

## Note to Participants at the Yale Legal Theory Workshop

These are draft chapters from a yet unnamed book about morality and the concept of law. Together they may be a bit long, so I have indicated a point near the end of the first section of chapter two where pages can be skipped. For those really pressed for time, I would suggest reading just chapter three.

Since some people might be blissfully ignorant of the traditional debate between legal positivists and their opponents, it might be helpful to put here a summarizing passage that appears late in chapter three:

“On the exclusive positivist account, the grounds of law are to be found in the rule of recognition, which lists a set of ultimate criteria for the identification of law; no criterion for the identification of law, however, can require moral reflection. The inclusive positivist account also looks to a rule of recognition for the ultimate criteria, but allows that criteria for the identification of law, ultimate or otherwise, may require moral judgment for their application. In both versions of the positivist account the content of the rule of recognition is to be determined by looking to see what are generally accepted as the ultimate criteria in the relevant legal system, at least by legal officials. Nonpositivist accounts count moral considerations as grounds of law independently of what are generally accepted to be grounds of law. On the Radbruchian version of natural law theory, that a rule or standard not be grossly unjust is a standing criterion of validity. (Note that an extreme natural law view that holds that full compatibility with morality is a criterion of the identification of law is not among the plausible views, as it is in clear conflict with ordinary usage of the concept of law.) The Dworkinian nonpositivist account holds, at the most general level, that the law is to be found by providing the morally best interpretation of the extant legal materials.”

The chapters are mostly about why anyone might have thought this was a worthwhile dispute and what might be a fruitful method for resolving it.

I look forward to our discussion.

Liam Murphy

## Chapter Two

### Concepts in Practical Philosophy

#### *1. Why does conceptual disagreement matter?*

Attention to conceptual content is important in legal, moral, and political argument because of the ideological use to which conceptual entrepreneurship and the exploitation of ambiguity can be put. Here is Richard Epstein writing about liberty:

A person does not exercise his liberties when he kills or enslaves another; he does not vindicate his property rights when he steals from another. If he is restrained from these actions by another, he cannot claim a loss of liberty, but only the loss of an ability to act to which he was never entitled. Liberty is best understood as freedom from force or falsehood, not as a maximization of the things which are under one's disposition and control.<sup>1</sup>

Three different notions of liberty are invoked here. There is the “moralized” idea of liberty as freedom to do what you like so long as you do not violate certain rights,<sup>2</sup> the classical negative liberty of freedom from force, and a notion of positive liberty as maximization of things under one's control. What is important in this passage is the insinuation that the first two of these are equivalent, standing together against the rejected concept of positive liberty. Traditionally understood, negative liberty is interfered with

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<sup>1</sup> Richard Epstein, “Causation and Corrective Justice: A Reply to Two Critics,” *Journal of Legal Studies* 8 (1979): 489.

<sup>2</sup> For discussion of libertarians' use of “moralized” accounts of liberty, see G.A. Cohen, “Capitalism, Freedom and the Proletariat,” in *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, ed. Alan Ryan (1979), 9.

by the enforcement of the rights and other legitimate claims people may have, and so it is unsuitable for libertarian slogans such as “liberty can be limited only for the sake of liberty.” For that, the moralized conception of liberty is more suitable. But “Freedom from force and fraud” sounds more stirring as a rallying cry than: “Freedom from force except where force is necessary to enforce the legitimate claims of other people.” Also, the latter dangerously opens up space for argument about just what the legitimate claims of others are. So it is clear why a libertarian author might consciously or unconsciously try to keep both of these concepts in the air at the same time, appealing to one or the other as the rhetorical demands of his argument require. And it is important for the critic to point out that there are different concepts of liberty being invoked, that they are not compatible, and so on.

But what isn't important for arguments about libertarianism and for political philosophy generally is to settle what liberty, as opposed to some other possible political value, *really* is. Isaiah Berlin was right to describe “liberty” as a “protean word.”<sup>3</sup> None of the notions of liberty Epstein invokes violates conceptual propriety. And all are useful for political discussion. As a rhetorical matter, some of them may be more susceptible to demagogic abuse than others,<sup>4</sup> and the very fact that there are these different but closely related concepts opens up the space for sleights of hand. So some would prefer that all but one of these concepts withered away. But that doesn't mean that one of them is, now, the right concept.

Similar remarks apply to the concept of democracy, though in this case it seems that we are not dealing with a cluster of different concepts but rather a single,

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<sup>3</sup> Isaiah Berlin, “Two Concepts of Liberty,” in *Four Essays on Liberty*, 121 (1969).

<sup>4</sup> This seems to be the main concern Berlin had about the concept of positive liberty. See his Introduction to *Four Essays on Liberty*, p. ix.

indeterminate concept. As with any concept, there are views about its proper application which can be regarded as simply mistaken. A democracy is a system of governance where the people rule, in some sense. Though some insist that substantive equality is implicit in the very idea of democracy, rule by philosopher kings who aim at securing social equality is not democratic. Nor was the German Democratic Republic democratic, despite the fact that the use of the label in 1949 to claim the anti-fascist tradition in recent German history was in one sense entirely appropriate. So there is a core to the concept which sets rough boundaries to correct usage. But within these boundaries there are a range of importantly different systems of government that can legitimately be categorized as democracies.

Pretty much every concept is indeterminate to some extent. But in the typical case—Does the concept of a car extend to sports utility vehicles?—this indeterminacy is obviously of no significance and nobody much cares where the boundaries of the category might get drawn when that is necessary in a particular context. With democracy and many other normative concepts the case is different. It is not obviously unimportant whether the concept of democracy should be applied to systems where voter turnout routinely falls below 50%, for example. Nonetheless, the central questions of political philosophy and political science are not questions of categorization, but normative and descriptive questions about the design and function of political institutions. Democratic theory is not the same as an account of the concept of democracy, and the former is more important than the latter.

Take next the concept of the rule of law. On most people's understanding, the rule of law is opposed to arbitrary and personal rule. But beyond that rough sense of the

neighborhood, different accounts of the rule of law are best seen not as accounts of a concept, but as different substantive theories about the way in which systems of governance should be organized to realize a certain political ideal—one that has something to do with people being able to control to some extent the nature of their interactions with political authorities but that is distinct from justice and democracy. Different theories of the rule of law will characterize this special and distinct value a system of governance may bring about in different ways. For Joseph Raz, what we are trying to get at with a theory of the rule of law are the conditions a system of governance must satisfy if, in governing people, it respects their autonomy.<sup>5</sup> For Ronald Dworkin, the key idea is the role of law in establishing a set of principles that each of us can acknowledge as justifying the state’s exercise of coercive power, though we disagree about justice and right and wrong generally.<sup>6</sup> Both political theories about what, other than justice and democracy, we should aim at in the design of the institutions of the state make perfectly appropriate use of the label “the rule of law.”

The point is clearest for the concept of justice. In the opening pages of *A Theory of Justice*, Rawls writes:

The concept of justice I take to be defined, then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role.<sup>7</sup>

This is Rawls’s version of Hart’s idea that all accounts of justice tell us to treat like cases alike, while different accounts of justice vary in their criteria for likeness.<sup>8</sup> Rawls and

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<sup>5</sup> “The Rule of Law and Its Virtue” in *The Authority of Law* (1979), 210 .

<sup>6</sup> Dworkin, *Law’s Empire*; Dworkin, “Hart’s Postscript and the Character of Political Philosophy,” *Oxford Journal of Legal Studies* 24 (2004).

<sup>7</sup> John Rawls, *A Theory of Justice* (rev. ed., 1999), 9.

Hart held that so much is fixed by the very concept of justice. But neither took that to be controversial or in need of sophisticated philosophical defense. The important point, for both, is that theories of justice offering very different criteria of distribution are equally compatible with the concept of justice and that what *is* fixed by the concept is, as Hart put it, “incomplete” and cannot “afford any determinate guide to conduct.”<sup>9</sup> A theory of justice is an attempt to come up with principles that can guide conduct and institutional design and that is not at all a work of conceptual clarification or analysis, as Rawls’s arguments for his own theory make plain. As Rawls writes:

Clearly this distinction between the concept and the various conceptions of justice settles no important questions. It simply helps to identify the role of the principles of social justice.<sup>10</sup>

Of course, it is possible to disagree with Hart and Rawls about what is fixed by the concept of justice. But disagreement with a particular understanding of the concept is unlikely to play an important role in evaluating a philosophical position. Thomas Nagel argues that principles of social justice do not apply across national boundaries, though transnational humanitarian obligations certainly exist.<sup>11</sup> He puts his position this way because, like Rawls, he associates the idea of justice with the relative positions of different social groups. Since he believes that what matters internationally are absolute levels of deprivation rather than relative positions, it follows that there is no such thing as

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<sup>8</sup> *The Concept of Law*, 159-160.

<sup>9</sup> *Id.*, 159.

<sup>10</sup> *A Theory of Justice*, 5. In earlier work, Rawls took the very different view that his two principles of justice were candidates for the correct account of the concept of justice; for discussion, see Murphy, “Rawlsian Concepts.”

Jeremy Waldron, in “The Primacy of Justice,” *Legal Theory* 9 (2005), addresses what he takes to be neglected issues concerning the concept of justice, but his discussion does not revise or defend Rawls’s account of the concept—rather, it argues for the primacy of justice, so understood.

<sup>11</sup> Thomas Nagel, “The Problem of Global Justice,” *Philosophy & Public Affairs* 33 (2005).

global justice. My own view is that economic justice requires the promotion of people's absolute levels of welfare and that these requirements do not respect national boundaries. Is this disagreement with Nagel best captured by saying that I believe that there is no such thing as justice, or that there is such a thing as international justice? Of course the inclination is to say the latter, thus using a broader concept of social justice than Nagel; the political significance of the term "justice" is such that this usage is worth fighting for. But that is clearly a secondary debate about the ideological consequences of our linguistic usage in political argument. What is primary, at least theoretically, is the disagreement about what moral principles should guide people and states in their social and economic relations, domestically and internationally; in argument about that, either understanding of the concept of justice will do.

So within pretty obvious and rough boundaries set by the meanings of words and the need for meaningful communication with others, political philosophers can and do make use of partly stipulative and more precise accounts of equivocal or indeterminate concepts such as democracy and justice. It is not part of their task to attempt to analyze the true content of the concepts that play a central role in the presentation of their views.

This conclusion is not in tension with the importance of analytical critique of the conceptual usage of others in philosophical, political, or legal argument. Conceptual indeterminacy allows not just for ideological rhetoric, it can also, more simply, obscure the real nature of the disagreement between different political camps. A policy of intervention in other countries in the name of liberty can blunt the objection that foreign intervention is incompatible with liberty in the sense that implies national self-determination. Perhaps the most instructive examples of this phenomenon involve the

use of the concepts of equality and liberty in the Age of Revolution and contemporary claims of continuity with revolutionary aspirations. Many Haitian revolutionaries believed that the values of liberty and equality, while they condemned slavery, were compatible with rule from Paris and nondemocratic government thereafter.<sup>12</sup> American revolutionaries used the same concepts to express the opposite combination of views. And contemporary Haitians and Americans can claim continuity with revolutionary usage in order to obscure from view a national political tradition that for a long time rejected political liberty, in the one case, and racial equality, in the other.

Genealogies of different concepts of, say, liberty, rights, or the state, are also important for understanding the history of political philosophy,<sup>13</sup> and thus also for contemporary political theorizing, since, as Rawls emphasized, evaluation of a moral or political theory is a matter of assessing overall plausibility relative to the main alternatives. Sometimes conceptual change within the philosophical tradition raises no difficult problems of interpretation. It is obvious from the texts that Hume has in mind a narrower subject of justice than Rawls; and though they used words a bit differently, there is no difficulty relating their discussions. Where the question is more global—What is the history of the concept of a moral right?, for example—the analysis will need to be much more complex. But in none of these contexts where analysis of political concepts is necessary or useful is the task to uncover the correct account, against which other accounts or usage can be judged.

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<sup>12</sup> See Sibylle Fischer, *Modernity Disavowed: Haiti and the Cultures of Slavery in the Age of Revolution* (2004).

<sup>13</sup> See the papers in Terrence Ball et al., eds, *Political Innovation and Conceptual Change* (1989).



If we are not doing political theory but instead interpreting legal texts, things are obviously different. Article 7 of the Canadian *Charter of Rights and Freedoms* provides that

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

An interpreter of this text will have to fill out the legal meaning of “liberty” and “justice.” Application of this article, especially in the early years of its existence, inevitably requires a judge or other official to engage in constructive political theorizing. But the first step will be to figure out what the subject matter of the theorizing should be, and that is fixed by the meanings of the words, as used in that legal context. Again we should not assume that the concepts of “liberty” and “justice” in Canadian Charter law are just the same as the concepts appropriate for use generally. Legal usage can depart dramatically from ordinary usage, as the history of the phrase “due process” shows. So what will guide a judge are whatever principles of constitutional interpretation are appropriate for a Canadian judge deciding a Charter matter. The judge will not necessarily be engaged in a search for the true account of the concepts of liberty and justice.

A good example from international law is the concept of the state. The legal definition of “state” has long been contested.<sup>14</sup> It is contested both what the criteria for statehood in international law are and what they should be. Neither question is the same as that of what states really are. And there is no reason to think that the best account of the state for international law will coincide with the best account for social and philosophical inquiry. Thus Weber’s definition of the state as that which (successfully)

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<sup>14</sup> See James Crawford, *The Creation of States in International Law* 2<sup>nd</sup> ed. (Oxford, 2006).

lays claim to a monopoly on the legitimate use of force may not be the best account for legal purposes. The concept of the state also well illustrates the dangers of ideological abuse—through the recently popular idea of the failed state. The rhetoric of failed states seems designed at least in part to provide a language of justification for intervention and the suspension of rights under international law generally. But then the criteria for failure tend to shift with the case in hand and to be constrained only by the general idea that something has gone wrong—rather than by considerations relevant to international legal personality and the rights and duties that flow from that.<sup>15</sup>

I have argued that though analysis and critique of the way in which central concepts are employed is essential to political argument, it is no part of political philosophy to get the content of those concepts right. It might be doubted whether anyone disagrees with this.

The concepts of liberty, democracy, and justice are some of those Ronald Dworkin discusses in his argument against what he calls “Archimedeanism” in political philosophy.<sup>16</sup> Dworkin writes that “conceptual analysis that does not involve normative judgment, assumptions or reasoning”<sup>17</sup> is not part of constructive political philosophy. But he nonetheless believes that political philosophy is in a certain way *about* concepts.

Lawyers and politicians who argue about [judicial review] do not just assume that democracy means majority rule, so that judicial review is by definition undemocratic and the only question left to be decided is whether it is nevertheless justified. On the contrary, lawyers and politicians argue about what democracy really is: some of them insist that judicial review is not inconsistent with

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<sup>15</sup> See Crawford, 718-23

<sup>16</sup> Dworkin, “The Character of Political Philosophy.”

<sup>17</sup> *Id.* at 6.

democracy because democracy does not mean just majority rule, but majority rule subject to those conditions that make majority rule fair.<sup>18</sup>

My disagreement is that I don't think that lawyers and politicians, any more than philosophers, are at bottom concerned about what democracy "really is" or "means." They are concerned about whether the principles of governance they favor are compatible with such practices as judicial review. The term "democracy" is used by all, since most people around here now agree it's a good thing, whatever it is. But they are not, in the first instance, arguing about the concept. They are arguing about what's right and wrong in institutional design.

In his discussion of authority, Joseph Raz takes a very similar approach.<sup>19</sup> His "normative-explanatory" account of the concept of authority is not offered as an account of the meaning of the word "authority." It is normative in the sense that it takes a stand on substantive issues that have been contested in the "philosophical and political traditions of our culture"; so there is no claim that to know how to apply concept of authority without error is implicitly to believe Raz's theory. But the account is also meant to be explanatory in that it is "an attempt to make explicit elements of our common traditions" which singles out "important features of people's conception of authority."<sup>20</sup> For Raz, the normative and explanatory aspects of his theory together amount to "a discussion of a concept which is deeply embedded in the philosophical and political traditions of our culture."

As I read them, both Dworkin and Raz believe that important parts of political theory are properly characterized as investigations of conceptual content. That they both

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<sup>18</sup> Id. at 7.

<sup>19</sup> For discussion, see Murphy, "Razian Concepts."

<sup>20</sup> Raz, *The Morality of Freedom*, 63, 65.

also insist that these investigations are not investigations of standard usage such as lexicographers might engage in (“purely linguistic,” to use Raz’s way of putting it), might be thought to suggest that they are merely using “concept” in a very broad way—to encompass not just the initial act of categorization that defines a certain subject, but also the best theory of that subject. In that case, their positions would be no different from that of Rawls in *A Theory of Justice*. But I do not believe that this is so. It is clear that both of them believe that their accounts of central political concepts, including the concept of law, are accounts of something that all people in a common linguistic and political culture share. We share a practice of categorizing the evaluative aspects of our social world and the philosophical accounts are offered as better accounts of that practice. This much is clear, I think, from Dworkin’s idea of interpretive concepts, whose content is figured out by interpreting an actual evaluative practice, and from Raz’s idea that investigations of concepts, such as his investigations of the concepts of authority and law, are attempts better to understand ourselves.<sup>21</sup>

A very different view about the importance of conceptual inquiry in practical philosophy is Frank Jackson’s. He believes that conceptual analysis is essential to many metaphysical issues, including ones related to ethics. Here is a compelling passage:

If I say that what *I* mean—never mind what others mean—by a free action is one such that the agent would have done otherwise if he or she had chosen to, the existence of free actions so conceived will be secured, and so will the compatibility of free action with determinism.

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<sup>21</sup> On interpretive concepts, see p. x., below. On Raz and self-understanding, see, for example, “Law, Authority, and Morality,” x

But this, Jackson says, will lose him his audience, for he will have turned an interesting philosophical debate into an easy deduction from a stipulative definition and some accepted facts. He goes on,

What then are the interesting philosophical questions that we are seeking to address when we debate the existence of free action and its compatibility with determinism? What we are seeking to address is whether free action *according to our ordinary conception*, or something suitably close to our ordinary conception, exists and is compatible with determinism.<sup>22</sup>

Jackson is surely right that it is no solution to the problem of free-will to define it away. So I am with him on insisting that the discussion be about an interesting philosophical question. But for that to be the case is it essential that we be discussing free action according to our *ordinary conception*? I'm inclined to agree with Jackson that there is an ordinary conception of free action and that "would have done otherwise if I had chosen to" doesn't capture it. But I have certainly known philosophers who claim that that is the only kind of free action they can make sense of. And in any case, the fact that there is an interesting philosophical question here doesn't depend, it seems to me, on there being an ordinary conception of free action. We could be all over the place about the idea of free action, just as we are with liberty, and there would still be interesting philosophical questions to ask about whether the kind of control we in fact have over our actions is compatible with the kind of responsibility we take ourselves to have for them. Perhaps, in fact, the problem with G. E. Moore's discussion of free-will that Jackson alludes to stems from too *great* a focus on the canonical way of posing the problem, in terms of the

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<sup>22</sup> Frank Jackson, *From Ethics to Metaphysics: In Defense of Conceptual Analysis* (1998), 31.

relations between concepts, rather than the background philosophical issues, which could be expressed in a number of different ways.<sup>23</sup>

**[Note for Yale Workshop audience—the rest of this section could be skipped without loss. The next section starts on p. 16.]**

Another metaphysical debate with apparent ethical significance is that over personal identity. Much of the discussion of this topic has taken the form of conceptual analysis.<sup>24</sup> But then if Derek Parfit is right, the most important claim in this area—that we are not, as we believe ourselves to be, separately existing entities, distinct from our brains and bodies and our experiences—might have been disprovable, if the empirical evidence had been otherwise.<sup>25</sup> And when it comes to the ethics, Parfit concludes that it is irrational to believe that what matters is personal identity. Even if Parfit is wrong about what matters, it must be right that this is not to be settled by further reflection on the concept of a person.<sup>26</sup> Similar points apply to the concept of death. Though we remain puzzled about this concept, particularly as medical advances put pressure on it, the practice of legally defining the condition of “brain death” is generally accepted because it is generally accepted that our ordinary notion of death is not fine grained enough to guide us in all the practical contexts in which it is relevant. The question of when to remove someone’s organs for the purpose of transplanting is very different from the question of when it is appropriate to bury someone.

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<sup>23</sup> Moore’s discussion of free will is found in G. E. Moore, *Ethics* (1912), 84-95.

<sup>24</sup> For discussion see Sydney Shoemaker, “Personal Identity: A Materialist’s Account” in Sydney Shoemaker and Richard Swinburne, eds., *Personal Identity* (1984) 126-9.

<sup>25</sup> Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), 227-8.

<sup>26</sup> Dworkin agrees: See the discussion of the irrelevance of debates about the concept of a person to the abortion issue in *Life’s Dominion* (1994), 22-3.

What of Bernard Williams's "thick" ethical concepts, such as that of courage? As Williams explains it, thick ethical concepts are specific rather than abstract, and their application is guided by both an evaluative and a factual judgment.<sup>27</sup> A purely descriptive account of their proper use is therefore not possible: "in imaginatively anticipating the use of the concept, the observer also has to grasp imaginatively its evaluative point."<sup>28</sup> Now Williams associates abstract ethical concepts, such as justice, with moral theory, which he is generally against. This is compatible with what I said above: that theories of justice are not accounts of the practice of using a certain concept but instead constructive normative theories focused on a certain subject matter. And we can agree that the thicker the concept, the more ethical inquiry will be a matter of understanding conceptual usage (which will require understanding its evaluative point) and less a matter of constructive theorizing. But the domain of the thick concepts is neither extensive nor that significant.<sup>29</sup>

In fact the concept of courage seems to be a rather rare example of a concept where disputes about application are typically just border disputes about the application of the term that, while they may reflect moral disagreement, do not reflect moral disagreement that would have to be expressed by using other, more abstract concepts. The concept of courage is in one sense very thin—since courageous conduct is always in itself in one way good, even though all things considered what was done may have been very bad, we do not have to think about related moral concerns in order to apply the concept. Whether a person who never feels fear can be considered courageous in a

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<sup>27</sup> Bernard Williams, *Ethics and the Limits of Philosophy* (1985), 129.

<sup>28</sup> *Id.*, 142.

<sup>29</sup> For critical discussion of the distinction and the use Williams makes of it, see Samuel Scheffler, "Morality through Thick and Thin," *Philosophical Review* 96 (1987): 411.

particular situation is a question about the proper use of a term. That turns in part on whether such action has the good quality associated with courage, but, as Williams insists, it does not turn on moral theorizing and the employment of abstract concepts. The concepts of brutality and cowardice are similar in this respect, as perhaps is the concept of a lie. But things are more complicated for other concepts Williams counts as thick.<sup>30</sup>

Whether someone has made a promise is to be figured out just by considering a practice of use of a term, but whether someone has broken a promise is not. The evaluative point of categorizing promises into the broken and the kept is controversial; discussion of excusing conditions will quickly move to the more abstract level. As will discussion of whether, in keeping a promise in a particular situation, a person is to that extent praiseworthy. The concept of treachery, it seems to me, is usually applied only where the conduct was all things considered wrong, and so judgments of treachery require a good deal of theorizing that makes use of abstract concepts. Gratitude too may be considered inappropriate if the benefits came from a sufficiently odious course of action. So not all the concepts Williams counts as thick can be said to tie us into a shared evaluative practice only—rather than, also, to abstract moral theorizing that cannot itself be characterized as reflection on the proper employment of the concept.

In any event, what is clear is that many moral problems and pretty much all political problems require abstract concepts for their proper consideration, and so the existence of some thick ethical concepts does not undermine the claim that moral and political theory is not centrally concerned with the understanding of concepts. Nor would Williams have thought that it did.

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<sup>30</sup> My examples come from Williams, *Ethics and the Limits of Philosophy*, 129, 140.



## 2. Conceptual Analysis?

Analysis of concepts actually employed in political argument is important if we are to understand that argument and diagnose ideological impasses. This purpose does not require us to resolve disagreements about correct use of the concept across the board. Still, there has to be a shared conceptual core if people can be said to be using the same concept at all. So isn't one legitimate reason to reflect on concepts that this will uncover that shared core? Isn't that worth knowing just for its own sake? Political philosophers may wish to know what the deep structure of the concept of democracy is, in just the way epistemologists once pursued the deep structure of the concept of knowledge. As I understand this kind of inquiry, the deep conceptual structure can be approached by considering the proper use of the associated word or words.<sup>31</sup> If we can settle just what

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<sup>31</sup> I follow Jackson, *From Ethics to Metaphysics*, 33-4; Paul Horwich, *Meaning*, (1998): 44, 98. To say that the project I am discussing--figuring out the core of the "content" of a concept--is a matter of determining proper word usage doesn't settle the issue of how one concept is to be distinguished from another, which is not an issue I am concerned with.

One reason Raz gives for distinguishing the question of the meaning of "law" from the content of the concept of law is that "law" is used in a variety of contexts that have nothing to do with legal systems. See "Two Views of the Nature of the Theory of Law: A Partial Comparison," in Jules Coleman, ed., *Hart's Postscript: Essays on "The Concept of Law"* (2001); "Can There Be a Theory of Law?" in Martin P. Golding and William A. Edmundson, eds *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005). I don't understand this point, since it would seem to apply equally to the concept of law. In any event, though Raz insists that "law" is not ambiguous, in fact it seems to be. Hence the joke in the following lines from a song by Billy Bragg:

The laws of gravity are very very strict  
And you're just bending them for your own benefit.

Perhaps there is a common meaning to "law" in all contexts where it is appropriately used. But, in the first place, Raz's account of what that is seems wrong: "The word is used in all these contexts [legal, religious, mathematical, etc.] to refer to rules of some permanence and generality, giving rise to one kind of necessity or another" ("Can There Be a Theory of Law?", 325). For classical natural lawyers, the natural law was at least in part a matter of following natural inclinations in the right way; it is hard to understand this in terms of rules. And when Dworkin rejects the model of rules for law—essentially arguing that the law is the outcome of a certain weighing of values as applied to a particular case—his position doesn't seem to run afoul of the meaning of "law." Last, many of us don't recognize necessity of any kind in the mere existence of a legal rule. But even if this definition were correct, I can't see why it would be incompatible with the view that there are (say) four different senses of the word "law", appropriate for different contexts. In particular, there seems to be all the difference in the world between a law of physics, which is not in any sense practical, and the rest. That's why it's funny to say that the laws of gravity are strict.

role in our political categorizations the word “democracy” plays, we will have the material for an account of the content of the concept of democracy. Of course the account of the proper usage of a word like “democracy” we are looking for is not the kind of account you would expect to find in the dictionary. The hope would be to find more structure to the proper use of the term than we, or the lexicographers, had realized was there. So this project of conceptual analysis is not “purely linguistic” in Raz’s sense; and there is no reason to rule out in advance a normative dimension to this kind of inquiry.

Jerry Fodor writes that “no concepts ever actually did get analyzed, however hard philosophers tried.”<sup>32</sup> This will seem right if we expect an analysis to eliminate all indeterminacy that appears at the surface level of everyday use. Even the concept of a bachelor runs into trouble when it comes to the pope and unmarried men living with women<sup>33</sup>—or with other men, for that matter. But that doesn’t mean that reflection or analysis cannot uncover any structure whatsoever. It is just that, whatever may be the case for the concepts of bachelor, table, or belief, analysis of the kinds of politically significant concepts I have been discussing will yield only skeletal accounts that do little to resolve the indeterminacy and contestation found at the surface of our practices.

Any attempt to come up with an account of the proper application of a concept depends upon intuitive reactions to particular cases: Is this legless thing that carries people up mountains a chair? Is a speed limit the kind of thing that could be just or

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Raz also notes that we need not use “law” to make use of the concept of law. Id.. That seems right, but since the way we usually make use of the concept of law is by using the word “law” or some translation of it, the place to look if we are trying to figure out what kind of categorization the concept of law recommends is by looking at the usage of the words that express it. Quentin Skinner discusses this issue in “Language and Political Change” in *Political Innovation and Conceptual Change*, 7-8.

<sup>32</sup> Jerry Fodor, “Water’s Water Everywhere,” *London Review of Books* (21 Oct., 2004): 17.

<sup>33</sup> See Gilbert Harman, “Doubts about Conceptual Analysis,” in Michaelis Michael and John O’Leary-Hawthorne, eds., *Philosophy in Mind* (1994), 45.

unjust? Is a country where less than half of the population votes in national elections a democracy? Can I be free if I have nothing to eat?

The traditional way of analyzing concepts used answers to well-posed questions such as these as the data from which to build a list of necessary and sufficient conditions for correct application of the concept. In recognition of the difficulty of finding such a list, there is the alternative of seeking a “cluster” of defeasible descriptions (of whatever the concept is a concept of) explicit or implicit knowledge of which would suffice for mastery of the concept. Legal philosophers have tended to follow Nicos Stavropoulos in referring to these approaches as “criterialism.”<sup>34</sup> Rawls’s account of the concept of justice, that justice is that department of political morality concerned with the distribution of benefits and burdens, is criterialist in this sense though it is, of course, a minimalist account.

The main rival approach that legal philosophers have been attracted to is the “causal-historical” approach that ties the reference of a term to the nature of the thing in the world that was first given that label. This view is supported by thought experiments such as Hilary Putnam’s question about whether a substance on “Twin Earth” that satisfied all the descriptions we on earth commonly associate with water, but which had a chemical structure other than H<sub>2</sub>O, would be successfully referred to in the utterance of “water” by an earthling.<sup>35</sup> The correct intuitive response is supposed to be No, and this is the basis of the idea that the extension of the concept of water is fixed by the nature of the thing (as discovered by science) called water by the first user of the term and those who followed him, not by any cluster of beliefs ordinary people have about water. Most

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<sup>34</sup> Nicos Stavropoulos, *Objectivity in Law* (1996), 2.

<sup>35</sup> Hilary Putnam, “The Meaning of ‘Meaning,’” in *Mind, Language, and Reality* (1975), 215.

philosophers seem to share Putnam's intuitions here whenever the concept concerns a "natural kind." But not all do, and non philosophers are apparently divided on the matter.<sup>36</sup> My own reaction, for what it's worth, is that I have no confident intuition one way or the other about this case. Saul Kripke's examples concerning biological kinds are more approachable; for example, we are invited to agree with him that a reptile that looks just like a tiger is not in fact a tiger and wasn't one even before we had developed our modern biological taxonomy.<sup>37</sup> I find Kripke's invitation resistible, at least when I think about real cases rather than hypothetical ones. The thylacine, now extinct, was first called a Tasmanian tiger because of his stripes. Later it was considered more correct to call him a Tasmanian wolf, because he did, in fact, look and act a lot like a wolf. Biologically speaking, the thylacine was no more a wolf than a tiger since he was a marsupial. But then there is, it seems to me, a broad sense of "wolf" where it is perfectly reasonable to distinguish between placental and marsupial wolves.<sup>38</sup> My intuition here is that the broad sense of "wolf" was always there—it did not get coined for the first time when someone first saw wolf-like marsupials; but I'm sure many disagree with that.

So even for terms referring to things that might be thought to have a scientific "essence," the intuitions supporting the causal-historical account of reference are, I think, unstable and therefore cannot be the basis of a refutation of a criterialist approach for such concepts. It is therefore perplexing that some philosophers appear to believe that intuitions about natural kind concepts support the rejection of a criterialist approach to

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<sup>36</sup> For discussion of divergent intuitions about this kind of thing, see Jonathan Weinberg et al., "Normativity and Epistemic Intuitions," *Philosophical Topics* 29 (2001): 429-; Gabriel M. A. Segal, "Reference, Causal Powers, Externalist Intuitions and Unicorns," in Richard Schantz, ed., *The Externalist Challenge* (2004): 329-.

<sup>37</sup> Saul Kripke, *Naming and Necessity* (1972), 120-1

<sup>38</sup> As is done here: [http://www.naturalworlds.org/thylacine/introducing/tasmanian\\_wolf\\_1.htm](http://www.naturalworlds.org/thylacine/introducing/tasmanian_wolf_1.htm). See the discussion of "motley" concepts in Segal, where he offers the example of the use of "cat" to cover some non felines, such as civet cats.

any concept, and so too to such politically significant concepts as that of the cruel and unusual,<sup>39</sup> and law.<sup>40</sup>

It seems to me that the causal-historical approach to the political concepts I have been discussing doesn't get off the ground. This approach requires for its support intuitions about cases just as much as the criterialist approach.<sup>41</sup> But it is hard to think of the right kind of example, since there is not, for the case of democracy and the rest, the same plausibility to the distinction between underlying structure or essence and superficial description that the examples concerning natural kinds turn on. We don't have even a tentative account of the essence of democracy that is sufficiently distinct from a folk description to serve the purpose that DNA or molecular structure do. But suppose it were plausible to believe that descriptive political theory, "at the end of enquiry," would produce an account of the essential nature of different systems of government. Suppose, in other words, that the problem here is just the poor state of contemporary political science. Then support for the causal-historical theory could come from a more abstract or theoretical kind of intuition—an intuition that the extension of the concept of democracy is to be found by uncovering the nature of those systems of government to which the term "democracy" has been applied in a causal chain since the initial baptism—where that nature may have nothing to do with the kinds of beliefs that guide people in their day to day use of the term. The trouble is that this is an intuition that is not shared, neither among philosophers nor ordinary folk.

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<sup>39</sup> See David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy & Public Affairs* 17 (1988): 105.

<sup>40</sup> See Jules L. Coleman and Ori Simchen, "Law", *Legal Theory* 9 (2003): 1-.

<sup>41</sup> See Jackson, 31-42; Fodor; J. L. Mackie, "What is De Re Modality?", *Journal of Philosophy* 71 (1974): 551-.

By contrast, the criterialist approach does get off the ground, since reflection on these political concepts will yield some criteria, at least of a negative kind (an absolute monarchy is not a democracy). But, as I have been in effect saying all along, the criterialist approach will yield at most only a few banal criteria and so could not be expected to give us an account of the deep structure of these concepts that will resolve any important disputes.

It is to this situation that Dworkin responds with the idea of interpretive concepts: concepts whose deep structure can be revealed only by a constructive interpretation of the practice in which the concept finds a place. Such an interpretation aims to find a point to the practice, and to characterize the value picked out by the concept in its best light. In effect we settle disagreements about what democracy really is by arguing about what it is about democracies that is worth having. Since this process is normative—it is, in fact, doing political philosophy—we can expect to come up with a correct or best account. But what we will not come up with is an account of the true content of the concepts in question. For that to be so, there would have to be convergence in intuitions about particular cases that can support the generalization that the proper application of these concepts is whatever application that emerges from a political theory about the values they pick out.<sup>42</sup> Again, it seems to me clear that neither philosophers nor ordinary folk are going to be in agreement about this. And again, it is only convergence in intuitions about usage that could justify the claim that constructive interpretation gets interpretive concepts right.

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<sup>42</sup> Dworkin may agree with this; see Ronald Dworkin, *Justice in Robes* (2006), 19, where, in defending his view that the concept of law is an “interpretive concept,” he writes about “our sense of its correct application.”

Consider, as an example, Dworkin's own discussion of democracy in *Freedom's Law*.<sup>43</sup> The argument there is that most people mistakenly associate the concept of democracy with majoritarian institutions. He makes the powerful point that if we believe that because we believe that what is central to democracy is self-governance, we need to recognize that there are substantive preconditions of equality that would have to be met in a society before it could rightly be said to be governing itself through majoritarian institutions. But even supposing that I am convinced by this argument that majoritarian institutions are not, in themselves, valuable, this does not in the least shake my sense that the concept of democracy is centrally tied up with the existence of such institutions. In other words, this argument doesn't change my understanding of democracy *as a category* at all.

The point to emphasize from this discussion is that all accounts of the meaning or the extension of particular concepts will in the end need to be grounded in intuitions about proper usage. This provides support for moving directly to a theory of meaning as use, a theory which also has in its favor that it seems to be of entirely general application, while the causal-historical view, for example, is plausible only for a certain narrow range of concepts.<sup>44</sup> Also in the use theory's favor, in the present context, is that it leaves open just how determinate the meaning of a particular term may be. In Paul Horwich's account, the meaning of a term consists in that use property—regularity in the use of the word—that is explanatorily basic in that it best explains all the word's individual uses. If there is no single property, meaning is indeterminate.<sup>45</sup>

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<sup>43</sup> *Freedom's Law* (1996), 1-35.

<sup>44</sup> See Horwich, 53.

<sup>45</sup> *Id.* at 40-1.

But my argument does not depend upon the defensibility of this or any other theory of meaning. What it does depend on is that any account of conceptual content must be grounded in shared intuitions of correct application of the concept. The upshot is that no form of conceptual analysis is likely to yield more than a few obvious truths about the content of the political concepts we have been discussing. But of course if I am right this is not bad news for political philosophy. Substantive political theory is not the same thing as an account of the content of the politically most important concepts. Critique of ideological conceptual fancy footwork is important, but this does not require getting the concepts involved right, or even believing that such a thing is possible.



## Chapter Three

### The Concept of Law

#### 1. *Explicative Definitions: The Instrumental Approach*

If the existence of different senses of terms like “justice”, “liberty”, “democracy”, “rights”, “the rule of law, “state,” “virtue”, “person,” and “free-will,” is of largely negative consequence for political theory, relevant mostly to critique, why does legal philosophy proceed on the assumption that the case is different for “law”? Why has it been assumed that the concept of law is one we have to get right? (It is noteworthy that the two political philosophers I mentioned in the previous chapter who believe that getting concepts right has a role to play in political philosophy are both also philosophers of law.)

Partly the problem has to do with a vexing variation in the usage of “concept.” Hart called his book *The Concept of Law* despite the fact that very little of his book was, in the ordinary sense, about the content of a concept at all. For Hart, an account of the concept of law was evidently just an account of the nature of law.<sup>1</sup> The three key questions he associates with interest in the nature of law are: “How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?”<sup>2</sup> The second of these questions is closely tied to the variety of possible

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<sup>1</sup> See Raz, “Two Views,” 8; Raz, “Can There Be a Theory of Law?” 325.

<sup>2</sup> P. 13.

accounts of the concept of law but the others, especially the third, seem not to be. Rather, the question of whether law is an affair of rules is one that can be answered by looking, once you know where to look. Most of Hart's book is about the way in which law is an affair of rules; this is his "improved analysis of the distinctive structure of a municipal legal system."<sup>3</sup> And though it proceeds on the assumption of a positivist conceptual view about the boundary between law and morality, most of that analysis is descriptive in the sense that Hart claims for his enterprise.<sup>4</sup> We can call the descriptive account that makes up the core of the book an account of the concept of law if we embrace a certain wide sense of "concept." But whatever may have seemed natural in Oxford in the 1950s, it now seems more natural to think of conceptual questions as ones of fundamental categorization; only about five pages of *The Concept of Law* were devoted to such questions.<sup>5</sup>

So when a positivist insists that the judge who appeals to moral considerations in reaching a decision is making law because those moral considerations are not part of law—because they cannot be, because moral considerations are not the kinds of things that can answer legal questions—we can say that he is making a conceptual claim. When a legal realist or Dworkin says that there aren't many determinate legal rules worth speaking of, at least in the United States, they are making a descriptive claim (one which can be true whatever concept of law is being employed). Where the realist and Dworkin disagree is at the conceptual level: The realist, assuming a positivist understanding of the

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<sup>3</sup> Id. at 17.

<sup>4</sup> For further discussion of this point, see Murphy, "The Political Question of the Concept of Law," in *Hart's Postscript*, 371.

<sup>5</sup> Hart, *The Concept of Law*, 207-12.

grounds of law, concludes that there isn't much law;<sup>6</sup> Dworkin, agreeing that this is what a positivist should conclude, sees it as a *reductio ad absurdum* (one of many) of that understanding of the category of law.

(This distinction between conceptual and descriptive claims about law does not appear to involve a commitment to a philosophically significant distinction between analytic and synthetic claims. Though claims about proper categorization do feel like claims about the proper use of words or deep structural meaning, and though it is natural to talk and think that way, there seems to be no reason why we could not understand them instead as just the most fundamental commitments we have about the nature of law, the shared background which is required for disagreement to be possible. The label "conceptual" could be understood just to mark out positions on the nature of law which are beyond the pale, not worth considering, at least for the time being. Since such commitments are not up for grabs but rather taken for granted, they would be revealed in the same way truths of meaning are thought to be revealed, by intuitive responses to cases. And there would be no reason to insist that such commitments are immune to revision in light of further experience with the practice of law.)

So our question is why the issue of proper categorization, the proper way to distinguish between law and other things, has seemed so important to legal philosophers. The first part of the answer concerns something "law" has in common with "justice" and the rest. These are all terms of great political significance. For Dworkin, they all have to do with something that is good, and that is the basis of their political significance. But the concepts of tyranny, authoritarianism, fascism, and so on also have great political

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<sup>6</sup> On the positivist assumptions of legal realism, see Brian Leiter, "Legal Realism and Legal Positivism Reconsidered," *Ethics* 111 (2001): 278-.

significance. What's important here is that there are a range of terms that tend to carry immediate weight, pro or con, in political argument and which a political theorist or politician will therefore like to use in senses that help persuade others to their point of view. Thus most Western theorists of government today will reject an account of the concept of democracy that leaves their own theories beyond the pale.

For a more academic example, consider the discussion generated by Rawls's theory of distributive justice about the difference between equality of welfare or resources as a value, on the one hand, and the moral significance of giving priority to the interests of the worse-off, on the other. Derek Parfit is probably right that the priority view cannot with linguistic propriety be considered an egalitarian view, since it doesn't recommend equality of anything, even as one value among many.<sup>7</sup> Those attracted to the priority view feel a tension here. On the one hand, there is rectitude in saying: "That's right, the issue never was equality, as such, at all, so No, I'm not an egalitarian." On the other hand, since the priority view best captures what many of us who thought we were egalitarians were thinking all along, there is a natural inclination to spontaneously redefine the term so that that it encompasses the priority view, for the sake of the desirable associations this leaves in place.

When it comes to "law," the range of politically significant issues tied up with the usage of the word is great.<sup>8</sup> Depending on the sense we attach to the word "law," it could be argued that we the public will be more or less likely to believe that there is a prima facie duty to obey the state's commands or believe that its rule is legitimate; will have greater or lesser respect for the state; or will be more or less concerned about the

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<sup>7</sup> See Derek Parfit, *Equality or Priority?*, The Lindley Lecture at the Univ. of Kan. (1991).

<sup>8</sup> For more on the issues discussed in this paragraph, see Murphy, "Concepts of Law" and "The Political Question of the Concept of Law."

legitimacy of judges' appealing to moral considerations in the course of making decisions. There are also a range of possible effects on legal officials of various kinds. Perhaps we get better outcomes from conscientious judges if they are not positivists;<sup>9</sup> or perhaps it is the other way around.

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

If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.<sup>10</sup>

So Hart was prepared to defend a positivist concept of law on essentially instrumental grounds. It is common to reject this approach by saying that it confuses what is with what we would like to be.<sup>11</sup> Those making this claim generally seem to believe that what is, is a univocal concept of law. But we can leave that aside. For the instrumentalist can cheerfully claim, as Frederick Schauer does, that even if there were convergence on a univocal concept of law, it could still be appropriate to argue that we would be better-off changing our practice of categorization.<sup>12</sup> Hart and Schauer are not confused: The instrumental argument is not about what the content of the concept of law really is but

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<sup>9</sup> See David Dyzenhaus, *Hard Cases in Wicked Legal Systems* (1991).

<sup>10</sup> Hart, *The Concept of Law*, 209.

<sup>11</sup> See Julie Dickson, *Evaluation and Legal Theory* (2001); Waluchow, 86-98; Raz, *The Concept of a Legal System*, 2<sup>nd</sup> ed. (1980), 215-6.

<sup>12</sup> Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *Oxford Journal of Legal Studies* 25 (2005): 493-.

rather about what it would be best for it to be. In Carnap's terms, they offer an explicative definition of "law"—one which preserves much of the meaning the word has in ordinary use, but extends or refines it for the sake of certain ends.<sup>13</sup> (By contrast we can say that a purely descriptive definition aims merely to capture current meaning and a purely stipulative definition is not constrained by current meaning.)

Instrumentally motivated campaigns to reform usage are often reasonable, and not only in the sciences. Even if there is a shared and univocal sense of "egalitarian" that categorizes the priority view as nonegalitarian, there are reasons in favor and few reasons against trying to nudge usage in a different direction. Whether the reformers get away with this depends, as Hart might say, on whether they get away with it. But perhaps it is not silly to think that they might.

With "law," however, the instrumental approach seems hopeless, and for a number of different reasons.

There is, I believe, a plausible nonspeculative case to be made that exclusive positivism tends to promote a healthy critical attitude to the state.<sup>14</sup> But the argument that positivism or nonpositivism will lead to better judicial decisions needs to consider a wide variety of possible situations, turning on the many possible permutations of the variables of the goodness or badness of existing law and of each branch of government. And there are the other possible effects to consider. Even if there were agreement on the appropriate ends for the instrumental argument, it is evident that it is going to be impossible to make the practical case that one or another way of understanding the

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<sup>13</sup> Rudolf Carnap, *Meaning and Necessity* (1947), 7-8; Quine, "Two Dogmas of Empiricism," 24-7.

<sup>14</sup> See Murphy, "Concepts of Law" and "The Political Question of the Concept of Law."

relationship between law and morality will be the means to the best outcome, all things considered, in all circumstances.

It is in any case not plausible to think that desired ends will be the same in all circumstances. A critical attitude to the state seems obviously desirable in stable and more or less homogenous polities such as Britain for the last few hundred years, but it is hard to deny that in particular times and places, a quietist attitude to the state may be for the best. One option is of course to accept that the instrumental argument for the best concept of law is inevitably parochial. I have heard it suggested that justice was well served in the civil rights era in the United States by a quietist attitude to the (national) state.<sup>15</sup> Should we wish that the accepted categorization mandated by “law” differs between, say, Canada and the United States, so that Canadian judges applying Article 7 of the Charter must always in part make law while American judges applying the equal protection clause never do? Whatever may be the importance of either a quietist or a critical attitude in any given circumstance, this seems like a bad result (which of course would also never come about). But it gets worse. Perhaps quietism was for the best in the United States in the civil rights era. Probably it is not for the best in the new imperial era. It would be silly to think that practices of categorization should or could change that fast.

Suppose the instrumental argument worked on its own terms: one or another explication of the concept of law would do best, all things considered, in promoting certain political ends in all circumstances. More fundamental problems remain. The concept of law is part of everyday life everywhere. The instrumental argument has no

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<sup>15</sup> By quite a few members of various audiences that heard me present the lecture that became Murphy, “Concepts of Law.”

purpose if there is no serious prospect that convergence on the preferred usage will actually happen. Where the motivation for an explication is that convergence on the new meaning will have good effects, it will make no sense to offer one outside a constrained and perhaps professionalized context of communication. Convergence on a new meaning for “egalitarian,” is imaginable, since “egalitarian” (in contrast with “equality” and all the other political concepts discussed in the previous chapter) is not an important part of everyday discourse. It is largely a technical theoretical term and so we can imagine that the people who use it might be persuaded to accept a wider scope of application. The thought that the urging of theorists might change the usage of “law,” by contrast, seems absurd.

More important for the purposes of understanding philosophers’ interest in the concept of law, there would never be convergence even among the theorists, since they won’t all agree about the values any particular instrumental argument about the concept of law depends on. It makes no difference that there may be a correct answer to the question of which are the true or most important political ends; being correct doesn’t mean that others will agree with you. There isn’t agreement on all the values relevant to the scope of “egalitarian” either, but since the term is not an important part of actual political discussion, the stakes are low: only language purists will care whether it becomes acceptable to refer to the priority view as a kind of egalitarianism.

## *2. Why Disagreement About the Concept of Law Matters*



Though the instrumental approach to the dispute over the concept of law is hopeless, both its initial appeal and its failure highlight the importance of the perceived political implications of different ways of drawing the boundary of law for any explanation of why this has seemed worth fighting over. For my own case, certainly, it is distrust of quietism and what seem overly romantic views about law that explains my instinctive attraction to exclusive positivism.<sup>16</sup> Even those who insist that there is a correct rather than just a preferable way to draw the boundary between law and morality can agree that one reason this particular project of conceptual analysis is important is that its outcome may have politically significant consequences.<sup>17</sup>

But the clear political stakes tied up with the concept of law are not in themselves sufficient to explain legal philosophers' fixation on the conceptual question. Different accounts of the concepts of liberty, democracy, justice, and the rule of law have political implications too. No one makes instrumental arguments for reformist explications of these concepts, presumably because it is so obvious that there would never be agreement about the ends that the reform should be directed at. But what is more important is that hardly anyone mounts arguments about how to get those concepts right. What most of us feel instead is the need to be on the look out for ideological conceptual fudging and the importance of identifying cases where very different political commitments are expressed in the same words. Though we all might wish for concepts of liberty and the rest that best suit our political commitments, most of us do not feel that searching for a method that might yield those results is a central part of political philosophy. The concepts of justice, liberty, democracy, and the rule of law are all part of everyday political life, and

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<sup>16</sup> See Murphy, "The Political Question."

<sup>17</sup> A good example of what I have in mind can be found in the first and second-last paragraphs of Joseph Raz, "Authority, Law, and Morality," in *Ethics in the Public Domain*, 194, 221.

the political stakes of different usages are not lower for these than for the concept of law. Why then the continued quest for the truth about the concept of law in particular, a quest which persists no matter how hostile the philosophical environment to conceptual enquiries may be? The main puzzle still remains.

Unlike the other politically important concepts, law is a central concept not only for evaluation of the state but also for the day-to-day operations of its main institutions and for people's understanding of their day-to-day interactions with it. For whatever else it does, the concept of law governs the categorization of rules and standards into those which are in force as the obligations imposed by the state on its citizens and those which are not. This is the main reason why the concept of law has such everyday importance for all of us. And it is the reason, I believe, why philosophers persist in trying to get this high-stakes political concept right, while they are for the most part happy to let the others alone.

Dworkin is often criticized by his positivist opponents for running together the issue of the content of the concept of law with that of how we figure out what the law is in a particular place.<sup>18</sup> But he is right to do so because we cannot decide as a general matter how questions of legal validity should be answered in a particular legal system without first settling the conceptual question. Of course there is a good deal of common ground among the various possible senses of "law." And so all parties will be able to agree about the legal validity of properly enacted speed limit rules, etc. Disputes over the concept of law won't be relevant if what is before us is properly enacted legislation that is both obviously constitutionally innocent and susceptible to a plain reading. Nor will they generally affect our thinking about firmly entrenched private law precedent that takes the

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<sup>18</sup> See, e.g., Raz, "Two Views," 23-5; Coleman, 180-1.

form of formally realizable rules.<sup>19</sup> But once we get beyond this kind of thing, variations in commitment on the boundary between law and morality will lead to variations in judgments of legal validity. If the law declares that contracts entered into under duress are voidable and there is no binding precedent that fits the facts of some case where duress is alleged, and also no established interpretive method (such as Cardozo's method of sociology)<sup>20</sup> that enables us to settle the legal question without engaging in moral reflection about the best way to understand or improve the doctrine of duress, then a judge trying to decide whether the contract is enforceable against the party claiming duress will have to engage in moral reflection. Even if he concludes that the right way to make a decision is to appeal to community morality, or to a criterion of efficiency, or to toss a coin, he will need to engage in moral deliberation in order to reach that conclusion. Since finding an answer required moral reflection some will say that valid law did not settle the matter prior to the decision. But others will disagree. Though a judge making a decision need not take a stand on the conceptual question, that is required for anyone venturing an opinion on what the law was before the decision was made.<sup>21</sup>

As I have argued in chapter one, the concept of law we all share is indeterminate and none of the different stances philosophers have taken on whether there was prior law in a case like this is obviously mistaken as a matter of usage. But there is, nonetheless, a strong inclination in most of us to think that one of those stances must be right. Unlike

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<sup>19</sup> I defend these claims at the end of this chapter.

<sup>20</sup> Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

<sup>21</sup> Dworkin writes: "Jurisprudence is the general part of adjudication, silent prologue to any decision at law" (Dworkin, *Law's Empire*, 90). If "jurisprudence" means the theory of the concept of law, I don't agree, since judges can conscientiously and legitimately make decisions without having a settled view about that. If "jurisprudence" is understood more broadly to include the question of political philosophy about how judges ought to decide cases, then it will be the prologue to many decisions. Since, however, that political question will, for some cases, have only one reasonable answer, I still wouldn't say that it is prologue to all decisions.

what seems acceptable for the concepts of liberty and democracy, say, it would strike most people as unsatisfactory to say that there are simply different senses of “law” such that, for example, in one sense the contract wasn’t ever legally enforceable while in another sense there was no answer to question of whether it was enforceable until the judge made her decision. Most people are comfortable with the idea that some questions about what the law is have no answer; what seems unacceptable is that may be no uniquely correct answer to the question of whether or not there is an answer to the question of what the law is.

We expect there to be an answer to questions of legal validity—a particular rule or standard is legally valid, or invalid, or it is unclear which. It is not an answer to be told: “It is in one sense valid, in another invalid, and in a third neither the one nor the other.” The question of what, if anything, the law is on some matter in some jurisdiction matters to everybody living in that jurisdiction and the idea that it all depends on which among various equally acceptable senses of “law” you prefer can seem almost repugnant, politically speaking. I venture that this a large part of the reason why, against all odds, legal philosophers persist in trying to get the concept of law right.

### *3. Analysis of the Concept of Law*

“Against all odds” because none of the methods philosophers have favored for getting the concept of law right has any chance of success.<sup>22</sup> What is true for the concepts of democracy and the rest is true for the concept of law too. Though the general argument

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<sup>22</sup> For a different application of skepticism about conceptual analysis to the debate over the concept of law, see Brian Leiter, “Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,” *American Journal of Jurisprudence* 48 (2003): 43.

has already been made in the previous chapter, it will be helpful to apply the various approaches to the concept of law in particular.

Nicos Stavropoulos favors a version of the causal-historical approach according to which the reference of “law” is fixed by what legal experts tell us about the nature of paradigm cases of law.<sup>23</sup> He offers a sophisticated and detailed argument against objections to extending the causal-historical model to legal concepts, but his view in the end must still be grounded in intuitive reactions to cases. It is hard to see that this grounding will be forthcoming. Supposing that the relevant experts are lawyers and legal theorists, we know that, unlike the chemists who tell us about the nature of gold, they don’t all agree about the nature of law.<sup>24</sup> But leaving that aside, suppose that while most people (not knowing what the experts think) believe that the death penalty is provided for by valid law in Texas, all the experts agree that the Constitutional materials, on the appropriate moral reading, show that the Texan death penalty statutes are not valid law.<sup>25</sup> What seems pretty clear is that while some ordinary folk might react by thinking that they were wrong to include those statutes in the category of law, many will react with incredulity. A response like John Austin’s may come to many minds:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned,

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<sup>23</sup> Stavropoulos, .

<sup>24</sup> A point Coleman and Simchen make against this view. Coleman and Simchen, “Law,” 22-7. But the view they favor is no more plausible. They put forward a version of the causal-historical approach according to which the reference of “law” is not determined by what the experts tell us about the nature of the paradigm cases. Rather, “to fall under the extension of ‘law’ is to bear the appropriate similarity relation to paradigmatic instances. But the determination that something or other bears this similarity relation to a paradigmatic instance of law is a task that the average speaker can be expected to be able to carry out.” Id., 27-8. But insofar as there is supposed to be a determinate extension for “law”, there needs to be just the one similarity relation. Just as the experts disagree about the nature of law, we ordinary folk disagree about what the relevant similarity relation is.

<sup>25</sup> For defense of the “moral reading” of the constitution, see Dworkin, *Freedom’s Law*.

and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.<sup>26</sup>

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

A more traditional criterialist approach is much more plausible for the case of law than the causal-historical view.<sup>27</sup> If the concept of law were determinate, the way to express that would be with a list of (perhaps defeasible) criteria for its correct application generally accepted in the relevant population. The trouble is, of course, that there is no convergence on the key questions of whether unjust law can be law or whether what the law is can be determined in part by moral considerations.<sup>28</sup> Raz's ingenious solution is to determine the criteria by investigating the relations between the concept of law and other concepts, in particular that of authority.<sup>29</sup> In general this seems like an extremely promising approach. But the actual argument depends upon his "normative-explanatory"

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<sup>26</sup> John Austin, *The Province of Jurisprudence Determined* (1832), 158.

<sup>27</sup> See Raz, "Two Views"; "Can There be a Theory of Law?". Perhaps the purest traditionalist is Matthew Kramer, see his *In Defense of Legal Positivism*, 177-82.

<sup>28</sup> See Dworkin's discussion of "theoretical disagreement in law" in *Law's Empire*, 1-44.

<sup>29</sup> See Raz, "Authority, Law, and Morality."

account of the concept of authority being in some sense implicit in the concept of law we all share, and it is rather clear that it is not.<sup>30</sup>

Dworkin's alternative method is also promising because it starts precisely from the fact of intuitive disagreement about particular cases. In its most recent presentation, it is clear that it also, like Raz's method, approaches the concept of law via another concept.<sup>31</sup> Whereas Raz claims that law necessarily claims authority, Dworkin claims that where there is law, there the value of the rule of law, or legality, is instantiated:

Claims of law are claims about which standards of the right sort have in fact been established in the right way. A conception of legality is therefore a general account of how to decide which particular claims of law are true.<sup>32</sup>

For this claim about the connection between the concepts of law and of the rule of law to be acceptable, it would have to be the case that ordinary people generally would intuitively rebel at the idea that there can be valid law where the rule of law is violated. It seems obvious that there is no reason to think that this would be the typical reaction: many theorists have explicitly claimed that the rule of law and law are not coextensive.<sup>33</sup> Speaking for myself, I don't have a clear intuition one way or the other about the matter.

But perhaps this conceptual claim is inessential for Dworkin's argument.<sup>34</sup> His fundamental idea is that to figure out the content of all the politically important disputed concepts, including law, we have to figure out what is good about the value that the concept picks out. We get the concept of liberty right by figuring about what's good

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<sup>30</sup> For further discussion, see Murphy, "Razian Concepts."

<sup>31</sup> See Dworkin, "The Character of Political Philosophy."

<sup>32</sup> *Id.* at 24-5

<sup>33</sup> See, e.g., Raz, "The Rule of Law and Its Virtue."

<sup>34</sup> When a version of the claim is made in *Law's Empire*, 91, Dworkin writes that his argument does not depend upon it.

about liberty. We offer an interpretation of the concept of liberty that tries to present the value the concept is concerned with in its best light. Similarly, though “law” doesn’t just refer to a value, that’s part of what it does. And so for law we must offer an interpretation that presents what we take to be good about law in the most compelling way: we present the value associated with law as the best or most choiceworthy value it could be, while still being the value associated with law. Again, we could object that, for some people, there is no value associated with law as such. Certainly this is the way Hart thought about it.<sup>35</sup> But even leaving that aside, Dworkin’s method for figuring about the true content of political concepts of any kind is, in my view, quite unsupported.

We are, to repeat, making claims about the (deep structure of the) proper usage of words. By what authority can we claim that the right way to understand the concept of law, the right way to employ it, is in the way that makes what is valuable about law as choiceworthy as it could be? The only authority there could be is that, in reacting to particular cases, we find ourselves being intuitively drawn to this view. I for one do not, and the same is true for very many legal theorists. There seems to be no support coming from the only place it could come from—intuitive reactions to questions of usage—to justify Dworkin’s methodology for getting the concept of law right.

#### 4. *Abandon the Concept of Law?*

So I conclude that there is no better or correct employment of the concept of law that will settle the question of the relation between law and morality that has occupied philosophers for many centuries. Where does this leave us?

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<sup>35</sup> See the Postscript to *The Concept of Law*.



A possible response is that we don't need to make use of the concept of law. More precisely, we don't need to make use of what Dworkin has recently called the "doctrinal" concept of law—that concept which governs our thinking about legal validity, or, as Lewis Kornhauser puts it, our thinking about the legal order as opposed to the legal regime.<sup>36</sup> My discussion so far has all concerned the doctrinal concept. Kornhauser discusses a different, social-scientific concept of law relevant rather to our thinking about the legal regime.<sup>37</sup> The social-scientific concept would categorize some governance structures as legal systems and others not.<sup>38</sup> There is not, in general usage, a determinate social-scientific concept of law, but it is easy to imagine that an explicative definition of "legal system" might become accepted among a community of social scientists with shared aims.<sup>39</sup>

This social-scientific concept would be largely irrelevant for participants in legal systems, however, and the question is whether that participation could go on without the doctrinal concept. Or rather, since there is no chance of the doctrinal concept actually falling into disuse, what we are really asking is whether it is playing any important role in legal practice and social life generally or whether it can be regarded as otiose—a wheel spinning on its own.

Within legal practice, judges and other legal officials need a theory of legal decision-making, which is a political theory setting out what legal materials and other

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<sup>36</sup> Dworkin, *Justice in Robes*, 2; Lewis Kornhauser, "Governance Structures, Legal Systems, And The Concept Of Law," 79 *Chicago-Kent Law Review* 79(): 375.

<sup>37</sup> This should not be taken to suggest that accounts of the doctrinal concept of law do or should ignore institutional factors. Thus Joseph Raz holds that it is essential to the existence of law that there exist "law-applying" institutions, such as courts. See Raz, *The Concept of a Legal System*, 187- 238; Raz, "The Institutional Nature of Law," in *The Authority of Law*, 103.

<sup>38</sup> Kornhauser.

<sup>39</sup> I take it that this is what Leiter has in mind. See, e.g., Brian Leiter, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis," in Coleman, ed., *Hart's Postscript*, 369-70.

considerations it is appropriate to take into account and in what way. But such an account can be expressed without making use of the idea of the law in force prior to the decision. There is nothing novel here; anyone who holds that a conscientious legal decision may involve more than simply apply existing law already recognizes the need for such a theory.

Legal practice also requires a theory of legal counsel, of how lawyers should advise clients. This is where Holmes's "bad man" theory of law can seem plausible: Lawyers should advise clients on the assumption that all they care about is how the legal system will affect their interests and so offer predictions about it is most likely to do to them.<sup>40</sup> Whether or not the "bad man" description is necessary, the idea that lawyers do and should advise clients based on predictions about what will happen, as opposed to considered judgments about the content of current law, is also hardly novel.

Finally, considering legal practice in the broadest political sense, we need a theory of what legal systems should strive for if they are to achieve the distinctive virtues legal governance can achieve—this would be a political theory of the rule of law.<sup>41</sup> Construed broadly, this theory would encompass such questions as whether it is better in general to have a set of legal materials made up so far as possible of formally realizable rules.<sup>42</sup>

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<sup>40</sup> See Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897): 457.

<sup>41</sup> In Dworkin's terms, we might here employ the "aspirational" concept of law; in Kornhauser's terms, we are here thinking of "law" as a term of commendation. See Dworkin, *Justice in Robes*, 5; Kornhauser, 376.

<sup>42</sup> This is one of the issues that "normative positivists" are most centrally concerned with. See Tom D. Campbell, *The Legal Theory of Ethical Positivism* (1996); Campbell, *Prescriptive Legal Positivism* (2004); Campbell, "Prescriptive Conceptualism: Comments on Liam Murphy, 'Concepts of Law,'" *Australian Journal of Legal Philosophy* 30 (2005): 20; Jeremy Waldron, "Normative (or Ethical) Positivism" in Coleman, ed., *Hart's Postscript*, 411; Jeremy Waldron, "Can There Be a Democratic Jurisprudence?" (unpublished ms. 2004). Methodologically, Campbell embraces the instrumentalist approach: we should stipulate the concept of law which, among other good effects, fits best with the model of law as a set of formally realizable rules (Prescriptive Conceptualism, 27). One possible interpretation of Waldron's articles has him embracing a version of Dworkin's interpretive method.

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

But we need not pursue any further the prospects for more or less clever rephrasings of familiar discourse about law. Even if coherent paraphrases were available for every familiar kind of claim about the law, it would not be plausible to think that nothing important had been lost in the translation. It is not, in other words, plausible to think that all talk about the law that is in force is idle.

Law professors, at least in the United States, are surprisingly comfortable with the idea that there is no such thing as “the law,” that there are rather just legal materials and

good and bad legal decisions. Perhaps this is an effect of legal realism, but it is more fundamentally an effect, I think, of teaching American appellate decisions.

Comparatively speaking, American legal sources on their own provide strikingly little determinate guidance. Of particular importance is the lack of convergence on legal standards of interpretation and stare decisis in the horizontal dimension. My anecdotal sense is that law professors in other countries, even other common law countries, are far less inclined towards the kind of knowing skepticism about “the law” that is prevalent in American law schools.

Even in the United States, however, the eliminativist option is surely not agreeable to judges and other officials. It seems that almost all judges believe that their duty is to figure out what the law is, and apply it. Though not all judges believe that this exhausts their responsibility (Cardozo, for example, did not), most believe that this is their first obligation. They could, instead, follow a theory of adjudication that did not address the issue of where the law ends and other considerations begin, but we can guess that this way of conceiving of what they are doing would strike most as both artificial and wrong. One reason for that, perhaps, is that the theory of adjudication is always going to be controversial. In the absence of convergence within this particular branch of political theory, judges can insist that nonetheless they are all constrained by the law. In light of the lack of convergence on an account of the law, and given that in any case judges must inevitably sometimes appeal to considerations of political morality in order to reach a decision, this claim of course rings somewhat hollow. But not entirely so. To suggest that judges abandon entirely the idea of being constrained by the law and instead only follow the theory of legal decision-making they judge best is to suggest a radical

reworking of the understanding of the role of legal officials—both the understanding of the officials themselves and of the rest of us.

As I have already suggested, it is in the end the understanding of the rest of us that most fully undermines the eliminativist option. Though we ordinary citizens could negotiate our relationship with the state reasonably effectively if we only asked ourselves what the state is likely to do, and while that may be the main question people who seek the advice of lawyers want answered, it is nonetheless the case that many of us are in the habit of acting on beliefs about what the law is. For some this might be because they are concerned about not violating what they believe is a (prima facie) moral duty to obey the law. For others, it is just part of their self-understanding of how they relate to their state and through it to others. Many people who are skeptical or have no view about a moral obligation to obey the law nevertheless “accept” the law in Hart’s sense: for some reason or other, they treat valid law as giving them reasons for action.<sup>43</sup> It is hard to take seriously the idea that we should just stop thinking and deliberating in this way. For the criminal law, in particular, it is ridiculous to propose that, properly understood, there are no crimes, just good or bad decisions in criminal cases, and better and worse predictions about our interactions with the criminal justice system.

But could not acceptance of the law by citizens be understood instead in terms of a theory of good legal decision-making? Is anything lost if we say that what people really treat as reason-giving are good legal decisions, what those with authority ought to decide? What is lost is a distinction between what the law is and what a legal official ought to do that is entirely familiar to all of us and compatible with every contending account of the concept of law. For the positivist, of course, it is important to be able to

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<sup>43</sup> See Hart, *The Concept of Law*, 203.

say, for example, that while I accept the law as it is, I believe that the courts ought to overrule the relevant precedent or strike down the relevant legislation. But even for Dworkin, whose theory of law implies that if a judge ought to overrule a precedent then that precedent was already not a valid source of law (but rather a “mistake”), there is an important distinction between how a judge ought to reason when she ought to give force to the law, and how she ought to reason in those circumstances which justify not giving force to the law—a kind of justified official disobedience.<sup>44</sup> To suggest that we can get along just fine with a moral theory for legal decision-makers in their official capacity, that we lose nothing by not being able to discuss as a distinct question what they ought to do insofar as they are applying law, is again to suggest an implausibly radical view about how far our ordinary discourse is based on confusion and mistake.

### 5. *Overlapping Consensus*

So we face a problem. We cannot give up on the idea that some statements about what the law is make sense, and can be true, but the indeterminacy of the doctrinal concept of law makes it hard to see how this is possible.

A solution that seems natural is to consider legal propositions as true, or false, when the various different concepts of law, or various plausible different accounts of the concept of law, overlap. A plausible account of the concept of law is one which is not in conflict with ordinary usage. As we saw above, accounts of the content of the concept of law depend in the end upon intuitions about proper use, and such intuitions as we have do

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<sup>44</sup> See the discussion of the distinction between the grounds and the force of law in Dworkin, *Law's Empire*, 108-13.

not allow us to distinguish between the rival versions of positivism and nonpositivism legal philosophers have defended. But they do allow us to rule out obvious changes of subject, such as, for example, an account of the doctrinal concept that insists that the only grounds of law in the United States are papal edicts.

The overlap among different acceptable accounts of the concept of law implies overlap in different plausible accounts of the foundations for the determination of legal validity. As laid out in chapter one, there are at least four such accounts, two positivist and two nonpositivist. On the exclusive positivist account, the grounds of law are to be found in the rule of recognition, which lists a set of ultimate criteria for the identification of law; no criterion for the identification of law, however, can require moral reflection. The inclusive positivist account also looks to a rule of recognition for the ultimate criteria, but allows that criteria for the identification of law, ultimate or otherwise, may require moral judgment for their application. In both versions of the positivist account the content of the rule of recognition is to be determined by looking to see what are generally accepted as the ultimate criteria in the relevant legal system, at least by legal officials. Nonpositivist accounts count moral considerations as grounds of law independently of what are generally accepted to be grounds of law. On the Radbruchian version of natural law theory, that a rule or standard not be grossly unjust is a standing criterion of validity. (Note that an extreme natural law view that holds that full compatibility with morality is a criterion of the identification of law is not among the plausible views, as it is in clear conflict with ordinary usage of the concept of law.) The Dworkinian nonpositivist account holds, at the most general level, that the law is to be found by providing the morally best interpretation of the extant legal materials. There are

different possible versions of this account. So when I write that the Dworkinian account is one plausible account of the concept of law I do not mean to refer to the entire Dworkinian theory of the grounds of law, with its special focus on the value of integrity and so on. What seems to be obviously plausible, as an account of the concept of law that is compatible with general usage, is the more general statement.

The first question to think about is how great the area of overlap is among the categorizations implied by different acceptable versions of the doctrinal concept, and how we are to understand that overlap. If the overlap is significant, the conclusion that there is no right answer to the question of the content of the concept of law may be compatible with the common sense presumption that there are right answers to many questions about what the law is.

We might think that the overlap is nonexistent, at least in the United States and other countries where individual rights are constitutionally enshrined.<sup>45</sup> Some people believe that the equal protection clause of the 14<sup>th</sup> Amendment to the U.S. Constitution enacts, as part of U.S. law, a moral principle of equal treatment: “government must treat everyone as of equal status and with equal concern.”<sup>46</sup> Others believe that the equal protection clause authorizes the Supreme Court to decide, outside the boundary of law, whether legislation or common law doctrine violates its view of what morality requires in the domain of equal protection. As decisions are made, and to the extent that the principle of stare decisis is taken seriously, a body of equal protection law builds up. But

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<sup>45</sup> The next several paragraphs are closely based on Murphy, “Concepts of Law.”

<sup>46</sup> Dworkin, *Freedom’s Law*, 10.



certainly, the exclusive positivist will say that right after Reconstruction there was very little in the way of a law of equal protection.<sup>47</sup>

As there is no agreement on the right way to understand the Equal Protection Clause, and as all law must satisfy that clause, do we not face the result that there is no law at all? If there is no way to resolve the disagreement between those who believe that adjudication of equal protection issues takes place at least in part outside the law and those who believe it all happens within law's boundary, it may seem to follow that there is no truth of the matter about whether any particular piece of legislation is, or is not, valid law.

Take a piece of legislation that is not unconstitutional on a nonmoral reading of the Constitution and Supreme Court precedent. Assume also that on the best moral reading of equal protection, the legislation violates this right. An exclusive positivist holds the legislation valid, a nonpositivist of Dworkin's kind holds it invalid, as does, most likely, an inclusive positivist. And there is no way of saying who is right because the disagreement depends not on competing interpretations of the legal materials but on the concept of law, and there is no truth of the matter about that.

It is significant that we may have to conclude that there is no answer to the question of what the law in such a case. But the problem does not generalize to every legal question. For there is, in fact, substantial overlap between various versions of

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<sup>47</sup> The exclusive positivist position is beautifully and succinctly brought out in this passage of Joseph Raz (Raz, "Authority, Law, and Morality," 217):

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

positivism and nonpositivism, a shared core among the various versions of the doctrinal concept. It may seem that this is impossible: How can there be anything shared between a practice of categorization such as Dworkin's which insists that moral considerations are always relevant to determining what the law is and one such as Raz's which insists that they never are? It is possible because that disagreement is often of no practical significance, and because there is so much agreement about what else is relevant to determining what the law is.

The area of overlap seems to me to be rather big. No one thinks that 10 years imprisonment for murder is unconstitutional in the United States, or that the law against murder violates the law of equal protection, or that only marriage between persons of the same sex is permissible under Massachusetts law. Though some insist that these conclusions depend in part on moral reasoning and others deny it, the truth of these propositions doesn't depend up agreement about why they are true. And of course there is in any case partial agreement about why they are true. The overlapping consensus I have in mind doesn't apply only to lowest level legal conclusions. It applies also to a good many of the factors that are relevant to reaching such conclusions. All plausible versions of the doctrinal concept hold that such legal sources as validly enacted statutes, judicial decisions, and constitutional provisions are grounds of law.

Of course there are disagreements about how to interpret such legal sources and what weight to give them. But again, in a significant range of cases, those favoring moral readings of sources, and a moralized approach to the doctrine of stare decisis, will end up in the same place as exclusive positivists who offer a straight-forward nonmoral interpretation. Suppose that a plaintiff in an American contract case argues that his letter

containing an offer of a world cruise for \$15,000, “deemed accepted if we don’t hear from you within 10 days,” created a binding contract once the ten days had expired, though the offeree had done and said nothing. The rule that there is no contract in a case like this is well established in unambiguous precedent, and the moral case in favor of the plaintiff’s point of view is extremely weak. If we follow Dworkin and try to interpret contract law as a whole to show it in its morally best light, there is simply no case for concluding that the offeree is legally bound. Sometimes the moral factors that nonpositivist concepts of law locate within the boundary of law are inert, even if they are always in principle playing a role.

Not all areas of law are as settled and morally benign as that. Consider the question of damages for breach of a promise for which there was no bargained-for consideration, but to which the promisor is nonetheless bound under the doctrine of promissory estoppel. There is no clear consensus in the American case law about whether reliance or expectation damages are appropriate in such cases, and there is quite a bit to think about, from the moral point of view, if we want to know which kind of damages ought to be available. (Does the doctrine of promissory estoppel reflect a proposition of corrective justice that reasonable detrimental reliance ought to be compensated, or is it just an instrumentally justified expansion of the grounds for enforcement of promises?) Here, as with the equal protection clause example, we have to conclude that on some accounts of the concept of law there is an right answer to the question of damages, while on others there is not.

It is in general true that the less determinate the legal materials and the less agreement there is on issues of interpretation and the weight of precedent, the more the

moral factors recognized by nonpositivist accounts of law will have a role to play, and thus the less law we will find. Since indeterminacy in the sources and standards for interpretation and the weight of precedent makes for less law on the exclusive positivist view taken on its own, it is tempting to think that the overlapping consensus I have described coincides with what exclusive positivists would say about what the law is and how to figure that out. Sadly, that's not so. In the first example from contracts determinacy in the legal materials coincided with low moral stakes. But take the issue of damages for breach of a contract for which there is bargained-for consideration. Here the rule that expectation damages is the default remedy is as well established in clear precedent as anything in private law. But from the moral point of view, there is actually a lot to think about. Contracts theorists argue endlessly about whether the default remedy should instead be reliance damages, specific performance, or something else. If we take a moral reading of contract law as a whole, it could be plausible to conclude that contract law provides for, say, the more general availability of the remedy of specific performance, despite the fact that this would force us to conclude that many prior conclusions by judges about contract law were mistaken.

Still, on any plausible nonpositivist view, determinate guidance from extant legal sources does considerably constrain the enquiry into the what the law is, so even when the moral issue is a live one, determinacy in the source law will affect the degree with which the lack of a univocal doctrinal concept of law leaves us with nothing to say about what the law is.

## 6. *Supervaluation*

I conclude that the area of overlap between plausible different accounts of the category of law is significant. This allows us to say that, where a proposition of law comes out as true for all plausible concepts of law, it is true; where it is false for all plausible concepts, it is false. Where there is no overlap among the plausible concepts, we cannot say that the proposition is false. We cannot even say that there is no right answer to the question of law; what we have to say is that it is indeterminate whether the proposition of law is true, false, or neither.

This suggestion is analogous to the so-called “supervaluation” approach to the vague terms such as “bald.” Vague terms, in the philosopher’s sense, have borderline cases—there are a range of numbers of hairs on a man’s head where it is indeterminate whether he is bald or not. The supervaluation approach counts sentences using vague terms as true (or false) when they are true (or false) on all the different plausible precisifications of the concept.<sup>48</sup> The concept of law is not vague, however; the problems we have been discussing do not concern borderline cases but different accounts of what can be relevant to determining whether a legal proposition is true. Different plausible accounts of the concept of law do not propose different ways of making the concept more precise, but different accounts of law as a category. It is therefore more accurate to say that the concept of law is ambiguous, though the various plausible disambiguations overlap considerably, as we have seen.<sup>49</sup>

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<sup>48</sup> On supervaluation, see Kit Fine, “Vagueness, Truth and Logic,” *Synthese* 30 (1975): 265; David Lewis, “Many, But Almost One,” in Keith Campbell et al., eds., *Ontology, Causality, and Mind: Essays on the Philosophy of D.M. Armstrong* (1993), 23.

<sup>49</sup> Since “law” is ambiguous rather than vague, the supervaluation approach to it is not affected by the objection to the supervaluation approach to vagueness that it implies that vague concepts do after all, at least in a certain sense, have precise boundaries (which, intuitively, they do not). For criticism of the supervaluation approach to vagueness, see Timothy Williamson, *Vagueness* (1994).

Normally, ambiguity raises no particular philosophical puzzles. It is always possible to disambiguate—to say, for example, that I meant by “bank” the financial institution. The ambiguity of the concept of law raises problems because the ambiguity is not generally recognized and because there are important obstacles in the way of any general practice of disambiguation. Government officials use the concept of law without any suggestion that it is ambiguous. And most of the rest of us do so too. Most people, if asked by a legal philosopher which of the various possibilities they had in mind, would not know how to answer. Even if the various possible views became well-known, the obstacles to disambiguation are those we have already seen. Acceptance of a general practice of case by case disambiguation—where participants, when pressed, would say for example that they meant that there was no law in the exclusive positivist sense—is unlikely just because such a practice would conflict with participants’ demands for univocal answers to questions of what the law is. And convergence on just one of the options is unlikely because of the political stakes involved in this choice.

What we have, with the concept of law, is a case of what David Lewis calls “semantic indecision.” But it is an indecision of a particular sort: as a group of language users, and participants in the practice of law, we have neither decided on one of the plausible disambiguations of “law” nor to accept that it is ambiguous and thus help ourselves to the practice of disambiguation on a case by case basis. And given both the contestedness of the concept and the practical demand for a practice that does not require case-by-case disambiguation, we can be sure that a decision will never be made.<sup>50</sup> My proposed response to this situation is well brought out in these remarks of Lewis:

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<sup>50</sup> For some relevant discussion of the differences between vagueness, ambiguity, and contestedness, see Jeremy Waldron, “Vagueness in Law and Language: Some Philosophical Issues,” *California Law Review*

What shall we do, if semantic indecision is inescapable, and yet we wish to carry on talking? The answer, surely, is to exploit the fact that very often our unmade semantic decisions don't matter. Often, what you want to say will be true under all different ways of making the unmade decision. Then if you say it, even if by choice or by necessity you leave the decision forever unmade, you still speak truthfully. It makes no difference just what you meant, what you say is true regardless. And if it makes no difference just what you meant, likewise it makes no difference that you never made up your mind just what to mean. You say that a famous architect designed Fred's house; it never crossed your mind to think whether by "house" you meant something that did or that didn't include the attached garage; neither does some established convention or secret fact decide the issue; no matter, you knew that what you said was true either way.<sup>51</sup>

7. *Does it matter that there is sometimes no truth of the matter about the content of law?*

We can go on talking to each other about law even though our concept of law is ambiguous, because, for a great range of cases, that ambiguity does not matter. But now what about the range of cases, which in some places, including the United States, is certainly not negligible, where the various plausible accounts of the concept of law do not overlap? Here the ambiguity matters in that it results in a truth-value gap. But does it matter that there are truth-value gaps? In professional legal practice, perhaps not so much. Lawyers can still give predictive advice and judges can use their theory of legal

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82 ( ): 509. Waldron also includes a helpful discussion of the notion of "essentially contested concepts"; I myself do not believe that there are any such things.

<sup>51</sup> Lewis, 28-9.

decision-making without worrying about whether, in doing so, they are applying or making law. And for citizens too, the realization that the truth-value of some legal proposition cannot be determined without first disambiguating the concept of law is not so terribly threatening to our self-understanding of our relationship to the state, and through it to others: it is one thing to say that, for some subset of legal propositions, there is no answer to the question of whether they are true, false, or neither; quite another to say that this is the case for all legal propositions.

Nonetheless, the fact that there are several concepts of law abroad that do not fully overlap does matter. It matters primarily to our political discourse about the way legal decisions should be made and the way legal institutions and legal materials should be designed. The generally dispiriting public discourse about judicial nominations in the United States provides a good example. All sides claim that the nominees they favor will apply the law, not make it, and that the nominees that they do not favor will do the opposite. “Legislating from the bench” is right out. But then, judges appealing to their own judgments of political morality in the course of making a decision is also out. As already noted, there is in the United States no determinate settled law governing adjudication in hard cases, or the force of horizontal stare decisis, so at the very least appellate judges must engage in moral reflection in order to decide how to go forward when the legal materials do not provide a simple answer. This inescapable point is almost always disavowed in the public sphere.<sup>52</sup> To the extent that politicians defend asking questions about the political views of nominees, they usually suggest that this is

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<sup>52</sup> When Justice Scalia defends his version of originalism, he does so by making a political rather than a legal argument, without reflecting on the implication that, to reach the conclusion that they should not appeal to their own moral judgments when making decisions judges must engage in reflection on political morality; see Antonin Scalia, *A Matter of Interpretation* (1997).



needed in order to smoke out extremists who will make law, not apply it.<sup>53</sup> This game of cat and mouse rather obviously obscures what is really at stake.

If the question concerns the proper weight of precedent, or when a court should depart from the plain meaning of a statutory text, and the relevant legal norms about stare decisis and statutory interpretation do not settle the matter, it is obviously nonsensical to answer that judges should apply the law. But this answer is equally empty if the question is what judges should do in hard cases, especially cases involving interpretation of broad statements of rights in constitutions, for the ambiguity in the concept of law concerning the connection between law and morality maps precisely on the different camps in that debate.

Of course we could always treat the fact that judges ought always and only to apply the law, never make it, as a fixed point about the concept of law, and build an account of the concept of law around that premise. This would be one way to understand Dworkin's project. The trouble is, the facts about usage do not support that premise. And even if they did, people's sense that judges ought always to apply the law clearly depends on what they understand that to involve. An opponent of judges' making use of moral judgment when making decisions, when told that this is part of what it is to apply the law, might respond, "Well, if that's what applying the law is, judges should not do it." A better way to understand Dworkin's project (though of course not one he would accept) is that it offers a theory of the rule of law and of adjudication that aims to show that appeal to moral judgment in legal decision making is compatible with the rule of law—that, specifically, judges' use of moral considerations in their decision-making does not

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<sup>53</sup> See, for example, Senator Charles Schumer's press conference of October 31, 2005. Transcript available here: <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100707.html>.

violate the ban on retroactivity.<sup>54</sup> Similarly, the project of “normative positivists,” who, unlike Dworkin, are troubled by legal decision-making that turns on moral considerations, is best understood as that of giving a theory for the design of legal materials and of legal-decision making that is compatible with a rather different theory of the rule of law.

When it comes to questions of institutional design and the theory of conscientious legal decision-making within any ongoing set of legal institutions, we would be better off avoiding use of the concept of law altogether, because precisely where the design and adjudication questions run up against hard questions about the rule of law, the ambiguity in the concept of law starts to be relevant. Since the really important questions in legal philosophy are these questions of design and legal decision-making, in connection with the theory of the rule of law, we should do what we can to make those issues perspicuous and free from distracting and potentially misleading ambiguities in the terms of our discussion.

As Duncan Kennedy argues at length, the combination of the obvious fact that policy or ideological considerations are inevitably involved in legal decision making in a legal system like that in the United States and the almost unanimous official and professional denial of this fact does great damage to our general understanding of the role of courts in government.<sup>55</sup> More than that, this denial can be described as ideological in that it “increases the appearance of naturalness, necessity, and relative justice of the status quo, whatever it may be, over what would prevail in a more transparent regime.”<sup>56</sup>

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<sup>54</sup> Retroactivity has been a central concern of Dworkin’s since the publication “The Model of Rules,” *University of Chicago Law Review* 35 (1967): 14-.

<sup>55</sup> Duncan Kennedy, *A Critique of Adjudication* (1997).

<sup>56</sup> *Id.*, 2.

The equivocation in the concept of law, which allows all sides to insist in good conscience that all they ask is that judges apply the law, shores up this situation of denial. It does this by blocking direct political discussion of what legal decision-makers should do, in the system they work within and with the materials they have. As with the political concepts discussed in the previous chapter, we see that though it is not necessary or possible to get the concept of law right, it is essential to acknowledge its ambiguity and to bring out the rhetorical role that ambiguity can play in political argument.

#### 8. *What matters more*

People care about the concept of law and not just because of the political stakes associated with it. Unlike other politically significant concepts, it seems important to get the concept of law right, because this concept governs our practice of figuring out what our legal rights and obligations are, and that matters to us. But there is no solution to the dispute between positivists and nonpositivists about the relation between morality and law. The only possible ground for such a solution would be a convergence of intuitions about correct use of the concept, and there is no convergence. One day there may be convergence around one rather than another explication of the indeterminate concept of law we currently share. But there is no point arguing now for the benefits of converging in one way rather than another, though the benefits might be real, since our practices of categorization are not generally influenced by such argument. In the meantime, the equivocation in our concept of law does mean that there is often no answer to questions about what the law is, not even the answer that it is unclear what the law is. But it isn't

the case that the upshot of my conclusion about the concept of law is that there is no law at all. In ordinary life we can continue to talk to each other about the law that is in force because for a wide range of cases, the ambiguity in the concept of law does not matter.

The ambiguity becomes relevant when we reach political questions about how legal materials and institutions should be designed, and how officials should act, such that the ideal of the rule of law is not compromised. In those discussions, the discussions that really matter, both practically and within political philosophy, we would be better off agreeing not to talk about the law. At the least, if we do use the concept in such discussions, we should disambiguate as we go.

Some of these topics belong in other volumes. One that belongs in this volume is the theory of adjudication. This is a topic in applied political philosophy; the discussion in chapter seven aims to be neutral between competing conceptions of law. But we are not yet finished with the core of traditional legal philosophy. The topic of legal obligation, or the “normativity of law,” cannot be approached without keeping in mind the indeterminacy of the concept of law. We turn to that topic in the next chapter. And then there is the further question, discussed in chapter five, of whether there are other conceptually dictated characteristics of law—other, that is, than the issue of the role of morality in determining the concept of law. This forms important background for the discussion of international law in chapter six.