to which we must appeal in order to decide a question of law.

Dworkin’s objection to legal positivism, then, is that positivists cannot account for the validity of these further considerations. On the one hand, the sources thesis requires that all legally valid considerations be traced back to a source. This, he argues, rules out the possibility that the unpedigreed considerations are legally, and not just morally, binding for positivists. On the other hand, the separation thesis denies any necessary connection between law and morality. This suggests that it is possible to know all there is to know about what the law is just by examining the posited law; the mere fact that the posited considerations dictate a given result can be sufficient to decide the matter. *Riggs* casts doubt on this thesis as well, since, as we have seen, in *Riggs* the Court took the question of what the law required to remain open even after determining the result required by the posited law. The possibility of hard cases thus threatens the very bases of legal positivism.

Dworkin’s objection threatens the positivist commitment to the social nature of law in principle because the problem of hard cases generalizes. It does so in two ways.

First, the possibility of hard cases like *Riggs* does not merely show that the law can sometimes require appeal to moral principles in order to decide a matter. Judges must
appeal to morality in hard cases because they must appeal to moral principles in every case. As Dworkin notes,

once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, lawbooks cite them, legal historians celebrate them. But they seem most energetically at work, carrying most weight, in difficult lawsuits like Riggs [...] 74

In other words, legal principles, or considerations that are binding in virtue of their merits, not their sources, are ubiquitous in law. Judges must appeal to principles, or merits-based considerations, every time they make a judgment, since every legal decision requires a decision as to whether to uphold the law as it is, or whether to amend or overrule it. Such decisions must be made on the basis of legal principles because, Dworkin argues, decisions as to whether or not the law ought to be upheld as written cannot be merely a matter of the judges’ own preferences, including her preferences from among legally binding principles. Instead, such decisions are made in accordance with legal principles; as Dworkin notes, all decisions to change (or not to change) the law must themselves be founded on legally binding principles if they are to be justified. 75 If Dworkin is correct in his analysis, then, it seems that principles do bear on every decision that a judge must make; their role is not limited to judgments in hard cases. As a result, Dworkin concludes that “unless at least some principles are acknowledged to be binding upon judges, requiring them as a set to reach particular decisions, then no rules, or very few rules, can be said to be binding on them either.” 76 An account of legal reasoning must therefore show how moral principles can bear on every case that comes before the law, for Dworkin.

74 Dworkin, Taking Rights Seriously, 28.
75 Dworkin, Taking Rights Seriously, 37. Though Dworkin does note that the fact that a given decision advances a principle is not sufficient to justify it.
76 Dworkin, Taking Rights Seriously, 37.
The problem of hard cases also generalizes in that it suggests that any moral consideration can have bearing on legal reasoning. It is true, as Dworkin concedes, that positivists can admit that some moral considerations can enter into legal reasoning. In particular, as we saw above, those moral considerations that are anticipated by the posited law may well be legally binding for positivists. So, for example, as we saw above, the law might require employers to pay a “fair” wage; it might enforce only “reasonable” contracts, or “just” constraints, and so on. However, as Dworkin explains, even rules that include moral terms still exclude certain considerations. So, to take Dworkin’s example, it is true that a rule that says, e.g., that all unreasonable or unfair contracts are void does indeed require us to consider certain moral aspects of contracts when deciding whether or not to enforce them. However, he notes, a case might arise in which the law requires judges to enforce a contract even though it is unreasonable or it is grossly unfair. Nonetheless, the principles governing this case would not be recognized by the posited rules and would thus not be law, for positivists; such principles would be excluded by the posited rules. This is because, Dworkin notes, “even the least confining of these terms restricts the kind of other principles and policies on which the rule depends.”77 As a result, the mere inclusion of some moral terms, or principles, in the posited law does not make it sufficiently flexible to handle all cases that might come before it. The inclusion of some such terms thus does not make the posited law invulnerable to the possibility of hard case; so long as the ultimate test for legal validity remains a posited one, the threat that hard cases pose to positivism persists.

77 Dworkin, *Taking Rights Seriously*, 28 (original emphasis).
Positivists cannot hope to list all possible moral principles in the rule of recognition, however. This is because, they are “controversial, their weight is all important, they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle.”78 As Dworkin explains

We could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards. We could not bolt all of these together into a single ‘rule’, even a complex one, and if we could the result would bear little relation to Hart’s picture of a rule of recognition, which is the picture of a fairly stable master rule specifying ‘some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule…’79

Nor, finally, can positivists include among the criteria for legal validity the criterion that all moral principles are also recognized as law. This is because such a test would collapse positivism’s social test for distinguishing between law and morality into a moral one, contrary to the basic tenets of legal positivism.

Dworkin arrives at a similar conclusion in Law’s Empire, where he argues that every legal judgment must be underwritten by a theory of law if we are to explain the nature of legal reasoning. As Dworkin explains,

no firm line divides jurisprudence from adjudication or any other aspect of legal practice… Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers and when rival foundations compete, a legal argument assumes one and rejects others. So any judge’s opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.80

---

78 Dworkin, Taking Rights Seriously, 44.
79 Dworkin, Taking Rights Seriously, 40f, citing Hart, The Concept of Law, 92.
80 Dworkin, Law’s Empire, 90.
And, for Dworkin, a theory of law consists in providing a complete justification for the system, taken as a whole. Dworkin thus concludes that there can be no ultimate social test for distinguishing between law and morality. He summarizes his conclusions from “Model of Rules I” by noting that

it is wrong to suppose, as that theory does, that in every legal system there will be some commonly recognized fundamental test for determining what standards count as law and which do not. I said that no such fundamental test can be found in complicated legal systems like those in force in the United States and Great Britain, and that in these countries no ultimate distinction can be made between legal and moral standards, as positivism insists.\textsuperscript{81}

Instead, he argues that a complete theory of law must explain how law can include all moral considerations, and how all such considerations can figure in every application of a legal rule to a case. He thus offers an alternative theory of law.

\subsection*{3.4 Dworkin’s Alternative}

Dworkin’s alternative account of law begins with the supposition that legal reasoning is a kind of political reasoning. This is not to say that Dworkin is advancing a theory of how judges ought to decide cases, or what people ought to do; Dworkin explicitly denies that he is answering these practical questions.\textsuperscript{82} Rather, he thinks that legal reasoning – that is,

\begin{footnotesize}
\textsuperscript{81} Taking Rights Seriously, 46, (footnote omitted). Dworkin makes a similar point earlier in “Model of Rules I” where he claims that “if the positivists are right in another of their doctrines – the theory that in each legal system there is an ultimate test for binding law like Professor Hart’s rule of recognition – it follows that the principles are not binding law.” (Taking Rights Seriously, 36, my emphasis.)

\textsuperscript{82} Dworkin notes that “conceptions of law [including the one he is offering] which are theories about the grounds of law, commit us to no particular or concrete claims about how citizens should behave or judges should decide cases. It remains open to anyone to say that though the law is for Elmer or Mrs. McLoughlin or the snail darter, the circumstances of these cases are special in some way such that the judge should not enforce the law. When we are for some reason anxious to remind ourselves of this feature of our concept of law, we say that the law is one thing and what judges should do about it is quite another; this accounts, I think for the immediate appeal of the positivist’s slogan.
\end{footnotesize}
determinations of what the law requires and the application of legal rules to cases – is itself inherently political, and a correct theory of law must take this fact into account. Again, he articulates this idea in two different ways.

(a) The Rights Thesis

Dworkin’s early formulation of this approach begins with the idea that the parties to a legal challenge have a determinate right to a given outcome, and that it is the aim of a judge to discover, rather than invent, what this right is. This right, for Dworkin, is a political right: it is, as Dworkin explains, a “creature[] of both history and morality.”\footnote{Dworkin continues, “what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions,” \textit{Taking Rights Seriously}, 87.} Judicial decision-making is thus a form of political reasoning, for Dworkin; it is of a piece with general political reasoning about the moral and political rights that people can claim against one another. Dworkin thus endorses what he calls the “rights thesis,” which holds that “judicial decisions enforce existing political rights.”\footnote{Dworkin, \textit{Taking Rights Seriously}, 87.}

Legal reasoning is distinctive, then, in that, first, it concerns people’s rights and duties, rather than matters of the overall good or collective goals, and, secondly, in the in

\footnote{Law’s Empire, 112.}
the manner in which institutional considerations figure in judicial decision-making. Consider each claim in turn.

First, Dworkin argues that legal decision-making is best understood as concerning primarily the rights and duties that people can claim against one another, rather than as decisions that advance some overall aim or goal of the community. In this regard, legal decision-making is best understood as concerning matters of principle rather than policy. Dworkin distinguishes between questions of principle and questions of policy, arguing that whereas questions of policy aim to promote certain states of affairs, by balancing the interests or benefits to some against the burdens on others, questions of principle, aim to protect individual rights, independently of the states of affairs that so doing will produce. This is not to say that individual rights are irrelevant to questions of policy, or that when people have a right, it ought to be protected, come what may; rather, Dworkin aims only to suggest that there is an intuitive difference between these two kinds of reasoning. The first distinctive feature of legal reasoning, then, for Dworkin, as compared to political reasoning more generally, is that, on his account, legal reasoning concerns primarily matters of principle, not policy. Dworkin does not deny that matters of policy can sometimes enter into legal decision-making. Judges do indeed frequently cite such considerations in rendering their decisions.

Dworkin admits that this distinction is a rough one, and that it requires much more treatment than he provides. He aims only to suggest an intuitive distinction between these two aspects of political decision-making, and to argue that legal decision-making is often, though not always, better understood as concerned with matters of principle, not policy. See Taking Rights Seriously, 84-6 and 90-100.

Dworkin cites Lord Denning’s decision in Spartan Steel & Alloys Ltd. v. Martin & Co. ([1973] 1 Q.B. 27) in this connection, though he leaves it open whether Lord Denning’s stated reasons provide the best understanding of this decision. Taking Rights Seriously, 83f.
nature of this claim: many argue that judges do, or ought to, decide cases based on which outcome would best promote some overall goal, like, say, economic efficiency. Indeed, as Dworkin concedes, this controversy might even arise with regards to a given case: so, as Dworkin suggests, Spartan Steel might be understood either as raising a question about whether it is economically efficient to grant recovery for pure economic loss, or about whether the plaintiff has a right to recovery in such circumstances.\(^87\) But, he argues, judicial decision-making is, and ought to be, founded on matters of principle, not policy.\(^88\) Not only does this model of legal decision-making better describe judicial reasoning, but it also better defends judicial decision-making against the charges that judges illegitimately act as deputy legislators when they decide hard cases, and the charge that they impose new duties retroactively on the parties in such cases. In this respect, then, it differs from other kinds of political decision-making, which concern matters of both principle and policy.

Judicial reasoning can also be distinguished from political reasoning more generally by the manner in which institutional considerations figure in legal reasoning. As Dworkin notes, all determinations of political rights must take the institutional history of that community into account.\(^89\) This is because all political officials are bound by the doctrine of political responsibility. According to this doctrine, political officials must make only those political decisions that they can justify on a political theory that justifies

\(^87\) Dworkin, *Taking Rights Seriously*, 85.
\(^88\) Dworkin writes, “I propose, nevertheless, that judicial decisions in civil cases, even in hard cases like Spartan Steel, characteristically are, and should be generated by principle not policy.” *Taking Rights Seriously*, 84.
\(^89\) Dworkin, *Taking Rights Seriously*, 87.
all the other decisions that they have made or propose to make. That is, the doctrine of political responsibility prohibits political officials from making political decisions in isolation from all other political decisions that they have made, even if, when taken on their own, these decisions can seem well-founded. So, for example, this doctrine prohibits a politician from, say, both relying on the sacredness of human life to outlaw abortion, but permit parents of babies with deformities to withhold life-saving medical treatment. This is because these decisions are mutually incompatible, and, on this approach, politicians are under a duty to be capable of rendering their political decisions consistent with one another. In particular, according to Dworkin, all political decisions must be capable of falling under a “comprehensive theory of general principles and policies” that can justify all other decisions that are taken to be correct. That is, for Dworkin, all political decisions, including judicial decisions, must be capable of falling under a unified and general political theory that is capable of providing a justification for them. This doctrine thus requires articulate consistency; that is, it requires that officials confer rights and duties consistently amongst citizens. So, for example, if an official grants a right of sexual liberty to one individual or group in one context, then she is under a duty to grant it to another group or individual who claim it in a relevantly similar circumstances.

93 Dworkin, *Taking Rights Seriously*, 88. Note that this demand is weaker when officials are not distributing benefits and burdens as a matter of right. Dworkin distinguishes between matters of principle and matters of policy; questions of people’s rights and duties are questions of principle, not policy. Judicial decision-making, he argues, is best understood as a concerning principle, not policy. It is for this reason that it invokes the more stringent demands of articulate consistency.
Judicial or legal decision-making differs from political reasoning more generally however, in that it confirms or denies concrete institutional legal rights. That is, it is distinctive in that it confirms or denies the particular rights that parties have in virtue of the particular legal institutional rules, including statutes, past judicial decisions, and so on, that have been enacted in their communities, in particular cases, once all the rights of those around them have been taken into account. Again, consider each feature in turn.

First, in rendering legal decisions, judges must take into account the particular institutional rules of the system in question. Institutional rules are the constitutive and regulative rules of the system: they are those rules that, first, constitute given patterns of behaviour as, say, a game, a religious practice, a legal system, etc. – that is, they are those rules that make it true that given patterns of behaviour constitute practices that are governed by a distinctive set of norms or rules. And, secondly, they are those rules that govern these practices. That is, institutional rules are also those rules that tell people what, according to the rules of the institution, they can and cannot do. So, e.g., the institutional rules of chess are the rules of the game that, first, make it true that, under certain circumstances, when two people move bits of wood around a board of alternating squares, they are playing chess, and, secondly, they make it true that moving the bishop straight ahead is an illegal move (in chess).

People can claim distinctive institutional rights and duties, pursuant to these institutional rules. So, for example, a chess player has a “chess” right to win a game if she checkmates her opponent. These rights and duties are autonomous, or independent of the moral rights and duties that people can claim against one another, according to

---

Dworkin. That is, the rights and duties that people have pursuant to these institutional rules are not determined by their moral rights and duties. As Dworkin explains, “no one may claim an institutional right by direct appeal to general morality.”\(^95\) So, for example, one cannot lay claim to having won a chess match by appeal to moral virtue alone.\(^96\) Instead, people’s institutional rights and duties are determined by reference to the particular rules of the institution. So, e.g., whether or not one has won the game determined with reference to the rules of chess.

Institutional rights and duties are genuine rights and duties nonetheless, however, insofar as they can ground claims that people can make against one another. As Dworkin explains, it would be wrong, and not merely surprising, if the officials of a chess tournament awarded the prize money to the person who needed it most, and not the person who won the most games.\(^97\)

The officials governing these institutions are thus *insulated* in the exercise of their official capacities. That is, to the extent that they diverge from the requirements of the rules of the institutions, officials must ignore background moral and political considerations in their attempts to uphold and enforce institutional rules. Instead, officials must apply the rules of the institution in isolation from these general background considerations, where there is a difference between them. It is true that institutional rules or considerations can run out. That is, cases may arise in which it is unclear what the rules require of the case. So, to borrow Dworkin’s example, there might be a rule of chess

---

\(^97\) Dworkin, *Taking Rights Seriously*, 101. As Dworkin notes, “it would provide no excuse to say that since tournament rights merely describe the conditions necessary for calling the tournament a chess tournament, the referee’s act is justified so long as he does not use the word ‘chess’ when he hands out the award.”
that requires that a player forfeit the game if he unreasonably annoys the other player. But, this might not settle whether, say, continually smiling at one’s opponent so as to unnerve him constitutes unreasonably annoying him for the sake of the rule. General moral considerations cannot decide the matter, however. Rather, in order to decide whether continual smiling constitutes an unreasonable annoyance for the purposes of the rule of the game, a referee must appeal to facts about the game and its general character, and render the decision that is most in keeping with these. Dworkin thus explains that “we do not think that [the referee] is free to legislate interstitially within the ‘open texture’ of imprecise rules. If one interpretation of the forfeiture rule will protect the character of the game, and another will not, then the participants have a right to the first interpretation.” The referee must therefore, say, protect the intellectual rather than, say, physical character of chess in his application of the forfeiture rule.

Legal rights and duties are institutional, then, in these respects. They require the constitutive and regulative rules of the institution to be in place in order to give them effect; once these rules are in place, legal rights and duties cannot be determined by appeal to moral considerations alone; and officials are bound to uphold and enforce people’s legal rights and duties in the exercise of their official duties. Official enforcement of general moral rights and duties to the exclusion of enforcing people’s legal rights and duties would constitute a wrong against the subjects (and a violation of official duty), and not merely a surprise.

But, Dworkin explains, legal rules are not wholly autonomous from morality. Unlike, say, the rules of chess, there are a number of ways in which legal rules depend on

moral rules and considerations. First, it is true that legal rules include constitutive and regulative rules that define legal institutions, designate its officials, and establish the limits on the exercise of their power. However, these rules are not sufficient to determine whether or not a subject has a right to have a given rule enacted as law. So, for example the general constitutive and regulative rules of the institution are not sufficient to determine whether someone has a right to, say, minimum wage legislation. Instead, as Dworkin explains, “citizens are expected to repair to general considerations of political morality when they argue for such rights.”

In addition to appealing to general moral considerations in order to determine whether or not a given law ought to be enacted, judges must also appeal to morality in order to determine, secondly, the intention or purpose of a particular statute or clause, and, thirdly, in order to identify the basic principles that underlie or are embedded in the positive law. On the one hand, as Dworkin explains, the intention or the purpose of a statute or law provides a bridge between the particular rights and duties that a statue creates, and the general political justification for the statute. That is, an appeal to the intention or purpose behind a statute provides one way in which general moral justifications for the statute in question can enter into a determination of the particular rights and duties it confers. On the other hand, an appeal to the principles that underlie or are embedded in the positive law provides a bridge between the political justification for the doctrine that like cases ought to be treated alike, and hard cases in which it is unclear what this doctrine requires. That is, morality also enters into the law when judges must decide what, given a line of cases that has come before, the law requires of the next case.

---

Dworkin thus concludes that “the concepts of legislative purpose and common law principles are devices for applying that general political theory [described above] to controversial issues about legal rights.”

It is for these reasons, then, that Dworkin argues that legal rights are a species or function of more general moral and political rights. That is, it is because legal rights depend in these ways on the general, or background, moral and political rights that people have that Dworkin holds that they are indeed a *kind of* moral and political right. Legal decision-making, then, and legal reasoning more generally, are thus a kind of moral and political reasoning, for Dworkin. The application of legal rules to cases, and determinations of what the law requires in particular cases, is thus a function of the moral and political rights that parties might have in particular cases.

Dworkin thus imagines legal decision-making on the model of what an ideal judge, Hercules, would decide. Hercules has perfect knowledge of all the facts of the legal system and a perfect justification for it. In order to decide a given case, he must determine what the best justification for the system, taken as a whole, would require of the instant case, and apply this justification to the case at hand. The decision that Hercules would make in a case is thus the one that best coheres with the best justification for all the rules and decisions of the system, considered together. A given consideration is legally valid, then, and a given conclusion is the legally required one on this approach, if it is the one that Hercules would provide in a given case. Dworkin’s alternative approach to law thus avoids the difficulties that positivism encounters because he can

---

explain how law can include all of morality, and how every application of a legal rule to a case must invoke a moral judgment as well.

(b) Interpretation

In later works, Dworkin begins with the idea that law sets out those conditions under which past political conditions can justify the state use of coercion. Dworkin notes that the point of law is to “insist that [the state use of] force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.”¹⁰⁴ That is, the aim of law is to limit the state use of coercion to just those instances in which past political decisions can justify it. It thus follows from this understanding of law that law consists in “the scheme of rights and responsibilities that meet that complex standard.”¹⁰⁵ In other words, legal rights and obligations consist in those obligations that follow from this justification for the state use of force.

Legal reasoning, as Dworkin explains, is thus “best understood as arguments about how far and in what way past political decisions provide a necessary condition for the use of public coercion.”¹⁰⁶ Judges’ decisions about what the law requires in particular cases consist in judgments about when past political decisions justify the state use of force. Dworkin’s understanding of judges’ deliberations about the law is thus different

¹⁰⁴ Dworkin, Law’s Empire, 93.
¹⁰⁵ Dworkin, Law’s Empire, 93. Elsewhere, Dworkin writes, “the most general point of law, if it has one at all, is to establish a justifying connection between past political decisions and present coercion.” Law’s Empire, 98.
¹⁰⁶ Dworkin, Law’s Empire, 96.
from positivists’ account of legal judgment since, on Dworkin’s understanding, a
determination of what the law on a matter is requires an appeal to a political justification
for the state use of force, in addition to reasoning from posited legal considerations. But,
it falls short of an all-things-considered political judgment since, unlike general moral
and political reasoning, legal reasoning is constrained by the past political decisions that
the state has taken.

Dworkin thus defends law as integrity, namely, the idea that “rights and responsibilities
flow from past decisions and so count as legal, not just when they are explicit in these
decisions, but also when they follow from the principles of personal and political
morality the explicit decisions presuppose by way of justification.”

Integrity, for Dworkin, consists in a “distinct political virtue,” one that is different from justice,
fairness, and political due process. Integrity consists in the requirement that people ought
to treat like cases alike, or that they act in accordance with a unified set of moral
convictions, rather than capriciously or arbitrarily. Understood as a political virtue,
integrity consists in the requirement that the state speak with “one voice;” that is,
integrity requires that the state act in a “principled and coherent manner” towards all of
its subjects, as though it consisted of a unique individual acting on a coherent set of moral
convictions. Law as integrity, then, holds propositions of law to be true, or rules to be
legally valid, when they “figure in or follow from the principles of justice, fairness, and
procedural due process that provides the best constructive interpretation of the

107 Dworkin, Law’s Empire, 96.
108 Dworkin, Law’s Empire, 166.
109 Dworkin, Law’s Empire, 166.
110 Dworkin, Law’s Empire, 165.
community’s legal practice.” In other words, on Dworkin’s account of law as integrity, the law consists in those political principles that provide the best justification for the posited law that has come before, and the application of these principles to new cases that come before it. Law as integrity thus combines the requirements of the posited law with the best constructive interpretation, or political justification for it.

In order to determine what the law requires in a given case, judges must apply Dworkin’s two-step test of fit and justification. That is, they must first identify those principles of political morality that best fit the legal and political decisions that have come before. Where there is more than one such principle, judges must, secondly, choose the one that provides the best justification for these decisions. The law on a matter, then, consists in the outcome that is dictated by the application of this principle of political morality to the case at hand.

Dworkin elaborates this idea by comparing judicial decision-making to writing a chain novel. Even if no novel has ever actually been written this way, Dworkin imagines that in writing a chain novel, a number of different authors must act together in order jointly to create the best, unified novel that they can write. This process proceeds in two stages. In the first stage, each author must determine which interpretation of the material that has come before best fits the characters, plots, themes, and so on that have come before. In other words, in order to write his portion of the text, each author must attempt to identify those understandings of the portions of the text that have been written that can

---

111 Dworkin, *Law’s Empire*, 225. More specifically, Dworkin explains, rules are legally valid and results are those that are dictated by the law when they figure in or follow from principles of “fair political structure, a just distribution of resources and opportunities, and an equitable process of enforcing the rules and regulations that establish these.” Dworkin’s use of “justice,” “fairness,” and “procedural due process” are meant to stand in for these ideals. See *Law’s Empire*, 164f.
explain the main events, characters, themes, etc. of the portion of the novel that has thus far been written as though they had been written by a single author.

This does not mean that these potential interpretations must account for every aspect of the text that has thus far been written: a potential interpretation might leave some sub-plots or themes unexplained. But, a potential interpretation must provide a general explanation for the text, and it must explain the main plot points, characters, events, and so on in order to count as a candidate interpretation of it. If the novel to date is so internally inconsistent that no such interpretation can be found, an author must then decide which characters, events, themes, and so on are most central to the text, and provide an interpretation that captures most of these, and concede that this interpretation is not wholly successful. If even this is not possible, then he must abandon his project of writing a unified chain novel as if it was written by a single author with a coherent view of the work, since, as Dworkin explains, in this case “nothing can count as continuing the novel rather than beginning anew.”

The requirement that an interpretation fits the novel-in-progress is a threshold requirement: a candidate interpretation need only provide some explanation of the portion of the text that has been written thus far. This process of identifying potential interpretations might therefore result in multiple candidate interpretations. The author must therefore proceed to the second stage of the interpretive process, namely, that of identifying the interpretation that casts the novel in its best light. The interpretation that casts the novel in its best light is that interpretation that makes the novel the best it can

\[\text{112 Dworkin, Law’s Empire, 230f.}\]
be, all things considered. This determination depends on the author’s substantive aesthetic judgments about beauty, literature, his insight into human nature, perhaps, and so on. But, this judgment is not an unconstrained aesthetic judgment since it is constrained by the requirements of fit that resulted from the first stage of the interpretive process.

Although these stages of interpretation are described as two distinct processes, this description is more of a heuristic device than an accurate description of the process in which the authors of a chain novel must actually engage. In fact, these two stages are much more intertwined than this description suggests. So, for example, aesthetic judgments often enter into initial determinations of fit. An author might decide that a given interpretation fits a text so badly, or provides such a poor interpretation of it that it is not worth evaluating in the second stage of analysis. Aesthetic judgments might thus enter into determinations of fit. Alternately, an author might decide that a given interpretation shows the text in a better light because it provides a better fit. In this respect, then, questions of fit might thus enter into the aesthetic stage of analysis as well. Dworkin thus explains that the distinction between the two stages is thus “less crucial or profound than it might seem.”

Legal reasoning, for Dworkin, is best understood on the model of the chain novel. In determining what the law requires in a given case, each judge ought to “think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be.” Like the authors

113 Dworkin, *Law’s Empire*, 231.
115 Dworkin, *Law’s Empire*, 239.
of a chain novel, judges add to this “story” by first determining which interpretation best fits what has come before, and, where there is more than one such interpretation, judges must choose the one that provides the best justification for past decisions.

Unlike the authors of the chain novel who must make aesthetic judgments, however, judges must make decisions of political morality when rendering a judicial decision. In particular, when rendering a judicial decision, judges must identify those principles of justice, fairness, and procedural due process that best explain the existing law, and then apply these principles to the case at hand.\(^{116}\) Justice is understood here to consist in a just distribution of resources and opportunities; fairness consists in fair political structures, and procedural due process consists in an equitable process for enforcing the rules and regulations that establish these structures.\(^{117}\) In rendering a legal judgment, then, judges must identify those principles of justice, fairness, and procedural due process that best explain the posited law as if it were structured by a coherent set of such principles. Dworkin thus explains that in law as integrity, the first stage of judicial reasoning

\[
\text{As Dworkin explains, “law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.” Law’s Empire, 243.}
\]

\(^{116}\) As Dworkin explains, “law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.” Law’s Empire, 243.

\(^{117}\) Dworkin, Law’s Empire, 164.

\(^{118}\) Dworkin, Law’s Empire, 243.
the best it can be from the perspective of political morality. As above, this stage of analysis explicitly requires judges to make a substantive moral judgment. Judges must decide which principles of justice and fairness are better, as a matter of abstract justice, as well as which are preferable as a matter of political fairness given the moral convictions of the members of the community in question.\textsuperscript{119} Where these two sets of considerations diverge, judges must also decide which ought to prevail.\textsuperscript{120} This decision likewise requires a judgment of political morality.

As above, Dworkin’s account of judicial reasoning as proceeding in two stages is best understood heuristically, rather than literally. Notwithstanding Dworkin’s two-stage analysis, these two processes are deeply intertwined. As he explains,

\begin{quote}
    in law, as in literature the interplay between fit and justification is complex. Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among political convictions of different sorts; in law as in literature these must be sufficiently related yet disjoint to allow an overall judgment that trades off an interpretation’s success on one type of standard against its failure on another.\textsuperscript{121}
\end{quote}

On the one hand, determinations of fit enter into questions of justification since an interpretation is morally better if it better fits the existing law.\textsuperscript{122} Judges must therefore consider which interpretation best fits the law when engaged in deliberations about justification. Dworkin thus explains that “questions of fit arise at this [second] stage of interpretation as well, because even when an interpretation survives the threshold

\begin{footnotesize}
\begin{enumerate}
\item\footnotesize Dworkin, \textit{Law’s Empire}, 249.
\item\footnotesize Dworkin, \textit{Law’s Empire}, 250.
\item\footnotesize Dworkin, \textit{Law’s Empire}, 239.
\item\footnotesize As Dworkin explains, “an interpretation is \textit{pro tanto} more satisfactory if it shows less damage to integrity than its rival.” \textit{Law’s Empire}, 246f.
\end{enumerate}
\end{footnotesize}
requirement, any infelicities of fit will count against it... in the general balance of political virtues.”123

On the other hand, as Dworkin notes, determinations of fit are “political not mechanical.”124 Judges cannot simply count the number of decisions that fit an interpretation, and choose the one that fits the most decisions. Some decisions, or some lines of reasoning generally, might be mistaken, and some might be more fundamental to a given area of law than others.125 When deciding questions of fit, judges must “take into account not only the numbers of decisions counting for each interpretation, but whether the decisions expressing one principle seem more important or fundamental or wideranging than decisions expressing the other.”126 Dworkin thus concludes that questions of fit express [a judge’s] commitment to integrity: he believes that an interpretation that falls below his threshold of fit shows the record of the community in an irredeemably bad light, because proposing that interpretation suggests that the community has characteristically dishonoured its own principles. When an interpretation meets the threshold, remaining defects of fit may be compensated, in his overall judgment, if the principles of that interpretation are particularly attractive, because then he sets off the community’s infrequent lapses in respecting these principles against its virtue in generally observing them. The constraint fit imposes on substance, in any working theory is therefore the constraint of one type of political conviction on another in the overall judgment which interpretation makes a political record the best it can be overall, everything taken into account... It is... the structural constraint of different kinds of principle within a system of principle, and it is none the less genuine for that.127

Dworkin thus introduces Hercules again as a model of legal judgment. As above, Hercules possesses perfect knowledge of the past legal decisions of the community, and of all the principles of political morality, and he considers all possible interpretations of

123 Dworkin, Law’s Empire, 256.
124 Dworkin, Law’s Empire, 257. Dworkin also notes this at 247.
125 Dworkin, Law’s Empire, 247.
126 Dworkin, Law’s Empire, 247.
127 Dworkin, Law’s Empire, 257.
the system as a whole. It is of course true that no human judge could ever render such a complete judgment. But, for Dworkin, ideally, legal judgment should proceed like this.

Dworkin’s account of legal judgment thus explains the robust relationship between law and morality that he takes law to have, and the manner in which morality figures in legal reasoning. My claim, however, is that Dworkin fails sufficiently to distinguish legal from moral judgment. Dworkin’s requirement that legal judgments fit the posited law does not sufficiently constrain questions of justification, and legal judgment for him collapses into general political justification. As a result, I will argue, despite his efforts to the contrary, Dworkin collapses legal and moral reasoning, and obliterates the ultimate conceptual distinction between law and morality.

I will argue for this conclusion by attempting to show that Dworkin cannot explain some of the more complex judgments at which legal officials might arrive. I will argue that the reason he cannot explain these more complex judgments is because he cannot explain the basic ways in which source-based rules can determine a legal outcome on their own; it follows from the fact that Dworkin cannot explain the more complex kinds of legal judgment that legal officials can make that he cannot explain the basic ones either. As a result, I will conclude, it must be possible for source-based considerations to determine legal outcomes directly, without appeal to further moral considerations. Dworkin’s in-principle objection to legal positivism must therefore fail.

I will begin by setting out an example of the kind of complex legal judgment that Dworkin cannot explain. I will then argue that this problem generalizes: Dworkin cannot explain these complex legal judgments because he cannot explain legal judgment at all,
as distinct from moral judgment. This is because the ultimate distinction between law and morality is itself dependent on posited, not moral rules. As a result, I will conclude, Dworkin cannot even get a theory of law off the ground. I will then conclude that some conception of legal positivism must be correct, though I will not propose a positive theory of law here. Let us now turn to an examination of the difficulty with Dworkin’s alternative approach to law.

3.5 The Problem I: Justifications and Excuses

Dworkin is right to suggest that the law can sometimes require judges to decide questions on a balance of considerations. But the law need not do so as a conceptual matter, as he contends. And, whether or not the law does require judges to engage in such deliberations depends on social facts about the system. We can see this by examining some of the ways in which the law can direct judges to judge on a balance of considerations, and examining the constraints that the law can impose on such judgments. Let us begin with an example.

Suppose I hit someone. When am I criminally responsible for assault? The law has a two-part test for criminal responsibility. First, it asks whether I am guilty of the offence charged: did I commit an assault, at law? Determining this requires inspecting the test for assault and deciding whether my actions fall under it. This test can differ in different jurisdictions. So, for example, in some legal systems, issuing a threat counts as an assault, while in others it does not. In order to determine whether I have committed an assault for the purposes of a determination of responsibility, then, a judge must first determine whether my actions fall under the rule for assault for that jurisdiction.
The law then asks whether I have any defences. There are two kinds of defences at law: justifications and excuses. Suppose I hit someone in self-defence; suppose, say, that I hit someone, and I did it on purpose, but I hit him in order to stop him from hitting me first. Here the law says even though I satisfied the requirements of the crime, I acted in self-defence, and so have a justification. It is true that I hit someone, and I did it on purpose. It is also true that it is unfortunate that this happened. But, where I have a justification, I have committed no wrong at law. The initial finding of guilt is thus extinguished, and the law returns a verdict of not guilty.

Suppose, on the other hand, that I was provoked. So suppose, for example, that my victim was taunting me, uttering racial slurs, insulting me or my family, and so on, and I hit him. Here, the law does say that I did something wrong. I committed a guilty act at law, and, legally speaking, I am blameworthy. But, the law holds, I have an excuse; I ought not to be held fully responsible. I acted as any reasonable person would have, I succumbed to ordinary human weakness, I couldn’t help myself, and so on. Where I have an excuse, the initial finding of guilt remains intact, but I am not held responsible. The law thus returns a verdict of guilty but excused here. Both defences thus absolve me of responsibility; however, legally speaking, these are two different verdicts.

The problem with Dworkin’s account is that he cannot explain this distinction; that is, he cannot explain why the law would require a verdict of guilty but excused rather than a verdict of not guilty. Recall Dworkin’s account of legal reasoning: Dworkin thinks that every application of a legal rule to a case must make appeal to all moral considerations. Only so can an account of law avoid the problem of hard cases and the difficulties that he attributes to positivism. The fact that I have an excuse, then, must
therefore enter into the initial question of whether or not my actions satisfy the requirements for assault. This is because, when applying the test for assault to the case at hand, judges must also decide whether, on the best justification for the posited law, I ought to be held responsible for assault. By hypothesis, however, where I have an excuse, I have satisfied the requirements for assault, but I ought not to be held responsible for it. This is just what it means to have an excuse. But because Dworkin requires that judges appeal to all moral considerations in every application of a posited rule to a case, the fact that I have an excuse must be brought to bear on the initial question of whether or not I have committed an assault, thereby extinguishing the initial finding of guilt. As a result, judges, on Dworkin’s approach, will never get to the second stage of judicial analysis, making all excuses function like justifications, and collapsing the distinction between the two kinds of defences for him. This basic legal distinction therefore serves as a counter-example to Dworkin’s theory of law.

There are a number of concerns that one might raise about the argument just presented. First, one might object that the distinction between excuses and justifications is itself a moral one, and can thus indeed accommodate the legal distinction. So, for example, one might argue that, morally speaking, there is a distinction between being excused and having a justification, and that judges may well take this distinction into account when engaging in their moral evaluation of the posited law. It is true that the distinction between excuses and justifications is a moral one; morality does indeed distinguish between prohibited acts that we are nonetheless not responsible for, and acts that are bad or unfortunate, but for which we are not to blame. This cannot save Dworkin’s approach
to law, however. Irrespective of this moral distinction, the moral fact that I have an excuse must enter into the first stage of legal analysis, for Dworkin, and it still tells against an initial finding of guilt. This is because even the application of the initial test for assault requires the judge (or the trier of fact) to make an all-things-considered moral judgment about whether I ought to be held responsible for assault. Where I have an excuse, however, I ought not to be held responsible. This just follows from the nature of excuses. As a result, even if, morally speaking, I am guilty of an assault, but excused, for Dworkin, the fact that I have an excuse must result in a verdict of not guilty, contrary to legal doctrine.

Alternately, one might object to my characterization of Dworkin as requiring that all moral considerations enter into each application of a legal rule to a case. Instead, one might hold, he can perhaps distinguish between those moral considerations that are relevant at the first stage of legal analysis, and those that are relevant at the second stage, and direct considerations about excuses to the second stage. This alternative presents Dworkin with a dilemma, however.

The distinction between those moral considerations that are relevant to the first stage of analysis and those that are relevant to the second stage of analysis is either a source-based one or a moral one. On the one hand, one might argue that whether excuses enter into the first or the second stage of analysis is a moral question, rather than one for the posited rules. It is true that the question of where excuses ought to enter into legal analysis is a moral question. But, the law need not be structured so as to accord with morality, and whether or not it does is a legal, not a moral question. On this understanding of Dworkin’s position, he can only explain one legal system (namely, the
one that happens to accord with morality), and he does so by accident, by engaging in some moral analysis. This approach cannot serve as a general theory of law.

On the other hand, one might suppose that there is some posited rule directing judges to consider facts about excuses at the second stage of analysis and not the first. This is a plausible suggestion, but it will not help Dworkin. This is because the application of this further rule to the case requires judges to again ask what, on a balance of considerations, the rule ought to require, returning the test to a moral one. This solution thus simply reintroduces the initial problem with respect to this further rule. In general, then, although it may possible to distinguish between those moral considerations that bear on the first stage of analysis and those that bear on the second, this line of argument is not available to Dworkin; he is committed to the view that questions of what the law is must invoke questions of what, on a balance, it ought to be.

Finally, one might argue that Dworkin’s insistence that judges invoke moral considerations need not apply to the application of legal rules, considered severally. Rather, Dworkin might require that judges ask of the posited law, considered as a whole, whether it is the best it can be, and apply those principles to the case at hand. So, in the example described above, Dworkin’s approach would require judges to ask of the assault-plus-defences rule taken as a whole what, morally speaking, it ought to be, and to follow the dictates of this moral rule when rendering their decision. This is also a plausible line of response. It is likely a good strategy for judges, in rendering their decisions, to first determine what the posited law, taken on its own, requires of a case, and then ask what, on a balance, they ought to decide. But, this is just the positivist conception of legal reasoning. Recall our initial account of positivism. There we saw that the positivist
insistence on the separation between law and morality leaves open the question of how judges ought to decide because positivism is a theory of what the law is; it tells us nothing about what people ought to do. We also saw that this distinction remains intact even when the posited law invokes moral considerations, or directs judges to consider moral questions explicitly. Even when the posited law makes explicit reference to morality, it does not thereby settle the questions of how judges ought to decide. As a result, questions of what people ought to do, or how judges ought to decide a case, are always further, moral questions, to be decided separately from questions of what the posited law holds on a matter, for positivists. Dworkin’s insistence that judges invoke moral considerations when rendering their decisions thus cannot amount to the suggestion that they first determine the what the posited law requires, and then ask what they ought to decide since so holding would collapse his position into legal positivism.

The best understanding of Dworkin’s approach to legal reasoning is one that requires judges to look to all moral considerations every time they apply a legal rule to a case. But, as I argued above, this understanding of law is incapable of drawing the basic legal distinction between excuses and justifications. This is a serious problem for Dworkin. This is because it is not a problem with excuses and justifications in particular. It generalizes to any instance in which the law directs judges to make all-things-considered judgments, but does so in a limited way. And the reason that Dworkin is vulnerable to this problem is precisely because he denies that source-based considerations can have independent legal weight; it is only if we think that source-based considerations can carry independent weight in judges deliberations, separately from moral
considerations, that we can explain how judges can draw the basic distinctions that we think are available at law. Let us consider this claim in more detail.

3.6. The Problem II: Its Full Generality

The problem outlined above is completely general. It has nothing to do with excuses and justifications in particular. In order to see this, consider another example. One of the distinctive features of the Canadian constitution is the existence of s.1, which asks the Court to decide whether an infringement of a Charter right is justified in a “free and democratic society.”128 Canadian law thus distinguishes between someone’s not having a right, and having a right that is justifiably infringed. So, for example, when the police arrest someone without a warrant, but they have reasonable and probable grounds to believe that this person has committed or will commit an offence, they are not infringing on anyone’s rights.129 Nor are any rights violated when the courts designate someone a “dangerous offender” and sentence him to a penitentiary for an indeterminate period of time where they constitute a threat to the life, safety, or physical or mental well-being of those around them.130 When police stop people at random to check their drivers’ license, insurance certificate, the mechanical fitness of their car, and their sobriety, however, they

---

128 Section 1 of the Canadian Charter reads “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (U.K.), 1982, c.11.

129 R. v. Storrey, [1990] 1 S.C.R. 241, holding that s. 9 of the Charter, which guarantees the right to be free from arbitrary arrest or detention, does not include this right.

are violating people’s s. 9 rights to be free from arbitrary detention and imprisonment. But, this right is justifiably infringed because of the great contribution that spot-check programs make to highway safety.

Like the distinction above, this distinction poses a difficulty for Dworkin. This is because, by hypothesis, where a right is justifiably infringed, people ought not to be able to claim it. This is just what it means to say that it is justifiably infringed. For Dworkin, however, this consideration must enter into the initial question of whether or not people have the right, and again, it tells against it. It thus extinguishes the initial claim to the right, making it impossible for Dworkin ever to proceed to the second stage of the analysis, and ever to return a verdict of someone’s having a right but it being justifiably infringed.

Dworkin will run into similar difficulties when attempting to distinguish between someone being responsible and not owing damages, and not being responsible; a contract that is void and one that is valid, but unenforceable, and so on. There is nothing special about these distinctions; they can be found all over the law. They arise because a legal system consists in some number of rules, and these rules can be combined in some (greater) number of ways, and each combination grounds a different legal outcome. Some of these rules raise questions of moral evaluation, especially in a just system. But not all of them do, and what the law requires of a given case will depend on the precise combination of rules that bear on it, and the precise ways in which the law introduces, or excludes, moral considerations from its dictates. The ways in which the law does so

---

131 Section 9 of the Canadian Charter reads “everyone has the right not to be arbitrarily detained or imprisoned.”

depends on the posited facts of the system, however. That is, whether or not the law requires an appeal to moral considerations in order to determine its requirements, and which moral considerations are relevant, depends on contingent facts about its rules. By making the application of every rule in the system depend on its underlying moral justification, Dworkin collapses these various rules into one another, making these distinct outcomes impossible.

This problem for Dworkin is also much deeper than it first appears. Consider again Dworkin’s test for legal validity. In order to determine what the law requires in a given case, for Dworkin, we must first identify those moral principles that best fit the posited law, and then select from these the one that provides the best justification for it. Recall, however, that, as we saw above, whether a moral principle “fits” the existing posited law itself requires moral judgment. In a complex system, there are likely to be inconsistencies in a line of past decisions, and even in the statutory law. A determination of fit also requires some way of distinguishing between those judgments that count as mistakes and those that correctly represent the law. But, this distinction itself often rests on some kind of evaluation of what the law ought to be. A determination of fit is therefore itself, in part, a moral question.

Secondly, what counts as the relevant law and the relevant facts of a case can itself require moral judgment. For example, there has been significant debate as to whether or not someone’s past sexual history is relevant to a determination of consent to sex. But, whether or not someone thinks this is relevant is likely going to depend, at least in part, on her moral views about sex.
Finally, one of Hart’s central insights into the nature of a legal system was to notice that what counts as a rule of the system, and where the boundary between legal rules, and all other social and moral rules lies, is itself a question for the system. As Hart showed, a given rule is legally valid when it satisfies the criteria for validity listed the rule of recognition. It is true that Dworkin denies that such posited considerations are all there is to law; however, he grants Hart’s claim that this is the test for validity for the posited rules of the system. As a result, the test for determining which rules count as the posited rules of the system is itself a social test. But, for Dworkin, even this rule is subject to moral evaluation in its application; that is, judges must even ask about the best justification for the rule of recognition when relying on the distinction between legal rules and all other rules and considerations. As a result, even the *ultimate* test for distinguishing between law and morality is, at least in part, a moral one, for Dworkin, he cannot even identify what counts as the posited law without asking which considerations ought to count, and deciding on the basis of this. Dworkin’s test for legal validity is thus moral all the way down, making it impossible for him to even get the initial distinction between law and morality off the ground. This obliterates the possibility of law, as distinct from morality. But we know that there is such a distinction. Dworkin’s in-principle objection to legal positivism must therefore fail.

3.7 Ways Out

Indeed, Dworkin concedes as much in his response to the objection that there is no real difference between his position and Harts. There he argues although he grants that there is some distinction between law and morality, this distinction rests on a moral test, not a social one. See his discussion in *Taking Rights Seriously*, pp. 58-64.
It thus seems that we are left with a puzzle. On the one hand, it seems that social facts cannot fully ground a theory of law since any combination of social facts alone is vulnerable to the problem of hard cases. On the other hand, however, it seems that a complete solution to the problem of hard cases – namely, the inclusion of all of morality in every legal judgment – collapses the distinction between law and morality. How, then, can we reconcile these two features? I will conclude with a suggestion for a few places to look.

First, we need not accept the source-merits distinction that Dworkin begins with, and that positivists inherit. Underlying this debate is a distinction between a very thin notion of source-based or posited law, and merits-based considerations, which include all of morality. This distinction is very intuitive if we begin with the problem of hard cases, which make it seem as though law consists in those considerations that are binding in virtue of their sources, or pedigree, and those to which are binding because they ought to be, whether or not they have been posited by a recognized source. This distinction, however, is both problematic on its own terms, and, as we saw above, it leads to problematic consequences. One suggestion for resolving this puzzle, then, is to reconsider the initial distinction between source- and merits-based considerations with which we began.

Secondly, we might also look more carefully at what constitutes a hard case. As we have seen, hard cases appear to be decided on unposited moral grounds, but they remain determinations of what the law is, rather than what it ought to be. Any theory of law, however, must at the very least, explain the distinction between what the law is and what it ought to be. We can thus perhaps draw on this starting point for a theory of law to
help to shed some light on why hard cases are decided on the basis of what the law is rather than what it ought to be. This might then point to a promising way of explaining how the law has the resources to resolve these cases without collapsing the distinction between law and morality.

These proposals of course do not solve the problem with which we began. Hopefully, however, they can point us to a way out of our initial problem without running into of the difficulties that Dworkin encountered. In what follows I will argue that neither standard positivist response to Dworkin’s challenge – that is, neither Jules Coleman’s inclusive positivism, nor Joseph Raz’s exclusivist approach – succeeds. I will draw on their failures, however, to develop an alternative, and, I hope, more plausible, account of source-based reasoning, and an alternative solution to the problem of hard cases. Let us begin by considering Coleman’s inclusivist response to Dworkin.
IV. COLEMAN’S INCLUSIVE POSITIVISM

4.0 Introduction

Inclusive positivists respond to Dworkin’s challenge by granting Dworkin’s analysis of hard cases, but denying that this poses any threat to legal positivism.\textsuperscript{134} It is true, they concede, that judges can be legally bound to apply moral, and not just posited considerations. \textit{Riggs} may well be an example of such an instance. But, this is not because moral considerations are necessarily legally binding on judges. Rather, where this holds, it is so as a matter of contingent fact about the system: it is just because the posited law has validated these moral considerations that they are also legally binding on judges. The criteria for validity therefore remain a matter of social fact for inclusive positivists, and the fundamental tenets of legal positivism are intact.

This inclusivist response can provide an easy explanation of posited laws that make explicit reference to moral considerations, like, say, common law rules that refer to reasonableness standards, constitutional provisions that draw on considerations of fairness or justice, and so on. Unlike exclusive positivists, who deny that this intuitive explanation can account for the role of morality in law, inclusive positivists can provide a straightforward account of legal references to morality. Some considerations are indeed binding in virtue of their merits, or their appropriateness to the circumstances, on their

account. Where, say, the law tells people to charge a fair rate, where it requires that state action conform to the principles of fundamental justice, where it demands that people take only reasonable risks, and so on, it requires that people engage in moral reasoning in order to determine the precise scope and content of their duties, and the considerations that enter into their deliberations are indeed legally binding because of their goodness, or because they ought to be. In this respect, people are indeed subject to legally binding merits-based considerations, as Dworkin suggests. But, inclusive positivists insist, where the law makes such appeals, it does so merely as a matter of the posited law; it is only where posited rules so direct people that moral considerations are thereby incorporated into the law. Hence, they conclude, the possibility of legally valid merits-based considerations is wholly consistent with the social nature of law.

Dworkin’s threat lies in the concern that the inclusion of merits-based considerations in a source-based conception of law renders it ineliminably vulnerable to controversy in a manner that is inconsistent with the positivist insistence on its social nature. Moral reasoning, for Dworkin, is indefinitely variable. Moral considerations can combine and bear on one another in indefinitely many ways, depending on the precise combination of circumstances that people encounter. How the relevant considerations weigh against one another, and the role that they ought to play in our deliberations, depends on the circumstances in which people find themselves and the specific ways in which they figure or ought to figure in these situations. Because the circumstances that people can encounter are indefinitely variable, according to Dworkin – that is, because there is no end to the precise manner in which facts about people’s circumstances can
combine – the possibility that they encounter novel and unanticipated situations is always open.

It is for this reason that any fixed set of rules for determining what people ought to do in a given set of circumstances is vulnerable to the possibility that a novel and unanticipated situation will arise in which the rules fail to settle the question of what to do, but where there is a determinate legal answer nonetheless. It is in this respect that Dworkin thinks that source-based rules are vulnerable to the possibility of hard cases, and it is for this reason that he thinks controversy or disagreement is endemic to law. Where the posited rules and the facts of the case cannot settle the question of what to do, there is no further common fact to which judges can appeal to settle the question, leaving open the possibility of disagreement. Dworkin’s insistence that law include merits-based considerations is meant to address this concern by making law sensitive to the innumerable ways in which moral considerations can combine, and sufficiently flexible to account for the possibility of reasoning through new cases. But, he argues, where this is so, law cannot be based on a social practice, even an ultimate one, alone, since along with this sensitivity to new circumstances and flexibility to accommodate them comes the possibility of controversy, even controversy with respect to the very practices that form the foundations of law.

In advancing his inclusivist defense to Dworkin’s charge, Jules Coleman attempts to reconcile law’s vulnerability to controversy with its social nature. Coleman grants, with Dworkin, the possibility that law is practical in the ways that Dworkin imagines, and that it includes moral considerations among its criteria for validity. This may well make

---

law vulnerable to controversy, as Dworkin suggests. But, Coleman argues, this is no threat to positivism, even when controversy arises with respect to the basic rule of recognition. This is because, Coleman insists, we must distinguish between the grounds and the content of rules, and the disagreements that Dworkin has in mind in mounting his attack on legal positivism are disagreements in their content, not their ground. As such, they pose no challenge at all to the social nature of law.

I will begin by setting out Coleman’s understanding of law as based in a social practice, and examine his attempt to accommodate the possibility of disagreement, even deep disagreement, in a practice-based account of law. I will then examine whether or not Coleman has succeeded in his aims of distinguishing between the grounds and the content of law such that he can explain the possibility of disagreement on matters of social fact. Finally, I will examine whether, questions of Coleman’s particular account of law aside, his overall strategy of explaining the force of merits-based considerations in terms of social facts can itself succeed in responding to Dworkin’s challenge from hard cases. Let us begin, then, by examining Coleman’s social account of law.

4.1 Law as a Social Practice

Legal authority ultimately rests on a social practice, for Coleman, insofar as the authority of the rule of recognition, the ultimate legal rule, itself depends on the existence of a practice among the officials of the system. Whereas the authority of the subordinate rules of the system depends on their authorization of further, more basic rules, the authority of the ultimate rule of the system itself depends on a practice among the officials of the system. The officials of the system must be engaged in this practice in order for the rule
to be in existence. In this respect, then, the fact of this practice is an existence condition of the rule of recognition.

There are two elements to the practice that gives rise to the rule of recognition. First, the outward behaviour of the officials must be consistent with their following the same rule for validating laws. That is, the officials of the system must exhibit a convergent pattern of behaviour, and this behaviour must be such as to be consistent with their being subject to the same rule setting out the criteria for validity. This requirement reflects the external component to the practice insofar as it can be ascertained from the point of view of one who is not a participant in the practice. Secondly, however, the participants in the practice must adopt a reflective critical attitude towards their behaviour with regards to the practice. That is, they must justify their behaviour by reference to the rule, condemn violations, and adopt other attitudes that exemplify taking the rule to guide their behaviour. This reflective critical attitude constitutes what Hart calls the “internal point of view,” and, unlike the first requirement, it is not available to the external observer of the practice. Instead, one must be a participant in the practice in order to satisfy this requirement. In addition to the officials engaging in this set of practices constituting the rule of recognition, the bulk of the population must in general display a habit of obedience in order to say that a legal system exists, or is in effect, in a given community. This last condition is what Coleman deems an “efficacy condition” for the existence of a system.\(^{136}\)

In order to meet Dworkin’s objection, then, and in order to show that legal authority can indeed rest on a practice of this kind, Coleman must show that the kind of

\(^{136}\) Coleman, *The Practice of Principle*, 76.
disagreement that Dworkin alludes to is indeed compatible with the existence of such a practice, and that he can indeed sustain a distinction between controversy about what the rule is, and what it requires in a given case.

The key to Coleman’s response to Dworkin’s challenge lies in his insistence that the rule of recognition does not itself consist in the relevant practices of the officials. Unlike the officials’ practices, which consist in patterns of behaviour of particular people, the rule itself is an abstract propositional entity. Taking these to be one and the same thing consists in a kind of category mistake, for Coleman. The practices of the officials are therefore not themselves the rule of recognition. This, then, is what Coleman means when he says that the practices of the officials are the existence conditions for the rule.\textsuperscript{137} The rule itself is a distinct entity, over and above the practices of the officials.

There are a number of advantages with maintaining that a practice can generate a rule, but that this rule remains distinct from it. First, it can save Coleman’s account from triviality. Second, it can perhaps allow Coleman to assert the further conclusion that the rule of recognition is also a duty-imposing rule. I say perhaps because the distinctness of the rule from the practice is necessary, but it is not itself sufficient to ground this conclusion. In addition to showing its distinctness, Coleman must also provide further argument to show that this rule is a duty-imposing one. As we shall see, he does this by arguing that the practice in question is a socially-cooperative activity in Michael Bratman’s sense, and that these can indeed generate duty-imposing rules.

\textsuperscript{137} Coleman sometimes alternates between saying that the practices constitute the rule of recognition, and that the rule of recognition supervenes on the practices. (See, e.g., \textit{The Practice of Principle}, 116, where Coleman describes the rule of recognition as “partially constituted by or supervenient on a convergence of behaviour.”) I will not go into detail about the difference between these claims, except to say that he must mean something closer to the latter if his argument is to succeed.
Finally, if Coleman is correct in his insistence that the rule and the practice are distinct, then this lends plausibility to the distinction he draws between disagreements in content and disagreements in the application of the rule of recognition. Again, this only lends plausibility to Coleman’s response to Dworkin, but is not sufficient to establish it, because it must also be shown that this distinction is a meaningful one, and that the kinds of disagreements that that Dworkin alludes to in his challenge, are disagreements in application and not in the content of the rule. Let us therefore turn to Coleman’s argument for his conclusion that even though the rule of recognition is a social rule, in the sense that it depends on the existence of a practice for its existence, it is nonetheless distinct from the practice in the relevant respects.

4.2 Coleman’s Legal Pragmatism

(a) Pragmatism

Coleman’s thought that people’s practices can give rise to principles or rules that are nonetheless independent of their practices, and that can serve to govern them arises from his more general commitment to the pragmatic method of analysis. The pragmatic method of analysis takes its focus to be neither a mere description of facts about our behaviour, nor a derivation of how we ought to behave from abstract, first principles, but rather principle that reside somewhere “in the middle,” as he describes it.138 His primary aim in adopting this method of analysis is to defend corrective justice, as opposed to an economic approach, as the best explanation of tort law. But, as we shall see, Coleman’s account of the rule of recognition, and his solution to the problem of what makes legal

authority possible more generally, also draw on this approach. In order to see this, let us consider his pragmatic method in more detail.

There are five main tenets to Coleman’s pragmatism. First, he is committed to *semantic non-atomism*, or the view that the meaning or content of a concept, word, belief, proposition, and so on, depend, at least in part, on the meaning or content of other concepts or words within its semantic system.

Second, his *inferential role semantics* holds that we can understand the content of a concept at least in part in terms of the inferential role it plays in the practices in which it figures. Concepts, and the propositions that contain them, stand in inferential relations with respect to one another. My assent or dissent from a given proposition can warrant the adoption of other attitudes towards related propositions. The inferential relationships that these propositions stand towards one another reveal holistic a (or semi-holistic) “web or relations” between them. Inferential role semantics claims that the content of a given concept contained in a proposition is, at least in part, determined by its place in this web of relations, and the relations that it bears to related concepts. So, to borrow Coleman’s example, when my friend grasps that I have promised her that I will show up at a certain time, she is also warranted in drawing a number of inferences, including that I have a duty to show up, that she has the right that I do so, that I predict that I will show up, and so on. It is facts about the nature of promising that warrants these inferences when my friend grasps that I made a promise to her; they do not follow from considerations of logic alone. In this respect, the inferences are not formally valid ones. Rather, they are grounded in our grasp of the concept itself, for Coleman. Moreover, my friend is also

---

warranted in drawing practical inferences upon grasping my promise to her, in addition to possible theoretical judgments that it warrants. It allows her to infer claims about what rights and duties we have towards one another. We can thus see that the concept of promising bears certain inferential relations with these related concepts. A pragmatist approach to semantics would thus say that these inferential relations thereby determine, at least in part, the content of this concept.

Third, Coleman also offers an *explanation by embodiment* of the principles generated by people’s legal practices. That is, for Coleman, principles can simultaneously be embodied in people’s practices and explain them, and it is principles of these kind that Coleman seeks to explicate in articulating his theory of law. In particular, for Coleman, in certain practices, the inferential relations that concepts bear towards one another can themselves reflect general principles. When they do, we can say that these principles are both embodied in the practices, and that they can explain them. Law, for Coleman, is an instance of such a practice. As a result, one aspect of his attempt to provide a pragmatic explanation of law involves an articulation of those explanatory principles that are embodied in our practices.

Taken together, the foregoing also suggests a fourth commitment, namely, that the role of a concept in one practices influences, and is influenced by, its role in other practices. In this respect, practices, like concepts, are to be viewed holistically. As Coleman explains, “we must see [practices] as acting together to articulate, realize, or make explicit the content of the concepts and principles they embody.”\(^{140}\) To return to the example of promising, in order to determine what inferences the concept of promising

warrants at law, and hence its content as it figures in our legal practices, we must look to the role it plays in the personal and political practices in which it figures as well. Its content, like the content of concepts that lend themselves to such pragmatic analysis more generally, is determined by its role in all of these practices, taken together.

Finally, Coleman’s pragmatism commits him to the fundamental revisability of all of people’s beliefs, including purportedly analytic beliefs which are sometimes thought to be immune from certain kinds of counter-examples. Although people’s beliefs are also revisable in like of the kinds of empirical considerations that Quine adduced in arguing for the fundamental vulnerability of all beliefs to the possibility of revision, Coleman puts forth further, distinctively pragmatic criteria for revision. In particular, Coleman argues that people’s beliefs are revisable in light of concerns for theoretical coherence, simplicity, and consilience, along with considerations of practical usefulness. The commitment to the revisability of people’s beliefs in light of these considerations is one of the hallmarks of pragmatism, as Coleman understands it.

This method is clearly illustrated in his defense of corrective justice as the best explanation of the basic principles of tort law, as compared to an economic analysis of torts. As Coleman explains, the basic practical inferences that people draw in tort law give determinate content to its central concepts – harm, cause, repair, fault, etc. – thereby making the requirements of these more abstract principles explicit and concrete. This allows people to draw on these principles for guidance in particular cases. At the same time, however, the principles of corrective justice govern the particular decisions they make and inferences they draw in tort law. In so doing, they organize these basic
concepts of tort law and explain its nature and structure. Moreover, the principles of corrective justice themselves mediate between the particular practices of tort law and more abstract principles of fairness in allocating the costs of accidents, for Coleman. In this respect, they are what he calls “mid-level” principles. The basic practices of tort law again simultaneously give content to these more abstract principles and are constrained by them. It is in this sense, then, that Coleman maintains that the principles explain people’s practices. It is also in this respect that, as Coleman also explains, neither the practices embodying and articulating the principles, nor the abstract principles that govern them, is analytically prior.

One might worry that by bringing the principles and the practices that they govern so close, Coleman collapses the distinction between them, and thereby robs the principles of their force. Coleman avoids this charge of triviality by insisting that people’s tort law practices only partially determine the content of the principles of corrective justice. The key concepts of tort law – wrong, duty, responsibility, repair, etc. – also figure in other areas of law, and in our broader political and moral practices and judgments more generally, and the content of these concepts is determined by the roles that they play in all of these practices, taken together. We do not use these concepts in tort law in isolation, or in a matter that is unrelated to the ways in which we use them in the other practices in which they figure. When people do apply these concepts in tort law, then, they hold their roles in the other practices in which they figure as provisionally fixed. This allows them to locate their significance in tort law with reference to their roles in other practices, thereby allowing their content in tort law to be informed by these other

roles that they play. So holding is just an instance of the general claim that the application of a concept in one domain is informed by and revisable in light of the role it plays in other domains, rather than being discerned from reason alone.

Let us consider Coleman’s example of the principle of fairness as it is applied in tort law in order better to understand his pragmatic method. The notion of fairness has a distinctive application in the context of tort law. This application is mediated by the principles of corrective justice. But, the idea of fairness in tort law is not considered in isolation from the notion of fairness in our broader legal, political, and moral practices more generally. As a result, the basic principles of corrective justice, and the manners by which they are instantiated in tort law inform our idea of fairness more generally, while, at the same time, a concern for fairness governs the judges’ applications of the principles of corrective justice and the particular decisions that they make at tort law. Consider the way that the abstract principle of fairness can be mediated by principles of corrective justice in order to govern tort law decisions.

One the one hand, it is a general requirement of fairness that people not permit one person unilaterally to impose her terms of interaction on others. Holding otherwise would be to allow people unilaterally to impose their wills on others, subjecting each person to the whims of all others. When applied to the question of allocating the costs of accidents, this general requirement in turn requires that people distribute the costs of accidents fairly. That is, this general principle of fairness requires, when people are deciding who is to bear the burden of an accident, that they do so in a way that protects individuals to the subjective whims of another. This requirement is what underlies the objective standard of care that we have in tort law, and that is expressed in cases like
This is because any subjective standard of care – i.e., any standard that subjected members of a community to the subjective mental states of actors – would violate the principle of fairness with which we began. It is therefore only if people adopt an objective standard of care in tort law that the law of torts can uphold this general requirement of fairness. The objective standard of care in tort law, and, more specifically, the decision in *Vaughan v. Menlove*, thus serve as examples of how general considerations of fairness, combined with mid-level considerations of corrective justice can structure our basic principles of tort law, and can inform particular decisions.

We can also take this argument in the other direction, and show how the manner by which principles of fairness are expressed in people’s particular tort law practices can give content to our more abstract notion of fairness. As we have seen, it is a general requirement of fairness that people not make members of a community subject to one another’s whims. This principle requires that they sometimes redistribute the costs of accidents, so that the costs do not always lie where they fall. (Nor, under this principle, ought they to be held in common.) But, consideration of this general principle alone does not tell us how people ought to redistribute these costs, and it is consistent with a number of ways of doing so. The particular mechanism we adopt for redistributing the costs of accidents, and the particular set of norms that they take to govern this redistribution, can, in turn, serve to fill out the content of this general principle and render it more concrete. So, as we know, in North America, we return the costs of those accidents caused by wrongful human activity to the wrongdoer through our tort system. But this is not the only way to uphold the requirements of fairness outlined above. As Coleman notes, in

---

*Vaughan v. Menlove*. The decision in *Vaughan v. Menlove*, holding that a defendant of below-average intelligence is subject to an objective standard of care. (1837).
New Zealand, victims of accidents, whether negligently or innocently caused, can recover the costs of their misfortunes from a general state fund that is supported through the tax system. This also vindicates the general fairness requirement that people not be made subject to the whims of another, though it does so through a different institutional mechanism than in North America, and it results in different substantive rights and duties towards one another. Although they differ in the precise ways in which they express and implement this requirement of fairness, both systems can plausibly claim to uphold the same principle, articulated above, Coleman argues. We might therefore say, as Coleman does, that, in so doing, these institutions further specify the content of this general principle, but each in its own distinctive way.

The example of the role of the general principle of fairness in people’s institutions for upholding the principles of corrective justice is meant to illustrate the manner by which general normative principles can simultaneously guide and organize, and be informed and rendered more concrete by, our practices. As we have seen, people’s practices making particular decisions in tort law are both structured by general considerations of fairness and the prohibition against subjecting members of their community to one another’s whims, and, people’s engagement in these practices in turn fills out this abstract principle, and renders it more concrete and specific. This discussion is meant to illustrate Coleman’s pragmatic method more generally. It is this method that he has in mind in articulating his conception of the rule of recognition as both a rule that emerges from, or is generated by, the particular practices of officials of taking a given set of criteria to be the criteria for validity for a given system, and, at the same time, as governing their activities, and imposing a duty on them to apply all and only those rules
that satisfy the criteria listed in the rule of recognition. Let us now turn to his discussion of this rule and the manner by which it can serve both functions at once.

(b) The Rule of Recognition

The rule of recognition must have two key features in order for it to be a duty-imposing rule that is capable of authorizing all further rules of the system. First, it must be a conventional rule, and, secondly, it must consist in a socially cooperative activity. Consider each feature in turn.

The feature of the social practice of the officials that makes it possible for it to give rise to a rule that is capable of authorizing all further rules of the system is its conventional nature. Not all social practices are conventions. For example, mere social habits or regularities – i.e., practices that people happen to engage in on a regular basis without turning their minds towards the fact that others do so as well – are not conventions. A practice is a convention when the fact that some people engage in it itself gives others a reason to do so as well. Consider, for example, the practice of driving on the right hand side of the road. This is a widespread fact about the behaviour of drivers across North America. Hence, it is a social practice. But, the fact that most other drivers drive on the right gives me a reason to do so as well. Otherwise, I might be hit by oncoming traffic. Hence, it is also a conventional practice.

The rule of recognition arises from a conventional practice in this sense. The fact that other officials adhere to the criteria for validity contained in the rule of recognition gives each one a reason to continue to do so. In particular, it is not enough that the

---

144 Imagine that we did not also have a legal duty to do so.
behaviour of the officials of the system, when acting in their official capacities, happens to converge on the application of a given set of criteria for validity. That is, it is not enough, say, when judges issue decisions, lawyers give advice, police make arrests, and so on, that their behaviour happens to suppose the same criteria for membership for rules of the system. Such behaviour would amount to no more than a mere social habit or regularity. In addition to the existence of such a convergent pattern of behaviour, it is also necessary that the officials adopt a critical reflective attitude towards this convergent pattern of behaviour when they engage in it. That is, it is also necessary that they, say, take the fact that others are so engaged to be their reason for acting, that they criticize deviations from this pattern, and so on, and that when they do, they cite or appeal to the rule as their grounds for their justifications or their condemnations. Adopting this critical reflective attitude towards their behaviour constitutes taking the internal point of view towards it. When people take the internal point of view towards a pattern of behaviour, they take their behaviour and that of others to be guided by the rule. The inclusion of the internal point of view towards a given pattern of behaviour is what marks the difference between merely convergent behaviour, or a mere social habit, and behaviour that is governed by a rule.\textsuperscript{145} When people have this shared attitude towards a convergent pattern of behaviour, then, we can say that a social rule exists, and it is only when both conditions hold that there is a social rule.

In particular, the combination of convergent behaviour on the part of the officials, and their adoption of the internal point of view towards it gives rise to a rule that is independent of their practices and attitudes towards them, and whose content is not

\textsuperscript{145} Coleman, \textit{The Practice of Principle}, 82.
exhausted by a description of our practices and attitudes. That is to say, when we have the combination of these two features, our behaviour fixes the rule of recognition, for Coleman. Holding otherwise would trivialize the rule.

There are a number of difficulties with taking the rule of recognition and the behaviour of the officials to be the same thing. First, so holding seems, on its face, to be a category mistake. Unlike social practices and attitudes, the rule of recognition is an abstract propositional entity. As such, it has conditions of satisfaction that can be met or violated. On the other hand, it makes no sense to speak in these terms about a social practice.

More significantly, however, collapsing the two would rob the rule of all its force. One might think that to say that the existence of the rule of recognition depends on its being practiced is to say that its content is exhausted by a description of people’s practices, and that, as a result, the scope of their resulting obligations are themselves coextensive with our actual behaviour. The difficulty with so holding, however, is that, on this view, only those who engage in the relevant behaviour would fall under the rule; all those whose behaviour diverges from the practice would fall outside the scope of the rule, rendering violation impossible. As Coleman remarks, this would be tantamount to holding that ““whatever it is that officials do, they are following a rule whose content tells them to do that;””¹⁴⁶ those who are subject to the rule could not but comply, and there could be no such thing as violation. This, in effect, is no rule at all.

Instead, in order to meaningfully claim that the officials are following a rule when they engage in their practices of converging on a set of criteria for validity and adopting

¹⁴⁶ Coleman, The Practice of Principle, 79.
the relevant critical attitude towards their behaviour, there must be a gap between the description of their behaviour and the content of the rule that governs it. In order to generate this gap, the behaviour of officials must not only converge on a set of criteria for determining membership to the system, but they must also have a shared grasp of how to go on, or how to apply these criteria to future cases. That is, in order properly to say that the officials are following a rule when they engage in the shared practice of taking a given set of criteria to be the criteria for validity for membership to the system, it is not only necessary that their behaviour converges on a shared set of criteria for validity, and that they adopt a critical reflective attitude towards this shared behaviour, as we saw above. It is also necessary that the officials share a conception of which future behaviour is in accordance with these criteria and which is in violation. In short, part of the shared practice that gives rise to the rule of recognition must include a shared conception of how to “go on.” Only so can we say that the practices of the officials give rise to a distinct rule of recognition, over and above a mere description of their convergent behaviour, and whose content is not exhausted by this description. Once this rule is in place, we can properly speak of the behaviour of the officials as following a rule.

Note that it is not necessary that the officials of the system be capable of articulating this rule in propositional form, nor need they all articulate the same proposition when they do try to provide expression to the rule. People may well agree on the requirements of a rule over a broad class of cases while disagreeing over the precise formulation of the rule. One of the lessons that we learn from Wittgenstein, for Coleman, (or, from Kripke’s interpretation of Wittgenstein) is that our grasp of a rule and our
ability to provide a canonical expression of it can come apart. So long as their expressions of the rule that they take themselves to be following are broadly speaking convergent, we can say that they are following the same rule.

The inclusion of the requirement that the participants of the practice share an understanding of what it is to go on in the same way allows Coleman to avoid Wittgenstein’s problem of following a rule. Wittgenstein (or, again, as interpreted by Kripke) suggested that mere facts about our past behaviour, no matter how broadly construed, can never make it true that people are following a given rule, since any such set of facts alone is consistent with following an indefinite number of rules, all of which can capture our past behaviour, but which diverge down the line. The problem with this is that where people’s behaviour is consistent with following an indefinite number of divergent rules, it may turn out that they were following different rules all along, thereby vitiating the thought that we can look to the practices of the officials to fix a unique rule of recognition. It is for this reason, then, that Coleman insists that the officials of the system must also share a conception of how to go on in future cases in order for their practices to give rise to a rule of recognition that can serve as the fundamental rule for the system. It is only if we include this further requirement, on his view, that we can guarantee that the practices of the officials fix a unique rule, capable of generating a unified system of law.

It is important to be clear about the precise role that the internal point of view plays for Coleman, and his exposition of Hart. Recall that the problem with which

---

Coleman begins is to explain the force of the rule of recognition such that it can, in turn, authorize all subordinate rules of the system. In particular, Coleman must explain how the rule of recognition can impose a *duty* on officials to apply all and only those rules that satisfy the criteria for validity that it contains. This is because Coleman takes the rule of recognition to be a duty-imposing rule. This problem arises for him because, unlike the other duty-imposing rules of the system, the rule of recognition is a conventional rule; its force depends on its being practiced. But, as we know, and as Hart’s criticisms of Austin make clear, the mere fact that people engage in a social habit, or that they converge on a pattern of behaviour, is not enough to generate a rule imposing on us a duty to do so. Coleman has argued that, in addition to exhibiting convergent behaviour, they must also adopt an internal point of view towards this behaviour, including a view of how to go on in paradigm cases. The internal point of view is thus the missing ingredient that transforms merely convergent behaviour into behaviour that can properly be said to be subject to a rule.

It might seem that Coleman is suggesting that our adoption of the internal point of view is what explains its duty-imposing force. That is, it might seem, from Coleman’s line of reasoning, that it is the fact that officials adopt a critical reflective attitude towards their convergent behaviour that gives their behaviour its imperative force. The problem with this view is that so holding makes it seem like the fact that they think that they have duty to conform to a given pattern of behaviour *gives* them the duty to do so, and duties typically do not work this way. That is, we typically do not think that the mere fact that people think that they are subject to a duty is sufficient to make it so; people can be, and often are, mistaken about the duties they are subject to. On this understanding of the
structure of Coleman’s argument then, he has failed to explain the imperative force of the rule of recognition altogether.

There are a number of difficulties with this understanding of Coleman’s argument. First, the internal point of view is not a belief about what reasons people have. Rather, it consists in the adoption of a psychological capacity to adopt a given practice or pattern of behaviour as a norm. This capacity involves the disposition to conform to the rule, to evaluate one’s own behaviour and the behaviour of others in light of this rule, and to form beliefs and develop other attitudes that are associated with the adoption of such a commitment to the rule. To say that the rule of recognition requires that the officials adopt an internal point of view towards their convergent practice, then, is not to say that it requires that they operate under the belief that they are subject to a rule. Rather, it is to say that they exercise this psychological capacity to engage in the critical attitudes.

More importantly, however, so holding misconstrues Coleman’s argument. His claim is not that the adoption of the internal point of view is what transforms merely convergent behaviour into a duty-imposing rule. Rather, he is claiming that officials’ adoption of an internal point of view towards a pattern of behaviour can give this behaviour normative force. That is, officials’ adoption of the relevant critical attitudes towards a pattern of behaviour can imbue it with normative force; it can make the fact that they do engage in this behaviour, as a matter of habit, a reason to continue doing so. But, this is not enough to say that this reason is a duty-imposing one. That is, although their adoption of an internal point of view towards a pattern of behaviour may well

---

148 Coleman, The Practice of Principle, 88f.
transform that behaviour into a rule for them, giving them a reason to continue to engage in it, it is not sufficient to make this rule a duty-imposing one, and to thereby subject them to an obligation to continue to comply with it. So holding would indeed run afoul of the objection raised above, on which Coleman would be claiming that merely taking to be subject to a duty would be sufficient to make it so, in contravention of the fact that we can be mistaken about the duties we have. But, Coleman argues, once we distinguish between the question of what can give a practice its normative force in the first instance, and the question of the nature of this force, we can see that he need not be committed to this line of reasoning. He therefore needs to put forth a further argument explaining how the reason that officials get when they engage in the practices described above is a duty-imposing one.

Consider Coleman’s example of how the adoption of the rule that one do 100 sit-ups every day by someone who is already in the habit of doing 100 sit-ups a day changes her reasons for acting. Although she might have many other reasons for doing 100 sit-ups a day – it increases her fitness, improves her self-discipline, etc. – the fact that she is in the habit of doing so does not, on its own, give her an additional reason to do the sit-ups. But, where she also adopts the critical reflective attitudes that characterize taking something as a rule towards her habit – where, say, she takes the fact that she does so to be a reason to continue the practice, where she admonishes herself for failing to comply, and so on – she thereby makes the practice a rule for herself, and thus has reason to continue to conform to it. This reason is a new one, over and above the concerns for fitness and self-discipline that she had before. In this respect, then, her adoption of the internal point of view towards her practice transformed it into a rule for her, and gave her
a reason to comply. It thereby imbued the practice with normative force, in the relevant respects.

But, we would not say that she is now under a *duty* to continue with the practice. For one thing, our exerciser can extinguish the rule at whim. Since she is the one who created it, and she is imposing it on herself, she can also cease to adopt it, thereby extinguishing her duty to comply. But we do not typically think that duties can be extinguished at will in this way. It would thus be very odd to say that this personal rule can impose a duty.

The inclusion of the internal point of view in Coleman’s analysis of the rule of recognition for this reason does not explain its duty-imposing force for him. It only explains the possibility that it can serve as a reason in the first instance, thereby transforming it from a mere social habit to a practice that exerts normative force on its participants. Coleman needs a further explanation, however, for how this set of practices can impose a duty on the officials of the system. In order to do so, we must examine the actual structure of the practices that the officials engage in, rather than the psychological attitudes that they adopt towards them, and show how by engaging in these practices can generate a duty to conform to then. Coleman does so by arguing that by engaging in the practices described above, including the adoption of the internal point of view towards their behaviour and that of the other participants, the officials of the system are thereby engaged in a *shared cooperative activity* (SCA) in Michael Bratman’s sense, and that SCA’s may well be duty-imposing practices. In order to see this, we must say more about, first, what constitutes an SCA, and, secondly, why the practices described above constitute an SCA for the purposes of explaining their imperative force.
(c) Shared Cooperative Activities

In addition to each taking the same set of criteria to be the test for legal validity and respectively adopting the relevant critical attitude towards their behaviour, in order to generate a duty-imposing rule of recognition, the officials of the system must also take the fact that the other officials do so to be a reason for them to continue so acting. This is so whether or not they actually do have such a reason to act. Taking the actions and intentions of the other officials as reasons for each is the mark of a shared cooperative activity, and it is this feature, rather than the mere fact that they adopt an internal point of view towards their own behaviour, that can transform a merely convergent practice into one that can generate a rule and impose a duty on its participants to comply. This further feature of the shared practice cannot be captured by the thought that the officials of the system adopt an internal point of view towards the practice, since the mere adoption of the internal point of view is directed towards one’s own behaviour, and is something that each participant can do on her own, in isolation of the behaviour of all other participants in the practice.

In addition to being independent of a mere description of the behaviour of the participants to the practice, and to providing each participant of the practice a reason of her own to continue with it of the kind explained by the adoption of the internal point of view, we also know that, for Coleman, the rule of recognition also provides legal officials with a duty to comply. In particular, it imposes a duty on officials to coordinate their actions with the actions of the other officials, in an attempt to achieve certain shared ends, and to adopt a shared plan or project that can serve these valuable ends, and, in so
doing, to be responsive to the interests, intentions, preferences, and actions of others. But, Coleman notes, there are many features of social life that impose upon people a duty of this kind. The question of how a social practice can impose upon us such a duty is thus a general question for social philosophy. The duty that officials have under the rule of recognition is just an instance of this more general social phenomenon.

In particular, Coleman argues, it is an instance of a shared cooperative activity in the sense described by Michael Bratman. A shared cooperative activity in Bratman’s sense is a kind of shared activity of the type articulated by Margaret Gilbert. Gilbert distinguishes between engaging in an activity in tandem with each other, but each of us acting on our own, like, say, walking alongside one another, and engaging in a joint activity together, as we do when we go for a walk together. Shared activities of the latter kind have a distinctive normative structure, she argues. When we do something together, the actions and intentions of each participant create reasons for the others; the fact that, say, you want to go left when we are walking together is a reason for me to do so as well, whereas this need not be the case when we are merely walking alongside one another. SCA’s are shared activities in this sense: the actions and intentions of each of the participants create reasons for the others to go along with them.

There are three central characteristics to a shared cooperative activity:

(i) *Mutual responsiveness*: In SCA each participating agent attempts to be responsive to the intentions and actions of the other…Each seeks to guide his behaviour with an eye to the behaviour of the other, knowing that the other seeks to do likewise.

(ii) *Commitment to the joint activity*: In SCA the participants each have an appropriate commitment (though perhaps for different reasons) to the joint activity, and their mutual responsiveness is in pursuit of this commitment.

---

149 cf. Coleman, *The Practice of Principle*, p.95 and 96 for this description of the duty imposed by the rule of recognition.
(iii) Commitment to mutual support: In SCA each agent is committed to supporting the efforts of the other to play her role in the joint activity… These commitments to support each other put us in a position to perform the joint activity successfully even if we each need help in certain ways.150

When people engage in a shared practice with one another in conformity with these features, they are engaged in a shared cooperative activity, as opposed to merely each acting alongside one another, such that they thereby subject one another to a duty to continue acting in accordance with our shared project or plan, pursuant to their shared end. It is a necessary condition for the existence of an SCA that, in acting together, people form a shared intention.151 A shared intention is not an intention that each person holds individually, nor is it an intention in any “shared” mind. Rather, it consists in the adoption of attitudes by the participants to the practice that help them to coordinate and plan their intentional actions and to structure the relevant bargaining that goes on within their shared practice. It does so by providing what Bratman calls a background framework within which people can negotiate and coordinate their plans, and decide how their joint activity is to proceed. Participants in a practice can have a shared intention and a joint background framework even when their reasons or motives for engaging in the practice diverge; they can nonetheless engage in a shared activity even when each person has different reasons for doing so.

Because people have this shared background framework, they need not fully specify the content of their shared intention in order to engage in their joint activity. Acting together requires only that they agree on the general shape of the actions that they adopt – say, that they will go for a walk together or uphold a given legal system together.

---

Once they do, they can engage in a continuous process of negotiation or “give and take” as the action proceeds. They can continue to act together even though they might dispute the precise path that their actions will take because this process of negotiation or “give and take” takes place within this shared background framework. It is because this shared framework is place that their joint action can have the flexibility that it does. As Coleman explains, the framework creates the parameters of the reasons that people take to be good ones, or those that are appropriate to our practice. The precise nature of their shared activity, and the content of its accompanying shared intention is thus filled out as their action proceeds and becomes more specific.

Most importantly, for Coleman, the reasons that people create for one another when they engage in SCA’s of the kind described above are duty-imposing ones. This is because engagement in an SCA involves a joint commitment to a shared set of projects or plans such that this commitment induce reliance and give rise to justified expectations that they will remain committed on the part of the other participants. But, as we know, when people act so as to induce others to rely on them and to generate justified expectations on the part of others that they will perform a given act, they may well undertake an obligation to do so. As Coleman argues, it is not the special task of a legal theorist to explain this general feature of social life.

Coleman argues, then, that when we examine the precise nature of the practices of the officials, we can see not only that they can generate a rule giving them some reason to apply a given set of criteria as the criteria for validity for the system, but that this rule can be a duty-imposing one. This is because we can see that, upon inspection, the practices of

---

the officials do indeed satisfy the requirements for an SCA. Consider, for example, the
behaviour of judges when following the doctrine of precedent. First, judges are mutually
responsive to one another’s actions and intentions when they, say, follow the doctrine of
precedent. Judges in appellant-courts often render their decisions with the doctrine of
precedent in mind, and craft their judgments with a view to how they will be applied by
judges in lower-level courts. Lower-court judges, in turn, take the decisions of higher
courts to be constraints on their own decisions. Secondly, judges are mutually responsive
in this way, Coleman argues, because of their commitment to the joint goal of upholding
the rules of the system. This is so even if they have divergent reasons for taking this goal
to be valuable, and for pursuing it. Finally, their common engagement in upholding the
doctrine of precedent is one way that judges support one another in fulfilling their aims of
upholding the rule of law. In this respect, then, they are also mutually supportive. We can
thus see that the practices of judges do indeed satisfy the requirements for an SCA. As a
result, their behaviour not only gives rise to a rule of recognition that can give them some
reason to continue with the practice, but it gives rise to one that imposes a duty on them
to do so. This duty-imposing rule of recognition can then serve to explain the authority of
all other rules of the system. If Coleman is correct in his analysis then, he has discharged
his duty to explain the possibility of legal authority with reference to social practices alone.

Coleman is now also in a position to explain the possibility of disagreement, even
disagreement with respect to the rule of recognition, in a conventional account of law. He
grants Dworkin’s suggestion that considerations can be legally binding on us in virtue of
their merits, not their sources. Coleman also grants that this may well make law
vulnerable to the possibility of disagreement about what the law on a matter is. However, he argues, this possibility can be made consistent with the thought that law ultimately rests on a convention. Coleman thus charges that Dworkin’s challenge misconstrues the role of the convention in his account of the rule of recognition.

As we have seen, once the convention is in place, for Coleman – that is, once people have the convergent practices and the relevant set of attitudes – they can generate an independent rule that is distinct from those practices and attitudes that give rise to it, and whose content is not exhausted by a description of the underlying practices and attitudes that we adopt towards it. As Coleman explains, although the underlying practices and attitudes fix the rule, they do not exhaust it. But, Coleman argues, once we can explain how the rule is a distinct entity, over and above its underlying convergent practices, we can distinguish between questions of what the rule is and what it requires. It is true, Coleman concedes, that if judges disagreed about what the rule of recognition was – if the disagreements that Dworkin alludes were disagreements in the content of the rule, that is – then this would threaten the idea that law could be based in a convention. This is because the existence of such disagreements would indeed tell against the existence of a convention or shared practices for fixing the rule. However, when judges enter into the kinds of disputes that Dworkin draws on in mounting his challenge, they are disagreeing about what it requires, or in its application, not what the rule is. They can do so precisely because the rule is a distinct entity, over and above a mere description of their practices, and whose content is not exhausted by their convergent practices. To be sure, as we saw above, judges must broadly speaking agree about the nature of the

---

activity they are engaged in and what the resulting rule requires in most, or in canonical cases. If we could not say that, in general, judges agree in their judgments of what the rule requires, then we could not say that they are applying the same rule. Here the fact of disagreement really would undermine the existence of a convention. But, so long as, for the most part, judges agree in the nature of the activity and their behaviour converges in the manner described above, then, Coleman argues, there is no reason to worry about the possibility of disagreement, as does Dworkin. The question of what the law is in such circumstances can therefore remain untouched when judges engage in such disputes, and, as a result, Coleman argues, so too do the underlying conventions that give rise to its existence.

To put this response in the language of SCA’s, when judges enter into disputes of the kind that Dworkin adduces in his challenge to legal positivism, their disagreements take place within the background framework for interaction that structures their shared activity. As we have seen, this framework can accommodate disagreement, even deep disagreement, as to the precise nature and content of the shared activity that its participants are engaged in, so long as they agree on the framework for negotiation. And, Coleman concludes, Dworkin has given us no reason to doubt that the participants in the practice are in agreement as to the framework for interaction, even when they engage in the kinds of disputes that he alludes to.

We thus have Coleman’s inclusivist response to Dworkin’s challenge. Coleman can respond to Dworkin’s objection from hard cases by denying any inconsistency with legal positivism. It is true, Coleman agrees, that there can be hard cases in which the posited
law does not settle the issue. And, he concedes, judges may well be legally bound to apply considerations that are binding in virtue of their merits, not their sources. This occurs when the source-based rules themselves direct judges to moral considerations. But, he argues, this is wholly consistent with positivism’s insistence on the social nature of law because where judges are bound by merits-based considerations, this is itself a matter of social sources. It therefore remains true that social sources are necessary and sufficient for legal validity, and the basic positivist commitments thereby remain intact. Nor, further, on Coleman’s account, does the resulting controversy that arises from these moral challenges to law undermine law’s conventional nature, since even social rules can generate a distinction between their grounds and their content, and the disagreements that we see at law are merely disagreements in the content or application of legal rules, and not in their grounds, on his view. Coleman therefore concludes that law may well include moral considerations and as a result, it may well be vulnerable to the controversy that can accompany arriving at morally significant conclusions from a fixed set of rules. But, he contends, we need appeal to nothing more than facts about our social practices in order to provide a complete explanation for this feature of legal reasoning.

There are a number of difficulties with this line of response to Dworkin’s challenge, however. First, one might doubt the initial plausibility of Coleman’s crucial supposition that the practices of legal officials can generate a distinct rule governing their activities that can, in turn, support disagreement amongst them with respect to this rule. Secondly, however, inclusive positivists’ overall strategy of explaining judges’ reasoning in hard cases by reference to further posited rules is not sufficient to guard positivism against Dworkin’s challenge, since, as we saw above, Dworkin’s point in raising his
problem of hard cases is that any combination of source-based rules is vulnerable to the possibility that a new hard case will arise. This is why the problem of hard cases raises an in-principle challenge to legal positivism, rather than a problem about the particular cases that Dworkin cites. Consider each objection in turn.

4.3 Difficulties for Coleman’s Inclusive Positivism

Consider, then, Dworkin’s charge that Coleman fails adequately to ground the distinction between what the rule is and what it requires in with regards to the rule of recognition. As we have seen, it is central to Coleman’s defense that the disputes between judges that Dworkin adduces as evidence against legal positivism can be characterized as disagreements in the application, rather than the content of a rule. Coleman concedes that disagreements about the content of a rule – that is, disagreements about what the rule is – do indeed challenge the positivist view that law rests on a convention among officials for how to identify the rules of the system. But, he argues, Dworkin is mistaken to say that judges do engage in such disagreements, or that they engage in such disagreements in a way that threatens legal positivism. Rather, he argues, the kinds of disagreements that Dworkin has in mind are disagreements in the application, rather than the content of the rule. As a result, he concludes, they pose no threat to legal positivism. But, one might argue, it is not hard to imagine disputes about the content of the rule of recognition. So, to borrow Dworkin’s example, judges might disagree about whether the doctrine of precedent requires that judges be bound by their own previous decisions, when there is no
convention on the matter. Here it seems that they are disagreeing about what the rule is, and not what it requires. Coleman, however, must rule such disagreements with regards to the rule of recognition out as impossible, or non-existent.

In defence of his position, Coleman might adopt what Dworkin calls an “abstraction strategy.” That is, he might attempt to redescribe disagreements that appear to be about what the rule is in terms of more abstract disagreements about what it requires. So, in this case, Coleman might take this disagreement to be a dispute about the requirements of a rule stating that that judges ought to follow precedent when so doing is reasonable or correct in the circumstances, rather than as a dispute about what the rule pertaining to precedent is. On this understanding of the dispute, we can indeed say that there is a convention amongst the judges, namely to follow precedent when it is reasonable or correct in the circumstances; it is just that they disagree about whether so doing is called for in the circumstances at hand. This is indeed a disagreement about what the rule requires, rather than what it is, then, as required by Coleman’s defence of legal positivism.

There are three problems with adopting this strategy, however. First, it is ad hoc. Although there might be some cases that are better described as instances of one kind of disagreement rather than another, in general this strategy always seems open since it is plausible to say that, whatever people’s substantive disagreements are, they agree that always ought to be doing what is best, or acting reasonably, and so on, and so they can always find some conventional rule described at this level of abstraction they can be said

---

to be following. It thus seems that people can redescribe any purported disagreement about what a rule is into a disagreement about how to apply a more abstract shared moral convention, and Coleman gives us no reason to prefer his explanation of such disagreements over Dworkin’s. Coleman’s crucial distinction between disagreements in what the rule is, and disagreements in its application thus seems, at best, arbitrary.

Secondly, positivists can adopt this strategy only at the cost of losing the distinctive conventional nature of law and legal reasoning, as opposed to a community’s moral practices. The intuition behind legal positivism is that one of the distinctive features of law, and one of the ways in which it differs from morality lies in its conventional nature. But, if we take legal conventions to be as broad as those suggested by the abstraction strategy, then we can also say that a community’s moral practices are conventional, and that when people engage in moral disagreements, they are also really in agreement that they ought to do what is right or proper, but they merely disagree about what this shared rule requires. Now it seems that there is nothing special about the claim that law rests on a convention and there is no longer any interesting distinction between law and morality for positivists.

Finally, Dworkin argues, the abstraction strategy trivializes the notion of a convention in general. Conventions are social practices that give us a reason to conform to them because others converge on the behaviour as well. As we saw in the case of driving on the right side of the road, it is the fact that this is widely done that gives us a reason to do so as well. But, where we take the conventions in question to be the morally loaded ones that result from the abstraction strategy recommended above, then it seems implausible to suggest that the reason judges have for applying the resulting rule is the
mere fact of the convention. The reason judges have for, say, judging based on what is reasonable or correct in the circumstances is not that other judges do so as well; it is because it is reasonable or correct. The role of the convention thus falls away in our explanation of judges’ reasoning.

One might deny that Coleman engages, or must engage in this abstraction strategy that results in these problems for legal positivism. Coleman himself considers this objection, and denies that he is vulnerable to it.156 It may be true, he concedes, that we can redescribe any, or most arguments about what the rule, narrowly-conceived is as arguments about what a more abstract rule containing a moral term requires. But, he argues, so holding makes use of, rather than denies, the very distinction he is advancing. Moreover, he argues, if Dworkin thinks that the choice between the characterizations of these disputes is arbitrary, then by his own lights there is no reason to prefer his (Dworkin’s) interpretation of these disagreements as disputes about what the rule is over Coleman’s interpretation of them as questions of what a more abstract rule requires.

It is true that the question of whether to describe disputes between officials as disputes about the existence of one rule, narrowly-construed, or the grounds for another, more abstract one, is arbitrary. This dispute between Coleman and Dworkin thus ends in a draw. However, the absence of a positive reason to think that these disputes are disagreements about how to apply some more abstract rule, rather than about the existence of a narrower rule weakens Coleman’s more general claim that by engaging in a set of practices, judges activities give rise to a distinct rule that then in turn governs these activities. Coleman advances this claim in order to explain how law can rest on a

156 Coleman, The Practice of Principle, 116f.
convention, and yet be controversial. These two features of law are consistent because, Coleman explains, the controversies are not about the conventions in particular, but about the content of the rules that they generate. The conventions themselves thus remain intact, on his explanation. Absent some positive reason to think that the controversies are about the application rather than the existence of the rule, however, we have less reason to prefer Coleman’s metaphysically complex claim over Dworkin’s more basic one.

It is also unclear whether Coleman has succeeded in explaining the possibility of disagreement in a conventional rule. Once again, Dworkin raises a number of difficulties for his position. The conventions giving rise to the rule of recognition can support disagreement, on Coleman’s view, because they constitute SCA’s. That is, it is because judges are engaged in an SCA when acting in their official capacities that their practices can give rise to a rule that is not fully determined by their activities, and that can therefore support some divergence or disagreement between them. But, Dworkin argues, it is not clear, first, that judges’ activities do indeed satisfy the requirements of an SCA in the manner required by Coleman, and, secondly, that the manner by which their engagement in an SCA can give rise to an independent duty-imposing rule can support the kind of disagreement that Coleman aims to explain.157

---

157 Dworkin also raises a third problem for Coleman’s argument from SCA’s. He questions the extent to which SCA’s, even if they do give rise to obligations, involve conventions. It is true that when engaging in a shared activity, we might find it useful to rely on conventions for negotiating the details of our practice. But, we need not, nor are there always conventions in existence for determining what to do in a given situation. Nor need our shared activity establish a convention. We may well decide to leave the particulars of our joint practice open and negotiate them between ourselves, on a case by case basis. It thus seems that the connection between conventions and SCA’s is much more tenuous than Coleman’s analysis suggests.
On the one hand, Coleman risks either defining SCA’s so broadly that all areas of social life constitute an SCA, or, if he narrows his understanding, of rendering his claim that judges always engage in SCA’s false. Coleman sometimes suggests that people must only coordinate their behaviour with one another “in various ways” in order for it to constitute an SCA. But, people must coordinate their behaviour with each other in various ways just to live together in a shared community, and not every attempt to coordinate with other people constitutes an SCA. But, if he narrows his understanding of SCA’s to something closer to Bratman’s original requirements for them, then it seems that judges do not, and need not as a matter of conceptual necessity, engage in such a practice. It is not clear the judges share any more concrete goals than their commitment to doing their jobs. To be sure, this depends on other officials’ commitment to doing their jobs as well, but this is not sufficiently concrete to rule out substantial disagreement. Indeed, judges often adopt competing aims, in say, their interpretation of constitutional requirements, their understanding of the role of the judiciary or law more generally, their approach to statutory interpretation, and so on, and their efforts are sometimes best described as attempts to undermine one another in their aims, rather than support each other. In such cases, it is hard to see how they can be engaged in an SCA in all but the most trivial sense.

On the other hand, Dworkin argues, Coleman’s explanation of how judges’ engagement in an SCA and his solution to Wittgenstein’s problem seems at odds with his attempt to explain the possibility of disagreement amongst judges. As we have seen, Coleman argues that facts about people’s practices can give rise to an independent rule

whose content is not wholly determined by a mere description of their activities insofar as they share a conception of how to go on in at least paradigm or canonical cases. Only so can we solve the problem of under-determination raised by Wittgenstein and his followers, and ground the distinction between questions of what the rule is, and what it requires in a given instance. But, this shared conception of how to go on is precisely what Coleman denies in conceding Dworkin’s point about the existence of disagreement even in easy cases at law. The point of Dworkin’s objection is to suggest that any case, even paradigm or canonical ones, can raise fundamental questions of law. Even if Coleman thinks that judges can agree to, say, go on “in the same way,” or “as before,” etc., then, this is not sufficient to generate agreement on canonical or paradigm cases. Dworkin’s problem of disagreement calls into question the thought that judges were ever going on in the same way in the first instance. This difficulty further weakens Coleman’s key supposition that officials’ practices can give rise to a separate rule of recognition that in turn governs their activities, and can support disagreement amongst them.

Although the concerns raised so far for Coleman’s defense of inclusive positivism are serious, they largely target his particular account of the relationship between social practices and rules and his explanation of the ways in which a conventional account of rules can accommodate disagreement. Even if Coleman were to improve his account and resolve the difficulties raised above, however, there is a further problem that arises for the overall inclusivist approach of attempting to resolve the hard cases with reference to posited rules.
Recall the inclusivist’s response to Dworkin’s challenge. Inclusive positivists concede that officials can sometimes be legally required to appeal to considerations that are binding in virtue of their merits, not their sources, when deciding what the law requires in a given instance. So, for example, considerations like the principle that, say, no man may profit from his own wrong in *Riggs* is legally binding on judges in such cases in virtue of their merits: judges are bound to apply them because they are appropriate in the circumstances. But, they insist, whether or not officials are so required is itself a matter of social fact; it is nothing more than a contingent fact about the system that can require judges to so reason when reaching a legal decision. It is for this reason, then, that legally binding merits-based considerations are consistent with legal positivism.

Inclusive positivists thus explain the law’s resolution of hard cases on the model of posited rules that explicitly direct judges to moral considerations in their application, like rules, say, that require employers to pay a fair wage, rules that, say, require people only to take reasonable risks, rules that require state action to conform to the principles of fundamental justice, and so on. These rules are different from posited rules that happen to overlap with morality, but that remain distinct rules. As we have seen, rules like, say, those prohibiting murder or theft, etc. pose no problem for positivists, even though morality also prohibits such acts. This is because these rules do not establish a necessary connection between law and morality, or direct judges to appeal to morality in their application. Instead, these rules are posited rules that happen to have the same content as moral rules, and when judges apply them to particular cases, they are reasoning from source-based, rather than moral considerations. Rules that make explicit appeal to moral considerations, however, or those that explicitly direct judges to morality in their
application, are not like this. Instead, these rules invoke morality directly, and direct judges to appeal to moral considerations in their application to specific cases. When judges reason from these rules, then, they are indeed applying merits-based, and not merely source-based considerations to the cases before them. But, inclusive positivists insist, this is no threat to legal positivists because judges are so directed to morality by virtue of the posited rules, and so the basic tenets of legal positivism remain intact.

Inclusive positivists understand the law’s resolution of hard cases on the model of rules that make explicit appeal to morality, rather than those that merely happen to overlap with moral rules. Principles like the principle that no man should profit from his own wrong are law because there is some posited rule that recognizes them as such. But they are binding in virtue of their merits not their sources because there is some posited rule that directs judges to consider them where appropriate, without positively enacting them directly.

The appeal to morality in the manner described above certainly helps law to address the moral variability in the circumstances that people can face, and in the cases that come before it. The existence of such rules makes law more flexible and sensitive to the changing circumstances that people encounter. But, it cannot solve the problem of hard cases that Dworkin raises for legal positivism. Inclusive positivists face a dilemma in advancing this line of reasoning. Either they think that the law can include posited rules that incorporate all of morality, or they think that the law includes posited rules that incorporate some moral considerations, but exclude others. If they think that the law can include posited rules that direct judges to consider all of morality, then they may well solve the problem of hard cases. Where all of morality is included in law, the law will be
perfectly adept at handling any case that comes before it, and there will be no hard cases that are governed by a merits-based rule that cannot itself be traced back to the posited law. This line of response is not available to positivists, however, since where the posited law incorporates all of morality, the test for what the law is is no longer a social one, and the positivist distinction between what the law is and what it ought to be collapses.

On the other hand, inclusive positivists might think that the posited law directs judges to consider some moral principles, but not others. So, for example, the law might require judges to enforce all reasonable contracts, but not necessarily all fair or generous ones. This alternative avoids the difficulty of collapsing law into morality that positivists faced above; but, it fails to resolve the problem of hard cases. As we saw above, the problem of hard cases is not the problem of how the law can provide a determinate answer to Riggs in particular, or how to explain the legal validity of the principle that “no man should profit from his own wrong.” Rather, it is the problem of how the law can resolve cases that are unanticipated by the posited rules but seem to have a legally determinate outcome nonetheless. The inclusion of some moral principles in law goes some way towards resolving this problem by introducing some flexibility and sensitivity into the law. But, as we saw in our initial discussion of Dworkin’s objection to positivism, Dworkin denies that the inclusion of some moral principles in law is sufficient to save positivism from his charges. This is because even rules that include some moral principles exclude others, and it is always possible that a case arises that is decided on the basis of one of these excluded principles, but the outcome is legally determinate nonetheless. So, for example, in *C.I.B.C. Mortgages v. Pitt*, the Court held that even though her husband had unduly influenced her into taking out a mortgage on
her house, the contract could not be set aside, since the bank had no notice of the injustice in the contract.\textsuperscript{159} This contact would have been set aside under a rule voiding all unfair contracts. This is so even though, legally speaking, it ought to be enforced. This case would thus present a system with no superceding rule to this effect with a new hard case. More generally, a system of posited rules that includes some moral considerations, but not all remains vulnerable to the possibility of hard cases. If the inclusive positivist suggestion is that the law only include some moral considerations, then, it remains vulnerable to the next unanticipated hard cases, and this just is the problem of hard cases that Dworkin raises for positivists.

\textit{4.4 Conclusion}

I have thus explained Coleman’s attempt to reconcile the basic tenets of legal positivism with Dworkin’s insight about the moral nature of legal reasoning. As I have argued, Coleman attempts to do so by providing an account of social rules; that is, he attempts to reconcile these two aims by explaining how social practices can generate independent, duty-imposing rules capable of grounding the force of all subordinate rules of a legal system. But, as I have attempted to show, there is some question as to whether Coleman has succeeded to explain the possibility of a social rule that can support the kind of disagreement that we have at law. More generally, however, I have also argued that even if we were to grant Coleman’s account of social rules, there are difficulties with his overall response to Dworkin’s objection from the moral nature of legal reasoning. We

\textsuperscript{159} \cite{1993 Coleman}
ought thus to consider an alternative positivist response to Dworkin’s challenge, namely, Raz’s exclusive positivism.
V. Raz’s Exclusive Positivism

5.0 Introduction

Exclusive positivism poses a serious threat to Dworkin’s position since, unlike inclusive positivism, exclusive positivists deny Dworkin’s approach to legal validity outright. Whereas inclusive positivists concede Dworkin’s analysis of hard cases and his conclusion that there can be legally valid merits-based considerations, but take positivism to be capable of accommodating these insights, exclusive positivists rebut Dworkin’s challenge by denying the moral considerations can ever be legally binding. It follows from the nature of legal authority, they argue, that people can never be required to determine what the law is by appeal to what it ought to be.

Joseph Raz advances the most robust and most prominent articulation of exclusive positivism to date. Raz rejects Dworkin’s general approach to legal reasoning, since, he argues, it is in the nature of legal authority that law serves to mediate between subjects and their reasons for action, and Dworkin’s inclusion of moral considerations among the conditions for legal validity runs counter to this aim. He thus rules out the very possibility of including moral considerations in an account of legal validity, and rejects Dworkin’s account as incoherent.

Raz therefore denies that Dworkin’s examples of hard cases are ones where the law incorporates moral considerations. It is true, he argues, that judges can be legally required to look to morality in rendering a legal judgment, and, he concedes, Dworkin’s

---

hard cases may indeed be examples of such instances; however, he argues, this does not thereby make these moral considerations legally valid. Rather, he argues, these cases are like cases where the law refers to the rules of a foreign country in order to render a domestic decision: it directs judges to look to the rules of a different system, but it does not thereby incorporate these rules. The distinction between the two systems remains intact.

Raz’s explanation of the role of morality in law thus preserves the two fundamental tenets of legal positivism. On the one hand, the sources thesis holds, for Raz, since it remains true that all legal rules can be traced back to a social source; unposited moral rules can enter legal reasoning, for him, but only where the posited law so directs people. The test for what the law on a matter is, and whether or not it depends on morality thus ultimately remains a social one, for Raz. On the other hand, Raz also preserves the separation thesis since, it is not necessary that morality enter into law or legal reasoning; it does so merely as a matter of the posited rules of the system. There is thus no necessary connection between law and morality, for Raz.

If Raz is correct to hold that the nature of legal authority rules out the possibility of legally valid moral considerations, then we have reason to reject Dworkin’s challenge altogether. But, is it true that it follows from the nature of legal reasoning alone law must exclude all appeals to moral reasoning? If so, then must we accept Raz’s analysis of hard cases? Finally, are we left with a plausible account of legal validity once we expunge all appeals to morality from legal reasoning? Let us consider Raz’s position, and these questions, in more detail.
5.1 Raz’s Mediating Conception of Law

Raz puts forth a *mediating* conception of legal authority. Law, for Raz, mediates between people and their reasons for action. In other words, it provides people with an intermediate level of reasons to which they can appeal when deciding what to do, thereby precluding them from revisiting each question on its merits. Legal rules and directives thereby function like rules and directives more generally in people’s reasoning. Rules aid people in their deliberation in that they provide people with reasons that are easily accessible and identifiable, and that they are justified in relying on in virtue of their relations to their deeper (and, hence, less accessible and identifiable) reasons for action. To take Raz’s example, consider, e.g., the social rule requiring people to introduce acquaintances who do not know one another when they are in each other’s presence.¹⁶¹

The fact that this rule holds gives people a reason for action: one reason people have for introducing acquaintances who do not know each other when they are in each other’s presence is because of the existence of this social rule. This rule can therefore help us determine what to do in potentially awkward social situations. It can be especially helpful to people who are less socially adept, and who have difficulty navigating complicated social circumstances. In such cases, they need only to consult the rule in order to know how to behave, and their reliance on this rule can indeed help them out of this difficult situation.

The existence of this social rule can therefore help to absolve people of the need to determine on their own what to do when we are in a socially difficult situation. It ought to carry weight in people’s deliberations, and they are justified in relying on it, because it is well-founded. It actually does help people to achieve the ends that we aim at when they

turn to this rule in that it facilitates social contact: it helps people to get to know each other, eases the awkwardness of interactions between strangers, helps to remove people from some difficult situations, and so on. In all these respects, it is a good rule. But, as Raz explains, that this rule facilitates social contact does not give people an additional reason for following the rule. Rather, it is just because the reasons underlying the rule are good ones that the rule ought to carry weight in their deliberations; this is why they are justified in relying on it when deciding what to do. This social rule thus mediates between people and their reasons for action insofar as it provides us with an “intermediate” reason for action that is more accessible and easily identifiable than the deeper reasons that we might have, but that is nonetheless based on these reasons, and carries weight in virtue of them.

So too with legitimate legal authority, for Raz: when legal authority is exercised legitimately, legal rules and directives likewise mediate between people and their reasons for action by providing us with an intermediate level of reasons for action. They can thereby aid people in their deliberations, because this intermediate level of reasons is more accessible and easily identifiable than are their deeper or more fundamental reasons for action. Just as the social rule governing introduction between acquaintances can help people out of awkward social situations, then, especially for the socially inept, so too can legal rules help people deliberate about difficult practical problems. Moreover, just as the social rule is well-founded, and people are justified in relying on it, just the extent that it reflects our underlying reasons for introducing their acquaintances when they meet, so too is the exercise of authority legitimate, and are people justified in relying on legal
directives, to the extent that they are based on the reasons for action that they already have.

Raz’s mediating conception of law serves to ground his rejection of Dworkin’s challenge to legal positivism. Dworkin charges that legal positivists cannot account for the nature of legal reasoning since they cannot explain the inclusion of moral considerations among the criteria for legal validity. We know that moral considerations can figure in people’s legal reasoning, and can serve among our criteria for legal validity, however, by examining judges’ reasoning in hard cases. In hard cases, judges must appeal to moral considerations in order to render a legal verdict. Yet, their judgment remains one of what the law is, rather than what it ought to be. Drawing on his mediating conception of law, Raz rejects Dworkin’s challenge as antithetical to the nature of legal authority. If moral considerations were to figure in our determinations of what the law is, as per Dworkin’s suggestion, then, Raz argues, law could not serve its mediating function. This is because the existence of moral considerations among the criteria for legal validity would force people to revisit legal questions on their merits, vitiating the mediating function of law. Instead, he argues, it is impossible that law include moral considerations among its criteria for validity, and, he continues, there can be nothing more to law than what is given to us by its source-based considerations. It might therefore be true, as Dworkin suggests, that judges are sometimes required to look to morality in order to determine the legally required result. But, Raz argues, such cases are like cases where the law requires judges to look to the rules of a foreign country in order to render a domestic verdict: looking to such further rules is indeed required by the system, but these rules are not thereby incorporated into the system. Instead, Raz concludes, it is
impossible that there be moral considerations among the criteria for legal validity. So holding would run counter to the nature of legal authority for him.

I will challenge both aspects of Raz’s argument against Dworkin. I will argue that, first, by taking Dworkin’s challenge to be one from hard cases alone, Raz fails to appreciate the full force of his objection. Rather than being required merely at the margins of law, appeals to morality are a fundamental feature of legal reasoning, and by expunging all appeals to moral considerations from law, Raz guts legal reasoning of all its force. Secondly, nor is the appeal to morality inconsistent with legal authority, even as Raz understands it. It is true that the mediating conception of law rules out collapsing law into reasoning on a balance of considerations, or rendering all-things-considered judgments, but this is not sufficient to exclude all moral considerations from legal reasoning. Rather, it just excludes including them all at once.

I will therefore begin by setting out Raz’s mediating account of legal authority in more detail. I will then turn to his argument against Dworkin’s challenge, and the reasons he thinks that Dworkin’s suggestion is ruled out by his mediating conception of law. Finally, I will address each of Raz’s objections in turn, and set out my arguments for why I think they are insufficient for the task of refuting Dworkin. Let us now turn to a more detailed account of Raz’s account of law.

5.2 Legal Authority

Law succeeds in providing its subjects with a mediating reason for action when its exercise is legitimate; i.e., when it rules as a matter of right, and it imposes a corresponding obligation to obey. As a result, a complete understanding of Raz’s
mediating conception of law requires an account of its conditions of legitimacy. It is to this question that we will now turn.

All law, even bad law, for Raz, claims to be legitimate. That is, it claims to rule as a matter of right, rather than by mere force, and to be owed a duty of obedience, rather than mere accession to a threat. It is in this respect that legal authority differs from the mere exercise of coercive power. This follows from the nature of authority in general. On the one hand, all authorities claim to exercise power or control over another person as a matter of right rather than mere force, even if this claim is unjustified. This is how authority differs from the mere exercise of power. So, as Raz explains, when my neighbour threatens to burn garbage at his border in an attempt to stop me from growing tall trees in my garden, he is exercising power over me in his attempt to influence my behaviour. But, he is not claiming to exercise this power over me as a matter of right, and, as a result, is not exercising authority, even de facto authority, over me.\textsuperscript{162} This is so even if his exercise of his power is justified. This is because not even justified uses of power over another person amount to the exercise of authority. A de facto authority, instead, includes a claim to exercise its power over a person or group as a matter of right, rather than by force alone.

Authority, even de facto authority, also includes a claim to be owed a duty of obedience. It is true that all exercises of power – say, the issuance of a threat or, what amounts to the same thing for Raz, the use of coercion – include an “appeal for compliance,”\textsuperscript{163} in that they all attempt to influence behaviour. But, over and above their mere attempts to influence behaviour, authorities also claim to impose duties and confer

\textsuperscript{162}Raz, \textit{Morality of Freedom}, 24.
\textsuperscript{163}Raz, \textit{Morality of Freedom}, 26.
rights. In so doing, they not only appeal for compliance in the manner of any attempt to exercise power, but they also claim to be owed a corresponding duty of obedience. So, for example, the law imprisons people only after a finding of guilt, or breach of a duty; the law imposes a duty to pay damages, rather than merely coercing people to pay them; it imposes duties of care towards one another and duties to contribute to the services that people share; it imposes duties on officials to uphold their offices, and so on.\textsuperscript{164}

An account of the legitimacy of law therefore requires an account of the conditions under which law’s claim to rule as a matter of right, and its corresponding claim to be owed a duty of obedience are well-founded.

An authority’s claim to rule as a matter of right, and its corresponding claim to be owed a duty of obedience, are justified when, Raz argues, authorities base their decisions on the reasons that already apply to their subjects. In issuing their judgments, authorities are bound to survey all the reasons that apply to the case, and base their judgments upon them. Their judgments are therefore meant to sum up all the reasons that apply to those subject to their authority, and reflect the balance of reasons that holds sway. Authoritative reasons are thus, for Raz, dependent reasons; they depend on the underlying reasons upon which they are based. Raz therefore endorses the \textit{dependence thesis}, which states that:

\begin{quote}
all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.\textsuperscript{165}
\end{quote}

So, for example, the law should require able-bodied citizens to serve in the army during wartime just in case able-bodied citizens already do have reason to serve in the army or...
fight for their country at this time. Or, to take another example, the law should require us to pay taxes for the sake of maintaining our shared roads, education services, health services, social security, and other shared public goods just in case people already do have reason to fund such services.\(^\text{166}\) It is only because people are already subject to these underlying reasons that legislators have reason to enact these laws; if this were not the case, the resulting laws were ill-conceived or unjustified.

Authoritative directives need not always be issued in the interests of their subjects. So, for example, a military commander rules well when he issues a strategically sound directive, even if it does not advance his soldiers’ interests.\(^\text{167}\) This is because their reason directs them to put their country above their personal interests, so the commander is indeed exercising his authority based on the reasons that they already have, even if he is not commanding based on their interests alone.

It is of course also possible that authorities fail to base their decisions on the underlying reasons that already apply to their subjects, or that stray from this norm. So, e.g., they might err in their evaluation of the balance of reasons, or judge insincerely. In articulating his justification for authoritative force, Raz is merely claiming that authorities are meant to so formulate their judgments, if their authority is to remain legitimate. A particular authority or a particular judgment may well fall short of this ideal.

The dependence of authoritative reasons on the underlying reasons that subjects already have also does not entail that authoritative reasons make no difference to people’s reasons for action. Raz lists three ways in which the fact that an authority has issued a directive can make a difference to people’s reasons for action, even if it is based on the

\(^\text{166}\) See Raz, *Morality of Freedom*, 45f for Raz’s discussion of these cases.

reasons that they already have.\textsuperscript{168} First, authoritative directives can provide people with a determinate reason for acting one way rather than another when, absent the directive, reason alone would have been indeterminate. So, for example, people can have reason to pay a given sum in taxes, even when there is no independent reason to prefer monthly over, e.g., quarterly payments. The existence of a directive requiring them to pay one way rather than the other can settle the question and thereby affect the reasons that they have for acting, while still being based on the reasons they already had for paying their taxes.\textsuperscript{169} Second, authoritative reasons can provide solutions to pure coordination problems where reason requires that people settle on a common solution to a given problem, but it does not prefer any particular solution (of a given set). So, for example, people have reason to all drive either on the left or on the right side of the road, but reason alone does not tell them which side. An authoritative directive can settle this problem for them by altering the reasons that they have, while again still being dependent on their existing reasons.\textsuperscript{170} Finally, authoritative directives can also provide solutions to prisoner’s-dilemma type problems, where people’s individual interests can diverge from that of the group. The directives can indeed alter the reasons people have by providing them with an additional reason to behave in the interests of the group, while at the same time reflecting the reasons they already have, when their interests are indeed best served by cooperating.\textsuperscript{171}

\textsuperscript{168} Raz lists a fourth way in which authoritative directives can make a difference to our reasons when this argument first appeared in “Authority and Justification,” cited in note 1, above. This point now appears as a further qualification based on the needs of bureaucracies, and will be addressed in what follows.
\textsuperscript{169} Raz, \textit{Morality of Freedom}, 49.
\textsuperscript{170} Raz, \textit{Morality of Freedom}, 49.
\textsuperscript{171} Raz, \textit{Morality of Freedom}, 50f.
Finally, the dependence thesis does not require that authorities judge based on the reasons that apply to each subject, considered on her own. Although this is one way of satisfying the requirements of the dependence thesis, it is not the only way. In particular, the dependence thesis does not preclude the authority from deciding on reasons that apply to it in particular (in its official capacity), so long as the reasons on which they rely ultimately reflect the reasons that already apply to the subjects. So, for example, many bureaucratic concerns are based on such considerations. Consider, e.g., the refusal of many bureaucracies to engage with concerns that fall below a *de minimis* range.\textsuperscript{172} Although subjects may have reason to be concerned with such cases when taken in isolation, they also have reason to require that their institutions ignore such cases so that they can ultimately better serve the interests of their subjects. As a result, the inclusion of such bureaucratic considerations in authorities’ reasoning is indeed consistent with the dependence thesis.

Judgments based on people’s dependent reasons provide them with a reason for action, for Raz, when the *normal justification* for authority holds. Raz argues that authority is normally justified when people are likely better able to comply with the reasons that they have for acting when they submit to the directives of an authority than when they rely on their judgment of their reasons for themselves. Authority, in this respect, is a lot like expert advice. Although there might be other reasons for accepting someone’s advice – say, in order to spare his feelings, etc. – the normal reason for acting on someone’s advice is that it is good advice; that is, normally, people have reason to take someone’s advice when they think that they will do better by so acting. The normal justification for

\textsuperscript{172} Raz, *Morality of Freedom*, 51f.
authority is a lot like this. Although there might be other reasons for submitting to an authority – Raz considers the example of identifying as a member of a group\textsuperscript{173} – the normal reason for so submitting is that they are more likely to do better; that is, they are more likely to act on the reasons that they have, if they submit to the directives of the authority than if they were to act on their judgment of our reasons alone. This, Raz argues, is the normal justification for authority. When it holds, the authority is legitimate: its claims to rule as a matter of right are well-founded, and people are under a corresponding duty to obey.

Authoritative directives are also a lot like expert advice in that both are bound to base their judgments on reasons that apply to their subjects anyways.\textsuperscript{174} An expert issues sound advice when it is based on reasons, either theoretical or practical, that people already have, and it is just to the extent that her advice is a reflection of people’s pre-existing reasons that it is good advice. What separates an expert’s judgment from people’s own is, say, the expert’s easy access to evidence, her facility with the relevant concepts, her ability to grasp their significance, and so on. Over and above these qualifications, there is nothing special about her judgment relative to people’s own that warrants the priority that they accord to it when they defer to her expertise. But, facts about what evidence there is and the ways in which it is significance are considerations that apply to non-experts as well. When an expert bases her judgment on such considerations, she is therefore judging based on the very reasons upon which people ought to be relying anyways. To the extent that she judges well, then, she is not thereby creating new reasons for people; rather, she is merely aiding them with their own. It is

\footnote{\textsuperscript{173} Raz, \textit{Morality of Freedom} 54.}
\footnote{\textsuperscript{174} Raz, \textit{Morality of Freedom}, 52f.}
only when an expert deviates from the reasons that people already have that she creates new reasons for us. 175

So too with authorities. Authorities, like experts, are meant to base their judgments on reasons that apply to people anyways. They are not thereby meant to create new reasons for action; rather, like expert advice, their directives are meant to reflect the reasons that people already have. People have reason to submit to authority, however, to the extent that so doing will make it more likely that they are better able to comply with their reasons than had they relied on their own judgment. This, as we have seen, is the normal justification for people’s submission to authority.

It follows, then, that authoritative directives do not add further weight to the reasons that we have for acting anyways; the fact that a directive has been issued is not, in this respect, an additional reason for action. Rather, it has force in people’s deliberations just to the extent that is based on our underlying reasons, and whatever force it has is derived from the force of these underlying reasons. To accord an authoritative directive independent weight, over and above the weight of our reasons for action, would to be guilty of double-counting. When people do look to our underlying reasons for action even when an authoritative directive has been issued, they must then discount the weight of the directive in order to judge correctly. 176

It follows from the foregoing that, if people are to reason correctly from an authoritative directive, it must pre-empt or replace the reasons upon which they are based

175 An expert can create a new reason for someone even when she fails to judge on the reasons that this person already has because, as we saw above, people can have reasons other than merely acting on the best reason possible to follow an expert’s advice. So, e.g., someone might want to spare another’s feelings or submit to her authority for strategic reasons, and so on, even if the advice is bad advice.

176 Raz, Morality of Freedom, 59.
in people’s deliberations. In other words, when people submit to the force of an authority, they are precluded from deliberating about what to do on the reasons upon which the authoritative directive is initially meant to be based. This is the intuition that underlies the thought that people’s submission to an authority requires a “surrender of judgment.”

Note that this does not mean that they are precluded from further considering the matter when they are subject to an authority. It is of course always possible to continue to reflect on a question even after an authoritative judgment has been issued. People can always evaluate their reasons on their own, and ask whether the authority’s judgment is a good one. It is for this reason that Raz insists that submission to an authority does not require a literal surrender of judgment. What is important when people submit to an authority, however, is that, independently of their judgment on the matter, they act on her directives.

Nor does their subjection to an authority require that they submit to her directives come what may; people’s mere subjection to an authoritative reason does not mark the end of deliberations. There are indeed circumstances in which we might disregard it. So, for example, where, say, the authority was bribed or was drunk, where new evidence has arisen, and so on, Raz argues, people may well be justified in disregarding her advice. As Raz thus explains, the arbitrator’s judgment is not an “absolute reason” to act. But, subjection to an authority does preclude people from revisiting the initial question and deliberating on the reasons that originally bore on the matter. As Raz notes (in his

---


178 ibid.

179 Raz, “Authority and Justification,” 10.
explanation of the authority of an arbitrator), “the only proper way to acknowledge the arbitrator’s authority is to take it to be a reason for action which replaces the reasons on the basis of which he was meant to decide.”

In sum, then, on the mediating conception of authority, authorities mediate between people and their deeper-level reasons for acting by providing their subjects with an “intermediate” level of reasons to which they can appeal when deliberating about what to do. These reasons are justified, as we have seen, to the extent that they are based on the underlying reasons that people already have, and they derive their weight from these underlying reasons, and the exercise of authority is legitimate to the extent that the normal justification holds. There are a number of advantages to the availability of such intermediate-level reasons.

First, they can aid people in their deliberations by providing them with accessible solutions to cases that authorities have already considered, but that may be new to them. In this respect, authorities are a lot like experts in that we can rely on their familiarity with a set of considerations in an attempt to make our deliberations easier. Secondly, they can also help people to coordinate with one another even when they might have deeper disagreements between themselves. They can do so by providing them with common standards of conduct to which people can adhere despite their more foundational disagreements, either by finding already existing common ground between them, or by, say, imposing upon them a shared standard despite their competing aims. Finally,

---

180 Raz, “Authority and Justification,” 10.
181 Raz, Morality of Freedom, 58.
182 ibid.
183 As in, e.g., when we have an overlapping consensus.
184 As in when, e.g., we agree to submit to an arbitrator’s decision, whatever it is, in order to settle our differences.
people’s submission to authority as understood by Raz provides them with a set of persons or institutions who are bound to exercise their judgment in order to enable them better to comply with the reasons that they have for acting. In other words, people’s submission to authority on this mediating conception provides people with a set of persons or institutions in whose judgment they can trust in order better to enable them to act well. The benefits of this are clear.

5.3 Raz’s Response to Dworkin

Raz concludes that it follows from this conception of authority that it is impossible that moral considerations can ever figure among the criteria for legal validity. This is because the inclusion of moral considerations among the criteria for legal validity would vitiate the mediating role of authority, which is meant to pre-empt or replace the subject’s judgment of what she ought to do based on the merits of the case. If the subject has to engage in moral evaluations of her reasons for action on her own in her attempt to identify what the law requires, then legal directives could no longer serve their function of mediating between subjects and their reasons for action. Instead, if people include moral considerations among their criteria for legal validity, then the identification of legal directives would itself require that they rehearse our underlying reasons for action, rendering the appeal to authority idle, on Raz’s view.

Nor is it necessary that legal directives actually reflect people’s underlying reasons, or the exercise of authority always be legitimate, in order for Raz’s conclusion to hold. It is sufficient for him that all legal systems claim to exercise their authority legitimately, whether or not this claim to legitimate authority is well-founded. This is

---

185 Raz, Morality of Freedom, 59.
because, Raz argues, if law claims legitimate authority, then it must be capable of having authority, and, he concludes, this is all that is needed in order to rule out the possibility of a moral test for legal validity.

As we saw above, even though this claim is not always satisfied, law, of necessity, claims authority. It does so by claiming to rule as a matter of right, and claiming to be owed a duty of obedience. It is in this respect that we can distinguish between the exercise of authority, and the mere expression of power. But, Raz argues, if law claims authority, then it must be capable of having authority. That is, it must be the kind of thing that is capable of possessing practical authority. So, for example, it must contain directives. If, as Raz notes, law consisted in a set of propositions about volcanoes rather than rules, instructions, and so on, it would not only lack authority, but it would also fail to be the kind of thing capable of possessing authority. Similarly, if law consisted of trees rather than the activities of persons, it would not merely fail in its claim to authority, but it would be incapable of having authority altogether.186

Nor can legal officials be so conceptually confused in their claims to authority so as to cast doubt on their very ability to possess it. It is true that they may often be mistaken in their claims; they may well fail to have the authority that they claim to possess. However, they cannot be so confused so as to be systematically mistaken in their very ability to have such authority. This is because of the importance of law and legal institutions to people’s concept and our structures of authority. Law is so central to people’s notion of practical authority in general that systematic confusion with respect to the nature of legal authority would lead people to question their understanding of authority itself. As Raz explains, “it [authority] is what it is in part as a result of the

186 Raz, “Authority, Law and Morality,” 201.
claims and concepts of legal institutions.”¹⁸⁷ As a result, Raz thus concludes that it follows from the mere fact that law claims legitimate authority in the manner described above, that, as a conceptual matter, it must at least be the kind of thing that is capable of possessing it. This is so even if, empirically speaking, most legal systems fail to satisfy this claim.

The mere capacity to possess authority is all that is needed in order to rule out the possibility of a moral test for legal validity, for Raz. This is because if law is to be capable of exerting authority as understood above, then it must be possible to identify its directives without rehearsing their underlying reasons or revisiting the initial question they are meant to settle. Where we rule out the possibility of identifying legal directives without revisiting their underlying reasons, we also rule out the possibility of possessing legitimate authority, contrary to our assumption above.

Raz thus rejects Dworkin’s conclusion that people must look to moral considerations in their determinations of what the law requires. Instead, he argues, Dworkin’s suggestion runs counter to the nature of legal authority. If we were to accept Dworkin’s contention that a determination of legal validity requires that people also ask what the law ought to be, then, Raz argues, legal authority could not serve its mediating function, as required by his political morality. This is because, on Dworkin’s analysis, every identification of what the law is requires that people (also) consider the case on the merits, thereby vitiating the authoritative or peremptory force of the law, and undermining its ability to aid subjects in their deliberations. It is no help to say that Dworkin is proposing a theory of adjudication aimed at judges rather than a general theory of law, since, insofar as legal subjects are bound to apply legal dictates in their

¹⁸⁷ Raz, “Authority, Law, and Morality,” 201.
attempts at compliance, they are equally required to make legal determinations like the kind described by Dworkin; judges are not meant to issue legal directives that are different from the ones that subjects themselves should arrive at in their own determinations of what the law requires of them. As a result, even the focus on judges’ reasoning brings questions of law’s authority and its ability to mediate between subjects and their reasons to the fore.

If Raz is to successfully deny Dworkin’s contention that there can be legally valid merits-based considerations, then he must provide some explanation for the hard cases that Dworkin raises in support of his conclusion. Dworkin’s suggestion that legal reasoning is inextricably moral is initially very plausible; although not all areas of law are morally significant, the law often bears on weighty moral issues, it invokes moral notions in so doing, and a cursory survey of legal rules and legal judgments will reveal frequent appeals to moral considerations, and frequent reliance on moral judgment. The hard cases that Dworkin relies on in arguing for his conclusion lend compelling evidence for his case: on their face, they seem like clear instances of cases in which judges must appeal to moral considerations in order to determine what the law on a matter is. If he is to reject Dworkin’s conclusions about the relationship between law and morality, then, Raz owes an explanation of the evidence that Dworkin advances in its support.

---

Dworkin makes a similar point in “Civil Disobedience,” in *Taking Rights Seriously*, ch. 10, where he defends people’s right to act on their own judgment where the law is doubtful, and in *Law’s Empire*, where he argues that citizens should adopt a “protestant,” or “interpretive, self-reflective” attitude towards the law that “makes each citizen responsible for imagining what his society’s public commitments to principle are, and what these commitments require in new circumstances.” *Law’s Empire*, 413.
Raz therefore concedes that judges might be legally required to look to moral considerations in order to determine what the law on a matter is; the law may well refer people to morality in order to arrive at a legally determinate outcome. Raz thus grants Dworkin’s assessment of the state of the law, and acknowledges law’s frequent reference to morality. But, he argues, the mere fact that the law refers people to morality in order to reach an outcome does not thereby make these moral considerations part of the law. Rather, legal rules directing people to look to moral considerations are like rules directing us to look to the law of a foreign country: they legally require us to look to the rules of a different system, but they do not thereby make these distinct rules part of the system.\(^{189}\)

Hence the judgments that judges make pursuant to these moral considerations remain legally required, in the sense that judges are directed to look outside of the law by posited legal rules of the system. Their judgments are therefore not discretionary in the sense of being optional, from the point of view of the law. However, this does not thereby make them legally required moral judgments, as Dworkin would have it. Instead, for Raz, when judges look to moral considerations in their applications of posited rules they are looking outside the legal system to distinct considerations of what the law ought to be. As a result, then, we can thus see that in his attempt to respond to the potential counter-examples that Dworkin raises for his theory of law, Raz concedes Dworkin’s insight that the law makes frequent appeal to morality in directing judges to legal judgments, but he denies the conclusions that Dworkin draws from his analysis of hard cases; the mere fact that the law refers judges to moral considerations in their attempts to determine a given

\(^{189}\) Raz develops this argument in “Authority, Law and Morality,” in ch. 10 of *Ethics in the Public Domain: Essays in the Morality of Law and Politics.*
legal outcome does not thereby result in legally binding merits-based considerations. Rather, Raz argues, the two types of reasoning remain distinct.

This account of judges’ reasoning is meant to be a complete response to Dworkin’s objection insofar as, for Raz, all appeals to morality in legal judgment ought to be understood on this model. Every time judges are legally required to look to moral considerations in order to render a legal conclusion, for Raz, it is because there is a source-based law that directs them to do so, and it is only when there is such a posited rule that judges can be legally required to look to morality; any other appeal to morality results in a change in the law, rather than a judgment of what the law on a matter is. Holding otherwise would run counter to the nature of legal authority.

Raz’s theory of legal authority is among the most complete and compelling theories of authority available. Raz offers a solution to the difficult problem of explaining how the law can provide people with content-independent reasons for acting, and he preserves the positivist insistence on a strict distinction between what the law is and what it ought to be. However, nothing in his account of legal authority rules out the inclusion of morality in legal reasoning. Instead, it only rules out all-things-considered judgments. But, it is possible that law include some moral considerations, without including all of them, or without requiring the subjects to the law to reach an all-things-considered moral judgment in order to determine what the law is. Raz’s conclusion that the law exclude all moral considerations is thus unmotivated.

Secondly, however, although Raz’s analogy between legal references to the rules of a foreign system, and legal appeals to morality is compelling, and it is backed by a very powerful theory of legal authority, a closer inspection of how moral considerations
figure in law reveals that his explanation does not account for law as we know it. Appeals to moral considerations are ubiquitous in paradigm cases of law, even when the posited law contains no explicit direction to do so. Rather than explaining the role of merits-based considerations at law, then, a better approach would be to reconfigure the source/merits distinction that is supposed by the participants to this debate. Let us consider each difficulty in turn.

5.5 Difficulties with Raz’s Exclusive Positivism I: It Only Rules Out All-Things-Considered Moral Judgments

As we saw in the opening discussion, Raz’s defence of positivism poses a threat to Dworkin’s position since Raz denies its consistency with the nature of legal authority. If Raz is correct in his analysis, then the existence of moral considerations in legal reasoning is incompatible with the nature of law. We are thus faced with a genuine tension between the two positions.

It is true, as Raz argues, that reasoning from legal rules is different from reasoning on a balance of considerations. People do not weigh legal reasons in their deliberations the way they might weigh, say, the pleasure they get from taking the scenic route to work when deciding on a route, or, say, the possibility or rain in London tomorrow when deciding whether or not to travel to London, or any other considerations that people throw into the mix when deciding on a balance of reason. There are some considerations that ought to be excluded from people’s deliberations when people are subject to legal rules. So, for example, people have reason to stop at a red light persists even if there are no other cars coming, or if they are in a hurry; they are bound by their contracts even if
they are no longer to their advantage; they are constrained to build within zoning laws even though an alternative design would look nicer, and so on. This is indeed a distinctive feature of legal authority that distinguishes legal reasoning from deciding what to do on a balance of considerations, and it therefore serves as a constraint on a theory of legal validity.

However, not all considerations are precluded from entering into people’s deliberations when they are subject to a legal authority. Although legal reasons do have special force in people’s deliberations, it is always possible that they are outweighed by further countervailing considerations; people might be justified in running the red light in an emergency; their contracts might be void on public policy grounds, and so on. There is nothing in the force of the law alone that can preclude people from deciding against compliance, or prevent the existence of weightier countervailing considerations. Raz does acknowledge that there are limits to the force of the law; he notes that it is always possible that a judge is bribed or drunk, that there is an emergency, etc. It is for this reason that he rejects the idea that people’s submission to legal authority literally requires a surrender of judgment or a literal replacement of the reasoning of the authority for our reasoning. However, for Raz, the mere fact that people must sometimes question the force of the law does not undermine its general claim to authority insofar as it remains true that it ought to have pre-emptive force in the reasoning of its subjects, and it replaces their deliberations about what to do. It is therefore still true for him that people’s subjection to legal authority precludes them from considering each question on its merits, and that, for this reason, legal authority can serve its mediating role between people and their reasons.

189

190 Raz, “Authority and Justification,” 7f.
It therefore seems that what is distinctive in the nature of legal authority is that it precludes people from deliberating on some considerations when they are subject to its force; it does not end deliberation altogether. But all that follows from this, however, is that some moral, or on-a-balance considerations must be excluded by legal reasons or rules. The mere fact that law has the kind of pre-emptive force that Raz suggests does not rule out the inclusion of some moral considerations in our determinations of what the law requires; it merely rules out the possibility that a determination of what the law is requires that people rehearse all of their reasons and decide the question on a balance of considerations. As a result, it seems that it is possible to require some evaluation of the merits of an outcome in our determinations of what the law is, so long as it is not an all-things-considered determination.

Raz’s theory of legal authority thus does rule out Dworkin’s suggestion that judges invoke all moral considerations in every application of a posited rule to a case. However, as we have seen, the requirement that law invoke all moral considerations at once is too strong; it ultimately collapses the distinction between law and morality. This leaves open the possibility that law include some moral considerations. And, as we shall see below, this suggestion provides a more plausible account of law as we know it.

Raz does offer an alternative explanation for the exclusion of moral considerations from legal reasoning; however, this alternative account does not justify excluding all moral considerations from the law either.⁴¹ Even if he does not agree that authoritative reasons derive their force from the supposition that they are based on a consideration of all the reasons that underlie them, or that people are justified in submitting to an authority just to

the extent that so doing makes them more likely to comply with the reasons that they have for acting, they can agree with the weaker claim that an authoritative reason is capable of changing the reasons that they have for acting. At the very least, it seems that authorities can make a difference in our deliberations; there is a difference between being subject and not being subject to an authoritative reason for action, and the reasons that an authority has for issuing a directive do not, on their own, give those subject to the authority an authoritative reason for action. It thus follows, Raz argues, that the mere existence of reasons to be subject to an authoritative directive is not sufficient to make it true that people are so subject. There must be some further, independent fact in virtue of which they are bound by an authoritative dictate. Nor, then, he concludes, can the mere fact that people ought to be subject to an authoritative dictate make them so subject. It follows, then, that there must be some way of identifying the existence and content of an authoritative directive independently of our determinations that they ought to be so subject to it.

As above, this argument depends on a distinction between people’s subjection to legal rules and reasons, and reasoning from a balance of considerations, and, as above, it is the mere existence of this distinction that rules out the possibility of appealing to moral considerations in people’s determinations of what the law is. But, just as we saw in our analysis of Raz’s first argument for this conclusion, people’s mere subjection to legal authority does not end their deliberations about what to do; there is always a further question of whether or not they ought to comply with their legal reasons for action, and our settling this question calls for further evaluation of our reasons for action. It is therefore true, as Raz argues, that legal reasons are capable of making a difference in
people’s deliberations, and that suggests that it must be possible to identify them independently of their evaluations of their underlying reasons for action; however, as we have seen, this only rules out an all-things-considered test for legal validity. It remains possible to include some moral considerations in people’s determination of what the law is since, as we have seen, this is sufficient to maintain the distinction between legal and moral reasoning. As a result, neither is Raz’s appeal to the so-called practical difference thesis sufficient to justify expunging all moral considerations from the law.

5.6 Difficulties with Raz’s Exclusive Positivism II: It Fails to Explain Law as We Know It
There is a second reason why Raz’s exclusion of all moral considerations from law lacks motivation. The initial plausibility of Raz’s argument for the exclusion of all moral considerations from law depends on the relative infrequency of appeals to morality. In order for Raz to explain anything that we commonly recognize as law, or paradigmatic cases of law, it must be true that law, for the most part, does not require moral reasoning in its application. But, much of modern law does frequently require appeal to morality in its application, suggesting not so much that Raz’s theory is false, but that it is irrelevant.

Constitutional provisions enshrining people’s fundamental rights and duties are the most obvious instances of such appeals to morality, and, indeed, much of the debate between Dworkin and contemporary positivists has proceeded along this terrain. So, for example, the Canadian Charter guarantees the right to “equal protection and equal

benefit of the law without discrimination” (based on specified characteristics),\(^{193}\) the right not to be deprived of our life, liberty, or security of the person “except in accordance with the principles of fundamental justice,”\(^{194}\) the right to be “secure against unreasonable search or seizure,”\(^{195}\) the right not to be subjected to any “cruel and unusual treatment or punishment,”\(^{196}\) etc., and these rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”\(^{197}\) The notions of reasonable and unreasonable, equality, discrimination, fundamental justice, cruel and unusual, etc. invoked in these provisions are clearly moral or morally-loaded ones, as is the limitation based on the requirements for a free and democratic society, and when the law calls upon judges to decide whether these rights have been upheld or violated, it requires that they make a moral judgment. Whether or not these moral considerations are thereby incorporated into the law, these provisions listed above are clear examples of instances where the law requires that judges look to morality in order to determine what the law on a matter is.

Because of its close connection to morality, the criminal law is another obvious place to look for such legal rules. So, for example, theft is defined as taking the belongings of another “fraudulently and without colour of right.”\(^{198}\) Similarly, for the purposes of reducing a charge of murder to manslaughter, provocation is understood to be any “wrongful act or insult” that is sufficient to deprive an ordinary person of self-


\(^{194}\) *Canadian Charter of Rights and Freedoms*, s. 7.

\(^{195}\) *Canadian Charter of Rights and Freedoms*, s. 8.

\(^{196}\) *Canadian Charter of Rights and Freedoms*, s. 12.

\(^{197}\) *Canadian Charter of Rights and Freedoms*, s. 1.

\(^{198}\) *Criminal Code*, R.S., 1985, c. C-46, s.322(1). Similarly, one commits theft of telecommunication services when one uses electronic signals “fraudulently, maliciously, and without colour of right.” (*Criminal Code*, R.S., 1985, c. C-46, s.326(1))
control;\textsuperscript{199} people commit extortion when they attempt to induce another person to act by resorting to threats or violence “without reasonable justification”;\textsuperscript{200} the expression of a religious opinion in “good faith and in decent language” is a defense to blasphemous libel,\textsuperscript{201} as is the killing of a fetus in a “good faith” attempt to save the life of a mother a defense to the offence of killing an unborn child in an act of birth,\textsuperscript{202} and the publication of “fair comments” on a public person or work of art as a defense to defamatory libel;\textsuperscript{203} it is an offence to willfully incite or promote “hatred,”\textsuperscript{204} and so on. As these examples suggest, like the constitution, the criminal law likewise frequently invokes moral considerations in determining the rights and duties that people have towards one another, and towards the state.

Explicit appeals to morality are not limited to such morally charged areas of law like constitutional and criminal law, however. So, for example, showing that the relevant act or omission was caused by some person other than “a person for whose wrongful act or omission he is by law responsible” is a defence to the unauthorized deposit of deleterious substances in waters frequented by fish,\textsuperscript{205} the Federal Court is authorized to grant “such remedy as it considers appropriate and just in the circumstances” when it finds that a federal institution has failed to comply with the \textit{Official Languages Act};\textsuperscript{206} the

\begin{itemize}
\item \textsuperscript{199} \textit{Criminal Code}, R.S., 1985, c. C-46, s.232(2).
\item \textsuperscript{200} \textit{Criminal Code}, R.S., 1985, c. C-46, s.346(1).
\item \textsuperscript{201} \textit{Criminal Code}, R.S., 1985, c. C-46, s.296(3).
\item \textsuperscript{202} \textit{Criminal Code}, R.S., 1985, c. C-46, s.238(2).
\item \textsuperscript{203} \textit{Criminal Code}, R.S., 1985, c. C-46, s.310. More generally, the publication of works that one believes on “reasonable grounds” to be true, and that is relevant to the “public interest, the public discussion of which is for the public benefit” is likewise a defense to defamatory libel. \textit{Criminal Code}, R.S., 1985, c. C-46, s.309.
\item \textsuperscript{204} \textit{Criminal Code}, R.S., 1985, c. C-46, ss.319(1) and (2).
\item \textsuperscript{205} \textit{Fisheries Act} ( R.S., 1985, c. F-14 ), s.42(4)(b).
\item \textsuperscript{206} ( 1985, c. 31 (4th Supp.) ), s.76(4).
\end{itemize}
Canada Post Corporation is under a duty to set “fair and reasonable” postage rates;\(^{207}\) the security required by shareholders applying for an investigation may be ordered not to be returned where it is found that the application was “vexatious or malicious;”\(^{208}\) the Canadian Livestock Records Corporation prohibits holding any of its members personally liable for any act done “in good faith” in the exercise of their corporate powers,\(^{209}\) and so on.

As noted above, the presence of legal rules like the ones listed above that make explicit appeal to morality does not, on its own, threaten Raz’s explanation of the role of morality in law since these rule are consistent with his claim that judges need only appeal to moral considerations when rendering a legal judgment when the law provides explicit instruction to do so. But, it is important to notice, that these rules are prevalent in law; they are not limited to constitutional or criminal law or other areas that seem to have the closest connection with morality. Rather, as the foregoing analysis suggests, any area of law can require appeal to moral considerations in the manner described above, and, indeed, a cursory inspection of the law reveals the ubiquity of such references. In this respect then, the role of moral judgment in legal reasoning is not limited to certain narrow (though important) areas of law or to marginal considerations. This seems to undermine the image of a central core of legal reasoning that is untouched by moral considerations that Raz’s account evokes.

Secondly, however, judges’ appeals to morality are not limited to those instances where the law explicitly directs judges to refer to further moral dictates. Recall Raz’s

\(^{207}\) *Canada Post Corporation Act* (R.S., 1985, c. C-10), s.19(2).


\(^{209}\) *Animal Pedigree Act* R.S.,1985, c. 8 (4th Supp.), s.50.
explanation of moral reasoning in law. Raz concedes that the posited law may well require judges to turn to morality in order to discern its requirements. But, when it does, it is like instances of the law referring to the rules of a foreign country: the law may well make appeal to such rules in order to ground domestic decisions, but it does not thereby make these rules part of the system. The distinction between the systems remains intact. So too with law and morality, for Raz. The law may well make appeal to moral rules in order to determine legal requirements, but it does not thereby incorporate these rules. The distinction between the two systems remains intact.

Like Coleman, Raz takes rules like the ones listed above, that make explicit reference to morality, as his model for moral reasoning at law. These rules explicitly direct judges to appeal to moral considerations in their application of these rules, without positing these considerations directly. They thus indeed explain how some considerations can be legally binding in virtue of their merits, not their sources. If we take rules like the ones listed above as the model of moral reasoning at law, then, we can indeed see how judges can be legally required to apply some considerations at law because they are appropriate to the circumstances, rather than because they have been posited by a recognized source. The difficulty, however, is that not all moral reasoning at law is like this. That is, the requirement that judges look to moral reasoning at law is not limited to instances in which they are applying rules like the ones described above, that contain explicit direction to do so, but do not posit these considerations directly. In addition to instances of moral reasoning like the ones described above, judges may also be required to reason morally in the application of posited rules that are morally neutral on their face, or that contain no such reference to morality. Let us consider some examples.
Consider, then, the law against murder. The rule prohibiting murder is not generally taken to be an instance of a posited rule that directs judges to consider further moral considerations, like the rules described above do. Rather, it is a source-based rule that happens to overlap with morality. In this respect, it is not generally taken to be a counter-example to legal positivism.

Nonetheless, judges might appeal to moral reasoning when applying this rule as well. An accused is guilty of murder when he intentionally causes the death of another human being, or when he intentionally harms another person in a way that he knows is likely to cause death, and is reckless as to whether or not death ensues. A person who harms another intending to kill him and causes his death clearly falls under this rule. But, someone who beats another person, intending to cause his death, and then, under the mistaken belief that his victim is dead, throws the victim over a cliff, leaving him to die of exposure is also guilty of murder under this rule. This is so even though the accused did not intend to cause the victim’s death in the precise manner in which it occurred. This series of acts constitute a single transaction for the purposes of determining the culpability of the accused because, morally speaking, the accused is as blameworthy as he would be if he had caused the victim’s death directly. Similarly, an accused who holds the victim’s legs while another person strangles her is likewise guilty of murder under this rule. As above, the Court here held that there is no difference in the blameworthiness of the two accuseds. Or, to take another example, Canadian courts have found that an

---

210 *Canadian Criminal Code* (R.S., 1985, c. C-46), s.229 (a)(i) and (ii).
212 Here the Court held that there is no distinction between “the blameworthiness of an accused who holds the victim’s legs, thus allowing his co-accused to strangle her, and the
accused who beats another person knowing his actions are likely to cause death but is
efficient as to whether or not death ensues is likewise guilty of murder when his victim
dies because, in such a case, the accused “committed as grave a crime as the accused who
specifically intends to kill.”

In all of these cases, the courts have had to engage in moral reasoning in order to
determine whether or not the source-based requirements for murder have been met. This
is so even though the rule prohibiting murder contains no explicit directions to judges to
do so. Nor can these cases plausibly be construed as judges changing or amending the
law against murder. The courts in these cases were not improving the rule against murder,
or departing from the existing law. Instead, it is the merely because the rule prohibits
murder that these cases fall under it. This is so even if judges must engage in some moral
reasoning to so conclude.

One might perhaps argue the posited rule against murder contains implicit
directions to judges to consider morality in its application because it invokes the moral
notion of murder. On this view, although it is not exactly like the rules listed above that
explicitly refer judges to consider further moral rules, the law against murder could be
understood on their model. The moral reasoning that judges in which judges engage in
the application of this rule would thus pose no threat to exclusive positivism since these
cases would be instances of the law direct judges to look outside the posited rules to
morality in order to apply this rule, on this view. This line of reasoning cannot save
exclusive positivism, however. First, it would lead to the conclusion that even those

---

posited rules that overlap with morality are not law, resulting in a theory of law that is wholly unfamiliar. More significantly, however, one need not suppose a posited rule that overlaps with morality in order to show that judges must sometimes appeal to moral considerations in the application of posited rules, even when the law contains no explicit direction to do so. Consider, for example, the Ontario Family Law Act.\(^{214}\) In providing for the division of family assets, the Act specifies that

> The value of the following property that a spouse owns on the valuation date does not form part of the spouse’s net family property.\(^{215}\)

It then lists the property that is to be excluded from the family assets for the purposes of division upon the breakdown of a marriage. The Act thus directs judges to consider only the “value” of the excluded property, without directing them to consider how this value is to be determined. In its application of this rule to a case, the Ontario High Court held that

> while the Act speaks of value, it contains no definition of that term nor, indeed, guidelines of any kind to assist in the determination of its meaning other than the provision contained in s. 4(4) that when value is required to be calculated as of a given date, it shall be calculated as of close of business on that date.\(^{216}\)

Nonetheless, the Court concluded that

> absent any statutory direction, "value" must then be determined on the peculiar facts and circumstances as they are found and developed on the evidence in each individual case. While this approach does not lead to uniformity and predictability of result, it does recognize the individuality inherent in each marriage and case and permit the flexibility so often necessary to ensure an equitable result.\(^{217}\)

In other words, the Court held that even though the provision contained no explicit directions or references to a fair or equitable valuation, the application of this rule to the case requires an appeal to such considerations nonetheless. In applying this rule to the

---


\(^{215}\) Chapter F.3, Part I, s.4(2).


\(^{217}\) *ibid.*
case, the Court is not changing or amending the law; there are no references in the judgment to attempts to improve the law on the matter, or to the failures of the law that has come before. 218 Instead, it is the mere fact that the judges must determine the value of excluded property for the purposes of dividing family assets upon the breakdown of a marriage that requires them to use a measure of value that ensures a fair and equitable result. In other words, judges must appeal to moral considerations in the application of this rule even though this rule contains no explicit provisions to do so. This suggests that the test for determining whether to appeal to moral considerations need not be one that is explicitly anticipated by the posited law, as Raz suggests.

Judges might also invoke moral considerations when reasoning from one case to the next when deciding common law cases, even when there is no posited rule that explicitly invokes morality. Consider, for example, Lord Atkin’s reasoning in *Donoghue v. Stevenson*. 219 Here the Court was asked to determine whether a duty of care as it had commonly been understood and applied by the courts extended to the instant case, in which a the plaintiff had found the remains of a snail in a ginger beer manufactured by the defendant. No general principle governing the duty of care had as yet been articulated; instead, the Court had to uncover the principle governing the cases that come before and apply it to the case at hand. In order to do this, Lord Atkin began by noting that “the liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa,’ is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.” 220 That is, in order to determine the

218 Though the case did raise other novel issues.
219 [1932] AC 562 (HL).
220 [1932] AC 562 (HL), 580.
precise scope of the duty of care, he began with the moral idea that a wrongdoer owes his victim compensation. He concluded that this duty is limited to those people “who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

In short, in order to determine the scope of the duty of care, Lord Atkin looked to the precise nature of the of a wrongdoer’s duty to compensate his victims, and the kinds of considerations that can limit this duty. As above, this is a case of a judge looking to moral considerations in his application of a posited rule to a case. Lord Atkin appealed to these considerations even though the law contained no explicit provisions directing him to invoke such considerations. Not even the common law rules provided for such an appeal to morality, since, as we have seen, there was no articulated rule governing such cases at the time. And, as above, this case cannot plausibly be construed as an instance of a judge changing or improving the law in accord with what it ought to be; Lord Atkin was not attempting to improve the law of negligence or depart from the existing law. Instead, as he held, “in English law there must be, and is, some general conception of relations giving rise to a duty of care.” That is, Lord Atkin took himself to be discerning the principles already latent in the law and apply them to the next case, rather than introducing new principles. It was the mere attempt to extend the law in this way that required him to appeal to reason morally in the manner described above.

The foregoing analysis further undermines the plausibility of Raz’s suggestion that law exclude all appeals to moral reasoning. Recall Raz’s initial suggestion. Raz

\[ \text{ibid.} \]

\[ \text{ibid.} \]
concedes that judges must sometimes make reference to moral considerations in order to
determine what the law on a matter is. But, he argues, when they do, it is like they are
referring to the rules of a foreign country: the law might direct them to make such appeal,
but it does not thereby incorporate these distinct rules. The two systems remain separate.
This understanding of the role of morality in legal reasoning is plausible, and the analogy
with foreign law is compelling. But it relies on the supposition that the law requires
appeal to morality in the determination of its requirements where the posited law contains
explicit direction to do so. That is, Raz’s explanation of the role of morality in law holds
on the assumption that morality enters law only when the posited law makes explicit
appeal to morality. One might think that Raz can explain cases like the ones described
above, where judges reasoned morally in their application of posited rules to the cases at
hand by arguing that although the posited rules in question did not explicitly direct judges
to moral considerations in their application, they did so implicitly, by, say, implicitly
directing judges to considerations of, say, blameworthiness in the application of the rule
against murder, fairness when dividing up family assets upon the breakdown of a
marriage, or limits of the duty that private parties owe to one another when determining
whether manufacturers owe a duty of care towards the ultimate consumers of their
products. This explanation will not do for Raz, however. This is because it is only if one
is already reasoning morally that one can see that appeal to moral considerations is
necessary in the application of these rules. That is, it is only if a judge already thinks that,
say, one must make determinations of blameworthiness when deciding questions of
murder; that property ought to be divided fairly upon the breakdown of a marriage; and
that people owe one another a duty of care that one can see that the law implies an appeal
to these moral considerations in the first instance. Raz’s supposition that morality only enters legal reasoning where the posited law makes explicit reference to it, and that posited consideration must always take priority over moral ones, must therefore fail.

It thus seems that neither the inclusivist strategy of incorporating moral considerations into law, nor the exclusivist strategy of excluding all of morality from law, succeeds in meeting Dworkin’s challenge. But, as we have seen, Dworkin’s in-principle rejection of legal positivism also fails. It thus seems that we are at an impasse. The analysis above, however, also suggests that we might have reason to doubt the initial source/merits distinction that Dworkin draws, and that positivists inherit. Although there remains a distinction between considerations of what the law is, and considerations of what it ought to be, we need not suppose that source-based considerations exclude all appeals to moral reasoning in their application to particular cases. Let us turn to a more careful examination of this suggestion.

5.7 The Source/Merits Distinction Revisited

Recall Dworkin’s initial distinction. As we saw in our discussion of Dworkin’s theory, Dworkin initially draws this distinction in terms of source-based rules, and moral principles. He holds that source-based rules determine their outcomes automatically, and in an all-or-nothing fashion; they cannot meaningfully conflict; and their exceptions can be fully enumerated. They lack a dimension of “weight,” and once it has been determined that a source-based rule applies to a case, there can be no further question about what the law requires. It is therefore impossible to resolve conflicts between

---

posed rules by weighing them against each other directly. Merits-based considerations, or principles, on the other hand, are binding in virtue of their appropriateness to the circumstances. They provide a reason in favour of one conclusion or another, but do not decide cases automatically. Instead, they must be weighed against one another in order to decide a question.

Later, in *Law’s Empire*, Dworkin argues that source-based considerations consist in the past decisions of the members of legal institutions, including the legislators, city councilors, judges, and so on. These form the “pre-interpretive data” upon which judges, and others who are attempting to determine what the law requires, impose a theory of interpretation. So, e.g., to say that a statute is source-based is to say that it consists in “a physical entity of a certain type, a document with words printed on it, the very words congressmen or members of Parliament had in front of them when they voted to enact that document.” This excludes, however, the “difference that the statute makes to the legal rights of various people.” That is, it excludes those considerations to which people can appeal in order to determine the legal effect of the statute. More generally, Dworkin holds, although source-based considerations can tell people what the legal institutions of a given community are, “the question which features they have, in virtue of which they combine as a distinctly legal system, is part of the interpretive problem,” and requires appeal to further considerations.

---

226 Dworkin, *Law’s Empire*, 16. Dworkin is here distinguishing between two senses of the word “statute:” the physical entity itself, and the “real” statute behind the statute that requires a theory of interpretation to uncover.
There are difficulties with either formulation, however. First, Dworkin describes the distinction between rules and principles as a conceptual, or “logical” one.\textsuperscript{229} Nonetheless, Dworkin argues, whether or not a given standard is a rule or a principle can itself be a matter of controversy. The distinction between the two thus cannot be determined by inspection of the standard itself. As Dworkin notes, “‘a will is invalid unless signed by three witnesses’ is not very different in form from ‘a man may not profit from his own wrong.’”\textsuperscript{230} Instead, he argues, one must know something about American law in order to know that the first is a rule and the second is a principle.\textsuperscript{231} In other words, the question of whether a given standard is a rule or a principle is itself a matter of legal judgment, and can itself be a matter of legal controversy. The very same standard can be interpreted either as a rule or as a principle. So, to take Dworkin’s example, the First Amendment of the US Constitution prohibiting Congress from abridging freedom of speech can be interpreted as a rule, invalidating all attempts to limit speech, or a principle, merely providing a reason against an abridgment of speech, but not deciding the issue.\textsuperscript{232} So too with the legal requirement that every contract in restraint of trade is void.\textsuperscript{233} By reading in the requirement that only contracts that unreasonably restrain trade are void, Dworkin argues, the U.S. Supreme Court interpreted this standard as formally a rule, immediately voiding all contracts that contravene it. But it read it substantively as a

\textsuperscript{229} Dworkin writes, “the difference between legal rules and legal principles is a logical distinction.” \textit{Taking Rights Seriously}, 24, and again on p.26, when he remarks that the “logical distinction between rules and principles appears more clearly when we consider principles that do not even look like rules.”

\textsuperscript{230} \textit{Taking Rights Seriously}, 27.

\textsuperscript{231} ibid.

\textsuperscript{232} Dworkin takes those who advocate a “clear and present danger” test for limiting speech to be proponents of this latter view. See \textit{Taking Rights Seriously}, 27f.

principle, requiring the Court to take a variety of factors into account in order to determine whether or not a given contract unreasonably restrains trade.\textsuperscript{234}

This is just to say, however, that there are no such things as legal rules, as Dworkin understands them. If any standard can function either as a rule or as a principle, and one and the same standard can function as either at different times, then every application of a standard requires a fresh determination of whether it is to function as a rule or a principle. In other words, as Dworkin notes, every application of a standard invokes an implicit determination of its weight in the circumstances. But this is just to deny that there are any standards that settle the question of what the law requires “automatically,” and to say that every standard functions as a principle rather than a rule.

Dworkin’s second formulation of the source/merits distinction raises a different problem. In \textit{Law’s Empire}, Dworkin distinguishes between the pre-interpretive source-based “data,” and the legal interpretation that gives this data its legal effect, or weight. As we saw above, his thought is that it is only once someone imposes a particular theory of interpretation on a set of data that she can draw any conclusions about the specific features that the system possesses, and the particular rights and duties that it confers on people. And, of course, as we have seen, the interpretation that Dworkin has in mind is political; it requires an evaluation of which principles of political morality best fit the pre-interpretive data, and then a determination of which of these best justify the data. The problem here is a variation on the problem that we raised earlier for Dworkin, namely the difficulty that what counts as a legal institution or official, and what counts as a rule of the system are themselves questions for the system; they are dependent on what the

further posited rules say. It must therefore be possible to draw at least some inferences about what the law is by appeal to posited rules alone, without adopting a theory of interpretation. Otherwise, people could not distinguish the posited rules and the legal institutions and officials from all other rules and social practices of the community. That is, it must be possible to draw at least some inferences from the posited rules alone, without appeal to a theory of interpretation, if people are to be capable of identifying the pre-interpretive data in the first instance. But, if it is possible for some posited rules to ground legal inferences, then Dworkin cannot object that it is in principle impossible for source-based rules alone to ground legal conclusions. And, he has given us no further reason to doubt the ability of source-based rules to ground legal inferences.

Although this distinction has been widely questioned (especially in its first formulation), positivists adopt it in their defences of legal positivism against Dworkin’s challenge. Inclusive positivists concede Dworkin’s analysis of *Riggs*, and the source/merits distinction with which he begins, but, they hold that the law can include considerations that are binding in virtue of their merits, not their sources. It can do so since, even though these considerations are not posited by a recognized source directly (as they are in, e.g., the law against murder), they can be incorporated into the law by some further posited rule. As a result, for inclusive positivists, that the law must make such appeal to moral considerations is itself a contingent fact of the system, and hence it is consistent with positivism.

Exclusive positivists, on the other hand, likewise grant Dworkin’s distinction between those considerations that are binding in virtue of their sources, and those that are binding in virtue of their merits, and Dworkin’s suggestion that hard cases might arise
that cannot be decided on the basis of the posited law, but that have a legally determinate outcome nonetheless. This is no threat to legal positivism, on this view, however, because although the law might require judges to reason morally, it does not thereby incorporate morality, thereby maintaining the distinction between these two systems of rules.

Both positivist responses suppose a distinction between those considerations that are law because they have been posited by a recognized source, and those that are legally binding because of their merits, or because they ought to be, even though they are not part of the posited law. When judges reason morally in rendering their decisions, on these views, they are appealing to considerations that are binding in virtue of their merits, not their sources. Both positions suppose a conception of source-based reasoning that excludes moral considerations; none have challenged Dworkin’s distinction itself.

The discussion above suggests that not all instances of moral reasoning at law are best described as appeals to merits-, rather than source-based considerations, however. So, for example, when judges appeal to moral considerations in order to decide that holding down a victim’s feet while another person kills her constitutes murder; that, for the purposes of its division upon the breakdown of a marriage, the value of family property ought to be determined in accordance with principles of fairness; or that a manufacturer of a product owes a duty of care to its consumers because it can reasonably foresee their consumption of its product, and so on, it is implausible to hold that they are engaged in further moral reasoning, beyond the reasoning needed to apply the source-based rules to these cases. The application of a rule, even a source-based rule, to a case is an act of reason. These acts of reason might be “automatic” or “mechanical” in the sense that, in some instances, people can apply these rules quickly, or without thinking about
what they are doing. But there is no further sense in which the application of a rule to a case is automatic or mechanical. In particular, there is no causal sense in which one can apply a rule to a case automatically, or mechanically; the appreciation of a rule, or the rule and the facts of a case does not cause one to draw a given conclusion, whatever this might mean. Rather, the application of a rule to a case – even a posited rule – always requires an inference or act of reason, even if this act of reason is simple, or occurs very quickly.

It is thus plausible to assume that rules prohibiting murder, listing the property to be excluded from a family’s assets for the purposes of its valuation upon the breakdown of a marriage, or imposing a duty of care on private actors require people to reason morally when they are applying these rules to particular cases. This is so even when these rules are binding because of their sources, not their merits. It is thus not because they are applying source-based rules that judges must appeal to moral considerations when deciding cases like the ones above. Rather, it is because they are deciding questions of what counts as a murder, how to divide family assets upon the breakdown of a marriage, and what the scope of the duty of care is that they must reason morally. That is, it is because these are morally weighty rules, they bear on morally weighty circumstances, and their decisions have morally weighty consequences that judges must appeal to moral considerations when applying them to particular cases. This is so even though these rules are legally binding in virtue of their sources, not their merits.

Dworkin’s distinction between source-based rules as excluding all appeals to morality, or judgment generally, and all other rules and considerations that are binding in virtue of their merits thus misconstrues the nature of legal reasoning. This distinction is
intuitive if we begin with the problem of hard cases; if we begin our analysis of legal reasoning by considering *Riggs v. Palmer*, it does seem as though moral and source-based reasoning come apart. There is a sense in which they do, to the extent that there is a distinction between what the posited law does require, and what it *ought* to require. That is, there remains a distinction between legal and moral reasoning in general. But, the distinction is not quite as sharp as Dworkin draws it, whereby reasoning from posited rules excludes appeal to all moral considerations.

Legal positivists thus need not accept Dworkin’s source/merits distinction untouched in formulating their responses to his challenge. This said, however, this reconfiguration of the source/merits distinction is not sufficient to solve the problem of hard cases. This is because the majority’s appeal to the principle that no man can profit from his own wrong cannot plausibly be construed as an instance of source-based reasoning, even on this expanded understanding of reasoning from source-based rules. The problem posed by *Riggs*, and by hard cases generally, is that in these cases it seems that the law is determined by principles that cannot be traced to any posited source. In this respect, their legal validity is not like the validity of the moral considerations that judges appealed to in deciding the cases of murder, the valuation of family property or the scope of the duty of care that we saw above.

Positivists, however, have more resources for explaining law than Dworkin credits them with, and than they themselves draw on in their defences against Dworkin’s challenge. In addition to advancing this more robust conception of source-based reasoning, legal positivists can also explain the ways in which legal rules come together to form a system, united under the rule of recognition. And the expanded notion of
source-based reasoning, combined with this further feature of law are indeed sufficient to provide a positivist response to Dworkin’s challenge. I will now turn to a more detailed explanation of this conclusion.
VI. HARD CASES AND LEGAL VALIDITY

6.0 Introduction

Let us recall again *Riggs v. Palmer*. In *Riggs*, a grandson, Elmer Palmer, murdered his grandfather in order to expedite his inheritance. Elmer was clearly named as a beneficiary in the will, the will was validly enacted, and there was no posited law overriding the Statute of Wills, or prohibiting murderers from inheriting. Nonetheless, the majority held it is the “universal law administered in all civilized countries”\(^{235}\) that no one should profit from his own wrong, and for this reason denied Elmer the inheritance.

Here the Court relied on a rule that had no posited source in order to render its decision. Even so, the judges argued that they were deciding what the law is, rather than what it ought to be. This calls the sources thesis, or the view that all law must come from a source, into question. This also challenges the separation thesis, since the mere fact that the posited law pointed to a given outcome did not settle the question of what the law required; the judges still had to look to morality in order to decide the issue. The intuitive plausibility of *Riggs* suggests that a complete theory of law must be capable of explaining the validity of these further considerations as well.

As we have seen, contemporary positivists follow Dworkin in taking *Riggs* to illustrate the possibility of legally binding moral considerations that are not anticipated by posited ones. They thus take the challenge posed by *Riggs* to lie in the possibility of explaining the legal force of these moral considerations, given that the existence of a legal system is a matter of social fact. However, as we know, none succeed in meeting this challenge. Existing positivist responses fail because they take the challenge of hard

\(^{235}\) *Riggs*, 511f; 190.
cases to lie in the problem of explaining how morality can sometimes be imported into the law. On the other hand, Dworkin’s solution fails because he takes hard cases to indicate that all of morality is always in law.

Their mistake is to take the problem to be one of explaining how morality gets into law in the first instance. I will argue that despite surface appearances, *Riggs* is not an example of law being decided on unposited moral grounds at all. Instead, it is an example of the law preventing a unilateral attempt to seek legally prohibited advantage through the application of its rules. The law can prevent such attempts because of the distinctive way in which it governs people’s behaviour, as compared to all other social rules and institutions. It is true, I will argue, that the distinctive structure of law renders it specially vulnerable to hard cases like *Riggs*. Dworkin is thus right to suggest that the problem of hard cases is inescapable for law. But, I will argue the very features of law that explain its vulnerability to these cases also explain its ability to resolve them. This is because, as I will argue, it is one of the distinctive features of law that law maintains ultimate authority over its rules, and denies unilateral attempts to subvert them, and that the problem posed by *Riggs* consists in nothing more than such an attempt.

I will begin by briefly outlining the distinctive features of law that distinguish it from all other social rules and institutions, and show that they follow from Hart’s widely accepted view of law as the union of primary and secondary rules. I then turn to the advantage of such a system of rules, and explain why law is needed to accrue this advantage, even if people are perfectly good. Finally, I show how this understanding of law explains why law is inescapably vulnerable to hard cases like *Riggs*, as Dworkin
suggests, but it also shows why law has the resources to resolve such cases. Let us begin with an account of the distinctive nature of law.

6.1 The Distinctive Features of Law

The idea that law helps people to plan and coordinate their actions with one another is a familiar one. Law consists in a fixed and public set of rules for governing people’s actions and structuring their relations with one another, and these rules apply to all the members of a given community. Of course, the existence of such rules does not guarantee that people will comply with them. But, it makes people’s actions more predictable, and therefore helps each person to plan her affairs and coordinate with others’ attempts to do the same.

This cannot be all that law does, however. This is because this leaves the distinctive features of law that distinguish it from all other social rules and institutions unexplained. Coordination requires that people have some common and public set of rules or considerations, of which they are all aware, and to which they can all appeal when planning their affairs requires them to take into consideration the activities of others. This is not all that law provides, however. Law not only gives people some indication of how those around them will behave; it gives people a right, according to the law, to have others behave this way, and imposes a legal obligation on others to so behave. Second, in order to confer these rights and obligations on people, law must also be issued from an authorized source; otherwise, it consists in the mere exercise of power. Finally, not all harms count as legal sanctions. Instead, law backs these rights and obligations with a public sword; it entitles each person to call upon the power of the state
in order to protect her rights against others and to enforce people’s obligations against one another. These features constitute the distinctive marks of law, as compared to all other social standards and rules. An explanation of what law provides that leaves these features out fails to explain the advantage of establishing a system of legal rules, as opposed to instituting just any set of standards for coordinating people’s behaviour with one another. In order to understand how law governs people’s behaviour then, we must explain the point of these key features that make a system of social rules a legal system. My claim is that these features are necessary for explaining how law governs people’s interactions as actors who are capable of setting and pursuing ends for themselves, independently of the ends and pursuits of those around them. Law’s attempt to structure the relations between independent actors renders it vulnerable to the possibility of hard cases because, as I will argue, independent actors are capable of acting so as to subvert law’s structure. But, I will argue, law can also prevent people from succeeding in their efforts precisely because it consists in a system that renders the activities of independent actors consistent with one another. As such a system, it must also be capable of preventing its rules as being used as means for furthering prohibited ends. Let us therefore begin by considering the distinctive way in which law purports to govern people’s actions, and those features of law that make such governance possible.

6.2 Law as the Union of Primary and Secondary Rules

Indeed, as we have seen, it is precisely because John Austin could not account for these key features of law that Hart rejected his theory. See my discussion of Hart’s objections to Austin in ch.2.
When people are governed a legal system, they are subject to a set of rules conferring a coordinated set of rights and duties on them. That is, when people are governed a legal system, they are subject to a set of rules securing for each person a range of action over which she is entitled to be free from interference by those around her, but limiting this range of action to that which is consistent with others’ entitlement to the same; people thus also incur a set of obligations to respect the rights of all other subjects of the system.

The law secures these rights and obligations with the threat of force. When someone has a right at law, she is entitled to call upon the power of the state to protect it from encroachment by others, and when she is under an obligation, she is subject to the threat of state coercion for its violation.

This is of course not to say that the state will protect people’s interests from all sources of interference, nor is it a promise to provide people with the conditions for achieving their aims, come what may. It is, of course, always possible that, say, despite their best efforts, people fail to achieve the ends they set for themselves: I might do all that I can do but my efforts might be thwarted by natural forces, or, say, someone else gets there first, and so on. These are all unhappy results, but they are not violations of my legal rights. The entitlement to be free from interference is also not a promise that people will in fact refrain from interfering with one another’s rights. Rights and duties are rational constraints; it is up to the actor to decide whether or not to comply. By backing legal rights and obligations with the power of the state, however, law gives public warning that violations of these rights and duties are taken at the risk of state coercion, and that the state might force the wrongdoer to redress her wrong.
At the same time, the state is limited to protecting *just* those interests secured by legal rights and duties; people can engage in all other activities free from the threat of state coercion. This is not to say that people are under no further moral obligations to one another; there are indefinitely many obligations that people incur towards each other. Nor is it to say that only legal obligations are backed by the threat of harm. People can impose many different kinds of sanctions on one another for the violation of their obligations. But, the law limits the exercise of *state* coercion to upholding just those that are prescribed by law; there are no further types of behaviour that the state is justified in coercing.

Law has these features because of basic facts about its structure. In particular, law can provide the security it does because, as Hart illustrates, law fundamentally consists in the union of primary duty-imposing rules and secondary power-conferring rules, and it is founded in an ultimate rule of recognition.\(^{237}\) Primary rules are action-guiding rules. They tell people what, according to the law, they must and must not do. Power-conferring rules are rules setting out the conditions under which people can create, amend, or extinguish primary rules. Intuitively speaking, power-conferring rules are rules establishing legal institutions, like legislatures, courts, judges, police, etc. Legal systems must include such rules in order to render intelligible the idea that, under some circumstances, members of a community act and speak in an official law-creating, applying, and enforcing capacity, separate from acting on their personal desires and judgments.

\(^{237}\) Hart, *The Concept of Law*. 
Power-conferring rules also include rules setting out the conditions for making a valid will or contract, and other ways that private parties can alter their legal status with respect to each other. These rules are a kind of power-conferring rules because people are acting like private legislators when they change their legal status in accordance with these rules. But, there remains a significant difference between the actions that private parties take pursuant to these rules and the actions of officials; private parties do not act in an official capacity when they, say, make a will, get married, incorporate, and so on. Moreover, the powers they have to change their legal status consist in just those that the law confers on them; the law prevents people from unilaterally changing their legal status with respect to each other. Indeed, as we shall see, this is the central idea that the notion of a secondary rules explains.

Finally, law is founded in an ultimate rule of recognition setting out the authoritative criteria for validity for all the subordinate rules of the system. This rule imposes a hierarchical order on all the subordinate rules of the system, thereby establishing a means of resolving conflicts between them, should they arise. The rule of recognition thus unites all the various rules of the system into a systemic and coherent whole, and the various judgments and actions the officers of the system into that of a single public authority capable of speaking in a unified voice.

Such a system of rules enables law to issue rules conferring a set of legal rights and duties on the people living under it. This set of rules is fixed, public and coordinated. Consider each feature in turn.

First, to say that these rules are fixed is not to say that these rules are unchanging or unchangeable. On the contrary, as Hart points out in his criticism of John Austin, one
of the distinctive features of a legal system is that it provides the procedures for creating, amending, and extinguishing its own rules. The rules conferring rights and duties are fixed, then, in the sense that they are determined by facts that are independent of the whims and activities of private actors. This is because these rules are just those that are enacted pursuant to the recognized procedures of the system, and it is just to the extent that a rule is enacted in accordance with these procedures that it confers a legal right or duty; no other rights or duties, no matter how weighty, morally good, or widely practiced, are enforced by law. To say that law provides people with a fixed set of rules then is to say that it provides them with a set of rules that are fixed at any given time by facts that are independent of people’s private behaviour and attitudes in this respect.

Secondly, by making legal validity depend on conformity with specified procedures, the existence of power-conferring rules makes people’s legal rights and duties public. This is because on this conception of law, whether or not a given rule is a rule of the system depends the actions and judgments of public officials. In this respect, people’s legal rights and duties depend on facts that are available to all subjects of the system, and the continued existence of these rights and duties, or their extinction, remains a matter of public fact; there is no risk that the they might change or be extinguished in secret. This is not to say that they are easily discernable, or to say that there is a clear answer to what the law requires in any given case. As we well know, legal systems can be arbitrarily complex and people often need significant expertise in order to determine what the law requires in a given case. But, legal rights and duties are public in that the facts that make it true that a given person is under a legal right or duty are available to the

---

238 *The Concept of Law*, ch. III.
public at large, and, that these are the relevant facts for determining people’s rights and duties under the system is also a publicly available fact.

Finally, power-conferring rules also make it possible for law to issue a coordinated set of rules conferring a coherent set of rights and duties. Law confers a coordinated set of rules insofar as its rules work together to promote, rather than impede action. So, for example, where the law grants a right, it also imposes corresponding obligations to respect it; the law does not permit and prohibit the same action; it does not require people to engage in conflicting actions, or do and refrain from engaging in the same action, or otherwise require practical impossibilities. This does not mean that conflicts are impossible, or that they do not arise between the various rights and duties conferred by the system. In a system that is sufficiently complex, and that is created and maintained by many individuals, conflicts between rules are not unlikely. But, power-conferring rules allow law to resolve conflicts when they do arise by including rules for ordering the rules of the system and deciding conflicts. Where there is no such explicit rule for settling a conflict, the law will direct people to an authoritative official whose judgment on the matter settles the question. The important point here is that where conflicts between rules do arise, their resolution is also a question for the legal system; the system does not leave conflicts to be resolved by the subjects themselves. This is so just by virtue of the fact that the power-conferring rules return questions arising from the issuing, application and enforcement of its rules to the system.

6.3 Independence
These distinctive features of law make possible the complex kinds of interactions between people that we typically associate with life under a legal system, and that we think are absent in pre-legal societies.

Where there is no law, whether or not people’s interactions go well or badly for them depends on the particular characteristics of those around them. It is true that people might be kind and generous towards one another, and they might respect the interests of those around them, but they might not, and whether or not they do depends on their particular whims and inclinations on the matter. This is not to say that people are subject to the mere whims and inclinations of those around them where they have no law. Absent a system of fixed legal rules, people may well develop practices of, say, respecting one another’s holdings and engage in trades or exchanges of them; they might refrain from injuring one another, and inflict harm on those who do injure people, and so on. These practices can help to force people to treat those around them well, even when they are not so inclined. But, whether or not such practices are in place, and which practices people adopt remain a function of the particular characteristics of the members of the community, as does their continued existence. It is thus just to the extent that the members of a community are inclined to adopt and enforce such practices that they are in place. As a result, where there is no fixed set of rules for settling such conflicts, there is nothing further than people’s whims and choices to which people can appeal. That is, there is no further standard to which they can hold one another, other than that which is set by the particular choices of particular people in order to settle such conflicts and redress wrongs when they occur.
This makes people’s relations with one another doubly insecure. First, people are independent actors, capable of choosing their ends and pursuits for themselves, independently of ends and pursuits of others. Although they might take their ends and pursuits of those around them into consideration when deciding what to do, they need not. As a result, when people interact with one another, they are always vulnerable to the risk that someone might act against their interests and injure them.

Over and above their vulnerability to the possibility of suffering an injury at the hands of another, people are also vulnerable to the possibility that they have no recourse for recovery should the risk of injury materialize. That is, over and above the possibility of being harmed by a member of their community, people are also vulnerable to the risk that resulting losses are their burden to bear. One way to mitigate against the risk of injury by another actor is to make the occurrence of injuries less likely: people can physically protect themselves from the activities of those around them, or they can provide others with incentives to avoid risky activities. This is a useful strategy, and it is especially important for protecting things that are not fungible, like one’s person. So, for example, people have reason to drive defensively even when they have the right of way because the available remedies for accidents are poor compensation for the potential injuries that one might suffer. Another way to reduce the harm of injuries that people might suffer at one another’s hands, however, is to provide an avenue for recovery should an injury occur. The availability of recourse for recovery does not necessarily make the possibility of injury less likely (though it may help, since it increases the cost of engaging in risky activity). But it can reduce the harm that people suffer when an injury does occur by displacing some of the resulting costs of the injury. The availability of recourse can
thus relieve people of the responsibility for bearing the full burden of the loss. It is thus another way of making people’s interactions with one another more secure, even though it does not (necessarily) reduce the risk of injury directly.

Where there is no law, people are vulnerable to both kinds of risk. They are vulnerable to the possibility of suffering a harm by the activities of those around them, and they are vulnerable to the possibility that they bear the full burden of this harm; there may be nothing further to which they can appeal in order to seek compensation or redress. To be sure, people might adopt alternative means for relieving each other of these risks and making their interactions with each other more secure. People might, say, build fortresses around their homes or institute practices of, say, respecting one another’s interests, and exacting a price from the wrongdoer and returning it to the victim. As we have seen, however, whether or not they do engage in such practices depends on the whims and inclinations of the members of a given community, making people once again vulnerable to the particular characteristics of those around them.

Law, of course, does not relieve people from the risk of suffering an injury at the hands of another. Law does not consist in a set of physical constraints, that physically prevent people from harming one another, and this is what would be needed in order to protect people from the possibility of harm in this way. Instead, it consists in a system of rules prescribing the legal rights and duties that its subjects can claim against one another, and that are backed by the power of the state. As such, it remains possible that people violate their legal obligations towards one another, and infringe on another’s rights. But the distinctive features of law described above – namely, that it is fixed by facts that are independent of any person or group’s personal characteristics, that these
facts are publicly available to all the subjects of the system, and that they form a unified system, directing questions of conflict or indeterminacy back to the system to be resolved – relieve people of the second risk that they have no recourse for recovery in case they do suffer an injury. It does so by providing people with a further set of standards that, first, do not depend on the whims and inclinations of any particular person or group, and whose continued existence is independent of what anyone thinks of these rules, or whether or not people comply with them. Second, people can determine according to these standards, for any given action, whether or not it is subject to the threat of state coercion, and they can take those around them to know this as well. And, thirdly, these standards set out the conditions of state coercion conclusively, so that where questions as to the rules’ requirements do arise, as in cases of conflict or indeterminacy, they are not left to be settled by the subjects themselves. Although, as mentioned above, the existence of such a set of rules does not make violation impossible, it assures people that they can seek recourse when they do occur, thereby relieving them of the risks they face when interacting with actors capable of choosing their ends for themselves.

The availability of such a set of rules makes it possible for people to interact with strangers, or with one another as strangers, without facing the insecurity described above. It does so because it guarantees all subject to a legal system that they can seek recovery if they are injured by another party to an interaction, but that they are responsible for no more than the cost of the harm in the case of an injury. So, for example, it is of course possible that, even without a legal system in place, people can designate routes for travel, that they develop conventions coordinating their travel, and that these conventions are
steady and well-established, so that people can safely get from one place to another. But, it is the existence of a fixed system of rules securing, e.g., people’s right of way on the green light but not the red; at the crosswalk but not in the middle of the road; designating the roads for drivers but not, say, lawns or sidewalks, and so on, and rules preventing people from unilaterally changing all these rules, that makes possible the complex systems of traffic that we currently have. Similarly, even without a legal system, people may, say, trade goods with one another, develop reliable practices for determining the relative value of different objects, institute mechanisms for holding one another to the bargains they strike, and so on. But, it is only once people establish a legal system that also exhaustively sets out a set of public, fixed, and coordinated conditions under which its rules can be changed that people can, e.g., book a flight on the internet, or make a trade on the stock market. These are all risky activities, in the sense that they involve high, or non-trivial, stakes, and people stand to lose a lot in the case of injury. They are also risky in that they require the coordination of many people who often know nothing about one another, and who likely bear no other relation to one another beyond their mutual involvement in these interactions. The existence of a legal system renders people’s activities in these cases more secure by relieving them of the risk of bearing the full burden of these losses, and by guaranteeing that they can be held responsible by the state for no more than the cost of these losses.

More generally, the existence of a legal system allows people interact with one another merely on the supposition that those around them are also independent actors, entitled to set and pursue their ends for themselves, so long as they can be reconciled with the ends and pursuits of those around them. They need not assume anything further
about people’s particular ends or pursuits, or other personal characteristics in order to render their interactions with one another more secure. In particular, they need not assume anything about the intentions or motivations of those around them, including the assumption that people are self-interested, or morally good (or wicked), in order to render their interactions with one another more secure. They need only act under the assumption that they are each subject to a set of public, coercively enforced rules securing their choices over a range of actions, subject to the constraint that these rules secure a corresponding range of choices for all other subjects to the system as well.

The difficulties with interacting with other persons capable of independent action is not merely a product of people’s bad nature, though it is certainly made worse by people’s wickedness or selfishness in their pursuits. People’s choices can conflict even if they are morally good. This is because it is perfectly permissible for people to act on ends they set for themselves, independently of the ends and pursuits of those around them, and to respect the ability of others to do the same. Even so, however, people remain vulnerable to the risk of conflict. This is because there are multiple morally permissible ends that people might choose, and when they choose independently of one another, their ends and pursuits might come into conflict. Even if people are perfectly good, then, they still require a fixed and public set of rules for rendering their independent activities consistent with one another.

One might think that morality consists in just such a set of rules. Morality consists in a unified set of rules governing people’s actions to which everyone has access, and that binds people regardless of what their whims and desires happen to be. It is thus
coordinated, fixed and public in the relevant respects. Morality also provides people with some guidance for avoiding conflict and resolving them when they do arise. But, it cannot provide a determinate standard for rendering people’s independent activities consistent with one another because it cannot set fixed boundaries for distinguishing one person’s rights from another, and such a determinate standard is needed for rendering people’s independent activities consistent with one another. Let us consider an example.

Morality can, for example, tell people that it is wrong to help themselves to the belongings of others, that they ought to return objects lent to them, that they ought to compensate people when they destroy their belongings, and so on. But, it cannot provide a determinate answer to the question of what counts as the thing in question. It cannot tell people that, say, when a person writes on a paper, it is the paper that persists, even when the text is a beautiful poem, and even when it is written in gold, but when a person paints on a canvas, the canvas is destroyed and a new object – the painting – is created. So far as morality is concerned, either option is permissible, and the choice between them is arbitrary. As a result, when one person mistakenly writes on another’s paper, or paints on another’s canvas, morality can indeed tell her that the mistaken party must either return the original object or compensate the owner for its destruction. But it cannot direct the parties in these cases to, say, return the paper with the text on it to its owner, but to compensate the owner of the canvas for the destruction of her property, and this is what is needed in order for people to satisfy the requirements of their moral obligations, and to render their activities consistent with one another.

This problem is a general one. It is true that morality can provide people with principles governing the acquisition and transfer of rights. But these principles are indifferent as to the object of the right. People’s obligation, say, to return objects lent is independent of how they determine what counts as the object; if it is on loan, they are under an obligation to return it, whatever it is. As we have seen, however, there are multiple morally permissible candidates for what can count as the object. Satisfaction of this moral obligation requires returning the actual object lent, however, even when this is something different from what one might intuitively expect, and morality cannot deliver this. People thus need a further fixed and public set of rules specifying the conditions under which a given object can be said to belong to someone if they are to render their independent activities consistent with one another, regardless of how careful or well-intentioned they are in their attempts to respect the belongings of others.

So too for the other rules that law provides for reconciling people’s independent activities. In order for people to, e.g., drive safely in the presence of other drivers trying to do the same, they need rules specifying what counts as a road and who has right of way, no matter how careful or considerate they are; in order for people to limit their liability in their dealings with others, they need rules specifying the conditions under which they can incorporate, no matter how scrupulous they are, and so on. This is so even when people are perfectly good and in perfect agreement on morality’s dictates. Satisfaction of moral obligations when engaged in these practices likewise requires the existence of a fixed and public answer to these questions.

This problem is also much deeper than it first appears. Rendering people’s disparate aims and the actions they take in their pursuit consistent with one another does
not require reconciling every action that a person can take with the pursuits of every other actor in the world. So holding would make action virtually impossible. This is because virtually every time someone acts, she limits the range of action of all other actors. If people had to take every action that every person might choose into account every time she acted, they could almost never act. Law releases people from this general obligation, on the condition that they respect others’ power to act as well. But, it provides people with only a limited range of actions over which their choices are sovereign, and puts them under a corresponding obligation towards only a limited range of people, and morality cannot supply the boundaries for fixing this range of actions, or of persons towards whom people are under reciprocal obligations. That is, morality cannot specify the determinate particulars that fix the boundaries for deciding who counts as a party to an interaction and which actions are to be reconciled for the purposes of rendering people’s independent activities consistent with each other. As a result, although interacting on terms of independence is morally permissible, and although morality can provide people with general guidelines for governing such interactions, it cannot specify the boundaries in which they can occur, and, as a result, cannot supply people with determinate rules for rendering their independent actions consistent with one another.

When a legal system is a just one, the law gives effect to an important aspect of morality, namely, people’s ability to set and pursue their ends for themselves, and to respect the ability of others to do so as well. This is because, as we have seen, the existence of such a set of rules provides people with the relevant specifications for fulfilling their moral obligations towards one another. This is not to say that this is the purpose of legal rules to
give effect to morality in this way, though it is certainly true that legal rules *ought* to be just. It is just to notice that when they are good, this is something that people can gain from law.

Legal rules can render the actions of independent actors consistent with one another even when these rules are wicked or unjust. This is because it is the mere fact that legal rules are fixed, public, and coordinated in the ways described above that makes it possible for them to reconcile people’s independent activities with one another. Recall the initial difficulty: law makes it possible for people to interact with one another even though they are vulnerable to one another’s power of choice by establishing rules governing the circumstances in which the state can interfere with its subjects’ affairs, and by establishing fixed procedures for determining the creation, amendment and extinction of these rules. This makes it impossible for any particular person or group to unilaterally change these rules governing the state’s use of its power on a private desire or whim. Instead, it is only under certain circumstances – namely, when officials, acting in their official capacity, change these rules in accordance with set procedures – that one can effect a change in these rules. This makes the kind of complex interactions that we typically associate with life under law possible because it allows people to interact with one another – e.g., to drive on a highway, to make a trade on the stock market, etc. – without knowing anything about the particular characters of the parties to the interactions. That is, the existence of such a fixed and public set of rules exhaustively setting the terms governing the state’s use of force makes it possible for people to interact with one another on terms of independence, or without any concern for the particular ends and pursuits of those around them. This is so even if the rules themselves are bad or
unjust ones because it is the mere fact that they are fixed, public, and coordinated that makes such interactions possible; all that is needed for securing people’s interactions with one another is a fixed, public warning about the state’s use of force, and the assurance that these conditions will persist until further public notice. Of course, where the rules of the system are not good ones – where, say, they do not accord their subjects equal status, where they deny people rights that are morally valuable, etc. – subjects will likewise be incapable of engaging in free or just interactions with one another, or, at least, their ability to do so will be significantly curtailed. But, their mere ability to interact with one another as independent actors – i.e., their mere ability to set and pursue their ends for themselves and to refrain from interfering with the attempts of others – will remain intact, even where the system fails to set out moral or good conditions for interaction. My claim, then, is, that the fact that law renders the actions of free actors consistent with one another makes law vulnerable to hard cases like *Riggs*. However, law’s ability to so render people’s actions consistent with one another also explains how it can decide such cases. Let us therefore consider again the difficulty posed by *Riggs*.

6.4 *Riggs Revisited*

The Court in *Riggs* held that even though Elmer was clearly set to inherit under the will, and even though there was no countervailing posited law prohibiting murderers from inheriting, it is fundamental principle of law that no one should profit from his own wrong. For this reason, it denied Elmer the inheritance. Moreover, the Court held that this principle governed the case even though it had no posited source.
Riggs is not a hard case in the sense that it requires judges to apply a wicked or unsavoury law, nor is it hard in the sense that it arises from defects, moral or otherwise, in the formulation or application of legal rules; the Court in Riggs was not charged with applying unjust or wicked laws. Nor further is it hard in the sense that the relevant rules are hard to apply, or that it is unclear whether it falls under the rules in question. In all these respects, Riggs is an easy or clear case: the rules governing the disposition of property are just ones; the will clearly named Elmer as a beneficiary; it was clearly valid; it clearly fell under the Statue of Wills; and there was no posited law prohibiting murderers from inheriting, or otherwise vitiating the Statue. The difficulty that Riggs raises, then, does not lie in the application of the particular rules themselves.

Dworkin suggests that the difficulty with Riggs arises from the immorality of permitting Elmer to benefit from his wicked act, and the possibility that the law is implicated in such a wrong. Further commentators have adopted this analysis as well. All have supposed that the law’s appeal to the principle that no man should profit from his own wrong constitutes an appeal to a moral principle in an attempt to prevent the law from furthering Elmer’s immoral ends. The law on the matter is not so straightforward, however.

First, the principle upon which the Court in Riggs relied – that no man should profit from his own wrong – is too broad as stated. The law certainly sometimes permits people to profit from the fact that they have committed a wrong, even if they are not profiting from the wrong directly. So, for example, although many states have laws prohibiting criminals from profiting from the publication of the details of their crimes (so-called “Son of Sam” laws), not all states do, and whether or not so profiting is legally
prohibited depends upon whether such a law has been enacted, rather than on a conceptual feature of law. Adverse possession and breach of contract are two other obvious examples of instances in which the law permits people to profit from their wrongs. The law thus does not prohibit all attempts to profit from one’s wrong.

More importantly, however, modern legal systems typically prohibit the imposition of a penalty beyond that provided by the criminal law for the commission of a crime. In general, the law cannot divest a person of her civil rights or her property because of a lack of desert, or “dirty hands.” This is so even when allowing a person the benefit of her property or civil rights is morally repugnant. So, for example, the administrators of a retirement fund cannot deny a retired police officer his pension on the grounds that he has been convicted of drug trafficking. The mere fact that the officer is morally undeserving of this benefit cannot serve as the reason for denying it to him. More generally, considerations of moral desert, or lack of desert, cannot form the basis of a decision about who benefits at law. The Court’s denial of Elmer’s claim thus cannot be explained by mere appeal to his lack of moral entitlement to the inheritance.

---

240 Article III of the U.S. Constitution states that “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted,” U.S. Const. art. III, § 3, cl. 2. This clause has been liberally construed and has been read to prevent all official attempts to impose further punishment for crimes committed. See United States v. Brown, 381 U.S. 437 (1965), 442. See also Cummings v. Missouri, 71 U.S. 4 Wall. 277 277 (1867), holding that the deprivation of any right can count as a punishment if it is imposed as such. Similarly, article I of the U.S. Constitution prohibits federal and state Congresses from passing ex post facto laws and bills of attainder. Art. I, §§ 4, 9 and 10, respectively.

241 Board of Trustees of Police Pension and Retirement System of Oklahoma Board of Trustees of Police Pension and Retirement System of Oklahoma City v. Weed 719 P.2d 1276, holding that the Police Pension and Retirement Board’s attempt to divest an otherwise meritorious officer of his earned pension on the grounds of his criminal conviction violates the prohibition on corruption of blood and forfeitures of estates.
Instead, the problem in *Riggs* is that the defendant committed a legal wrong *so as to gain from someone else’s legal power*. Elmer’s act did not just consist in the prohibited act of murder, though it was also murder. Instead, he killed his grandfather *in order to prevent* him from changing his will and disinheriting him. In other words, Elmer sought to benefit from a power that the law confers on his grandfather, namely, his power to dispose of his property as he sees fit, and he did so through legally prohibited means.

By so doing, Elmer tried to usurp his grandfather’s legal right for his own gain. That is, he tried to help himself to his grandfather’s right to name the beneficiaries of his estate in order to secure his claim on the estate. But, when the law confers a power on people to dispose of their property as they see fit upon their death, it confers this power *just* on the testator. No one else has the legal power to decide how the testator will divest his property. Of course, the testator might ask for advice from his family or, say, his lawyers on how to best dispose of his estate. But, the ultimate decision, at law, remains his; no one else’s decision can have the legal effect of naming a beneficiary under his will. By murdering his grandfather so as to benefit under the will, Elmer attempted to subvert this power.

It is thus true that the will named Elmer as the beneficiary, that it was validly enacted, and that there was no countervailing posited law preventing murderers from inheriting in New York state at that time. But, the Court asked, “what law, human or divine, will allow him [Elmer] to take the estate and enjoy the fruits of his crime?” It continues,

If he had met the testator and taken his property by force, he would have no title to it. Shall he acquire title by murdering him? If he had gone to the testator’s house and by force compelled him, or by fraud or undue influence had induced him to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it
seems to me, would be a reproach to the jurisprudence of the state, and an offense against public policy.\textsuperscript{242}

In other words, by murdering his grandfather in order to prevent him from changing his will, Elmer negated his claim to inherit under it just as he would have lost his claim to title had he taken the property by force, or had he fraudulently induced his grandfather to will it to him.

The law’s vulnerability to the possibility that its subjects unilaterally act so as to subvert the power it confers is an unavoidable feature of its structure. By issuing a set of rules that render people’s actions consistent with one another, law takes its subjects to be rational actors, capable of setting and pursuing ends independently of those around them, whose actions can come into conflict with one another. Law aims to render people’s actions consistent with one another by subjecting them to a coordinated scheme of rights and duties, and by backing these rules with the threat of state coercion. These rules \textit{legally} prohibit acting so as to subvert this scheme. However, as rational actors, it is always open to legal subjects to attempt to subvert the law; there is no conceptual impossibility in their doing so. It is thus always possible for actors under this scheme to help themselves to its guarantees in order to seek a legally prohibited advantage; i.e., it is always open to the subjects of this scheme, as free actors, to seek to benefit from the law’s protection of, for example, someone else’s right to dispose of his property as he chooses.

No combination of rules can prevent actors from choosing to act in this way, no matter how complete or carefully crafted. This is because the law cannot make it impossible for them to abuse or subvert its guarantees. In addition to the possibility that

\textsuperscript{242} As per Earl, J., writing for the majority in \textit{Riggs}, 512f, 190.
subjects violate of its rules, they can also abuse the law’s guarantees by attempting to
usurp its authority and attempting to claim for themselves powers that it reserves for
other subjects, or for its officials.

The law remains vulnerable to the possibility that its subjects act this way regardless of who it designates as a subject, and which actions it permits or prohibits. This is because it is the mere fact that the law seeks to govern the actions of free actors through the imposition of a fixed set of permissions and prohibitions that it leaves open the possibility that a legal actor, whoever it is, will commit a prohibited act, whatever it is, so as to gain from a legal permission. This is so even if the law denies status to, say, women or African-Americans, or, say, confers it to households or ships,243 and even when it prohibits good acts and permits wicked ones. The law’s appeal to the prohibition against profiting from one’s own wrong only appears to be an appeal to a moral principle in Riggs because the law in this case was just.

The law’s inherent structure renders it vulnerable to cases like Riggs, but its inherent structure also provides it with the resources to resolve such cases. The law secures for the testator the exclusive right to name the beneficiaries of his estate by reserving to itself the power to determine its rules. As we know, legal rules can only be changed in accordance with fixed legal procedures. It is never open to a private party to unilaterally change the rules of the system. This includes the rules conferring the power on a testator to decide who is to inherit his property when he dies. Elmer’s actions

243 The household is taken to be the primary legal actor under Roman law, and under U.S. Admiralty law, ships can be taken to be legal actors for the sake of proceedings in rem. See, Barry Nichols, An Introduction to Roman Law, cited in fn. 11, above, for a discussion of the Roman law of persons, and e.g., The Ville de St. Nazaire,124 F. 1008 (D. Or. 1903), for the a discussion of the U.S. doctrine of proceedings in rem.
constitute such a unilateral attempt. Recall the facts of Riggs. In this case, Elmer had warning that his grandfather might attempt to change his will and disinherit him. Elmer murdered his grandfather in order to pre-empt this possibility and guarantee his inheritance. Elmer’s murder of his grandfather thus constitutes an attempt to usurp the power that the law reserves to itself to set the rules for deciding who gets to dispose of someone’s property when he dies. The law can prevent such attempts just by virtue of the fact that, in setting out the conditions under which its rules are created, amended or extinguished, it makes these conditions exhaustive, rendering all other attempts to change the rules of the system void. It is for this reason that it must hold Elmer’s attempts to be void as well, and deny his claim to the estate.

Cases like Riggs are easily multiplied. Consider another example. The law also prohibits keeping the profits from the sale of timber that was wrongfully taken from another’s land and then improved. This is so even if the defendants have a greater moral claim to the timber than do its owners. In Wooden-Ware, timber was taken by Aboriginals off land owned by the federal government, but reserved for them. Arguably, the defendants in this case are morally entitled to the benefits of the land, even if they do not have title at law. The law, however, upheld the rights of the lawful owner as against the defendants. It did so because it prohibits such unilateral attempts to subvert its rules, even if they are morally justified.

Similarly, the law also prohibits keeping the profits from the sale of a book in which the author intentionally commits libel for the sake of selling more books; or

---

244 Wooden-Ware Co. v. U.S. 106 U.S. 432, 1 S. Ct. 398 (1882).
from improvements made on coal that is taken from another’s mine, and so on. As above, in such cases the law is preventing itself from being used as an instrument to subvert its own aims. It is true that, in general, the benefits sought by the defendants in these cases are ones that the law protects: in general, the law protects the profits gained from otherwise lawful sales, and those accrued through improvements one makes to one’s property. But, in these cases, the defendants committed a legal wrong so as to benefit from these protections: Cassell & Co. helped themselves to Captain Broome’s reputation *in order to sell more books*; the defendants in the coal cases helped themselves to others’ coal *in order to gain from its resale*, and so on. As in *Riggs*, their acts constitute unilateral attempts to usurp powers that the law confers on others, namely, the power to control one’s reputation and to seek profit from the sale of one’s property. And, as above, the defendants in these cases committed these wrongs so as to benefit from the law’s protections. The denial of their claims, however, is not an *ad hoc* attempt to ignore the posited law when it points to an outcome too unsavoury to uphold, or to insert morality to curtail unwanted consequences of the posited law. Nor are these cases examples of the seamless connection between law and morality. They are not an open door for the inclusion of all moral considerations in legal reasoning, as Dworkin suggests. Instead, they are instances of the law’s attempt to reassert itself as an institution that delimits the range within which people are authorized to act in the face of the legally authorized powers of other agents to act. These limitations on the exercise of legal rights

---

do not need to be posited in order to be law. Instead, they follow just from the fact that the law precludes the unilateral attempt to change its rules.

Indeed, we can even generate another principle like the one applied in *Riggs* using this same line reasoning. In addition to preventing people from committing a prohibited act so as to benefit from another’s exercise of his right, the law must also prevent people from exercising their legal rights so as to benefit from another’s commission of a legal wrong.\(^{247}\) So, for example, I cannot refuse to contract with one person unless he breaks his contract with another.\(^{248}\) This is so even though the law gives me the freedom to contract, including the freedom to refuse to contract, and even though, in general, the law relieves people of responsibility for the wrongs of others. These prohibitions do not require explicit enactment in order to be legally binding. Nor do they indicate the existence of unposited moral considerations in law. Instead, they follow just from the fact that the law aims to systematically coordinate the rights of each with the rights of others, but that it protects nothing more than people’s entitlement to one another’s rightful actions.

My suggestion, then, is that the unposited moral considerations that Dworkin thinks are missing from the positivist account but that remain legally binding are just those that arise from the fact that law consists in a system of rules that confers a coordinated scheme of rights and duties on free actors. Doing so requires that it deny legal effect to unilateral attempts to change its rules. Hard cases arise under such a system because law governs free actors, who are capable of attempting to subvert law’s structure,

\(^{247}\) See O. W. Holmes, “Privilege, Malice, and Intent,” *Harvard Law Review* 1, 1-14, (1894) for raising this point in this connection.  
whatever it is. The law has the resources to resolve them because it maintains ultimate authority to determine its rules: unilateral action only has legal effect when the law confers a power. No further appeal to morality is necessary.

One might think that this appeal to law’s ability to coordinate the activities of independent actors constitutes an appeal to law’s purposes in a way that positivists might find objectionable. As we have seen, positivists limit their account of law to questions of what it is, not what it ought to be. Hart aims merely to provide a descriptively accurate account of law; no further normative conclusions about what people ought to do, or in what law ought to consist follow from his analysis. One might object, however, that by appealing to law’s ability to coordinate the activities of independent actors in order to resolve Riggs, the solution I have proposed makes appeal to law’s purposes, and thus extends beyond mere considerations of what the law is, as required by a positivist account.

It is true that some appeals to law’s purposes extend beyond those considerations that are captured by a descriptive theory of law. So, for example, Lon Fuller argues that the purpose of law is to guide human conduct so as to promote social order. He argues this aim is incompatible with wicked regimes like the apartheid regime in South Africa or the Nazi regime. To the extent Fuller supposes that law has a substantive aim as its purpose, and that this aim imposes moral constraints on the content that law can have,

---

positivists object that Fuller is proposing a theory of what law ought to be, rather than what it is.

On the other hand, however, one might take Fuller to be proposing a *formal* aim for law. On this understanding, what Fuller calls the “inner morality” of law is not a kind of morality at all; rather, it is best understood as a condition of efficacy. Fuller’s suggestion, then, that law be general, public, clear, and so on, in order to be law does not constitute a moral constraint on law.\(^{252}\) Instead, it merely sets out those conditions that legal rules must meet in order to fulfill its function as law. This aim, however, is neutral as to whether law is used for good or evil ends. As Hart notes, even the act of poisoning has its own internal principles. “But,” as Hart explains, “to call these principles of the poisoner's art ‘the morality of poisoning’ would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.”\(^{253}\) Positivists can thus readily concede Fuller’s claim that law, by its nature, has such formal ends since nothing in the adoption of such formal ends impugns the positivist distinction between law and morality.

It is true that my solution to *Riggs* supposes an understanding of law as coordinating the activities of independent actors. However, I have not proposed a purposive account of law in any meaningful sense. I do not argue that law can be characterized solely in terms of these consequences, nor do I argue that people intend for

\(^{252}\) Fuller lists eight conditions that law must meet in order to fulfill its function. These are that law be general; public; clear; prospective; consistent; that it be capable of being followed; constant through time; and administered in accordance with its dictates. See Fuller, *The Morality of Law*, ch.2.

law to have this consequence when they establish a legal system, or that the consequences that I allude to constitute law’s aim. The account of law that I have offered is wholly consistent with law having some other aim, or people having other intentions towards it, or no intentions with regards to it at all. It appeals only to the fact that law, understood as the union of primary and secondary rules, *does* have this consequence.

One might argue that characterizing a thing in terms of its consequences is sufficient for proposing a purposive account of law. I will not address this question directly. Instead, I will say only that even if one did think that the solution that I have proposed for *Riggs* is a purposive one, it appeals to nothing more than the formal ends that law might have; it is neutral as to whether these ends are good or bad. As we saw above, the law prevents people from committing a legally prohibited act so as to benefit from another’s exercise of her right regardless of the moral claim that the actor has to the benefit. In order to see this we need only appeal to the systematic features of law, as consisting in a system of rules that reserves to itself the authority to resolve conflicts in its requirements, and that only recognizes the acts of officials as having legal effect on its rules. As we have seen, this understanding of law requires appeal to nothing more than the conception of law as the union of primary and secondary rules, and it is consistent with law being used for good or wicked ends. As a result, even if one thinks that my solution supposes a purposive account of law, this proposed purposes are merely formal and are thus consistent with Hart’s positivism.

Overall, then, Dworkin is correct to suggest that the law is inescapably vulnerable to the possibility of hard cases, and that, when confronted with them, the law has the resources to resolve them even when their solution cannot be traced to a posited source.
A complete theory of legal validity must therefore explain law’s ability to handle these cases. But, Dworkin is wrong to think that this poses a threat to positivism. Explaining law’s ability to issue such a set of rules is precisely what Hart sets out to do in conceiving of law as the union of primary and secondary rules, and, I suggest, we need appeal to nothing further in order to explain law’s ability to resolve hard cases. In particular, no further explanation of the legal validity of moral considerations is needed.

6.5 Conclusion

I have thus proposed a resolution to the problem of hard cases by examining the nature of legal validity. I have argued that the very features of Hart’s account that resolve the puzzle raised by legal validity, namely, the difficulty of reconciling law’s social nature with the fact that it binds people independently of their inclinations, and whether or not they want to be bound, solves the problem of hard cases as well. It does so because the existence of secondary rules establishes the public institutions and voice from which law is issued and enforced, but it also limits law-creating and enforcing acts to just those that are issued by such public officers; as we have seen, no further private acts can have legal effect in this way. It is for this reason that Elmer’s unilateral attempt to usurp his grandfather’s power to divest of his property as he sees fit is void at law.

This solution provides a complete response to Dworkin’s challenge because it can explain how the law can require frequent appeal to moral considerations, and can resolve hard cases while remaining a system of social rules. Judges must frequently appeal to moral considerations when rendering legal decisions, because, I argue, on a more plausible account of source-based reasoning, morally weighty source-based rules can
require moral reasoning in their application to particular cases. Moreover, my solution can resolve the problem of hard cases because it appeals to nothing more than systematic features of law, and, as I have argued, the problem of hard cases, and Riggs in particular is best understood as raising questions about these features. As a result, no appeal to unposited moral considerations in necessary.

My solution avoids the problems encountered by existing accounts of law, however, because it does not require an explanation of how the law can require appeal to unposited moral considerations. I thus avoid the difficulties with saying that all of morality is already in law that plague Dworkin’s account, and those that arise for the inclusivist and exclusivist strategy of making the existence of morality in law depend on its anticipation by the posited rules.