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Philosophy of Law: Introduction

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INTRODUCTION

Making, acknowledging, and complying with law involves acts of rational judgment. The reasonableness and justification of these acts cannot be assessed without premises about true human goods, the nature of persons and their acts, and the contours of the common good and human rights. So a volume on the philosophy of law fittingly comes *fourth*. Issues of legal doctrine and interpretation resolvable by technique usually have some intellectual appeal. But legal studies are really attractive and worthwhile because law, and juristic argumentation, is an arena where themes and theses in ethics, political theory, and related philosophical domains all come to bear on—and crystallize out in—legislating and adjudicating to make a difference to human persons.

I. FOUNDATIONS OF LAW'S AUTHORITY

Very many legal theorists, some moved by one concern, some by another or other concerns, have thought that law is essentially a (kind of) social fact, and that the accounts of it appropriate to legal theory are purely descriptive. The social facts to be described will, of course, include countless evaluations (by law-makers, -finders, and -enforcers), especially ideas about how members of the relevant society should (according to law) behave. But the descriptive accounts themselves, it is usually supposed, can and should be value-free.

One concern motivating these meta-theoretical thoughts was political: Bentham's belief that, absent a social fact as transparent as statutory enactment, law-finding is corrupted by the class prejudices and partisanship of judicial cabals ('Judge and Co.'). Another concern was philosophical: Bentham's empiricist belief that if what we or judges refer to lacks the tangibility of sounds, marks, and mental images, it can be no more than a fiction. A more recent concern is that, given plurality of values and beliefs ('the fact of pluralism'), no method of settling social conflicts

can be as reliably efficient as the legal: reliance exclusively on relatively uncontroversial historical facts ('social-fact sources') such as enactment or the judge's articulation of a *ratio decidendi* and an order of the court. Some of the theorists who hold that law is exclusively social-fact source-based also find an independent, logically indirect support for that thesis in their concern that social science itself be value-free. This concern, in its turn, is fed by emulation of the impressively successful sciences we call natural, and by the sceptical thesis (about which natural science knows nothing) that evaluations all lack objectivity and truth. Theories animated by one or more of these concerns usually describe themselves as 'positivist',[1] and are widely treated as the default position in jurisprudence or philosophy of law.

The modern concerns just mentioned partly overlap with, and partly diverge sharply from, the perennial concern identified and promoted by the mediaeval theorists who first articulated the concept of *positive law* (see essay 7). Countless arrangements needed for a just, peaceful, and prosperous political community could reasonably take more or less different forms, and so can be put in place and maintained only by *decision* between incompatible acceptable alternatives. Such a *determinatio*,[2] once made, can only yield its benefits if it is adhered to with substantial unanimity even absent a persisting consensus about its superiority to the alternatives rejected, ignored, or hitherto unenvisaged. A legal system responsive to human need largely consists, therefore, of rules, principles, standards, and institutions adopted by such past decisions—decisions now treated as binding by reason of their pedigree as validly made by persons with authority to so decide. That is, the law consists largely of rules, standards, and institutions resting on and derived from social-fact sources.

Accounts of law's positivity offered by leading positivists were examined in several of my essays around 1970. Kelsen's main-period thesis that a legal system's norms must not or cannot contradict each other was a

[1] See what I say in essay 1, at the beginning of its sec. IV, about how desirable it is not to talk at all of *positivism*, as if there is such a position (even when qualified as *legal positivism*). At the most, as Joseph Raz says,

> we should think of legal positivism as a historical tradition containing writings some of which bear greater similarity in their central tenets to writings outside it (e.g. to Finnis, and to Aquinas as he understands him) than to each other, a tradition which cannot be characterized by adherence to any central tenet or tenets.... [T]here is little value, other than historical, in using the classification of writings into positivist and non-positivist when considering various accounts of the nature of law (if it has a nature). ('Comments and Responses', 253.)

Still, for all its confused variegations, there is a loose historical tradition, and it is one in which most of my contemporaries, notably Raz, have been very willing to be counted. (Raz's hesitation, here, about whether law 'has a nature' is warranted by that tradition's unclarities about what it was trying to do.)

[2] See e.g. essay 13 at nn. 5–6; essay 7, secs II, III.

starting point.[3] Another focus of investigation was his theses, explicit and implicit, defended and assumed, about the persistence of legal norms after their creation and about their termination by revolutions (even by *coups d'état* intended to preserve them).[4] Appeals to Kelsen's accounts, by courts in the aftermath of *coups d'état* which left the judiciary unchanged, afforded further matter for reflection in the same period.[5] These investigations all converged on the conclusion that treating something as a source of rules (or other standards), like treating rules as derived from a *source*, and as persistingly valid by reason of that derivation, is a form of thought whose premises refer not only to social facts (few or many, stark or subtle) but also to social *needs*. Such needs include the good of flexibility and clarity in social regulation in changing circumstances, the good of fairness across time between those who benefit others by conforming to rules and those who have been so benefited and now are summoned to comply with the same or other rules of the system, and the good of a stability sufficient to merit the expectations needed to make venturesome investments rational.[6]

To bring such needs into the light of social theory, and to show how, in themselves and in their juristic effects, they are needs not peculiar to the societies that have responded to them juridically, is to breach the confines of a value-free social science. But these are confines that, as the first chapter of *Natural Law and Natural Rights* argued, any *general* theory of human affairs must break. In no general theory of human institutions could such bounds be maintained without self-imposed arbitrariness in selecting the terms and concepts in which it is articulated, and an unreflective inattention to the explanations and theses actually deployed in every descriptive theory that succeeds in being more than a juxtapositing of local histories and vocabularies. An example (besides those given in that chapter): Weber's decision to call the central type of governmental *Herrschaft* 'legal-rational authority', when put alongside his accounts of ways of legitimating authority, shows that this type gets clear of mere rule fetishism (and of rule by fear and favour) just insofar as it rests on acknowledging intrinsic intelligible human goods in a way that (as he knew) only natural-law theories of law systematically articulate and defend.[7] What is that way? It surely is the way traced, doubtless imperfectly, in Part II of *Natural Law and Natural Rights* and recalled in many of the programmatic essays in this volume: identifying the forms of human flourishing, the inter-dependencies of persons, the need for authority to preserve and promote

[3] See essay I.6 (1970a), sec. I. On Kelsen's abandonment of that thesis in his last period, see essay 5, sec. III.
[4] See essay 21. [5] See at n. 30 below. [6] See e.g. essay 2, sec. III; essay 3, sec. III.
[7] See essay 9, sec. III.

common good, and the desirability of regulating authority by the Rule of Law, that is, of positive law judicially interpreted and enforced. Weber, like his philosophical masters Hume and Kant, never (when philosophizing) clearly and reflectively understood, even to reject, the basic principles of practical reason that pick out the forms of flourishing with which the whole 'way' just recalled begins. In rejecting what he rightly took to be the only eligible explanation of the rationality of 'legal-rational' authority, Weber was rejecting only the distorted images presented to him by his era's philosophical culture.

But we do not need to concern ourselves with these historical and philosophical issues to be able to see how problematic is the modern 'sources thesis' (or 'social-fact sources thesis') that:

> *All* law is source based. A law is source-based if its existence and content can be identified by reference to social facts *alone*, without resort to any evaluative argument.[8]

To this 'exclusive' legal positivism, the most closely relevant reply is not the 'inclusive' positivist's, that the sources in some legal systems may make and/or authorize reference to moral or other evaluative considerations and thereby include them in (incorporate them into) the law. Rather, it is that the easygoing phrase 'identified by reference to social facts alone', offered as a translation of 'source-based', is doubly problematic.

For, first, no one ever can rationally treat a *fact alone* as giving reason for anything, let alone something as demanding and choice-restricting as a law. There must always be some 'evaluative argument' for treating any fact or combination of facts as a 'basis' for identifying a proposition as obligation-imposing or in some other way directive or normative. What reason have I as citizen or judge for identifying certain utterances as now legally directive (for me or for anyone else), utterances made on some past occasion by an assembly styling itself constituent or legislative or a tribunal styling itself a superior court of record? The answer must, to make sense, refer to some good or goods (human need or needs) that will be promoted if I make the identification or prejudiced if I do not.[9]

[8] Raz, *Ethics in the Public Domain*, 211 (emphasis added); likewise *AL* 39, 47; Raz, *Between Authority and Interpretation*, 386.

[9] Of course, once a community has, with sufficient stable consensus, treated a set of laws as sufficient reasons for action, historians, sociologists, and other observers (including its own members) can refer to that fact by stating that those laws exist as laws of that community. But as is plainly acknowledged in Raz, *Practical Reason and Norms*, 171–7 esp. 172 and Raz, 'Promises and Obligations' at 225 (see *NLNR* 234–6), such statements are altogether parasitic upon the basic and primary thoughts and statements about the existence, validity, and obligatoriness of laws, viz. the thoughts and statements of those subjects and officials who thereby express their judgment that, in the factual situation they presuppose or identify, these are laws giving them sufficient legal and

And second, in no legal system responsive to human needs do citizens, judges, or other officials look to the bare social fact of a past legislative act or act of adjudication. Always the reference is to such acts in their intra-systemic context. And that context is, first and foremost, a set of propositions identifying necessary and sufficient conditions of validity both of legislative and adjudicative acts and of the legal rules identifiable by reference (directly but in part!) to those acts. And such validity conditions pertain not only to the circumstances and form of those acts but also to the consequent rules' persistence through time as members of a set of propositions whose membership changes constantly by addition, subtraction, amendment, clarification, explanation, and so forth. Contributing both rationale and countless details of content to this complex of propositions and intellectual acts (juristic interpretation), will be found 'references'—often silent but detectable by inference—to the desirability of coherence here and now, of stability across time, of fidelity to undertakings, respect for legitimate expectations, avoidance of tyranny, preservation of the community whose laws these are (and of its capacity for self-government), protection of the vulnerable, incentives for investment, maintenance of that condition of communal life we call the Rule of Law, and many other 'evaluative arguments'. Of course, these references, whether tacit or expressed, are themselves social facts, which like all other social facts could, instance by instance, be given a value-free, descriptive report. But their pervasiveness witnesses to the rational *need* for them. Only by looking to such desirabilities can there be a sensible response to the plain questions to which a consistent, rigorous positivism[10] is so unresponsive: Why treat past acts or social facts as sources of guidance in deliberation and reasonable decision-making today? How can any social fact validate? Or bind? And why *these* facts, not those?

However, as sec. III of this Introduction will reiterate and refine, those wholly evaluative desirability considerations can contribute to answering these fundamental questions about even 'easy cases', and to resolving a 'hard case' juristically, only when taken in combination with another, further range of factual considerations. These concern not past acts of legislation or adjudication but past conflicts and compact-like settlements of them,

moral *reason(s) to act* in the way they validly direct (reasons over and above avoidance of immediate sanctions).

[10] Positivists themselves are another matter: see at nn. 19, 20 below. On this incoherence of a consistent, rigorous legal positivism *with the explanatory task it sets itself*, see secs III, IV, and VII of essay 5, or 2000d, which begins:

> Legal positivism is an incoherent intellectual enterprise. It sets itself an explanatory task which it makes itself incapable of carrying through. In the result it offers its students purported and invalid derivations of *ought* from *is*.

present circumstances of various kinds, and future likely outcomes and consequences, threats, risks, and opportunities as estimated against wide ranges of background scientific and historical knowledge and belief.

Essay 4 reaches similar conclusions about how to understand authority. It shows that 'conceptual analysis' of authority cannot yield anything worth counting as a jurisprudential achievement unless it proceeds with attention to the intelligible human goods at stake, and to means of attaining them which are both effective and respectful of other such goods that the pursuit of them may affect. One can discern an 'analytically' possible concept or concepts of governmental authority entailing only that its possessors are entitled not to be usurped or impeded, and not that anyone has any obligation to attend to their directives. But any such concept will be simply inferior, to the point of irrelevance, compared with a concept of authority—just as analytical and even more clearly discernible—in which its exercise standardly results (and is intended and taken to result) in obligation. That obligation will be 'legal obligation' in two senses, or of two kinds: an intra-systemic legal obligation[11] extending as far as the scope of the authority supports and the juristically sound interpretation of its directive or other act determines; and a moral obligation, of presumptively the same extent, the force and effect of which, however, varies according to a number of morally relevant considerations about the justice of the law and the other moral obligations of its subject(s). Joseph Raz's ambivalent efforts to detach legal authority from presumptive (generic, prima facie, defeasible) moral obligatoriness[12] fail analytically, by failing to concede that between the extremes to which he exclusively attends—either a mere prima facie reason for action or an unqualified moral obligation to act just as the law requires[13]—there stands the desirable and coherent middle position: legal

[11] See *NLNR* 308–20, esp. 309–10, on the invariant strength or force of legal obligation 'in contemplation of law', i.e. intra-systemically.

[12] *AL* 234–7; Raz, *Between Authority and Interpretation*, 169–75. One of the several aspects of this ambivalence is that Raz (e.g. at 188; cf. 331, 332 at n. 4) also maintains that legal authorizations and obligations, since they authorize or require important interferences in other people's lives, *are* moral claims. (Contrast *AL* 158.) Another aspect: contrary to *AL* 236, Raz *ibid*., 379 maintains that judges consider themselves entitled to break ('flout') the law.

[13] Raz *ibid*. 169–71 retains essentially the same false contrast (contrast between non-exhaustive, implausible alternatives). Similarly: Gardner, 'How Law Claims, What Law Claims', argues for the (Razian) thesis that, in asserting or stipulating obligations, 'the law claims' that what these are is moral obligations. This argument fails most importantly by assuming the very point in issue, viz. that morality and self-interested prudence exhaust the realm of reasons and that there cannot be normativity (and thus obligation) which is *legal* (and so far forth not moral). *NLNR* 308–18 argues that there can be and is, even though its independence from the general flow of practical reasoning is incomplete and provisional. And of course, as the book also argues, a sound morality holds that obligation-stipulating laws, not on their face immoral, should be presumed, defeasibly, to create a moral obligation the strength of which is not invariant in face of competing moral responsibilities; and morally decent law-makers and law-appliers (who instantiate the central case of law-making and -applying) will try to ensure that the law they make or apply is fit to impose moral obligations

obligation in the moral sense, and with the qualified force and extent,[14] just summarized as *presumptive*.

Reflections such as these yield a general result. A disciplined *normative* legal theory can do all that a would-be value-free general theory can, and can do it with much greater power, not only as justification or critique but also as explanation. The normative foundations of such a legal theory are vindicated against some main forms of scepticism in essays I.1, I.2, and I.5. The theory's many-levelled normative structure is outlined and applied to legal issues in essay I.14, and the importance to it of a sound, non-fictitious understanding of the person and of political community in essays II.1 and II.6–7 respectively. How to consider law's proper scope and limits is thematic in essays III.1 and III.5. Essay 1 in this volume expounds and illustrates the fundamental method and some main theses of a normative theory of law's positivity, in direct debate with the leading contemporary positivist theories and theorists.

But that same last-mentioned essay, like the rest of my work hitherto,[15] fails to convey clearly enough the sheer oddity of the 'debate' that still dominates the construction of textbooks and distracts the attention of students. It is said to be a debate about *whether there is any necessary connection between law and morality*. It is supposed that until positivism cleared the air by its robust denial that there is such a connection, legal philosophy was entangled with moralizing and obfuscated by misplaced idealism. This supposition rests on simple inattention to the idiom of classic western philosophy, in which the propositions 'An invalid argument is no argument', 'A tyrannical constitution is no constitution', 'A false friend is no friend', and 'An unjust law is no law' *presuppose and entail* that arguments are not necessarily valid, constitutions are sometimes tyrannical, friends are not necessarily faithful, and law is not necessarily moral. But besides the inattention or ignorance, there is—and this is more interesting—the odd illogicality of supposing that the question whether there is 'any necessary connection' could be answered without conducting a *moral* inquiry.

What does morality say about whether law needs to be moral? Obviously, the morality (moral belief) handed down in our civilization vigorously asserted the moral necessity (requirement, stringent moral need, and duty)

that could only be overridden by moral responsibilities applicable in particular kinds of circumstance not provided for by law: see n. 14 below.

[14] Qualified, that is to say, by moral considerations (relating to the justice of the rule in general and/or the competing moral responsibilities of particular subjects in their circumstances) *going beyond* whatever moral considerations have been built into the legal meaning and content of the rule itself by the design of the law-maker and/or by other rules and principles of the legal system that bear upon the rule in question and modify its tenor.

[15] Even essay 10 n. 66, and *NLNR* 364–5.

that law be morally upright, and the viciousness of rulers (tyrants) who defy or ignore this necessity. More interestingly, the justified, true morality, as I have argued out in *Natural Law and Natural Rights*, takes the same position. It is morally necessary for responsible persons in community to arrange the community's affairs by introducing laws and adhering to the Rule of Law. It is morally necessary for citizens to treat their community's law as presumptively obligatory. And sound morality says something more about each of those morally necessary connections between law and morality. It says that the presumptive obligation of subjects is defeated (a) by countervailing moral responsibilities serious enough to make non-compliance just, and (b) by serious and relevant injustice in the formation or content of the law.[16] And it says that, whether similarly or by entailment, the moral necessity that rulers rule according to law is a necessity qualified by the moral necessity to take steps to preserve the community and its members against threats which the community has not forfeited its right to be defended from, including steps contrary to the law and even the constitution.[17]

In short, in the sense that self-styled positivists intend when defining positivism as the denial that there is any necessary connection between law and morality, no significant thinker has ever asserted or implied or assumed any such connection, and the positivists merely beat the air.[18] And

[16] *NLNR* 360–1.

[17] Thus the Colonization Commissioners for South Australia wrote to the Secretary of State for the Colonies in December 1837, demanding the recall of the province's first governor for illegal conduct:

> Exigencies may arise requiring vigour beyond the law. Cases may occur in which the magnitude of the evil to be prevented, or of the good to be obtained, may justify the exercise of unconstitutional and illegal power. The colonization commissioners, however,… are of opinion that the objects for which their regulations and instructions were set aside were not beneficial but injurious. (Parl. Pap., *Correspondence relative to Settlement of South Australia*, 56–7.)

[18] The fashion for summoning up such phantasms has not passed. Raz, *Between Authority and Interpretation*, 1 says that:

> theories of law tend to divide into those which think that, by its very nature, the law successfully reconciles the duality of morality and power, and those which think that its success in doing so is contingent, depending on the political realities of the societies whose law is in question. Belonging with the second tendency, I have suggested that it is essential to the law that it recognizes that its use of power is answerable to moral standards….

No instance of the first tendency is or could be identified. At 167, Raz says that Aquinas and Finnis (*NLNR* chs 1 and 10) 'regard the law as good in its very nature'; but actually Aquinas and I belong, from beginning to end, with the second tendency. Indeed, we recognize, more frankly and steadily than Raz, that the political realities of power sometimes occasion a law or legal system so amorally devised and imposed that nothing in its content or its context suggests that it claims to reconcile power with morality or recognizes its answerability to moral standards (cf. e.g. Raz *ibid.* 180: 'Necessarily the law claims to have legitimate moral authority over its subjects'). Certainly, no conceptual necessity rules out such a possibility, though any sound general theory of law will treat it as a non-central (deviant) instance of law, and legal theory specifically oriented to justification and moral guidance will treat it as not at all a law (that counts as law in conscience).

the only connection between law and morality that any classic philosopher or jurist had the slightest interest in asserting is a connection which cannot be denied without taking a moral position, on moral grounds—that is, without making legal theory a part of moral theory. Need one add that the moral position supporting such a denial will have all the moral plausibility of anarchism, egoism, and tyranny?

Arriving at a position too sophisticated and perhaps too unstable for the textbooks, today's leading positivists have come to agree with much if not all that is outlined in the last two paragraphs. They hold, for example,[19] that:

> a theory of law is . . . among other things, a theory of the conditions, if any, under which the law is morally legitimate and of the consequences that follow from the assumption that it is morally legitimate. . . . our interest in legal authority lies in how it establishes the moral authority of the law, or of parts of it. We are interested in the authority of the law, if any, in order to establish whether we have an obligation to respect and obey it.[20]

Thus, over the period in which these essays were written, there has been a very marked and welcome development in their discourse context, a development particularly about what is accepted as legal-philosophical inquiry into the nature and foundations of law's authority.

II. THEORIES AND THEORISTS OF LAW

As at other points in this Collection, the essays under this heading do not exhaust the set that might fittingly have been put here rather than elsewhere. So, for example, Posner and Economic Analysis of Law,

[19] See also Gardner, 'Legal Positivism: 5½ Myths', as discussed in essay 1, sec. IV, p. 43 points (1), (2) and (4). Similarly Green, 'Legal Positivism'. Contrast the account of legal positivism in the passage of 2007c discussed in the following footnote.

[20] Raz, *Between Authority and Interpretation*, 331–2. Accordingly, the summary in the opening paragraphs of 2007c needs amendment. I said:

> *Contemporary 'positivist' theories are, it seems, natural law theories*, distinguished from the main body of natural law theory (a) by their denial that the theory *of law* (as distinct from the theory or theories of adjudication, judicial duty, citizens' allegiance, etc.) necessarily or most appropriately tackles the related matters just listed, and accordingly (b) by the incompleteness of their theories of law, that is, the absence from them (and usually, though not always, from their accounts of those related matters) of systematic critical attention to the foundations of the moral and other normative claims that they make or presuppose.

Though the first (and main) proposition (here italicized) is correct, the rest of the passage should report that among those who label their theories about law 'positivist' there is fundamental disagreement about what is or is not included within a theory *of law*. And one may add to the passage the reflection that the classificatory meltdown and philosophical disorder it discusses still seem to have as their main cause an Enlightenment or Enlightenment-style *haste* to repudiate—before understanding—the mainstream way of thinking about society, morality, and law that runs from Plato through Aristotle, Cicero, Augustine, Aquinas, down to today. See again essay 7, especially its last section.

doubtless as deserving of a place here as Unger and Critical Legal Studies, are considered in essay 16, at the head of the essays on legal reasoning. Kant's legal theory is a primary topic of essay III.2. The whole set of essays on punishment, essays III.10–12, might properly have been placed among the present volume's first part, or essay III.10 put alongside the present volume's other essays on Hart.

The whole Collection's longest essay, essay 5, undertakes both some history of normative legal theories, and some detailed though summary illustrations of results I think sounder than well-known theories past and present. A little more history of legal theory is offered in essay 6. Essays 7–13 are detailed studies of specific theorists of law from Aquinas through to Unger, with Hart in central position. The study of Dworkin's legal theory in essay 12 can be put alongside the critiques of his politico-constitutional theory in essay II.6 and, earlier, in essays III.1–2, and of his account of the good of human life in essays III.17–18.

Should a normative theory of law have the enviably wide and substantive sweep of Adam Smith's *Lectures on Jurisprudence* of 1762–66, collated and published in 1978? Can it emulate the late pre-Benthamite *Essay on the Law of Bailments* by my predecessor at University College Oxford, William Jones?[21] Adam Smith was drawn, whether by his method or his interests, into more or less speculative theses about economic causality that go beyond what can plausibly be called a theory of *law*. And legal theory, subalternated as it is to normative ethics and political theory (each taken broadly enough to comprehend at least the outlines of an account such as Smith's of marriage, family, and domestic and civil economics), must certainly be more careful and precise than were Smith or his master Hume to distinguish clearly between the *ought* of intelligible goods and norms of practical reasonableness and the *is* of common or typical human tendencies of feeling and action.

A theme in early sections of essay 5 is that theory regresses as well as progresses. To be sure, the 'modern natural law' theorists Locke, Pufendorf, Blackstone, and Smith were to some extent easygoing and confused about method; here there was already regression from the 'classical natural law' theories of Plato, Aristotle, and Aquinas. But the neo-Hobbesian remedy prescribed and administered by Bentham and Austin, and with neo-Kantian sceptical themes by Kelsen, was devastatingly crude. Hart's grand work was one of strategic recovery from nearly two centuries of accelerated regression. At the core of the recovery was the internal viewpoint's openness to normativity, that is, to reasons for action considered precisely as such.

[21] See *NLNR* 289, 296.

It was an incomplete recovery, work in progress, as is stated, somewhat floridly, in the first section of essay 4, a paper for the Hart conference in Jerusalem. The measure of the advance made by Hart is explored further in essay 10 for the Hart centenary conference in Cambridge, and in sec. II of essay 11, where I show the extent to which he broke with the idea, fashionable for twenty years after the Second War, that philosophy is a matter of conceptual analysis. Normative legal theory is the proper extension of his strategic recovery of practical reasons as law's foundation and method, an extension freed from his serious mistakes about normative legal theory's incapacity (he claimed) to handle the study of vicious or other defective instances of law and legal system. Essay 11, in its later sections, considers some of the strategic mistakes in Hart's grasp of basic practical reasons, mistakes liable to subvert the very achievements in civilization that his method made legal philosophy cognisant of once again.

III. LEGAL REASONING

Legal reasoning's connections with the sources and modalities of other kinds of practical reason are surveyed in essay I.14 (1992a); critical comments on an earlier version of this (1992c) elicited the response that is essay 17. Essay 16, written for the same colloquium, takes up the legal significance of intention, especially in tort (studied on a broader canvas in essay II.11). Clarifying the elementary logic of the juridical relations that are a primary element in legal reasoning—rights, duties, liberties, powers, and so forth—was the very explicit purpose and topic of Hohfeld's analysis, vindicated against its learned misinterpreters in essay 18. Essay 19 brings out the role of insight ('abduction') in that discernment of principle which is the heart of analogical reasoning in properly legal reasoning. And Dworkin's account of legal reasoning, criticized for its 'one right answer' thesis in essay 12, is taken up in essay 20 as the helpful clarification it is, in relation to judicial developments of doctrine.

Still, Dworkin (like many others) over-emphasizes the judicial, at the expense of the legislative, in law. And quite generally it is a mistake to treat legal reasoning and judicial reasoning as identical. Certainly, judicial reasoning should be legal reasoning, of the best kind appropriate to the judicial context and responsibilities. But it is law-makers who have the first responsibility to think legally. For legislating ought to be done in full consciousness of the existing law, so that the changes that the enactment will make in the existing set of propositions of law can be made with precision—with the minimum, that is, of unintended and unexpected side effects on that set. If the judiciary faithfully carry out their duty to do

justice according to law, the principles of interpretation they use to identify the extent of the change will be the same principles as the legislators, guided by their legal advisers, had in mind in crafting the terms of their enactment. Neither organ of governance then is fully in charge; each contributes to an ongoing interaction between them, for the sake of common good and the Rule of Law, an interaction in which the reasoning of the one should track the reasoning of the other, with the initiative (and corresponding duties of justice) always properly with the legislator. (Of course, in some societies, the judiciary has been a primary law-maker in many fields, and in our society it has been primary in some, and still today, though now not without the odour of usurpation, it is perhaps still so.) Law is a kind of ongoing plan for common good, and to take seriously the moral reality that the bulk of the law consists of *determinationes*—because true moral principles under-determine what individuals and societies should choose and do—is to accept that a law's initial and presumptively decisive existence is as an adopted plan in the mind, the expressed intention, of the law-maker. The primary law-makers, properly, are those with conferred or attributed authority ('constituent' authority) to make a constitution, under which, and subject to which, certain sets of persons will have ongoing legislative authority: to make the laws to be carried out by persons with executive authority and applied by persons with judicial authority.

My doctoral thesis was on the idea of judicial power, studied first in theories of governance from Aristotle through Montesquieu, Locke, Bentham, Kelsen, and others, and then in the constitution-making and -interpreting of the founders and judicial interpreters of the Australian federal Constitution of 1900. The investigation of theories turned up little surprising, and little to challenge the conventional view articulated at the end of the preceding paragraph. Along the way, it did confirm (to me freshly) the extreme fragility and basic arbitrariness of the naïve empiricism that dominated Bentham's 'analysis'. And of the helpless determinism and egoism against which he struggled to make sense of his utilitarianism and constitutional code-making and -vending. It confirmed, too, the self-imposed incapacity of Kelsen to make any sense of so elemental an aspect of legal systems as judicial power. More interesting, in the end, was the detailed Australian history: how the statesmen who debated and drafted the Constitution distributed legislative, executive, and judicial powers; how they deliberately, against a vocal but small minority, established a constitutional institution—the Inter-State Commission to regulate aspects of trade among the federation's states—which combined some administrative, legislative, and judicial powers; and how that same

two-man minority, as soon as they, now judges, were able (in 1915) to constitute a majority in the supreme constitutional court, declared that the Constitution embodies a strict separation of powers, or at least of judicial from legislative or executive power, and that the Inter-State Commission therefore was constitutionally disqualified from exercising the powers that the Constitution's text and their own vivid knowledge of its founders' intention plainly conferred upon it. This rather shocking (and by 1960 long-forgotten) episode of judicial wilfulness[22] initiated a separation of powers doctrine strenuously and repeatedly enforced to invalidate federal legislation and institutions. In its unseemly origin and its subsequent judicial development alike, all this opened my eyes to the intellectual, juridical, and moral fragility of much of the legal or judicial reasoning of even the most widely admired and would-be austerely legalist (non-political) judges of the 1940s, 1950s, and early 1960s.

If we reject, as we should, the thesis that there is always or virtually always, even in hard cases, a uniquely correct legal answer available to be discovered and judicially enforced, we need to confront two issues: (1) what are the legal implications of a judgment which changes settled judicial and/or professional opinion about what the law is, in particular the implications for the question whether transactions entered into in reliance on that former opinion were made under a mistake of law; (2) how to explain the fact that virtually all judgments, even in hard cases where the tribunal is deeply divided, will be found to be constructed so as to give warrant to an affirmation that there is only one correct legal-judicial resolution of the points of law in issue.

(1) This issue is taken up in essay 20, in the context of English common law doctrine about rights to restitution of moneys paid under a mistake. Should we say that a payment made in reliance on a settled opinion (formed with or without professional advice) that it is legally required was caused by a mistake of law if that settled opinion is subsequently declared by authoritative judicial decision to have been legally erroneous? Essay 20 supports the recent judicial opinion that that question should be answered: Yes. But that answer obliges us to accept—as the essay does not get around to noticing—that, as a matter of momentary legal dogma (so to speak), an 'only one right answer' thesis is correct. (I hesitate to say that it is Dworkin's thesis, for so far as I know he has not himself deployed the

[22] Discussed, and related to the elementary typologies of governmental-power analysis that were the fruit of my thesis's theoretical part, in 1968c. *New South Wales v The Commonwealth* (*Wheat Case*) (1915) 20 CLR 54 remains authoritative today, as in 1960 and 1920. It is its historical background that was and largely remains forgotten.

argument I trace, and whose implications I consider, in this paragraph.) That is to say, the judgment that prevails in such a case (and in any hard case, as in any easy case) includes as part of its legal content or entailment the proposition that, just as the losing party's appeal to legal rules or principles is (to the relevant extent) legally erroneous and the losing party's liberty, property, or other relevant interests are accordingly (to the relevant extent) simply negated, so too the dissenting judgments and any earlier judgments or settled opinions contrary to the here and now prevailing judgment are and were mistaken. That proposition is included in the *res judicata*. So far forth, we can say that Dworkin's prolongation of Hart's salutary flight from legal 'Realism' (Hart's adopting or reproducing the internal point of view, paradigmatically the view of the law-abiding judge), insofar as that prolongation involves treating jurisprudence as a replication of judicial judgment, correctly identifies the legal-logical content of that judgment. But (as Dworkin's jurisprudence vividly stresses) the law is not a momentary system. Its rules about *res judicata* commonly and appropriately ensure that (once appeals and collateral challenges are exhausted) the law applicable to the adjudicated dispute between the parties is simply what it was declared to be in the relevant final judgment, right or wrong. But the status of that same judgment's statement of the law is not settled, for any other courts, advisers, or subjects of the law, by the rules of *res judicata*, but rather by the general flow of legal doctrine and argumentation—rules and principles understood as a whole to be treated so far as possible as both coherent and just, both here and now and across time. (That indeed is what Dworkin calls law's 'integrity'.) So: that judgment's status as a precedent, an authority, a source may sometimes be appropriately regarded as questionable, slight, perhaps nugatory, even while it is being enforced *inter partes*. Hence, the correctness of 'one right answer' as an exegesis of the judgment *inter partes* does not entail its correctness as a jurisprudential thesis at large. Nor do the reasonable dogmatic implications of the judgment for the application of rules about transactions made under mistake of law suffice to settle the jurisprudential issue about hard cases having only one right answer.

(2) Essay 12 argues in sec. IV that, *pace* Dworkin, judges need not expect to find or reach a uniquely correct legal answer in hard cases. The argument has nothing in common with the objection of naïve critics of Dworkin who think he has overlooked the fact that judges quite often disagree in such cases. Rather, it points to Dworkin's failure to specify, even in principle, *how well* an account or interpretation of the law must fit the legal materials (statutes, precedents, etc.). The failure's cause is the lack of commensuration between fit (stability) and moral soundness, compounded by the

under-determinacy of affirmative[23] moral principles and norms, particularly in face of pervasive uncertainty about past, present, and, above all, future facts. That judges nonetheless—even in or in face of dissent—construct their judgments in hard cases as if, even in such a case, there were a uniquely correct answer (which the judgment argues towards and articulates) cannot be explained simply by the dogmatic facts about every judicial judgment's legal meaning, recalled in (1) above. We need to add to the explanation this: judges each bring to their task the personal schedule of preferences and predictions with which they each, in their individual deliberating and choosing (in many contexts, legal and non-legal), drastically reduce the otherwise pervasive moral under-determinacy and factual uncertainty just mentioned. Neither the preferences nor the estimates of likelihood are legally controlled, or within range of reasonable legal control. They often differ widely from judge to judge. To attempt completely to free one's judicial assessment (of the law's bearing on the issues in hard cases) from the guidance afforded by one's sober beliefs about the desirable and the likely would be unreasonable. Beliefs about, say, the benefits of local as opposed to national or international governance (or vice versa), about the likelihood (or unlikelihood) of political control of a reforming judiciary, about the bearing of the Golden Rule[24] on proposals to upset legitimate expectations in the interests of other aspects of the common good—these are only a few of the many kinds of beliefs that, as a judge, one can with integrity employ to guide one to a definite, non-arbitrary resolution of hard cases. The reasons afforded by *these* beliefs break the stalemate between the competing fit and moral-soundness rankings. They justify one in reaching the decision one does, even when one's fellow judges are reaching opposite conclusions about that resolution and are doing so by express or tacit appeal to beliefs which one can acknowledge are morally and legally open to them to use in the way they do.

But, of course, one should not in one's adjudication employ these extra-legal beliefs to convert easy cases into hard cases that one then resolves contrary to what respect for law requires. That is lawless judging. Most of the plainly erroneous decisions of great courts, such as the High Court of Australia's already mentioned decision in the *Wheat Case* (1915), or the House of Lords' decision in the *Belmarsh Prisoners' Case* (2003),[25] or

[23] On the distinction between affirmative and negative moral principles, and its significance, see e.g. essay 17 at nn. 34–6, sec. III *passim*, and at n. 45; essay I.15 (1997b), sec. VI.

[24] The operation of the Golden Rule is always affected by what one would oneself be willing to undergo at the hands of others, and this willingness is affected by (not only reasons but also by) emotions, which vary somewhat between persons, and between groups.

[25] *A v Secretary of State for the Home Department* [2004] UKHL 56. For the background, see essay III.9 and for the errors see 2007a at 429–42: the Law Lords entirely ignored the provision

the US Supreme Court's decisions in *Dred Scott* (1856),[26] and *Roe v Wade* (1973),[27] and *Romer v Evans* (1996),[28] turned on the majority judges' extra-legal beliefs about likelihood and/or desirability, employed to set aside laws that presupposed more or less contrary beliefs which nothing in the constitutional framework disentitled the law-makers to presuppose and act on in the way they did.

IV. THE TWO SENSES OF 'LEGAL SYSTEM'

Not without the spur of Brian Simpson's comments, given as editor of the volume for which it was written and as someone whose scholarly legal-historical and jurisprudential learning was then and there being enhanced by vivid experiences of the struggling legal-political order of Ghana, essay 21 became clear, in its sec. IV, about the two main senses of 'legal system'. There is the system of rules and other norms or standards which as a set can guide the jurist and the citizen. And there is the system as a set of interacting persons, groups, and institutions, with their dispositions to interact both in compliance with, and in defiance or ignorance of, the system of rules etc. In the second sense, the legal system is the society to which the legal system in the first sense belongs, the society which *has* those rules and other standards. The way in which that society subsists and persists through time is part of what it is for the rules and standards themselves to last, to have the temporal dimension they do, a dimension very hard to explain without reference to the lasting identity of the society (political community) and of the persons who are that society's members.[29] Yet the lasting of the society as a distinct society with a history of its own is not independent of the formal question what rules and standards are treated by its members as their society's own legal system, for them to follow and to amend.

of the Human Rights Act 1998 (a provision on which they frequently act) requiring them to seek a rights-compatible interpretation of the statutory provisions in question, and such an interpretation was readily available. Precisely what result-orienting desire motivated this averting of the eyes (see 2007a at 433) from plain legal duty remains a matter for speculation irrelevant to legal analysis.

[26] *Scott v Sandford* 60 US 393. See essay II.1 (2000a) at nn. 40–3.

[27] 410 US 113. See 2000c at nn. 53–6; essay I.16 final endnote; essay II.1 (2000a) at n. 46.

[28] 517 US 620, based on the professed belief, ungrounded in evidence, that the law-makers had been motivated by 'animus', 'animosity', and 'bare…desire to harm a politically unpopular group'. Behind this very implausible assertion may lie something of that attitude towards 'majorities' which Dworkin had been promoting for more than two decades: see the discussion of it in essay III.1, sec. II.

[29] The lasting identity of persons is discussed in essay II.2 (2005c). But regrettably the lasting identity of political communities, with its cultural and other conditions, does not really become a theme again (after 1971) in my legal theory until essays II.6 (2008b) and II.7 (2008a).

That essay, 'Revolutions and Continuity of Law', was preceded and prepared for by annual essays of mine in the *Annual Survey of Commonwealth Law* on the judicial aftermath and discussion of revolutions or *coups d'état* in Pakistan, Uganda, Rhodesia, Cyprus, and Ghana.[30] The philosophical reflections in those essays, which reasons of space preclude including in this Collection, largely concerned the incoherence of using professedly value-free, 'pure', 'positivist' legal theories such as Kelsen's as a guide to judicial duty in the assessment of a revolution's impact on the country's law and legal system. That issue was presented in its purest form in Pakistan in the late 1960s. Around the same time it was presented in a more complex (and in that way more illuminating) form in and in relation to (Southern) Rhodesia. For in the latter context, the fundamental issue was whether there was indeed one country (the undivided realm of the United Kingdom and its colonies including Southern Rhodesia) or two (the United Kingdom and the already distinct country the lawful government of which had unlawfully declared its independence from the United Kingdom). That issue was considered, very amply, first by two courts in Rhodesia and then by the supreme court of the British imperial system, the Judicial Committee of the Privy Council. The essay was written before the judgments in the last of these tribunals; an endnote to the present version of the essay summarizes my *Annual Survey* commentary on those judgments.

In the 1980s, as the adviser to a committee of the House of Commons concerned with Parliament's residual powers in respect of Canada, and to two State governments in Australia, I had occasion to articulate and document in detail the ways in which it is conceptually possible, and can be juridically appropriate, to judge that one or more constitutional organs of an independent state have constitutional functions in and under the constitutional order (the legal system) of another, independent state.[31] Here the distinction and relation between the two senses of legal system becomes very important. Equipped with the distinctions worked out and applied in relation to Canada and Australia, it is easier to see and say how, for example, (a) the organs of the European Union can follow and in part generate a set of norms and doctrines according to which those organs and that set constitute a legal system which has juridical supremacy over the legal systems of the Union's member states, and (b) the norms and organs of a member state accord legal effect to the Union's norms and doctrines, including its doctrine of supremacy, while at the same time,

[30] See 1968b at 82–3; 1969a at 73–5, 89–95, 108–13; 1970d at 71–81.
[31] See 1981a, c, and d; 1983a.

(c) the people and the organs of the same member state consider themselves a distinct people and political community (sovereign state) which can, according to its own law (and in pursuance of its own distinct common good), revoke in whole *or* (despite Union doctrine) *in part* the supremacy of the Union's norms, doctrines, and organs. This is not a matter that has arisen for decision in the United Kingdom.[32] A matter that has arisen, involving at bottom the same kind of issue—*which* is the relevant community whose common good is rightly served as the ultimate object of and framework for the acts of constitutional organs—is the subject of my paper 2008e, on the lawfulness and probable justness of requiring the inhabitants of (part of) a dependency (technically and unknown to them just reconstituted as a separate dependency) to move to another (part of the same) dependency in the defence interests of the United Kingdom and its dependencies considered as a whole. Of the willingness of the House of Lords' majority to follow this analysis in *Bancoult (No. 2)*,[33] it can at least be said that it certainly does not have the jurisprudential incoherence involved in following a positivist analysis of the effects of revolution on a people's legal system.

Essay 22, finally, sums up a controversy that enabled me to become clear about precisely what are the components of a legal system as a 'set of rules and other standards'. These rules must be understood not as the statements found in the texts of constitutions, statutes, and judgments or judicial orders, but as the *propositions* which are true, as a matter of law, by reason (a) of the authoritative utterance of those statements taken with (b) the bearing on those utterances and statements (and on the propositions those utterances were intended to make valid law) of the legal system's other, already valid propositions. To say that is simply to make explicit what implicitly engages law students from the outset of their studies—the search for what (proposition) the legal sources and authorities, taken all together, *establish*. But there is no embarrassment to philosophy when it articulates with precision, and confirms, what was already known to common sense, any more than it is an embarrassment when philosophical

[32] *Pace* much legal-academic opinion, it was in no way raised in *Factortame (No. 2)* [1990] UKHL 7, [1991] 1 AC 603.

[33] [2008] UKHL 61, [2009] 1 AC 453. This follows 2008d in treating the undivided realm of the United Kingdom and its overseas territories as the community whose common good is at stake in assessing the justice and legality of requiring a few hundred tenants in one part of those territories to move to another territory (the judges assume that it is an expulsion from one dependency to another). The majority fail, however, to accept the essay's showing that in 1865 a Parliament guided by Liberal ministers sensibly decided to remove such issues from the supervision of the courts, not least the English courts (not to mention the court in Adelaide that had provoked the enacting of the Colonial Laws Validity Act 1865).

reflection issues in affirmations which, when tested reflectively and reflexively, turn out to be consistent with the worth of pursuing truth in discourse and philosophy.[34] All too many philosophical doctrines that have influenced and distracted the philosophy of law in recent centuries fail that important test.

[34] On self-referential inconsistency and resultant self-refutation, see essay I.3 (1977a), which in sec. III also discusses some puzzles about legal sovereignty, and essay I.4 (2005b).