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# THE LIMITED DOMAIN OF THE LAW

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**I**S law a limited domain? Are legal argument and judicial decisionmaking constrained by norms of decision that make considerations of morality, policy, and politics that would otherwise be part of a wise decision unavailable to the legal system? Do lawyers and judges operate in an environment constricted by the legal system's relative unwillingness or inability to look at facts, norms, and values routinely available to other decisionmakers? Are some arguments acceptable in the larger society presumptively unacceptable in the institution we call "law"?

The question whether the domain of law is limited in this way, although rarely couched in such terms, lies at the center of many of the most important jurisprudential debates of the past hundred years. Indeed, almost all the major American contributions to legal theory during that period can be understood to challenge the view

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that law is or should be a limited domain, and the substantial overlap among otherwise diverse perspectives on just this point might even suggest that the claim of law as a limited domain is no longer to be taken seriously. Yet not only should the claim be taken seriously, it may even be right. At the heart of understanding the phenomenon of law and the character of legal argument may be an appreciation of the fundamental narrowness of the law and a grasp of the way in which the characteristic modalities of law serve to screen out, often successfully, what would in other decisional settings be good arguments, important facts, and desirable values.

My goal is to examine the proposition that law is a limited domain through the lens of the most visible controversies in analytic jurisprudence in the last half century. As will become apparent, neither those controversies nor the tools of analytic jurisprudence alone can settle the issue, but they illuminate the important connection among the various perspectives seeking to challenge or to endorse a limited domain understanding of law. At the end of the day we may not be able to determine conclusively whether law in fact *is* a limited domain, but, if I am successful, we will see why framing the issue in this way helps so much in understanding the phenomenon of law and the character of legal reasoning.

## I. THE METHODS OF JURISPRUDENCE

In the Preface to *The Concept of Law*, H.L.A. Hart describes his book as an exercise in “descriptive sociology.”<sup>1</sup> And more than four decades after the book’s publication, scholars of jurisprudence still ponder over the meaning of Hart’s curious claim<sup>2</sup>—curious because *The Concept of Law*, however well entrenched in the canons of analytic jurisprudence and the philosophy of law, would hardly be regarded by professional sociologists as the kind of inquiry with which they are at all familiar.

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<sup>1</sup> H.L.A. Hart, *The Concept of Law*, at v (2d ed. 1994).

<sup>2</sup> See, e.g., Neil MacCormick, H.L.A. Hart 5 (1981); Gerald J. Postema, Jurisprudence as Practical Philosophy, 4 *Legal Theory* 329, 330–35 (1998); Ronald Dworkin, Thirty Years On, 115 *Harv. L. Rev.* 1655, 1680 (2002) (book review) [hereinafter Dworkin, *Thirty Years On*].

Yet although Hart's work appears primarily philosophical and not much sociological,<sup>3</sup> there is a point to his insistence that his task is one of descriptive sociology. Part of this point, according to Hart himself, emerges from the main themes of 1940s and 1950s ordinary language philosophy, an approach most associated with the Oxford philosopher J.L. Austin,<sup>4</sup> but one in which Hart should be seen as a central figure and not merely a follower of others.<sup>5</sup> As perceived by its proponents, ordinary language philosophy involved the close examination of the ideas and distinctions embedded in our language in order to reveal underlying and important features of the world. Quoting Austin, Hart maintained that he was using "a sharpened awareness of words to sharpen our perception of the phenomena."<sup>6</sup> The analysis of ordinary language was thus a means and not an end, and indeed arguably not about language at all in the sense in which philosophers of language study language itself.<sup>7</sup> Rather, ordinary language was the window into the phe-

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<sup>3</sup> For an attempt to erect a bridge between Hart's project and what sociologists would recognize as sociology, see Martin Krygier, *The Concept of Law and Social Theory*, 2 *Oxford J. Legal Stud.* 155 (1982).

<sup>4</sup> Most of the relevant corpus of Austin's work is in J.L. Austin, *How to Do Things with Words* (J.O. Urmson ed., 1962); J.L. Austin, *Philosophical Papers* (J.O. Urmson & G.J. Warnock eds., 1961); and J.L. Austin, *Sense and Sensibilia* (G.J. Warnock ed., 1962).

<sup>5</sup> A useful bit of evidence for this proposition is that Austin, in providing examples of what he called "performative" utterances—expressions whose very utterance produced operative consequences—often used examples drawn from the law, such as "I bequeath" in a will and "I hereby pronounce you husband and wife" at a wedding. In light of Hart's roughly contemporaneous concern with the operative and constitutive aspects of legal language, it is not unreasonable to infer that many of Austin's legal examples, and perhaps even the basic idea itself, came from Austin's friend and colleague Hart. See H.L.A. Hart, *Definition and Theory in Jurisprudence* (1953) [hereinafter Hart, *Definition and Theory*]; H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 *Proc. Aristotelian Soc'y* 171 (1949).

<sup>6</sup> Hart, *supra* note 1, at v, 14.

<sup>7</sup> Joseph Raz maintains that Hart's primary interest in Austin and ordinary language philosophy was an attraction with speech-act theory, which was among the most prominent aspects of Austin's philosophy of language. See Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 *Legal Theory* 249, 251–54 (1998). Yet although speech-act theory may be germane to Hart's view of legal language, this is not what Hart himself claims is the sociological value of looking at language to illuminate our understanding of the world. See Hart, *Definition and Theory*, *supra* note 5, at 7–8. Nor does it much touch on Hart's famous analyses of ordinary language, such as drawing a distinction between being obliged and having an obligation, and distinguishing between doing something as a rule and doing it because of a

nomena of which language is a part. In claiming that *The Concept of Law* was an exercise in descriptive sociology, Hart is best understood as maintaining that the language of the law and the language used to talk about the law could, if scrutinized with sufficient insight, support descriptive claims about the concept of law and about how law actually functioned.

There is another sense in which Hart's work can be seen as sociological. Hart was not only a speaker of English but had also, prior to his academic career, spent nine years at the bar as an equity practitioner. This experience of seeing how law "really" operated, a less modest man might have urged, could yield insight into the very nature of law. Hart's work is thus descriptive sociology not only because of its use of the implicitly empirical methods of ordinary language philosophy, but also because Hart's claims about the central features of a legal system are driven as much by the observations of an insider to the system as by philosophical speculation.<sup>8</sup>

Although Ronald Dworkin has famously taken issue with Hart about whether legal positivism can explain the law as we know it,<sup>9</sup> in some important respects their methods are similar.<sup>10</sup> Distancing himself from the generations of jurists who have debated

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rule, analyses with only a tenuous connection with speech-act theory in particular and the philosophy of language in general. See Hart, *supra* note 1, at 55–57, 82–83.

<sup>8</sup>For the argument that Hart's project was possibly more normative and less descriptive than Hart himself supposed, see Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 *Legal Theory* 381, 387–95 (1998). In a series of articles, Stephen Perry offers an important analysis of the methodological dimensions of Hart's work. Stephen R. Perry, *Hart's Methodological Positivism*, 4 *Legal Theory* 427 (1998); Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *Law and Interpretation: Essays in Legal Philosophy* 97, 98–99 (Andrei Marmor ed., 1995); Stephen R. Perry, *The Varieties of Legal Positivism*, 9 *Can. J.L. & Jurisprudence* 361, 362 (1996).

<sup>9</sup>Ronald Dworkin, *Law's Empire* 31–44 (1986) [hereinafter Dworkin, *Law's Empire*]; Ronald Dworkin, *A Matter of Principle* 131–37 (1985) [hereinafter Dworkin, *A Matter of Principle*]; Ronald Dworkin, *Taking Rights Seriously*, at xii (1977) [hereinafter Dworkin, *Taking Rights Seriously*].

<sup>10</sup>There are, to be sure, important methodological differences between Hart and Dworkin, particularly on the question whether a conceptual description or analysis of the idea of law can be in any way neutral or value-free. See Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 *Oxford J. Legal Stud.* 1, 7–23 (2004). But the important contemporary debate about the possibility or desirability of a descriptive, as opposed to a normative, account of the concept of law should not obscure the way in which the accounts of both Hart and Dworkin contain significant descriptive, and thus empirically falsifiable, components.

over the necessary and sufficient conditions of the concept of law and the meaning of the word “law,”<sup>11</sup> Dworkin has steadfastly refused to provide such a definition. In a claim both dismissive and profound, shallow and deep, Dworkin has often insisted that law is simply what lawyers and judges do.<sup>12</sup> He sees his task as providing a thick and philosophically informed description—sociological, if you will—of what lawyers do when they argue cases and what judges do when they decide them. Like Hart, Dworkin wants to describe law from the inside.<sup>13</sup> In a tradition going back at least as far as Emile Durkheim,<sup>14</sup> he purports to offer a participant’s view of the legal system, albeit a view that might not be understood in as deep a way by the participants themselves.<sup>15</sup>

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<sup>11</sup> On the methodological aspects of such inquiry, and on the distinction between analyzing a concept and seeking to define the word that may (contingently) identify it, see Raz, *supra* note 7, at 255. See also Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 *Am. J. Jurisprudence* 17 (2003) [hereinafter *Leiter, Beyond the Hart/Dworkin Debate*] (reconsidering the role of the Hart-Dworkin debate in the twenty-first century); Leighton Moore, *Description and Analysis in The Concept of Law: A Response to Stephen Perry*, 8 *Legal Theory* 91 (2002) (challenging Perry’s reading of Hart).

<sup>12</sup> Ronald Dworkin, *A Reply by Ronald Dworkin*, in *Ronald Dworkin and Contemporary Jurisprudence* 259, 261–63 (Marshall Cohen ed., 1984).

<sup>13</sup> Dworkin, *Law’s Empire*, *supra* note 9, at vii–viii.

<sup>14</sup> Emile Durkheim, *The Division of Labor in Society* (George Simpson trans., The Free Press, 1964) (1893).

<sup>15</sup> Dworkin’s inquiry is thus, in one sense of the word, “hermeneutic.” See MacCormick, *supra* note 2, at 37–40 (depicting law as seen by those who have, as Hart would put it, an internal point of view); see also Raz, *supra* note 7, at 250 n.4 (responding to MacCormick, noting Hart himself agreed with MacCormick’s account of Hart’s enterprise, but was somewhat troubled by the word “hermeneutic”); Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 *SMU L. Rev.* 167 (1999); Richard Holton, *Positivism and the Internal Point of View*, 17 *L. & Phil.* 597 (1998); Thomas Morawetz, *Law as Experience: Theory and the Internal Aspect of Law*, 52 *SMU L. Rev.* 27 (1999); Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a “Practice” in Legal Theory and Sociological Studies*, 30 *L. & Soc’y Rev.* 163 (1996). Whether the internal point of view is necessarily a more accurate account of the nature and functions of an institution is an open question, and it is not clear that legal insiders like lawyers and judges can provide a “better” account of law than can those who observe it from outside or who are affected by its outputs. Holmes’s “bad man” may not be able to tell us all that is interesting about law, but neither can Dworkin’s good judge Hercules, because there is no a priori reason to believe that an insider’s account of an institution is necessarily more accurate, and thus should be more privileged, than an outsider’s account. After all, insiders may, just because they are insiders, have biases and misperceptions that are no less consequential than the biases and misperceptions that outsiders have just because they are outsiders. Moreover, we might distinguish between an insider’s understanding of what law is and an

## II. THE LIMITED DOMAIN HYPOTHESIS

Dworkin's examination of legal practice may thus have a philosophical style, but we see that its premise likewise rests on descriptive sociological claims.<sup>16</sup> The sociological goals of Hart and Dworkin, shared even in the face of profound disagreement, might thus suggest that descriptive sociological ambitions need not be alien to the jurisprudential task, even the analytic philosophical jurisprudential task. To understand the phenomenon of law and the behavior of its inhabitants, we need an accurate empirical understanding of the legal enterprise, without which we cannot hope to analyze even its normative and philosophical aspects.<sup>17</sup> My goal here is to further the enterprise of descriptive jurisprudential sociological inquiry by examining the hypothesis of law as a limited domain, a hypothesis that Hart may too quickly (even if silently) have assumed, and that Dworkin may too quickly have rejected.<sup>18</sup>

By examining the possibility that law is a limited domain, I consider the proposition that there are in most advanced legal systems

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account, not necessarily an insider's account, of what commitments insiders, especially judges and perhaps also lawyers, need to have in order for a mature legal system to exist. Both Hart and Dworkin are engaged in both of these projects, but the projects are nevertheless distinct.

<sup>16</sup> Conceptual claims, maintaining that this or that idea best captures the core of some concept or word, are in some sense descriptive, at least if we understand the universe of the descriptive as encompassing all that is not normative. But if conceptual claims are one species of descriptive claims, then genuinely empirical claims, claims that depend on facts about the world as opposed to facts about language or ideas, are another species. My point is that Hart and Dworkin can both be understood as making claims that are empirical in just this way. On these and related issues, see Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, 4 *Legal Theory* 533 (1998).

<sup>17</sup> See Dennis M. Patterson, *Law's Practice*, 90 *Colum. L. Rev.* 575 (1990) (book review).

<sup>18</sup> In ways that will become clearer as the argument develops, I do not understand the project of jurisprudence as exclusively philosophical, although I am as concerned as others with the extent to which a virtually unlimited range of inquiries parades under the jurisprudential banner. See Michael Moore, *Hart's Concluding Scientific Postscript*, 4 *Legal Theory* 301, 301 (1998). Although I take jurisprudential inquiry to be significantly and desirably philosophical, I do not understand a philosophical focus as precluding related empirical jurisprudential inquiry, and I believe, with Dworkin, that jurisprudential inquiry can be focused on particular legal systems or particular families of legal systems. So although I acknowledge the value of purely conceptual inquiry, I resist the view that jurisprudence is necessarily, only, or perhaps even largely about specifying the essential features of the concept of law in all possible legal systems in all possible worlds.

a substantial quantity of otherwise valid social norms, or otherwise valid sources of decision, that law refuses to accept.<sup>19</sup> If law is a limited decisional domain, arguments permissible in other and larger domains become impermissible in law.<sup>20</sup> Just as a baseball umpire is precluded from accepting otherwise good arguments that a World Series victory for the Boston Red Sox might mean more (for example, produce greater utility or reward better behavior) for its fans than a New York Yankees victory would for the Yankees and its fans, law may be a domain in which otherwise acceptable moral, political, and policy arguments are unavailable, not because they are bad arguments, but rather because they are beyond the boundaries—out of play, if you will—of the institution of law.

The limited domain claim is both empirical and a matter of degree. Law may be more or less a limited domain, and the interest lies in the “more” or the “less.” Although Joseph Raz says that the

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<sup>19</sup> Although I use the word “valid,” I want to bracket important meta-ethical issues about what makes a prelegal or nonlegal argument or norm valid. Although I believe that prelegal norms are valid if and only if they are right, others would locate the validity of a social norm in its community acceptance, its pragmatic value, or perhaps even in something else. These are vitally important issues, but they are not my issues, and I use the word “valid” only to draw the distinction between what an agent or institution would find usable in the nonlegal environment and what that same agent or institution would find usable in the domain of the law.

<sup>20</sup> The reverse is true as well. Another aspect of the claim that law is a limited domain, although in some tension with the ordinary meaning of the word “limited,” is that law not only makes irrelevant otherwise relevant arguments, but that it also makes relevant otherwise irrelevant ones. Arguments from precedent may be good examples of this phenomenon, because a strong argument from precedent provides an otherwise unavailable reason for a decisionmaker to reach what that decisionmaker believes to be an erroneous conclusion. See Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1 (1989); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987). Indeed, not only do arguments from precedent have this character, but so also do arguments from authority in general since such arguments make mandatory or optional considerations that might otherwise be impermissible. On such “inclusionary” reasons, see Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 91–92 (1991). See also J. Raz, *Reasons for Action, Decisions and Norms*, 84 *Mind* 481 (1975). This is true for arguments from precedent particularly and authority generally, but the concentration of such arguments in law—their presumptive desirability in law and their comparative scarcity outside of it—may be a significant part of the special character of legal reasoning. See John Finnis, *On “The Critical Legal Studies Movement,” in Oxford Essays in Jurisprudence: Third Series* 145, 148–50 (John Eekelaar & John Bell eds., 1987).

limited domain “thesis” is trivially true,<sup>21</sup> his assertion rests on the mistaken assumption that the question of law being a limited domain is a conceptual one, and thus a “thesis” capable of being supported or rejected by logical argument alone. To the contrary, the limited domain question is not whether the set of legal norms is totally coincident with the set of all norms, for nowhere is that the case. It is indeed trivially true that law is, as a conceptual matter, a limited domain. But beyond the trivial truth lie important questions about the extent of divergence. A legal system in which only a tiny fraction of society’s moral, political, and practical norms are cognizable as law or usable in the legal system is noticeably different from one in which the bulk of such norms are legally eligible as well,<sup>22</sup> and it is along this axis that we locate the interest in law as a limited domain. Questions of “how much” are no less interesting or less jurisprudential because they invite inquiry as to matters of degree. When we ask whether law is slightly or greatly a limited domain we thus ask a question whose answer takes us far towards understanding what law does and how it does it.

To clarify the inquiry further, the hypothesis of law as a limited domain is not restricted to the realm of arguments or norms in any narrow sense. Legal outcomes are based on facts as well as on arguments, and part of the limited domain hypothesis asserts that the practices of the law render immaterial many facts that would otherwise be available in the larger environment. Were a member of Congress to be told that a bill she is proposing would cause a greater decrease in wealth in Europe than it would an increase in her own district, she would more likely respond “So what?” than engage in cross-national cost-benefit analysis. And that is because she understands her responsibilities in a limited way, recognizing that some facts lie beyond her domain. To the extent that law is a limited domain, there exist not only arguments and norms but also facts, data, methods, and much else that the law refuses to recog-

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<sup>21</sup> Joseph Raz, *Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment*, 4 *Legal Theory* 1, 7 (1998).

<sup>22</sup> To Raz and others, “cognizable as law” and “usable in the legal system” are two crucially different things, although to Dworkin they are largely the same. I address this question in Part VII, *infra*, and I gloss over it here not because it is unimportant but because it is best delayed until the basic distinction between more and less limited domains is in place.

nize, not because they are wrong or invalid, but because they are not part of legal decisionmaking. Although making a fact or argument or method legitimately cognizable requires some norm, it is still useful to emphasize that the limited domain hypothesis is about the full range of decisional inputs, and not just about norms, rules, or arguments. The hypothesis of law as a limited domain is, at bottom, a claim about the concept and scope of legal cognition.

Much in Hart's work might be understood (though perhaps not by Hart) as assuming that law is just such a limited domain. By identifying the idea of a "rule of recognition," *The Concept of Law* can be interpreted (which is a claim about a text and not about its author's mental state<sup>23</sup>) as presupposing that rules of recognition distinguish the norms or sources (or anything else) of the law from the norms and sources available in the larger society.<sup>24</sup> It is, to be sure, logically possible for some legal system's rule of recognition to recognize as law virtually any norm, source, value, or fact that its society recognized as legitimate, because the *concept* of a rule of recognition is agnostic about what a *particular* rule of recognition might recognize as law. But however logically possible such a rule of recognition might be, taking this logical possibility as important seems inconsistent (although suggestions in Hart's Postscript imply otherwise<sup>25</sup>) with the tenor of Hart's emphasis on the very idea of a rule of recognition, and also on the idea of *legal* validity. If the most familiar rules of recognition actually recognized as law all that the larger society recognized, and if as a consequence all (or

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<sup>23</sup> One finds too many references in modern analytic jurisprudential writing to what Hart said on this or that occasion, typically used to buttress the author's analysis of the meaning of *The Concept of Law*. Although Hart was one of the giants of legal theory and also a very nice man, neither of those facts privileges his understanding of his own text, any more than would be the case for James Madison's views about the meaning of the Constitution, or Pablo Picasso's about *Guernica*.

<sup>24</sup> The claim in the text is not inconsistent with Jules Coleman's views about the "epistemic" function that a rule of recognition might serve. Jules L. Coleman, *Markets, Morals and the Law* 3, 5 (1988); Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. Legal Stud.* 139, 141 (1982) [hereinafter Coleman, *Negative and Positive Positivism*]; see also Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001) [hereinafter Coleman, *The Practice of Principle*].

<sup>25</sup> I refer here largely to Hart's tentative embrace of what he in his Postscript calls "soft positivism." Hart, *The Concept of Law*, supra note 1, at 250–54. For extensive discussion of just this claim by Hart, see Hart's Postscript: *Essays on the Postscript to The Concept of Law* (Jules Coleman ed., 2001).

even most) socially valid arguments were also legally valid arguments, the emphasis on both legal validity and legal rules of recognition would be surprising. More plausibly, Hart seems to assume, even if not to assert, that although the concept of the rule of recognition allows a rule of recognition to be so capacious that the domain of law overlaps substantially with the domain of everything else, in actual advanced legal systems the set of norms recognized by the rule(s) of recognition is but a comparatively small subset of the set of norms recognized by society. When this is the case, the set of inputs the law permits is nowhere near coextensive with the set permitted throughout society, and real rules of recognition actually recognize a domain far smaller than the total domain of social norms and social facts.<sup>26</sup> There is a difference between the *concept* of a rule of recognition and the *point* of spending so much time thinking about it. Under this understanding of the point of focusing on a rule of recognition, then, *The Concept of Law* can be seen as likely motivated by the empirical belief, inter alia, that law as we know it is a limited domain.

### III. UNRAVELING THE RULE OF RECOGNITION

If a belief in the existence of law's limited domain explains at least some of the point of focusing on the idea of a rule of recognition, Hart can be understood as quietly assuming the descriptive sociological proposition that the recognition apparatus of a typical modern legal system refuses to acknowledge as legal an appreciable number of the facts, norms, and sources deemed valid in other

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<sup>26</sup> This interpretation of Hart is different from but not inconsistent with Scott Shapiro's view that Hart was particularly concerned with law's *guidance* function. See Scott J. Shapiro, *The Difference That Rules Make*, in *Analyzing Law: New Essays in Legal Theory* 33, 34-40 (Brian Bix ed., 1998); Scott J. Shapiro, *On Hart's Way Out*, 4 *Legal Theory* 469 (1998). When Shapiro, referring to what he calls law's "designation" role, notes that "[g]iven the myriad of norms that might compete for our allegiance, the law designates certain rules as those to which we are required to conform," he presupposes that the domain of legal norms is both smaller and more accessible than the domain of "myriad" social norms of all sorts. Shapiro, *On Hart's Way Out*, supra, at 491. So, although Shapiro's account of the relationship between the domain of legal norms and the domain of all norms is more functional than the one I offer here, our understandings of Hart's basic point are largely consistent with each other.

parts of society.<sup>27</sup> Moreover, Hart is plausibly interpreted as believing that the non-recognition of a fact, source, or norm as legal makes a genuine difference to legal practice.<sup>28</sup> Unlike Hans Kelsen, who insisted that the “pure theory of law” could not explain all that lawyers and judges did,<sup>29</sup> and who stressed that all instances of legal argument and legal decision contained nonlegal elements—that no legal decision was completely determined by the law—Hart seemed concerned with saying something more important about legal and judicial practice (even though he was not concerned with providing a theory of adjudication) than is captured by the purity of the Kelsenian inquiry.<sup>30</sup> After all, lawyers and judges need also to know the language of the society in which they work, the rules of grammar and syntax, the basics of arithmetic, a large number of widely accepted social facts, and much else. To maintain that there is something that lawyers and judges do that does not exhaust their professional practice is thus not to say something very interesting or controversial. Rather, Hart’s claim about a rule of recognition, while not inconsistent with the view that the facts, norms, and sources recognized by a rule of recognition do not explain all of what lawyers and judges do, becomes an important tool for under-

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<sup>27</sup> I use the words “sociology” and “sociological” only because Hart did, and I have neither interest nor competence in marking the boundaries between sociological inquiry and other forms of empirical inquiry in the social sciences.

<sup>28</sup> Jules Coleman maintains, correctly in my view, that Hart is committed to the Practical Difference Thesis, “the claim that, in order to be law, authoritative pronouncements must in principle be capable of making a practical difference: a difference, that is, in the structure or content of deliberation and action.” Coleman, *supra* note 8, at 383. I agree with Coleman’s interpretation of Hart but go further, believing that Hart was also likely motivated by (which is not the same as “committed to”) a belief that the rule of recognition made an actual difference, and not just a difference in principle, in the structure of and sources for deliberation and action in the legal systems with which he was most familiar.

<sup>29</sup> Hans Kelsen, *General Theory of Law and State* 146 (A. Wedberg trans., 1945) (“The judge is, therefore, always a legislator also in the sense that the contents of his decision never can be completely determined by the preexisting norm of substantive law.”); Hans Kelsen, *Pure Theory of Law* 349 (Max Knight trans., 1967) (“Every law-applying act is only partly determined by law . . .”).

<sup>30</sup> It is important to emphasize, however, that Kelsen saw his goal as one of offering explanations about legal theory and legal cognition and neither about law as a practice nor about the argumentation of lawyers and the decisions of judges. As Iain Stewart felicitously expresses it, Kelsen purports to give us a pure theory of law, but not a theory of pure law. Iain Stewart, *Kelsen and the Exegetical Tradition*, in *Essays on Kelsen* 123, 127 (Richard Tur & William Twining eds., 1986).

standing actual legal practices only if coupled with the descriptive claim, one that Kelsen neither affirmed nor denied, that a focus on “the law” usefully differentiates the professional activities of lawyers and judges from the activities of other sorts of folk.

It is this claim—that what most of the important modern rules of recognition actually recognize is a noticeably limited domain—that Dworkin is best understood as seeking to deny. With a number of well-chosen examples, most famously *Riggs v. Palmer*<sup>31</sup> and *Henningesen v. Bloomfield Motors*,<sup>32</sup> Dworkin posits that actual legal argument and actual judicial decisionmaking turn crucially on norms that are not previously part of an identified set of legally recognized (or “pedigreed,” to use Dworkin’s term for norms recognized by a rule of recognition on the basis of their provenance—source—and not their content) legal norms. He argues that the use of norms drawn from the universe of social principles and moral values is so prominent a feature of actual legal decisionmaking that no account of law can be satisfactory unless it explains this phenomenon. Moreover, Dworkin not only claims that many of the norms used in legal decisionmaking are not pedigreed, but also that they are not pedigreeable. Because of the nature of moral argument and moral disagreement, he argues, the idea of a source-based rule of recognition for the moral (and political) principles that pervade legal decisionmaking is impossible. Thus, he concludes, the looming presence of morality in actual legal decisionmaking is such that neither a rule of recognition nor the idea of law as a limited domain can provide an accurate descriptive account of advanced modern adjudicatory practices.

Although it is Dworkin who is most prominently associated with denying any account of legal decisionmaking that stresses rule-of-recognition-recognized legal norms, the broader attack comes from Melvin Eisenberg.<sup>33</sup> As is well known, Dworkin has long maintained that lawyers and courts occupy the forum of principle, with the fact-based and largely utilitarian forum of policy lying outside

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<sup>31</sup> 22 N.E. 188 (N.Y. 1889).

<sup>32</sup> 161 A.2d 69 (N.J. 1960).

<sup>33</sup> Melvin Aron Eisenberg, *The Nature of the Common Law* (1988). A broader explanation of the role of fact-based policy considerations in common law adjudication can be found in John Bell, *Policy Arguments in Judicial Decisions* (1983).

the domain of the law.<sup>34</sup> Insofar as this demarcation between principle and policy is one way of understanding law's domain as limited, then Dworkin, even while insisting that the domain of principle is not limited to *legal* principles in contrast to the larger set of social, political, and moral ones, can be understood as still endorsing a mild version of the claim that law is a limited domain.<sup>35</sup> By contrast, Eisenberg, using a larger array of examples, expands on even Dworkin's claim by arguing that it is in "the nature of the common law" that its rules are often set aside not only in the service of nonlegal principles of community recognized morality but also by nonlegal policy arguments.<sup>36</sup> However powerful Dworkin's distinction between policy and principle might be as a prescriptive matter, Eisenberg argues, as a descriptive proposition it is false, for common law decisionmaking draws on nonpedigreed arguments from policy as well as on nonpedigreed arguments from principle.<sup>37</sup>

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<sup>34</sup> Dworkin, *A Matter of Principle*, supra note 9, at 33–71; Dworkin, *Law's Empire*, supra note 9, at 221–24; Dworkin, *Taking Rights Seriously*, supra note 9, at 90–100.

<sup>35</sup> In *Law's Empire*, Dworkin provides his most sustained defense of the interpretive methodology that he believes best depicts American legal and judicial practice. Dworkin, *Law's Empire*, supra note 9. But Dworkin remains elusive on the contours of the domain of material that a judge is expected to interpret. The concept of interpretation, and for that matter Dworkin's own conception of interpretation, is in theory agnostic on the question of what it is that the interpreter should be interpreting. Indeed, it could (although not to Dworkin) be the case that the set of raw materials to be interpreted is a set consisting solely of pedigreed legal materials to which the judge is then expected to apply Dworkinian interpretive methods. At the other extreme would be an approach in which such methods are applied to the entire universe of social facts and social norms. Dworkin's view that what is being interpreted is an undifferentiated universe of society's political decisions is consistent with his view that the idea of "existing law" is descriptively inaccurate, and consistent with understanding the target of his attack in limited domain terms. See Dworkin, *Taking Rights Seriously*, supra note 9, at 293 (2d ed. 1978). Whether Dworkin's understanding of the domain to be interpreted is descriptively correct, however, is another matter, one that will be the focus of Part VI, infra.

<sup>36</sup> Eisenberg distinguishes legal from social propositions, and explains that social propositions, including but not limited to moral propositions, play a large role in common law decisionmaking. Eisenberg, supra note 33, at 14–42.

<sup>37</sup> On the use of social propositions to produce change in doctrinal propositions, see Eisenberg, supra note 33, at 64–76, 146–61.

## IV. THE LIMITED DOMAIN AND THE CORE OF AMERICAN LEGAL THEORY

The debates among Hart, Dworkin, and Eisenberg sharpen the issue, but the question whether law is a limited domain is far larger and far older. Both Dworkin and Eisenberg focus on common law decisionmaking rather than statutory interpretation, for example, but a rich literature, with Guido Calabresi's *A Common Law for the Age of Statutes* as the capstone, maintains that even statutes both are and should be less circumscribing than is often assumed.<sup>38</sup> If statutes are treated by common law courts as data and not as commands<sup>39</sup> and if statutes are thus merely one element of a more holistic enterprise of lawyerly argument and judicial decisionmaking, it is no longer clear that even statutes create much of a limited domain of legal inquiry. If statutory interpretation is understood as a "dynamic" enterprise in which factors well beyond linguistic meaning and the mental states of the drafters play a large role,<sup>40</sup> if the range of such factors is as large when dealing with a statute as Dworkin and Eisenberg claim it is when dealing with the common law, and if a statute in a common law country is just one more datum to be considered by a common law judge, then we again begin to lose a sense of a pedigreed set of legal norms demarcated from other norms by a rule of recognition, and we begin to lose the sense that law is a limited domain. For modern critics of textualist or formalist approaches even to statutory interpretation, the process of interpreting a statute is one in which a wide array of moral, political, and policy materials and norms inform the interpretive enterprise.<sup>41</sup> To suppose that only or even largely the language of

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<sup>38</sup> Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

<sup>39</sup> This understanding of the role of statutes is the pervasive theme of John Hamilton Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (2001).

<sup>40</sup> See generally, William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988).

<sup>41</sup> See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 324–25 (1990) (arguing against primary reliance on text); Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. Rev. 585, 718–29 (1996) (identifying policy discretion in statutory interpretation); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295 (1990) (criticizing textualism).

the statute determines how it will be applied and interpreted, these critics say, is to understate dramatically the role of a much larger set of considerations influencing what judges in common law countries do with statutes.

Challenges to the idea of law as a limited domain are hardly limited to Dworkin, Eisenberg, and Calabresi; they pervade much of twentieth-century American legal thought. The indeterminacy strand of American Legal Realism is often mocked in “what the judge had for breakfast” terms,<sup>42</sup> but that is an uncharitable and inaccurate way of thinking about the Realist perspective. When Joseph Hutcheson described the “hunch” as the significant determiner of judicial outcomes, with legal doctrine used to rationalize *ex post* those outcomes that the hunch generated, he took pains to emphasize that almost anything could inform the judicial hunch.<sup>43</sup> Similarly, Jerome Frank’s emphasis on the psychological side of judging,<sup>44</sup> an emphasis that did much to foster the “jurisprudence by breakfast” caricature of Realism, is best understood as an attempt to lessen the distance, descriptively and prescriptively, between how a judge as a human being and that same human being clothed in judicial robes would resolve a controversy. Frank’s insistence that the difference was wildly exaggerated in traditional legal theory and legal education is but another way of challenging the view of law as a limited domain; his goal was to emphasize that judges use the same factors and insights as judges that they do in nonlegal environments.

The same strain pervades even the more systematic versions of Realism. Underhill Moore, the most scientific of the Realists, insisted that actual empirical research into the determinants of legal outcomes would show that formal legal doctrine played a relatively

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<sup>42</sup> See, e.g., Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in *Judges on Judging: Views from the Bench* 76 (David O’Brien ed., 2d ed. 2004). For an analysis of the politics of the caricature and the larger politics of the reception (or non-reception) of Realism, see Neil Duxbury, *Some Radicalism About Realism? Thurman Arnold and the Politics of Modern Jurisprudence*, 10 *Oxford J. Legal Stud.* 11 (1990).

<sup>43</sup> Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 *Cornell L.Q.* 274, 274 (1929); see also Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 *Hastings L.J.* 231 (1990).

<sup>44</sup> Jerome Frank, *Law and the Modern Mind* (1930); Jerome Frank, *What Courts Do in Fact*, 26 *Ill. L. Rev.* 645 (1932).

small role, and that a larger array of social, psychological, and policy factors determined much of allegedly law-guided behavior.<sup>45</sup> Herman Oliphant was similarly focused; his identification of patterns of decision not found in the formal legal doctrine highlighted the way that such patterns were more a function of unbounded policy determinations than of more bounded legal doctrine.<sup>46</sup> In the same vein, Felix Cohen urged research on the social forces and backgrounds of judges that he believed determined legal outcomes, for he too thought that in the largely unconstrained nature of such forces and backgrounds lies the core of legal decisionmaking.<sup>47</sup> Finally, Karl Llewellyn, stressing “situation sense” and lauding the “grand style” of judging, insistently objected to seeing judges as focused only on doctrine, but urged them to bring within their compass a large range of social, economic, and cultural factors.<sup>48</sup> For these and the other Realists, their core claim was that judges no more than others can set aside whatever leads them to the best all-things-considered judgment just because a legal norm (or set of legal norms) directs them to disregard what they know to be relevant to the decision at hand.<sup>49</sup>

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<sup>45</sup> Underhill Moore and Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 *Yale L.J.* 1 (1943); see also John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *Buff. L. Rev.* 195 (1980).

<sup>46</sup> Oliphant was concerned, as were most of the other Realists, not with showing that the legal system's outcomes were indeterminate, but that the legal system's outcomes did not track what had been traditionally thought of as legal reasons. Herman Oliphant, *Facts, Opinions, and Value-Judgments*, 10 *Tex. L. Rev.* 127 (1932); Herman Oliphant, *A Return to Stare Decisis*, 14 *A.B.A. J.* 71, 107, 159 (1928); see also Brian Leiter, *Legal Indeterminacy*, 1 *Legal Theory* 481 (1995).

<sup>47</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809 (1935); see also Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 *Ill. L. Rev.* 96 (1923).

<sup>48</sup> Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 5–7 (1960); see also William Twining, *Karl Llewellyn and the Realist Movement* 203–69 (1973).

<sup>49</sup> As Brian Leiter correctly notes, the largely empirical concern of the Legal Realists that formally constraining legal norms may not be constraining in practice has been unfortunately slighted by a modern preoccupation with redefining the Realists as mostly concerned with baselines, the public-private distinction, and the contingency of legal rules and legal concepts. Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *Ethics* 278, 280 n.8 (2001). As a historical matter, Robert Hale and the other Realists who are associated with such ideas were not at the time taken to be central figures. See Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998). As a nonhistorical

Much the same focus can be seen in some strands of the Critical Legal Studies Movement, especially those that self-consciously seek to carry forward the Realist tradition.<sup>50</sup> And here the Critical Legal Studies perspective is usefully understood not as the often caricatured claim that “law is politics,” but rather as the broader but nevertheless more plausible claim that “law is almost everything.”<sup>51</sup> Duncan Kennedy’s hypothetical judge may have seen himself as having had a mission of social change,<sup>52</sup> but a charitable reading of Kennedy would suggest that he recognizes that not all judges and not all legal decisionmakers have the same mission. Rather, they typically have goals—vocations, to put it more grandly—that are describable independently of legal norms, that are more salient for them than legal norms, and that are more important to them than the enforcement of legal norms *qua* legal norms. Consequently, the argument goes, judges and other legal decisionmakers often successfully use their antecedent (to law) goals to shape decisions, proceeding then to employ malleable law in the service of a largely unlimited and certainly nonpedigreeable set of antecedent values that inform these goals. Accordingly, judges are substantially less constrained by legal norms than the typical picture of legal decisionmaking would suggest, and substantially more focused on the larger domain of social and personal goals than that traditional picture would suggest as well.

The Realist challenge to a limited domain conception of legal decisionmaking has been carried forward not only in parts of Critical Legal Studies, but also, and in the spirit of the scientific side of Realism, by those empirical political scientists subscribing to what

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matter, the possibility that the formal or linguistic indications of legal rules may not be the best predictor of legal outcomes is so central to understanding how law works that the contemporary redefinition of Realism has urged a useful modern point at the expense of slighting an even more useful traditional one.

<sup>50</sup> See Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 *J. Legal Educ.* 505, 507–10 (1986).

<sup>51</sup> See Roberto Mangabeira Unger, *The Critical Legal Studies Movement* 1 (1986) (contrasting formalism with “open-ended disputes about the basic terms of social life” and suggesting that the contrast between formalist legal analysis and such open-ended disputes is largely a function of the presence or absence of a “closely guarded canon”).

<sup>52</sup> Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. Legal Educ.* 518, 521 (1986).

they call the “attitudinal” model of judicial behavior.<sup>53</sup> In looking to explain judicial outcomes—typically Supreme Court decisions on constitutional issues—these social scientists have concluded that the best predictor of such outcomes is not anything usefully called “the law,” but rather the array of prelegal “attitudes” held by the Justices, with the determinants of those attitudes being a much larger collection of factors than can be found in law books, law schools, and the general acculturation of lawyers and judges. Although the set of determinants of judicial attitudes may not be infinite, so the argument goes, it is a far wider set of factors and values than a limited domain account of legal norms would suggest.

The range of factors ideally informing legal decisionmaking becomes yet wider in the views of self-described legal pragmatists, of whom Richard Posner is the most prominent but hardly the only example.<sup>54</sup> For this group, the pragmatist vision is one whose focus encompasses everything relevant to making the best all-things-considered decision. If modern legal pragmatism has an enemy, it is formalism, and the pragmatist pushes constantly against the idea that the best decisions, all things considered, should yield to the narrow limits of formal law.<sup>55</sup> Similarly focused, but in less robust form, are aspects of the Legal Process School, for again we see the

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<sup>53</sup> See, e.g., Saul Brenner and Harold Spaeth, *Stare Indecisus: The Alteration of Precedent on the Supreme Court, 1946–1992*, at 59–72 (1995); Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946–1963* (1965); Jeffrey A. Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002); *The Pioneers of Judicial Behavior 53–192* (Nancy Maveety ed., 2003); Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 *Am. J. Pol. Sci.* 261 (1996); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 *Am. Pol. Sci. Rev.* 557 (1989).

<sup>54</sup> For Posner’s conception of legal pragmatism, see Richard A. Posner, *Law, Pragmatism, and Democracy* (2003); Richard A. Posner, *Overcoming Law* (1995); Richard A. Posner, *The Problematics of Moral and Legal Theory* (1999); Richard A. Posner, *The Problems of Jurisprudence* (1990); Richard A. Posner, *Pragmatic Adjudication*, 18 *Cardozo L. Rev.* 1 (1996); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 *S. Cal. L. Rev.* 1653 (1990). For critiques of Posner’s pragmatism, see Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 *Const. Comment.* 675 (1999) (book review); Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical?* Richard Posner and Legal Pragmatism, 113 *Yale L.J.* 687 (2003) (book review).

<sup>55</sup> “Formalism,” when serving as something more than a term of all-purpose jurisprudential abuse, is also a contested idea, but my own account of formalism is not inconsistent with the limited domain account of law I explore here. See Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509 (1988).

stress on making “reasonable” decisions—reasonable in light not just of the law, but of a larger domain of values, policies, and strategic considerations.<sup>56</sup> We can add to the list those who promote all-things-considered balancing tests in constitutional law,<sup>57</sup> and even Lon Fuller, whose concentration on purpose in judicial decisionmaking was presented as an opposition to what he saw as H.L.A. Hart’s too-narrow concern with the language of a legal rule.<sup>58</sup>

I do not want to be excessively reductionist. There are important differences among Dworkin, Eisenberg, Calabresi, Fuller, the Legal Realists, the Critical Legal Studies Movement, the attitudinal political scientists, the legal pragmatists, the balancers, and the Legal Process School. Yet for all of their differences, these diverse perspectives hold in common a rejection of the basic premise of law as a significantly limited domain, and they thus share a rejection of the idea that what is important about law can be captured by a rule of recognition substantially distinguishing the domain of legal facts, norms, and sources from the domain of nonlegal facts, norms, and sources. To these assembled theorists, schools, and perspectives, and thus to much of the pragmatic and instrumentalist core of twentieth-century American legal thought,<sup>59</sup> legal cognition is largely unbounded, and so the basic motivation behind the concept of the rule of recognition turns out to be empirically false. As descriptive sociology, the inhabitants of this tradition might say, the idea of a rule of recognition is flawed, depicting poorly the ex-

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<sup>56</sup> Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>57</sup> For broader discussions of constitutional balancing, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943 (1987); Louis Henkin, *Infallibility Under the Law: Constitutional Balancing*, 78 *Colum. L. Rev.* 1022 (1978); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 24 (1992).

<sup>58</sup> Lon L. Fuller, *The Morality of Law* 228–29 (Yale Univ. Press, rev. ed. 1969); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630 (1958).

<sup>59</sup> For more on “pragmatic instrumentalism,” see Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 *Cornell L. Rev.* 861 (1981); Robert S. Summers, *Professor Fuller’s Jurisprudence and America’s Dominant Philosophy of Law*, 92 *Harv. L. Rev.* 433 (1978).

perience of judging and even more poorly the practice of lawyering. From this perspective, it is not that Hart was deficient as a philosopher or lawyer, but rather that he was deficient as a sociologist, identifying in the rule of recognition a concept the point of which neither explains legal practice nor captures in a useful way the professional behavior of lawyers and judges.<sup>60</sup>

#### V. LIMITED DOMAINS AND THE DIFFERENTIATION OF LAW

The question of law as a limited domain is hardly the only important aspect of thinking about the nature of law. Still, much of the stuff of law—resolving disputes, regulating behavior, making policy, negotiating social conflict on important moral issues, and much else—is not unique to the legal system. Consequently, examining the possibility that law may be a limited decisional domain can illuminate both significant parts of the phenomenon of law and the role of law and the legal system in a large and complex society. In part, legal systems are important because, as a matter of institutional design, they present themselves as contingent and not inevitable. Should human rights be protected by courts, legislatures, investigative commissions, or armies? Should tobacco policy be settled by tort litigation, Food and Drug Administration regulation, or congressional statute? Should contested electoral votes in a presidential election be determined by courts, election commissioners, or a legislature? Are issues of school finance, prison conditions, affirmative action, welfare policy, and gun control better determined in environments staffed largely by lawyers, or instead by bodies expert in the particular subject matter, or perhaps by the people's elected representatives? So with respect to *Henningsen*, for example, does it make a difference whether New Jersey's Supreme Court or its legislature sets the conditions for unenforceability of arguably unconscionable contracts? And turning to *Riggs*, should the circumstances under which criminal acts bar beneficiar-

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<sup>60</sup> For an interesting attempt to meld serious empirical inquiry with traditional legal positivism, see Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997); Brian Z. Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 *Oxford J. Legal Stud.* 501 (1995); Brian Z. Tamanaha, *Socio-legal Positivism and a General Jurisprudence*, 21 *Oxford J. Legal Stud.* 1 (2001).

ies from claiming under wills in which they are named be worked out over time in common law fashion, or is the issue better dealt with comprehensively by legislative modification of the Statute of Wills on the basis of recommendations by a panel of experts? In these and countless other cases, law stands not as inevitable but as an option, and the mechanism of lawyer argument and judicial resolution compete with other social decisionmaking institutions to be the locus of decision. And in these questions of institutional design and allocation of decisional authority, few issues are more important than the difference (if any) it makes to channel decisions into law rather than elsewhere, and thus the question whether law is a significantly limited domain becomes most pressing. If choosing law means excluding many potential inputs to the best all-things-considered decision, the choice is a crucial one. The question of law as a limited domain thus places on center stage the issue of what we lose (and what we gain) when we choose law. And even if the task is not institutional design but simple understanding, the distinction (or not) between law and other institutions in a complex society undergirds most attempts to explain the phenomenon of law and the character of a legal system.

Accordingly, then, exploring the possibility that law is a limited domain requires addressing the “compared to what” issue. The limited domain hypothesis has bite only when contrasted to a less limited, even if not unlimited, domain, and so we must grasp the idea of an “all-things-considered” judgment. Associated primarily with (but not necessarily located solely within) consequentialism, and in particular act-consequentialism,<sup>61</sup> an all-things-considered judgment screens out no fact or relationship that might bear on the decision, and is thus open to any input causally related to the consequences to whose maximization the consequentialist decision is directed. And even outside a consequentialist framework, an all-

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<sup>61</sup> I follow conventional philosophical usage in taking utilitarianism to be a special case of consequentialism. Most of the literature on consequentialist decisionmaking procedures, however, takes place within utilitarianism, and includes the various works collected in *Contemporary Utilitarianism* (Michael D. Bayles ed., 1968). For more recent work, see Brad Hooker, *Ideal Code, Real World: A Rule-consequentialist Theory of Morality* (2000); Conrad D. Johnson, *Moral Legislation: A Legal-Political Model for Indirect Consequentialist Reasoning* (1991).

things-considered decision is open to any decisional input bearing on whatever goal the process seeks to serve.

Not all political or policy decisions are all-things-considered decisions, but many are substantially so. A good policy analysis is marked by its ability to fathom the full range of policy-relevant considerations. Similarly, we often understand political decisions to be, at their best, unconstrained. It is misleading to think of systems of parliamentary sovereignty—the understanding until the recent entrenchment of various forms of quasi-constitutional human rights legislation<sup>62</sup>—as totally without constitutional constraint, yet legislative decisions in the United Kingdom, New Zealand, and Israel were for much of their history largely devoid of second-order constraints on first-order policy/political decisions. Little was screened out in advance, and virtually every factor was potentially relevant to every decision. In Joseph Raz's terminology, few exclusionary reasons barred consideration of what might otherwise have been germane to the best all-things-considered decision on any issue.<sup>63</sup>

With all-things-considered decisionmaking as the baseline, the limited domain hypothesis posits that an appreciably large number of considerations that might be available in all-things-considered decisional domains are unavailable to law.<sup>64</sup> Yet although the idea

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<sup>62</sup> See Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 *Tex. Int'l L.J.* 329 (2002) (describing the incorporation of substantive provisions of the European Convention on Human Rights into the domestic law of the United Kingdom).

<sup>63</sup> Joseph Raz, *Practical Reason and Norms* (1990). For in-depth discussion of exclusionary reasons and their place in law, see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979) [hereinafter Raz, *The Authority of Law*]; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (1970) [hereinafter Raz, *The Concept of a Legal System*]; see also Larry Alexander, *Law and Exclusionary Reasons*, 18 *Phil. Topics* 5 (1990); Tim Dare, *Raz, Exclusionary Reasons, and Legal Positivism*, 8 *Eidos* 11 (1989); Chaim Gans, *Mandatory Rules and Exclusionary Reasons*, 15 *Philosophia* 373 (1986).

<sup>64</sup> See Gerald Postema, *Law's Autonomy and Public Practical Reason*, in *The Autonomy of Law: Essays on Legal Positivism* 79 (Robert P. George ed., 1996); Joseph Raz, *Legal Principles and the Limits of Law*, 81 *Yale L.J.* 823 (1972); Frederick Schauer, *Rules and the Rule of Law*, 14 *Harv. J.L. & Pub. Pol'y* 645 (1991). Postema credits me with introducing the term "limited domain" to this conception of law. See Postema, *supra*, at 113 n.9 (citing Schauer, *supra*, at 645). It has, however, had occasional earlier appearances in just this sense among Critical Legal Studies and feminist theorists who noted the claim of law as a limited domain for the purpose of ridiculing

is clear, we need to explore just how a legal system could be such a limited domain. Following the focus on sources of law in many of the debates in modern legal theory, we start by hypothesizing a limited domain of sources. When such a limited domain exists, the sources of law are limited to those pedigreed by a rule of recognition. Otherwise acceptable sources of decisional guidance, not being recognized by the legal rule of recognition, do not count as law, even though they might count as something else. Now it is true, as some of the commentary on Dworkin has stressed,<sup>65</sup> that the domain of law being limited is not a logical corollary of the idea of a rule of recognition. In theory, a Hartian rule of recognition could recognize as legal sources the full array of socially available sources, and the domain of legal sources would be extensionally equivalent to the domain of social sources.<sup>66</sup> Yet although such a set of congruent domains could satisfy the *idea* of a rule of recognition, the bite of the idea comes from the possibility that real rules of legal recognition recognize a relatively narrow subset of what the society in which those legal rules of recognition exist recognizes.<sup>67</sup> Were a legal rule of recognition to recognize all or almost all social sources as valid sources of law, much (but not all) that we think distinctive about law would disappear, and the idea of a rule of recognition would do little to illuminate the phenomenon of law and the institutions of a legal system.

Although the idea of a rule of recognition draws its explanatory power from the possibility that not all that is recognized by society is recognized by the legal system, I emphasize again my expanded idea of a rule of recognition encompassing facts as well as norms. It is true that a fact is deemed relevant (or not) by virtue of a norm. Yet an excess focus on norms to the exclusion of facts may blind us to the way in which an important task of a rule of recognition is to determine which hard empirical facts are legally relevant and

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it. See, e.g., Kathryn Abrams, *The Deluge: A Trial and Judgment in One Act*, 65 *Tex. L. Rev.* 661, 687 (1987) (book review).

<sup>65</sup> See Coleman, *The Practice of Principle*, *supra* note 24; W.J. Waluchow, *Inclusive Legal Positivism* (1994); David Lyons, *Principles, Positivism, and Legal Theory*, 87 *Yale L.J.* 415 (1977); E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 *Mich. L. Rev.* 473 (1977).

<sup>66</sup> Coleman, *Negative and Positive Positivism*, *supra* note 24, at 139–40.

<sup>67</sup> See John Gardner, *Concerning Permissive Sources and Gaps*, 8 *Oxford J. Legal Stud.* 457, 460 (1988) (referring to a “finite number of permissive standards”).

which are not. Thus, it is better to think of legal as contrasted with social materials, or legal as opposed to social data, or simply to understand the idea of a legal source capaciously, with the domain of legal sources recognized by the legal rule of recognition being understood to encompass the full array of decisional inputs.

Although I focus on law as a limited domain, the differentiation of legal from other decisional domains need not be based on the domain of legal *sources* being limited. The domain of legal sources might be coextensive with the domain of social sources, for example, but the legal system could still use those sources differently.<sup>68</sup> The legal system might, for example, and largely does, insist substantially on winner-take-all two-party decisionmaking, channeling all disputes and policy decisions into decisionmaking mechanisms in which splitting the difference is difficult, in which allowing one party to win because she lost the last time is frowned upon, in which continuous monitoring is awkward, and in which dealing with a number of interests greater than two has emerged only with difficulty by virtue of jury-rigged mechanisms for multiparty litigation being tacked on to a structure fundamentally designed for two-party controversies. Thus, we might imagine a system characterized by *procedural* differentiation, in which law is differentiated from other decisionmaking venues not by the sources it uses but by how it uses them. Because applying different procedures to the same inputs would produce different results for some decisions—insofar as the array of results produced by the same sources with one procedure would be noncongruent with the array produced by another procedure—legal procedures would make a difference even if legal sources were not different at all.<sup>69</sup>

Even controlling for procedures as well as sources, different forms of psychological, political, or cultural selection or acculturation might still differentiate the legal system. Perhaps the array of legal decisionmakers is selected (or self-selected) with a disproport-

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<sup>68</sup> This is an important theme in Dennis Patterson, *Normativity and Objectivity in Law*, 43 *Wm. & Mary L. Rev.* 325 (2001).

<sup>69</sup> Thus, J.M. Balkin and Sanford Levinson argue for what they call “deep canonicity,” the idea that there may be “characteristic forms of legal argument, characteristic approaches to problems, underlying narrative structures, unconscious forms of categorization, and the use of canonical examples” that differentiate law more than does the “choice of materials.” J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, in *Legal Canons* 3, 5 (J.M. Balkin & Sanford Levinson eds., 2000).

tionate focus on the dull (or the interesting), the cautious (or the bold), the pessimistic (or the optimistic), the liberal (or the conservative), and so on. And even assuming representative selection, legal education and the social environment of law and lawyers might reinforce some traits of personality and discourage others. If this were the case (and numerous other variables could be added), we might see something usefully differentiated as the legal system even if both the sources and the procedures remained constant across different decisional domains. Yet with this large disclaimer, I still focus on a differentiation of sources and not on a differentiation of procedures, personnel, or acculturation.<sup>70</sup> My question is whether we might usefully understand an important question about law as the question of limited domain, and whether we might usefully examine whether law is the kind of limited domain of sources I hypothesized above.

#### VI. TESTING THE LIMITED DOMAIN HYPOTHESIS—THE NATURE OF JURISPRUDENTIAL INQUIRY REVISITED

At this point the inquiry appears to take an empirical turn. We can grasp the idea of a rule of recognition, a set of such rules, or, even better, a set of practices,<sup>71</sup> without rolling up our sleeves and

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<sup>70</sup> On these differences, see Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 *Cornell L. Rev.* 1080 (1997).

<sup>71</sup> Hart has given us the term “rule of recognition,” but in doing so he may have mischaracterized even his own insights. It is true that there could in theory be a rule of recognition that was recognizable as a rule, and it is equally true that *some* of the nonultimate rules of recognition in any legal system appear to be quite rule-like. Part of what is interesting about the civil law, for example, is captured by the way in which appearance in a formal code is sufficient and, in some systems, necessary for a norm to count as a legal norm. And in using the word “rule,” Hart seems to have imagined rules of recognition of this sort, as in “In England they recognize as law . . . whatever the Queen in Parliament enacts . . .” Hart, *supra* note 1, at 102. Hart also recognizes that a rule of recognition may fail to be expressly formulated and may even be unstated. *Id.* at 101. Yet in an important but underappreciated insight, Brian Simpson has urged us to think of recognition not in terms of rules but of largely nonrule-like Wittgensteinian *practices*. A.W.B. Simpson, *The Common Law and Legal Theory*, in *Legal Theory and Common Law* 8 (William Twining ed., 1986); see, more recently, Benjamin Zipursky, *The Model of Social Facts*, in *Hart’s Postscript: Essays on the Postscript to The Concept of Law* 219, 228–29 (Jules Coleman ed., 2001). Although some hold that recognizing the nonruleness of the rule of recognition is quite damaging to Hart, as does Matthew Kramer in *The Rule of Misrecognition in the Hart of Jurisprudence*, 8 *Oxford J. Legal Stud.* 401, 406–11 (1988), to me the idea of recogni-

doing difficult empirical work. We can also understand the idea of a limited domain without pursuing sociological inquiry. Nevertheless, taking the next step—attempting to determine whether a particular legal system or family of legal systems is or is not a limited domain—is an unavoidably empirical inquiry. And although this need not be thought problematic, much of jurisprudence, especially philosophical analytic jurisprudence, has often been plagued by the “if you have a hammer every problem looks like a nail” phenomenon.<sup>72</sup> When jurisprudence is defined as a philosophical enterprise, and further defined as the asking of philosophical questions to which only philosophical answers may be given, then we can understand the temptation to block off empirical exits from a philosophically cabined jurisprudential enterprise.<sup>73</sup> But if we follow the inquiry where it goes, an inquiry that starts as philosophical may head in an empirical direction,<sup>74</sup> and when that is the case, wisdom counsels against allowing disciplinary borders to impede otherwise fruitful avenues of inquiry.<sup>75</sup>

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tion safely survives its nonsusceptibility to rule-like formulation. Consider, for example, the way in which citation of secondary works by living authors moved from being unacceptable in English appellate practice to being sort of acceptable, with neither a dramatic shift in rule, nor even less dramatic changes describable in rule-like terms. What Hart called the “rule of recognition” is thus best seen as a collection of “practices of recognition,” the latter term coming closer to capturing the amorphous and shifting nature of what is an acceptable legal source as well as the way in which much of the development over time takes place from the bottom up rather than from the top down.

<sup>72</sup> See Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (2d ed. 2003).

<sup>73</sup> I do not deny that various disciplines might usefully want to retain their own comparative advantage in the best sense of that term, and in the desirable service of an intellectual division of labor. That is how, for example, I understand the statement that “[w]hether or not moral criteria of legality are capable of functioning as part of an actual legal system in this or that society is really not a question of any philosophical interest (though of course it is of considerable sociological interest).” Jules L. Coleman, *Constraints on the Criteria of Legality*, 6 *Legal Theory* 171, 182 (2000). The danger is that desirable divisions of responsibility *within* jurisprudence will too easily become definitions *of* jurisprudence.

<sup>74</sup> On the empirical dimension (or not) of traditional legal “science,” see Dennis Patterson, *Langdell’s Legacy*, 90 *Nw. U. L. Rev.* 196 (1995).

<sup>75</sup> On these and related issues about the very methodology of jurisprudence, see Julie Dickson, *Evaluation and Legal Theory* (2001); see also John Finnis, *Natural Law and Natural Rights* 3–18 (1980); Leiter, *Beyond the Hart/Dworkin Debate*, *supra* note 11; Joseph Raz, *On the Nature of Law*, 82 *Archiv für Rechts- und Sozialphilosophie* 1 (1996).

If we avoid this pitfall, we must evaluate more systematically just how limited, if at all, law's domain really is. Dworkin takes *Riggs* and *Henningsen* to establish the nonlimited domain of legal decisions, but are such cases representative? Perhaps in the ordinary run of cases neither lawyers in their arguments nor judges in their decisions even contemplate the possibility of venturing outside the limited domain of pedigreed legal rules. Perhaps the phenomenology of lawyering and judging is such that the mind focuses on a small array of pedigreed legal materials, venturing beyond that limited array only in the truly exceptional case. Thus, even if judges are socially empowered to depart from law's limited domain in cases of grave injustice, and even if lawyers are similarly permitted to urge them to do so, it may still be that in a large number of cases involving some but not grave injustice, or unwise but not catastrophic policy implications, the "crowding out" effect of law's limited domain renders ordinary injustice and routine policy error invisible. If this is actually so, then the fact that outcomes generated by the law qua law are in theory subject to "not unjust" and "not unwise" filters may say little about the effect of such filters in routine cases.<sup>76</sup>

In order to evaluate these and related possibilities, we would need a systematic study of the actual inputs into legal argument and legal decision.<sup>77</sup> As a starting point, we could examine actual sources used, perhaps believing that something of deep importance about law was captured by the fact that, seemingly, well over ninety-nine percent of all legal arguments are buttressed only, at least explicitly, by that remarkably small set of norms contained in books published by the West Publishing Company. Now there is a response to this, which one we might associate with Llewellyn's de-

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<sup>76</sup> We could extend the filter metaphor by noting that filters can be fine or coarse, and the implicit claim in the text is that the filters applied to law-generated outcomes are coarse and not fine, blocking large injustices or awful policy outcomes, but letting many small injustices and suboptimal policy outcomes pass through unobstructed.

<sup>77</sup> An illuminating discussion of the distinction between the ordinary business of the law and the arguably exceptional cases that Dworkin and others employ is in Matthew H. Kramer, *Coming to Grips with the Law: In Defense of Positive Legal Positivism*, 5 *Legal Theory* 171, 173–78 (1999). To similar effect is John Finnis, *On Reason and Authority in Law's Empire*, 6 *Law & Phil.* 357, 360–76 (1987).

construction of the canons of statutory interpretation,<sup>78</sup> but which actually represents a larger Legal Realist claim. It might be, so the argument would go, that virtually any nonlegal argument, norm, value, or principle could in fact find some support in what looks like a limited set of legal materials, and that finding most of the full range of human normative thought in legal sources, at least in as rich and dense a legal system as that of the United States, is not as difficult as it seems. As a result, the argument goes, the task of translating the unlimited domain of social sources into the limited domain of legal sources is like translating French into English. True, there are some things in French that do not translate easily or completely into English—*savoir faire*, for example, or even the Frenchman's silent shrug—but these are the exceptions and not the rule, and we would dramatically misunderstand the richness of English if we took such examples as demonstrating that English is quite limited when compared to French. So too with law, and it might well be that advanced and complex legal systems have developed in such a way that the set of norms and other inputs they allow and encompass is so large as to render the limited domain hypothesis somewhere between trivial and false. If uncontroversially pedigreed legal sources turn out to contain the resources for virtually all of the outcomes that would be reached in society at large, then law is little more than a different language, and understanding it as a genuinely limited domain would be misleading.

This is not the place to pursue or even to sketch the full scope of what a serious empirical test of the limited domain hypothesis would look like. The few thoughts immediately above can best be seen as a prolegomenon to a research program, and a woefully incomplete prolegomenon at that. Still, these thoughts may serve to underscore the essentially empirical nature of the claims that Hart has implicitly made and that Dworkin has explicitly resisted, and thus to suggest that their debate represents a serious framing of a crucial dimension of trying to understand what, if anything, is unique about the legal decisionmaking, and what characteristics demarcate it from other decisionmaking institutions.

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<sup>78</sup> Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395 (1950).

Although I cannot here establish the truth of the proposition that law is a significantly limited domain, there are, *pace* Dworkin, reasonably strong indications that a limited domain picture of law remains substantially accurate. The full history and breadth of “murdering heir” cases, for example, suggests that *Riggs* represents an exception to a then-prevailing and still-prevailing general rule that even highly unworthy beneficiaries will inherit according to the expressed terms of a will, not because allowing them to inherit is the pragmatically or all-things-considered best decision, but simply because to most American lawyers and judges, before and after *Riggs*, the unworthiness of the beneficiary—now, but not earlier, stopping just short of first and second degree murder—is rendered irrelevant by the Statute of Wills. We can find numerous examples of courts allowing killers to take property that became available to them solely because of their own culpable actions, including cases involving a killer of the testator who was found not guilty by reason of insanity,<sup>79</sup> a killer of the testator who was convicted of voluntary manslaughter,<sup>80</sup> murderers whose acts of murder caused property to pass to their children although not directly to themselves,<sup>81</sup> a murderer convicted of being an accessory after the fact but not of actually wielding the murder weapon,<sup>82</sup> a murderer who did not kill a “testator” but instead as remainderman killed the holder of the life estate,<sup>83</sup> and a “selfish, angry, resentful, indignant, bitter, self-centered, spiteful, vindictive, paranoid, and stingy” individual whose gross negligence served to “shorten the decedent’s life” and accelerate the perpetrator’s inheritance.<sup>84</sup> In all of these cases, all falling only slightly short of first and second degree murder, courts have allowed culpable killers to inherit, and have treated the *Riggs v. Palmer* principle, whether embodied in a statute or in the con-

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<sup>79</sup> *Estate of Artz v. Artz*, 487 A.2d 1294 (N.J. Super. Ct. App. Div. 1985).

<sup>80</sup> *Bird v. Plunkett*, 95 A.2d 71 (Conn. 1953).

<sup>81</sup> *Prudential Ins. Co. of Am. v. Athmer*, 178 F.3d 473 (7th Cir. 1999); *In re Estate of Van Der Veen*, 935 P.2d 1042 (Kan. 1997).

<sup>82</sup> *Reynolds v. American-Amicable Life Ins. Co.*, 591 F.2d 343 (5th Cir. 1979) (*per curiam*).

<sup>83</sup> *Blanks v. Jiggetts*, 64 S.E.2d 809 (Va. 1951).

<sup>84</sup> *Cheatle v. Cheatle*, 662 A.2d 1362, 1364 (D.C. 1995); see also *Schifanelli v. Wallace*, 315 A.2d 513 (D.C. 1974) (holding that a homicide judicially determined to be the result of gross negligence does not bar the killer from recovering under the insurance agreement).

mon law, as an exception to be construed narrowly, notwithstanding the broad potential implications of the “no man may profit from his own wrong” principle.

Much the same applies to *Henningsen*. Although *Henningsen* was obviously influential in changing the law and was not just an exception to the law, the case must still be evaluated as merely one member of a larger set of legal events in which the strict terms of a contract prevailed even under circumstances of considerable disparity in bargaining power, and even when the weaker party’s judicially enforced waiver represented a considerable deprivation of what would otherwise have been that party’s common law legal remedies.<sup>85</sup> *Henningsen* notwithstanding, parties with little bargaining power remain burdened, to their detriment, by a legal regime in which courts routinely refuse to take unequal bargaining power into account when they hold parties to what they have signed.

The potential unrepresentativeness of *Riggs* and *Henningsen* is hardly limited to these two areas of legal doctrine. Federal judges grudgingly enforce the literal language of the Federal Sentencing Guidelines even when they believe those guidelines work an injustice.<sup>86</sup> Supreme Court Justices refrain from overturning even those

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<sup>85</sup> There is an important theoretical disagreement at play here. Under one view, a pedigreed set of legal rules might be said to have substantial weight even though the results indicated by that set might on occasion be overcome by a very strong reason to the contrary. This is the sense in which such rules might have *presumptive* force, and under this view that force exists even when the presumption is overcome. See Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 196–206 (1991); Frederick Schauer, *Can Rights Be Abused?*, 31 *Phil. Q.* 225 (1981); see also Stephen Perry, *Judicial Obligation, Precedent and the Common Law*, 7 *Oxford J. Legal Stud.* 215 (1987); W.J. Waluchow, *Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism*, 6 *Legal Theory* 45 (2000). Under the opposite view, however, rules that do not carry the day, and especially rules that are rejected or (in the case of precedents) overruled, cannot be said to be or to have been authoritative. See Tim Dare, *Wilfred Waluchow and the Argument from Authority*, 17 *Oxford J. Legal Stud.* 347 (1997); Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, 4 *Legal Theory* 533 (1998). This is an important dispute with many implications throughout legal theory, and I note it here only to suggest that taking one side or another in this dispute would be important to determining the actual effect on the full domain of legal practice of a limited set of rule-of-recognition-recognized legal norms.

<sup>86</sup> See, e.g., *United States v. Bristow*, 110 F.3d 754, 757–59 (11th Cir. 1997) (regarding the innocent possession of unloaded weapon); *United States v. Lam*, 20 F.3d 999, 1005 (9th Cir. 1994) (regarding the possession of shotgun whose shortened barrel qualified it as a “sawed off” shotgun even though defendant was using it only to pro-

precedents they believe to be morally or constitutionally flawed,<sup>87</sup> and they follow the plain meaning of poorly drafted federal statutes whose drafting deficiencies produce injustice or bad policy.<sup>88</sup> And with some frequency courts refuse to make what *to them* appear to be wise all-things-considered changes in common or statutory law, believing that such changes are for a legislature and not for a legal system. So when the Supreme Court of New Hampshire in *In re Blanchflower* refused to recognize extra-marital gay and lesbian sexual activity as “adultery” for purposes of the New Hampshire fault-based divorce law, it did so not because it thought that limiting adultery to heterosexual activity had a sound basis in policy or morality, but because it understood its own *legal* role in far narrower terms.<sup>89</sup>

Indeed, the strongest example of this legal self-understanding—the legal point of view—comes from those parts of the law in which, by operation of a broadly worded statute, courts are explicitly authorized to operate in an *unlimited* fashion, but in which they have nevertheless proceeded to convert that broad mandate into something both narrower and more limited. When Congress in the Sherman Act in effect told the courts to use whatever resources were available to them to determine what was to count as a “contract, combination . . . or conspiracy, in restraint of trade or commerce,”<sup>90</sup> the courts proceeded to bridle against this authorization to operate in unlimited domain fashion, and proceeded to substitute a series of per se rules substantially narrowing their own scope

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tect his own previously robbed convenience store). At times this works in the other way, with the law's limited domain of permissible considerations making reasons for greater punishment unavailable, as when a court found itself unable to increase a defendant's sentence on the basis of having obliterated the serial number on a weapon because the weapon, a silencer-equipped handgun, was manufactured by the defendant and thus had never contained a serial number in the first place. *United States v. Bakhtiari*, 913 F.2d 1053, 1063 (2d Cir. 1990).

<sup>87</sup> See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 213 (1994) (Scalia, J., concurring in the judgment); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419–20 (1983).

<sup>88</sup> *United States v. Locke*, 471 U.S. 84 (1985), excoriated in Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *Case W. Res. L. Rev.* 179, 204 (1986), rehabilitated in Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 *Vand. L. Rev.* 715, 728–30 (1992).

<sup>89</sup> 834 A.2d 1010 (N.H. 2003).

<sup>90</sup> 15 U.S.C. § 1 (2000).

of operation and their own relative unlimited discretion in individual cases.<sup>91</sup> Much the same can be said about the tendency of the courts to make far more concrete and rule-like the initially open-ended Securities and Exchange Commission Rule 10b-5,<sup>92</sup> and of course the frequent substitution in constitutional law of three- and four-part legalistic tests for the far more open-ended and thus not domain-restricted constitutional text.<sup>93</sup> In numerous areas of law, therefore, it turns out that courts themselves see law as a limited domain, even to the extent of creating such a domain when they are plainly authorized to operate in a far broader fashion.

Even if the lessons of *Riggs* and *Henningsen* turn out to be far narrower than Dworkin and others have suggested, and even if it is thus misleading to suggest that these cases demonstrate the pervasive role of moral principles in legal argument and judicial decisionmaking, perhaps Dworkin and others need only show one instance. As Dworkin himself has suggested,<sup>94</sup> and as Duncan Kennedy had suggested earlier,<sup>95</sup> as long as departure from the limited domain is possible (the judge doesn't get fired, or disbarred, or even widely criticized) in one case, then in *every* case the possibility looms, such that the full domain of considerations remains open in every instance of law application.<sup>96</sup> So as long as *Riggs*-style adjudi-

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<sup>91</sup> See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price-fixing); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953) (tying arrangements). On the phenomenon generally, see Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. Rev. 303.

<sup>92</sup> 17 C.F.R. § 240.10b-5 (2002); see Thomas Lee Hazen, *The Law of Securities Regulation* 683-700 (2d ed. 1990).

<sup>93</sup> See, e.g., *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (four-part test for commercial speech); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (three-part test under the Establishment Clause). The very fact that such tests have been often criticized for their mechanical aspect is strong evidence of their narrowing tendencies. See Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv. L. Rev. 30 (1993); Robert F. Nagel, *The Formulaic Constitution*, 84 Mich. L. Rev. 165 (1985); cf. Frederick Schauer, *Opinions as Rules*, 62 U. Chi. L. Rev. 1455 (1995).

<sup>94</sup> Dworkin, *Law's Empire*, *supra* note 9, at 350-54.

<sup>95</sup> Duncan Kennedy, *Legal Formality*, 2 J. Legal Stud. 351 (1973).

<sup>96</sup> There is a similar suggestion by Raz that

[i]n common-law countries, courts can distinguish common-law rules, apply doctrines of equity, and use other devices to ensure that the law as applied to the case is not unjust. Therefore, in such countries all judicial decisions rely on at least one additional premise—i.e., that there is nothing in the situation that

cation is possible, for example, then not just in *Riggs* and not just in cases in which *Riggs*-style outcomes are reached, but in every case the moral issue is on the table. If *Riggs* is permissible in one case out of a thousand, so the argument goes, then in every one of those thousand cases the issue is before the court whether the law should be set aside in the service of nonpedigreed moral principles, and thus those nonpedigreed moral principles are in play in every case and not just in one case out of a thousand.

Although moral principles may be logically available in every case, what is logically available may still be psychologically and phenomenologically remote, so that in the vast majority of cases neither lawyers in their arguments nor judges in their decisions even contemplate the possibility of venturing outside the limited domain of pedigreed legal rules.<sup>97</sup> Instead, the phenomenology of lawyering and judging may be such that the mind focuses on a quite small array of pedigreed legal materials, with the mind wandering beyond this only in the truly exceptional case.

Nor is thinking and operating largely within the limited domain of plainly pedigreed legal materials restricted to judges or to lawyers arguing before them. Lawyers in their non-appellate practices focus overwhelmingly on the language of statutes, appellate cases, and authoritative legal treatises, and law students learn the law from casebooks whose content—cases, overwhelmingly—differs less than might have been expected were the lessons of the Realists truly accepted. And when lawyers criticize legal outcomes, it is rare for them to couch those criticisms in the language of morality or policy. Rather, they accuse judges of having mistakenly interpreted statutes, constitutional provisions, and reported cases, again underscoring the way in which the actual practices of judging, legal ar-

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would justify modifying the law, or its application to the case, by this court on this occasion.

Raz, *supra* note 21, at 4. For the argument that such an acknowledgment undermines legal positivism, see Jeffrey D. Goldsworthy, *The Self-Destruction of Legal Positivism*, 10 *Oxford J. Legal Stud.* 449, 486 (1990).

<sup>97</sup> “[T]he sense of a gap between legal argumentation and moral argumentation is not a theoretical specialty or insight demanding extraordinary mental concentration. To the contrary, its presupposed existence is the common fare not just of the general public but of working-stiff lawyers, including the ones who sit as judges.” Frank I. Michelman, *Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary*, 47 *UCLA L. Rev.* 1221, 1242 (2000).

gument, and legal education remain disproportionately focused on a limited domain of plainly pedigreed legal materials.

This is not to say that we could not also find numerous counterparts to *Riggs* and *Henningsen*, for of course we can. Moreover, reliance on policy and principle often looms large in legal arguments, and discussions of policy and principle often loom even larger in the classrooms of American law schools. Yet it is not implausible to see the roles of policy and principle as playing a decidedly secondary and interstitial role in American legal practice, and as playing an even smaller role if we look not only at hard cases but at the full range of the ordinary business of the law. Policy and principle appear before us when the law runs out, and also when the results the law generates even when it has not run out seem extremely, and not just somewhat, unwise as a matter of policy or extremely, and not just a little bit, unjust as a matter of morality. In such cases the presumptive dominance of the limited domain is overcome, but, still as a testable hypothesis far more than a demonstration, it appears likely that only significantly wide legal gaps, significantly serious mistakes of policy, and significantly grave cases of injustice are sufficient to allow the intrusion of such considerations into the limited domain of rule-of-recognition-recognized legal materials. When the gaps are narrow, or when what the law says in the areas between its gaps falls well short of policy or moral catastrophe even when it is somewhat unwise or somewhat unjust, the legal systems of even the countries in which the domain of law seems least limited are ones in which the rule of recognition appears to do real work, and in which failing to recognize the overwhelming narrowness of legal argument produces a distorted picture of the practices and institutions we know as the law.

## VII. WHITHER POSITIVISM?

At some difficulty, but not without purpose, I have avoided almost any mention of the word "positivism." That is because what I have suggested to this point might retain its potential interest and importance even had the word "positivism" never been invented, even had legal positivists never existed, and even had legal theorists for the last half century, century, or two centuries not been debating the nature of legal positivism and the soundness of positivism as one perspective on the nature of law. Accordingly, good

judgment would suggest I leave positivism out of my analysis of law's domain, thereby avoiding the slings and arrows of legions of legal positivists who would claim that in associating the limited domain hypothesis with legal positivism I have misunderstood or misinterpreted the positivist tradition. The theorist of good sense who wanted to discuss the limited domain hypothesis would ignore legal positivism entirely, leaving the positivists to different issues and different debates.

Yet even apart from suffering from a deficiency of good sense, I remain unwilling to cede important dimensions of a long and rich positivist tradition to contemporary debates among positivists, debates whose outcome may insufficiently advance our understanding of the phenomenon of law. Thirty-five years ago Robert Summers, having identified twelve different positions that were often labeled as "positivist," many of them mutually exclusive, urged that the term be dropped entirely on the grounds that it had become "radically ambiguous and dominantly pejorative."<sup>98</sup> But such a strategy runs the risk of ignoring too much that is important and correct in the positivist tradition, and of neglecting the label that serves to draw together important parts of that tradition. Moreover, an important part of the positivist program is the concern with the *autonomy* of law, a concern that not implausibly grows out of historical positivism's traditional focus on the actual (and not only the conceptual) separation of law and morality.<sup>99</sup> So although the idea of law as a limited normative or decisional domain is not a necessary condition for law's autonomy, it is certainly one of the more obvious ways in which law could be thought of as at least partly autonomous from the larger domain in which it exists. My inquiry here is thus not so much an effort to reorient or to recapture positivism as to emphasize a dimension of the positivist tradition that appears to have been shunted aside.

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<sup>98</sup> Robert S. Summers, *Legal Philosophy Today—An Introduction*, in *Essays in Legal Philosophy* 1, 15–16 (Robert S. Summers ed., 1968); see also Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *The Autonomy of Law: Essays on Legal Positivism*, supra note 64, at 1, 24 (arguing that, when discussing positivism, "we may do better to discuss issues on their own, not relying so much on labels that now mislead and irritate more than they clarify").

<sup>99</sup> See *The Autonomy of Law: Essays on Legal Positivism*, supra note 64; see also Brian Bix, *Law as an Autonomous Discipline*, in *The Oxford Handbook of Legal Studies* 975 (Peter Cane & Mark Tushnet eds., 2003).

When Dworkin first objected to legal positivism, he challenged what he understood to be Hart's commitment to a limited domain account of law. In response to Dworkin, Hart's defenders—first David Lyons and Philip Soper, then Neil MacCormick, and then Jules Coleman and others—all sought, in different ways, to show that the various aspects of *Riggs*, *Henningsen*, and the other examples that Dworkin claimed demonstrated the untenability of the law/nonlaw distinction showed nothing of the kind, and that *Riggs*, *Henningsen*, and the other horses in Dworkin's stable of examples are in fact based entirely on law in a Hartian positivist sense.<sup>100</sup> There is some truth in these objections, for formal pedigreed rule-of-recognition-recognized law may be broader (especially in its inclusion of many of the things that Dworkin calls "principles") than Dworkin's assault on positivism takes it to be. Yet some of these objections went beyond the claim that law can include principles to the claim that law can in theory include anything that a society conventionally decides. In this line of argument, one sees a progressive broadening of the positivist picture of law in a way that makes Dworkin wrong, but at the risk of losing the core insight of the pre-Hartian and possibly even Hartian positivist idea. As Jeremy Waldron somewhat snidely but not completely inaccurately describes the situation, "the motive behind such moves is to secure a victory in the descriptive debate for a position called 'legal positivism', no matter what that position turns out to be."<sup>101</sup> More delicately, Kent Greenawalt observes that framing the issue in this way

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<sup>100</sup> See Neil MacCormick, *Legal Reasoning and Legal Theory* (1978); Coleman, *supra* note 73; Coleman, *Markets, Morals and The Law*, *supra* note 24; Coleman, *Negative and Positive Positivism*, *supra* note 24; Matthew H. Kramer, *Throwing Light on the Role of Moral Principles in the Law: Further Reflections*, 8 *Legal Theory* 115 (2002); Lyons, *supra* note 65; Soper, *supra* note 65; Waluchow, *supra* note 65.

<sup>101</sup> Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *Natural Law Theory: Contemporary Essays* 158, 160 (Robert P. George ed., 1992). Even less gentle is Dworkin, *Thirty Years On*, *supra* note 2, at 1656:

Exclusive positivism, at least in Raz's version, is Ptolemaic dogma: it deploys artificial conceptions of law and authority whose only point seems to be to keep positivism alive at any cost. Inclusive positivism is worse: it is not positivism at all, but only an attempt to keep the name 'positivism' for a conception of law and legal practice that is entirely alien to positivism.

Dworkin's charge turns considerably more *ad hominem* later. See *id.* at 1678.

“does not seem very important for understanding the legal systems under which we live.”<sup>102</sup>

As developed in the ensuing several decades, the defense of positivism against Dworkin has blossomed into a position variously described as soft positivism,<sup>103</sup> inclusive positivism,<sup>104</sup> and incorporationism.<sup>105</sup> With its sometimes forgotten roots in Kelsen,<sup>106</sup> the position, to oversimplify it, is that law (but not the concept of law) is what a community says it is, and not what God or objective non-conventional morality says it is. By existing as a function of social choice and not extra-social force, law is thus “posited,” and is not usefully thought of as in any way “natural.” But because community determination of what law is provides both the necessary and sufficient conditions for legality in that community, the inclusive legal positivists insist, positivism is compatible with law being inter-

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<sup>102</sup> Greenawalt, *supra* note 98, at 14. For additional discussion of the consequences of broadening positivism, see also David Dyzenhaus, *Caveat Reviewer—A Reply to Matthew Kramer*, 21 *Oxford J. Legal Stud.* 703, 703–04 (2001); David Dyzenhaus, *Positivism’s Stagnant Research Programme*, 20 *Oxford J. Legal Stud.* 703, 715 (2000); William Twining, *Imagining Bentham: A Celebration*, in *Current Legal Problems* 1998, at 1, 21 (M.D.A. Freeman ed., 1998) (stating that much of the current debate is “repetitious, trivial, and almost entirely pointless”).

<sup>103</sup> This is the term used by Hart in his *Postscript* to describe the position and to express some highly qualified sympathy with it. Hart, *supra* note 1, at 250–54; see also Eleni Mitrophanous, *Soft Positivism*, 17 *Oxford J. Legal Stud.* 621 (1997). As should be apparent, I believe that Hart’s even cautious and qualified sympathy with soft positivism is in some tension with the most important themes of *The Concept of Law*, and in even greater tension with important parts of the pre-*Concept of Law* positivist tradition.

<sup>104</sup> Waluchow, *supra* note 65; Brian Bix, *Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate*, 12 *Can. J.L. & Jurisprudence* 17 (1999); W.J. Waluchow, *Herculean Positivism*, 5 *Oxford J. Legal Stud.* 187 (1985); Waluchow, *supra* note 85.

<sup>105</sup> The term comes from Jules Coleman, *Jules L. Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 *Legal Theory* 381 (1998), and labels a position Coleman has developed over a considerable period of time. Coleman, *The Practice of Principle*, *supra* note 24; Coleman, *Negative and Positive Positivism*, *supra* note 24; see also Kenneth Eimar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 *Legal Theory* 1 (2000); Kenneth Eimar Himma, *Incorporationism and the Objectivity of Moral Norms*, 5 *Legal Theory* 415 (1999).

<sup>106</sup> Kelsen’s idea of the *Grundnorm* was as agnostic on the content of actual *Grundnormen* as inclusive legal positivists maintain that the idea of a rule of recognition is about the content of any particular rule of recognition, so it may be fair to attribute to Kelsen’s positivism the first development of the idea that law, as opposed to the concept or pure theory of it, could be compatible with a wide variety of relationships between law and morality.

twined with morality, with (correct) morality being a criterion of legality, and even with the domain of law being coincident with the domain of morality or the domain of social norms. As long as this is what the community specifies as its law, and as long as community specification is not subject to further moral (or other) tests, then we can understand law as being posited, we can understand that legal validity does not *necessarily* depend on moral validity, and we can understand the positivist picture of law as being correct. To the inclusive legal positivist, positivism is simply the claim that the concept of law itself does not demand a moral test for legal validity, and this claim, say the inclusive legal positivists, is consistent with law being subject to moral tests of legal validity in some legal systems, and even with law being contingently subject to moral tests of legal validity in all extant legal systems.

There are many possible responses to inclusive legal positivism, but the most powerful might be a challenge to its importance. So let us assume that inclusive legal positivism is correct, and that the concept of law encompasses all varieties of law that a community may posit, including not only the variety in which legal validity is not a function of morality, but also the varieties in which morality is either a necessary or a sufficient condition for legal validity.<sup>107</sup> But if the concept of law includes, *inter alia*, a legal system in which the set of legal norms is congruent with the set of social norms, a legal system in which morality is a criterion (or even the sole criterion) of legal validity, and a legal system in which morality is irrelevant to legal validity, then what does this conception of legal positivism tell us about law? It does tell us that natural law is mistaken, and indeed the inclusive positivist position has been explicitly described by its proponents as chiefly an alternative to natural law.<sup>108</sup> Yet the only natural law position that inclusive legal positivism falsifies is the position that morality is a necessary condition for legality, such that immoral laws are simply not laws at all—*lex injusta est non lex*. But although inclusive legal positivism does falsify

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<sup>107</sup> On the differences between morality as a necessary condition for legality and morality as a sufficient condition for morality, see, for example, Matthew Kramer, *How Moral Principles Can Enter into the Law*, 6 *Legal Theory* 83 (2000).

<sup>108</sup> See Coleman, *Markets, Morals and the Law*, *supra* note 24, at 4 (“Positivism denies what natural law theory asserts, namely, a necessary connection between law and morality.”).

this often caricatured version of natural law, a version that one can actually discover in occasional quotes from Cicero<sup>109</sup> and William Blackstone,<sup>110</sup> it does not tell us even that the more sophisticated versions of natural law to be found in Thomas Aquinas<sup>111</sup> or John Finnis<sup>112</sup> are wrong. It may possibly tell us that Fuller's complex procedural variation on natural law theory<sup>113</sup> is wrong as well, but only a particularly uncharitable reading of Fuller that would put the Ciceronian version of natural law at center stage. As a consequence, inclusive legal positivism, even if correct, runs the risk of failing to challenge or falsify any vision of the nature of law that people have taken seriously for the past two hundred and fifty years.<sup>114</sup> "Law is whatever the people (or the judges) say it is" is an important claim if there are serious arguments for moral criteria for legal validity, but without those arguments, inclusive positivism is largely battling a straw man.

Thus, apart from putting still one more nail in the coffin of a particularly indefensible version of natural law, it is difficult to see what the correctness of inclusive legal positivism teaches us. With most versions of natural law off the table, the proposition that law is what a society says is trivially true. That societies can determine what is to count as law, and can determine it within a range so wide that it encompasses both the necessary (within that society) coincidence of law and morality and the necessary (within that society) exclusion of any reference to morality in the criteria for legal validity, tells us nothing about what this society or that society has actually determined. Proponents of inclusive positivism do take pains

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<sup>109</sup> Cicero, *De Legibus*, bk. I, § 6 (C.W. Keyes trans., 1928).

<sup>110</sup> 1 William Blackstone, *Commentaries* \*44.

<sup>111</sup> Thomas Aquinas, *Summa Theologiae*, questions 90, 91, 94, 95, 96 (R.J. Henle S.J. ed. & trans., University of Notre Dame Press 1993).

<sup>112</sup> Finnis, *supra* note 75; John Finnis, *The Truth in Legal Positivism*, in *The Autonomy of Law: Essays on Legal Positivism*, *supra* note 64, at 195.

<sup>113</sup> Fuller, *The Morality of Law*, *supra* note 58; Fuller, *Positivism and Fidelity to Law*, *supra* note 58.

<sup>114</sup> There is a surprising prevalence in modern jurisprudential debate of the "no one believes this anymore" substitute for argument, surprising because it is the kind of argument from mass opinion (or mass academic opinion) that we might expect philosophers to try to avoid. The statement in the text is not intended to be a member of this unfortunate genre, but only a worry about the extent to which a significant amount of contemporary jurisprudential debate draws its impetus from opposing what may well be more of a straw than a strong and widely held position.

to distinguish general from particular jurisprudence,<sup>115</sup> with the latter being concerned with what law looks like in this or that society but the former being concerned only with what is true about the concept of law in all legal systems. We are then prompted, however, to reframe the previous tendentious question about the importance of inclusive positivism and instead to pose a different tendentious challenge about what questions general jurisprudence asks or answers that illuminate the phenomenon of law. There may be some, but it is surely not absurd to suggest that this is a legitimate issue to raise, especially when the consequence is in effect to banish what appears to be a traditionally important aspect of jurisprudential inquiry.

In the current debates, *inclusive* legal positivism typically does battle with, not surprisingly, *exclusive* legal positivism. And although Dworkin has been as dismissive of the so-called exclusive version of legal positivism as he has of the inclusive, exclusive legal positivism, commonly associated today with Joseph Raz,<sup>116</sup> and ably amplified by Scott Shapiro,<sup>117</sup> far more faithfully captures the traditional positivist concerns. By claiming that positivism is committed to a strictly source-based view of law, Raz's view comes closer to the spirit of the idea of a rule of recognition, to the historical positivist concern with the actual and not just conceptual separation of law and morality, and to trying to explain the empirical and not just conceptual autonomy of legal thought and legal argument.<sup>118</sup> Yet in developing this view, Raz rejects the view that any part of a legal system in which morality is a criterion for legality can be understood in legal positivist terms. This would seem to suggest that the interpretation and application of the morally loaded provisions of, for example, the Constitution of the United States, would not count as law to Raz, and it would also suggest that whatever it was

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<sup>115</sup> On the distinction, see Moore, *supra* note 18, at 302; see also, with different terminology, the discussion in Brian Bix, *Law, Language, and Legal Determinacy* 190–95 (1993); Brian H. Bix, *Raz on Necessity*, 22 *Law & Phil.* 537, 546–54 (2003).

<sup>116</sup> See Raz, *The Authority of Law*, *supra* note 63; Joseph Raz, *Authority, Law, and Morality*, 68 *Monist* 295 (1985).

<sup>117</sup> See Shapiro, *The Difference That Rules Make*, *supra* note 26; see also Leiter, *supra* note 85, cautiously defending “hard positivism”—Leiter’s label for exclusive positivism—and suggesting a relationship between the conceptual claims of hard positivism and empirical inquiry that is not incompatible with what I argue here.

<sup>118</sup> That this was Raz’s focus was apparent early on. See Raz, *supra* note 64.

the judges were doing in *Riggs*, *Heningsen*, and many other common law cases, it was not law. In arriving at this point, Raz's debt to Kelsen, especially apparent in Raz's earliest work, is most obvious. Just as Kelsen emphasized that no legal decision was completely determined by the law, so too can Raz accept that important parts of American (and, now, South African, Canadian, and British, among others) judicial and legal practice are not based on what the positivist would call law.<sup>119</sup> If one can accept that no legal decision is completely determined by law, one can accept as well that many legal decisions are largely undetermined by law, even though they may determine what the law *will* be.<sup>120</sup> For Raz and the other exclusive positivists, there is a profound difference, to use Raz's words, between law and legal reasoning, and it is the goal of exclusive legal positivism to explain the former and be relatively unconcerned with the latter. The latter, Raz insists, is unavoidably moral in part, but that fact says nothing about the criteria for law *in strictu sensu*.<sup>121</sup>

Raz's exclusive positivism is at the same time both useful and unsatisfying. It is useful in putting a sharp analytic edge on Kelsen's point that law ought not simply to be equated with what lawyers do, what judges do, or even with the output of legal institutions.<sup>122</sup> To say that law is what lawyers and judges do is too simple,

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<sup>119</sup> I will bracket here the potentially interesting possibility that declarations of unconstitutionality are not equivalent to declarations of legal invalidity in the sense of invalidity used by legal theorists. See Jules Coleman's report of Raz's view to this effect in Coleman, *The Practice of Principle*, *supra* note 24, at 110, and Dworkin's rejoinder in Dworkin, *Thirty Years On*, *supra* note 2, at 1675. Thus, exclusive legal positivism may not be inconsistent with arguably indeterminate morally loaded phrases—equal protection of the laws, cruel and unusual punishments, unreasonable searches and seizures—being enforceable parts of the positive law, and parts whose function is not to render other parts invalid, but only to make them unenforceable.

<sup>120</sup> Thus, Raz takes pains to distinguish law from legal reasoning, and insists that legal reasoning—much closer to what judges do—is not based solely on the law. Raz, *supra* note 21, at 4–6.

<sup>121</sup> See also Coleman, *supra* note 73, at 171 (“No one denies that moral principles figure in legal argument and practice.”).

<sup>122</sup> See Joseph Raz, *Legal Principles and the Limits of the Law*, in Ronald Dworkin and *Contemporary Jurisprudence* 73, 85 (Marshall Cohen ed., 1984). Raz argues that the moral standards that judges may be legally required to follow (as, for example, with moral standards like equality that are legally enshrined in the United States Constitution) are still not, as moral standards, law. *Id.* On this point, see Bix, *supra* note 104, at 27–28.

for we need a way to differentiate the distinctively legal part of such roles and activities from the parts that are shared with other agents, other institutions, and other functions. Yet although Raz's exclusive positivism illuminates this aspect of law, it may, for modern legal systems, explain too little of legal practice and too little of the process by which conclusions are reached in legal argument and judicial decision. If a large part of what lawyers and judges do in advanced legal systems is not to count as having been based on law,<sup>123</sup> and if many of the most salient (and potentially distinctive) aspects of a legal system do not involve what Raz and other exclusive positivists would call "law," then we can again ask what dimensions of law are usefully illuminated by exclusive legal positivism.<sup>124</sup> There may be some, and more may be illuminated by exclusive than inclusive positivism, but if too much remains unilluminated we can understand why Dworkin and others would wish to head in a different direction.

Yet although empirical inquiry is not Raz's project, such an empirical inquiry, if guided by Raz's conception of exclusive positivism, may turn out to be more useful. If source-validated norms dominate the practice of legal argument and judicial decision, and if their place in such argument turns out to be a function of their source and not of their content, then it may be that the positivist picture of law, as understood by exclusive legal positivism, is largely correct, and that source-based authority indeed lies at the heart of the concept of law. To put it differently, and perhaps by way of reviewing the bidding, it would not be unreasonable to take this prolegomenon to an empirical inquiry as offering the tentative conceptual conclusion that Dworkin was largely correct in his understanding of the claims of legal positivism he wished to attack. Dworkin's contrast between positivism's "austerity" and a system in which judges and legal officials "turn to more general principles of strategy and fairness,"<sup>125</sup> for example, can without much strain be

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<sup>123</sup> Even though, Raz would say, exclusive legal positivism is compatible with judges having a large role to play in determining what law will be, and even if in some systems judges may have a legal obligation to do so.

<sup>124</sup> For another suggestion that what is interesting and important about law may be captured neither by incorporationism nor by exclusive positivism, see Kramer, *supra* note 107.

<sup>125</sup> Dworkin, *Thirty Years On*, *supra* note 2, at 1677.

seen as a different way of expressing the understanding of positivism as committed to, even if not quite coincident with, the idea of law as a limited domain. But although I have argued that Dworkin's characterization of positivism was largely correct, I have argued as well, pending a more serious empirical testing of the limited domain hypothesis for the same system at the same time, that Dworkin was likely mistaken in believing that his attack on his correctly conceived understanding of positivism was successful.

To the extent that, at least in this Part, I have attempted to connect the idea of law as a limited domain to the best understanding of legal positivism, it is partly in the service of the historical project of attempting to prevent the loss of an important part of the positivist tradition. When Jeremy Bentham took pains to make clear that laws could be cruel, impolitic, and perhaps even unconstitutional but could not be illegal,<sup>126</sup> he could not have had anything in mind other than that the domain of the legal was to be demarcated from the domains of the moral, the political, and the constitutional. This becomes even more clear when we focus on Bentham's excoriation of the common law and his obsession with what Gerald Postema calls "publicly accessible"<sup>127</sup> law taking the form of rules with "explicit, fixed, verbal formulation[s]."<sup>128</sup> Most importantly, when Bentham made clear that he did not wish judges to engage in a direct utilitarian approach to their adjudicatory tasks but rather to follow the rules of law explicitly,<sup>129</sup> he cannot be interpreted in any way other than as believing that the domain of judicial decisionmaking (and, presumably, lawyer advocacy) was to be substantially limited when compared to the direct utilitarian calculations in which he expected legislators and policy designers to engage.

John Austin's focus was similar. Like Bentham, Austin was concerned—perhaps "obsessed" would be a better word—to offer a "line of demarcation" between positive law and various other sorts of rules and norms.<sup>130</sup> Indeed, Austin was even more concerned

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<sup>126</sup> Jeremy Bentham, *Of Laws in General* ch. I, § 8 (H.L.A. Hart ed., 1970).

<sup>127</sup> Gerald J. Postema, *Bentham and the Common Law Tradition*, at ix (1986); see also *id.* at 295 ("public standards"), 448 ("public knowledge").

<sup>128</sup> *Id.* at 290.

<sup>129</sup> *Id.* at 440–64; see also Gerald J. Postema, *The Expositor, the Censor, and the Common Law*, 9 *Can. J. Phil.* 643 (1979).

<sup>130</sup> John Austin, *The Province of Jurisprudence Determined*, Lecture I (William R. Rumble ed., Cambridge University Press 1995) (1832); see Wilfred E. Rumble, *Divine*

than Bentham with authority,<sup>131</sup> and with the use of authority to screen out from most of ordinary and much of legal decisionmaking the kinds of considerations of utility that were appropriate for an “intellectual élite.”<sup>132</sup> Even Kelsen, whose project was far more conceptual and less descriptive, empirical, and prescriptive than Bentham’s or Austin’s, developed his “pure theory” in part because of the belief that “alien elements” like psychology, sociology, ethics, and political theory were being too easily mixed with legal science, and thus that actual and not just conceptual legal scientists were refusing to recognize the actual limits of their own competence.<sup>133</sup> Moreover, Kelsen believed that a “legal order” served certain important social purposes, and though he believed that a legal order could be identified purely and non-normatively, he was not agnostic on the desirability of such an order.<sup>134</sup> Similarly, if we go back to the earliest traces of positivism, we see that Hobbes, like Bentham and Austin, thought it important in actual legal systems to be able to identify the law from among a much larger domain of social, moral, and political norms.<sup>135</sup>

Bentham, Austin, Kelsen, and Hobbes are four of the most prominent names in pre-Hartian positivism, and I select them non-randomly out of a much larger tradition. But the focus of their projects makes clear that the demarcation of law from its neighbors is one of the continuing concerns of the legal positivist tradition, a concern that has its roots not only in conceptual analysis but in recognition of the importance of trying to offer theoretical accounts of genuine distinctions that Bentham, Austin, Kelsen, Hobbes, and many others observed in the actual legal systems with which they were most familiar. In an important respect, my efforts to (re)connect the idea of law as a limited domain with legal posi-

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Law, Utilitarian Ethics, and Positivist Jurisprudence: A Study of the Legal Philosophy of John Austin, 23 *Am. J. Jurisprudence* 139 (1978).

<sup>131</sup> See Postema, *supra* note 127, at 327.

<sup>132</sup> *Id.*

<sup>133</sup> Hans Kelsen, *General Theory of Law and State* 5–6 (Anders Wedberg trans., 1945); Hans Kelsen, *Pure Theory of Law* 1 (Max Knight trans., 2d ed. 1967).

<sup>134</sup> See Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 *Harv. L. Rev.* 44, 49 (1941).

<sup>135</sup> Dyzenhaus, *supra* note 102, at 708 (discussing chapter 26 of Thomas Hobbes’ *Leviathan* (John Gaskin, ed., Oxford Univ. Press 1998) (1651)).

tivism signal a concern to preserve an important dimension of the descriptive positivist tradition.

Indeed, positivism's roots become even more important once we recognize that, for Bentham and Hobbes, legal positivism had a prescriptive function as well as a descriptive one. Bentham, for example, was concerned not only with the demarcation of law from larger and less easily applied utilitarian norms, but was also concerned with urging a system in which the activities of judges were restricted to the law. For Bentham, the domain of the law was not only something to be identified and described, but was also the domain within which judges were to be corralled. And although we may agree or disagree with Bentham's prescriptive program, it should be clear that only a limited domain conception of positivism can support such a prescriptive agenda. Two hundred years on, we still debate judicial power in the language of permissible and impermissible sources for judicial decision, and thus there is a fruitful connection between Bentham's prescriptive agenda and contemporary debates. Further, there remains now a significant group of theorists who carry on a prescriptive positivist agenda in just those terms.<sup>136</sup>

Moreover, a different form of the prescriptive side of positivism defends positivism as the best way of offering a strong critique of law.<sup>137</sup> Again, such a claim for positivism's virtue may or may not be sound, but the existence of the position makes clear that a version of positivism supporting such a critique is an important part of the positivist tradition in ways not incompatible with Bentham's basic ideas. To redefine positivism so that it is no longer capable of even supporting a prescriptive claim thus seems unfaithful to positiv-

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<sup>136</sup> See Tom D. Campbell, *The Legal Theory of Ethical Positivism* (1996); Neil McCormick, *Ethical Positivism and the Practical Force of Rules*, in *Judicial Power, Democracy and Legal Positivism* 37 (Tom Campbell & Jeffrey Goldsworthy eds., 2000); Anthony J. Sebok, *Misunderstanding Positivism*, 93 *Mich. L. Rev.* 2054 (1995). For discussion, see Deryck Beyrevelde & Roger Brownsword, *Normative Positivism: The Mirage of the Middle Way*, 9 *Oxford J. Legal Stud.* 463 (1989). I admit to some sympathies with the prescriptive side of positivism myself, in Frederick Schauer, *Constitutional Positivism*, 25 *Conn. L. Rev.* 797 (1993), but I believe the argument in the text to be compatible with my being dead wrong in my normative views.

<sup>137</sup> See David Lyons, *Founders and Foundations of Legal Positivism*, 82 *Mich. L. Rev.* 722 (1984) (book review); Frederick Schauer, *Fuller's Internal Point of View*, 13 *Law & Phil.* 285 (1994); Frederick Schauer, *Positivism as Pariah*, in *The Autonomy of Law: Essays on Legal Positivism*, supra note 64, at 31.

ism's origins. Perhaps it would be best to jettison positivism's prescriptive uses (which is not to say that positivism's descriptive uses cannot be valuable in themselves). But then we need to be clear that we have redefined positivism once again, rather than having just provided the further explication of a longstanding tradition.

I do not mean to exclude Hart from a central place in the positivist tradition, and indeed there may be a dimension of Hart that fits especially well with my focus on legal decisionmaking as a limited domain. This dimension, often ignored in contemporary debates because it is not controversial, is the idea that a legal *system* comes into existence upon the merger of primary and secondary rules, with the latter distinguishing a legal system from simple orders backed by force. Now if we think of the project even of conceptual analytic jurisprudence as identifying those features that have over time characterized all known understandings of law,<sup>138</sup> then surely one of them is the idea of a system. Part of what makes law different from numerous other normative activities, and numerous other rule-governed activities, is its systematic nature, and it would not be untoward to venture the thought that systematicity is an essential part not only of all extant legal systems, but of the concept of law itself.

If this is so, then a social practice of norm recognition that did not have this systematic character might not even qualify as law. Moreover, a focus on law's systematic nature is not only important to Hart, but has been important to theorists throughout the positivist tradition.<sup>139</sup> As a result, one way of understanding the idea of a limited domain is as one form of just such systematicity. While there may be others, the connection between the idea of law as a limited domain and Hart's focus on the systematic nature of anything qualifying as a legal system may from still another direction connect the idea of law as a limited domain with the positivist tradition, and may show that accounts of the nature of law—including some versions of inclusive positivism—that fail to demonstrate this systematic quality may be less faithful to the positivist idea than some of their proponents have suggested.

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<sup>138</sup> Finnis, *supra* note 75, at 3–6.

<sup>139</sup> See Brian H. Bix, 28 *Aust. J. Legal Phil.* 231, 236–37 (2003) (book review).

## CONCLUSION—UNDERSTANDING THE DIFFERENTIATION OF LAW

I conclude by emphasizing what should be obvious—my project is not a semantic one, and I am not concerned here with defining the word “law.”<sup>140</sup> I am instead concerned with understanding a related set of seemingly differentiated (from the rest of society, but, importantly, not much from each other) social institutions—law schools, lawyers, judges, bar associations, law reviews, West Publishing, bar examinations, the Supreme Court, and most trial and appellate courts, to take the most obvious members of the group.<sup>141</sup> To understand what the members of this group hold in common with each other but not with the members of most other social institutions is to try to understand not the meaning of the word “law,” and perhaps not even the concept of law,<sup>142</sup> but the practice

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<sup>140</sup> An important analysis of the relationship between definitional and semantic projects, on the one hand, and conceptual ones, on the other, is in Jules L. Coleman & Ori Simchen, “Law,” 9 *Legal Theory* 1 (2003). Yet although I disclaim the semantic project here, it is important to note a way in which it may be important. Just as Hart and Fuller both believed that there was something genuinely morally and operationally important about the application of the word “law” in the context of resistance to official iniquity, so too might the same issues apply to the use of the word “law” in questions about modern positivism. Although exclusive legal positivism does not entail the conclusion that only that which is law should be taught in law schools, tested on bar examinations, or argued in court, it may be too late in the semantic day to draw that distinction for the population at large. If, sociologically and not conceptually, the definition of the word “law” will have causal effects on what we teach in law school, what qualities we desire in lawyers, what we test for on bar examinations, and what we welcome in legal argument, the exclusive positivist distinction between law and legal reasoning or between law and the activities of the legal culture may have unintended nonlogical consequences of narrowing the phenomenon of law as we know it. That this not be so is obviously part of Dworkin’s concern, even though he denies the importance of the semantic approach to jurisprudence. Yet if it turns out to be the case that legal argument and legal decision—the phenomenon of law—is indeed a limited domain, then Dworkin’s project will have to be taken as far more prescriptive than descriptive, an understanding that may again shift the terrain of jurisprudential debate.

<sup>141</sup> I say “most” trial and appellate courts only because there may be various dispute resolution mechanisms—some mediation, some arbitration, most trials in traffic and small claims courts presided over by non-legally trained magistrates, and so forth—that are well out of the orbit of the cluster of institutions with which I am most concerned.

<sup>142</sup> Perhaps because of the title of Hart’s book, and the debates that the book has spawned, there is a rich jurisprudential literature devoted to the very question of what it is to engage into a conceptual inquiry about law, and how such an inquiry differs (if at all) from an inquiry into the meaning of the word “law.” See Brian Bix, *Conceptual Questions and Jurisprudence*, 1 *Legal Theory* 465 (1995). My own inquiry takes as its

(in the Wittgensteinian sense) of law as we know it and the institutions of the law as we know them.<sup>143</sup> My inquiry is directed not to the concept of law but to the phenomenon of law. Such an inquiry is partly and necessarily conceptual at the outset, but turns empirical more quickly than much of traditional analytic jurisprudence (itself a practice) has seemed willing to confront. Understanding law may well be fostered by various disciplines doing what they do best, whether it be philosophy, or sociology, or economics, or something else, but it may also be fostered by a willingness to move as the inquiry demands from one such discipline to another. If understanding law as a limited domain (or not) is part of understanding the nature of law, we may have to face up to difficult methodological as well as conceptual issues at the border between philosophical and empirical inquiry.

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initial data a cluster of institutions commonly designated as “legal,” but the impetus for the inquiry is the empirical overlap between the institutions themselves and not the contingent fact that they happen to attract the same label.

<sup>143</sup> Some of this phenomenon might be illuminated by considering the rich literature on the sociology of professionalization. See Samuel Trosow, *The Database and the Fields of Law: Are There New Divisions of Labor?*, 96 *Law Libr. J.* 63 (2004). There is an interesting question whether professionalization follows the idea of a limited domain of knowledge, or whether, by contrast, the creation and reinforcement of a limited domain is a consequence rather than a cause of professionalization and professional self-identity.