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A Frame Without a Picture: On the Relevance of Law to the Decision of Hard Cases

Abstract

How are judges (and others) to decide hard cases? One view says that even in hard cases it is *law all the way down*, as Justice Elena Kagan put it in the United States Senate Judiciary Committee hearings considering her nomination to the Supreme Court. But another view, widely held among many legal positivists, acknowledges that law at some point runs out, and that in such instances judges and other legal decision-makers must go beyond the law in reaching their conclusions. And although these two positions seem in conflict, dealing with this apparent conflict requires an understanding of what makes a hard case hard and of what inputs into legal decisions are to be considered as law. This essay considers the question of the role of law in the decision of hard cases and concludes with even further questions about how different answers to the question about the role of law in the decision of hard cases reflect different views not only about the nature of judicial decision-making but also about the capacities of judges and the legal system.

Úrtak

Hvussu eiga dómarar, og onnur, at taka avgerðir í truplum málum? Sambært eini áskoðan er tað galdandi, sjálvt í trupulum málum, at lóg er *allan vegin niður,* sum Elena Kagan dómari mælti í rættarnevndini hjá senatinum í USA, tá hennara tilnevning til hægstarætt varð viðgjørd. Onnur áskoðan, ið serliga er væl dámd millum løgfrøðiligar positivistar, viðurkennir hinvegin at lógin til tíðir ikki er fullkomin, og at í slíkum støðum mugu dómarar og onnur, ið taka løgfrøðiligar avgerðir, leita víðari enn lógina, til tess at røkka niðurstøður teirra. Hesar áskoðanir tykjast at vera í stríð við hvørja aðra, men til tess at handfara hetta sokallaða stríðið, krevst nærri kunning um júst hvat ger eitt mál trupult og um hvørji atlit, ið vera tikin í lógaravgerðum, eiga at verða umrødd sum *lóg*. Hendan greinin umrøður leiklutin

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hjá lógini, tá avgerðir skulu takast í truplum málum, og endar við at seta víðari spurningar um, hvussu ymisk svar upp á spurningin um leiklutin, ið lógin hevur í sambandi við at avgerðir verða tiknar í truplum málum, endurspeglar ymiskar áskoðanir, ikki bara um grundarlagið fyri rættarligum dómaraavgerðum, men eisini um førleikarnar hjá dómarum og lógarskipanini.

Introduction

The great Austrian legal philosopher Hans Kelsen often likened law to a frame without a picture.[2] For Kelsen, *no* legal decision is ever completely determined by the law. Every application of law, Kelsen insisted, is ultimately determined by non-legal empirical and philosophical considerations, while nevertheless being bounded by constraints set by the law. Hence the metaphor of the frame without a picture.

In insisting that *every* decision by a court or other legal actor, and *every* application of the law to particular facts and particular situations, necessarily involves non-legal factors, Kelsen staked out a position that seems extreme. It is not immediately apparent, for example, that concluding that a driver driving at eighty miles per hour is violating the law specifying a limit of sixty-five requires recourse to factors other than *the law*.[3] And thus a more familiar and intuitively sound conclusion is that there are indeed applications of the law that are based

2 Hans Kelsen, *Pure Theory of Law* (Max Knight trans., Univ. of California Press, 1967), 245, 350-351; Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie L. Paulson & Stanley L. Paulson trans., Clarendon/Oxford, 1992), 80. Useful commentary on this idea includes Iain Stewart, "The Critical Legal Science of Hans Kelsen," *Journal of Law & Society*, 17 (1990), 273-308; Lars Vinx, *The Guardians of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press, 2015); Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007), 153.

3 Concluding that the driver was violating the law does, to be sure, require knowledge of the language in which the law is written, as well as the mathematical proposition that eighty is greater than sixty-five. But Kelsen had something more than this in mind. Specifically, he believed that there was no rigid distinction between law-creation and law-application, and thus that even what appear to be routine applications involve at least some law-creation. See Hans Kelsen, "Pure Theory of Law," *Law Quarterly Review*, 51 (1935), 517-614, at 519-521. For commentary, see Brian Bix, "Positively Positivism," *Virginia Law Review*, 85 (1999), 889-923, at 908; Drury Stevenson, "To Whom Is the Law Addressed?" *Yale Law & Policy Review*, 21 (2003), 105-167, at 134 n.118. But the view that applying the rule as stated in the text to driving at eighty miles per hour involves law-creation incorporates, to put it mildly, a non-standard and counter-intuitive view of law creation.

only on the law.[4] Even those who believe this, however, perhaps most prominently Kelsen's approximate contemporary and jurisprudential *rival* H.L.A. Hart, also acknowledge that there are disputes and applications as to which the existing law does not supply an answer.[5] These are the hard cases, and they arise, for Hart, when there are *gaps* in the law,[6] or when some putative application of a legal rule lies in the *penumbra* of that rule.[7]

Here, Hart argued, the law has run out, and judges, especially, should then in the exercise of their discretion make decisions in much the same way that a legislator would make them, accordingly drawing on all of the normative, empirical, and

4 Or at least only on the law and on basic understandings of language, logic, arithmetic, and non-controversial empirical propositions.

5 H.L.A. Hart, *The Concept of Law* (Penelope A. Bulloch, Joseph Raz & Leslie Green eds., 3d ed. 2012) (1961), 124-136. For commentary on Hart on this point, see Michael Martin, *The Legal Philosophy of H.L.A. Hart: A Critical Appraisal* (Temple University Press, 1987), 50-63; Scott J. Shapiro, *Legality* (Harvard University Press, 2011), 234-240; Frederick Schauer, "Easy Cases," *Southern California Law Review*, 58 (1985), 399-440.

6 For careful and prominent analyses of the idea of a gap in the law, see Pablo E. Navarro & Jorge L. Rodríguez, *Deontic Logic and Legal Systems* (Cambridge University Press, 2014), 158-175; Joseph Raz. *The Autonomy of Law: Essays on Law and Morality* (Clarendon/Oxford, 1979), 70-77; John Gardner, "Concerning Permissive Sources and Gaps," *Oxford Journal of Legal Studies*, 8 (1988), 457-461. And compare Ronald Dworkin, "No Right Answer,?" in P.M.S. Hacker & J. Raz (eds.), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon/Oxford, 1977), 58-84; Ronald Dworkin, "On Gaps in the Law," in Paul Amselek & Neil MacCormick (eds.), *Contrversies About Law's Ontology* (Edinburgh University Press, 1991), 84-90.
Kelsen is complicated on this point. Although he maintained that no legal decision is completely determined by the law, Kelsen also insisted, seemingly in contradiction, that there were no gaps in the law. See Eugenio Bulygin, "Kelsen on the Completeness and Consistency of Law," in Luís Duarte d'Almeida, John Gardner, & Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing, 2013), 225-244. But the contradiction can be resolved by noting that Kelsen believed that the law provided a "frame" for every application, even as that frame was never sufficient conclusively to resolve a particular application within that frame.

7 See also H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, 71 (1958), 593-629, at 612-613. For commentary, see Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon/Oxford, 1993), 7-35; Frederick Schauer, "A Critical Guide to Vehicles in the Park," *NYU Law Review*, 83 (2008), 1109-1134; Anthony J. Sebok, "Finding Wittgenstein at the Core of the Rule of Recognition," *SMU Law Review*, 52 (1999), 75-109.

policy resources that a legislator would use.[8] And although Hart, unlike Kelsen, believed that this characterization applied only to some and not to all decisions by courts and other legal actors, Hart did agree with Kelsen to the extent of believing that in these penumbral or *gap* cases the law had little role to play in determining the final result.[9]

Kelsen and Hart do not, of course, exhaust the universe of jurisprudential positions. Nevertheless, the contrast between the two suggests that an important question about the decision of hard cases is the issue of the role that law *qua* law plays in such decisions. And unless we tautologically define law as what judges do, it is hardly self-evident that law is a major component of the decision of hard cases.[10] But, as Ronald Dworkin has famously emphasized,[11] nor is it self-evident that law is *not* an important factor in the decision of hard cases. Exploring this question, however, requires that we have some understanding of what a hard case is, as well as some understanding of what law is. This paper will accordingly start by addressing those interrelated questions as a precursor to proceeding to the heart of the matter.

8 See Jules L. Coleman & Brian Leiter, "Legal Positivism," in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996), 241-260, at 249-251; Roger A. Shiner, "Hart on Judicial Discretion," *Problema* 5 (2011), 341-362. And on the necessity of going beyond the law, narrowly defined, in the decision of hard cases, but with less focus on Hartian exegesis, see David Lyons, "Derivability, Defensibility, and the Justification of Judicial Decisions," in *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge University Press, 1993), 119-140.

9 See H.L.A. Hart, *The Concept of Law*, *op. cit.* note 2, at 272-274; H.L.A. Hart, "Discretion," *Harvard Law Review*, 127 (2013), 652-665; Nicola Lacey, "The Path Not Taken: H.L.A. Hart's Harvard Essay on Discretion," *Harvard Law Review*, 127 (2013), 636-651. For a critique of Hart on just this point, see Margaret Martin, "Method Matters: Non-normative Jurisprudence and the Re-Mystification of the Law," in Jorge Luis Fabra-Zamora & Gonzalo Villa Rosas (eds.), *Conceptual Jurisprudence: Methodological Issues, Classical Questions and New Approaches* (Springer, 2021), 53-74.

10 The terminology is both tricky and important. Joseph Raz, prominently, distinguishes law from legal reasoning, and includes within the idea of legal reasoning all sorts of considerations, especially moral considerations, that are not exclusive to legal reasoning, however important they may be to reasoning *simpliciter*. Joseph Raz, "On the Autonomy of Legal Reasoning," *Ratio Juris*, 6 (1993), 1-15.

11 Ronald Dworkin, "The Model of Rules," in *Taking Rights Seriously* (Duckworth, 1977).

By way of introductory example, consider the comments of now-Justice Elena Kagan when questioned by Senator Jon Kyl at the Senate Judiciary Committee hearings held to consider her nomination to the Supreme Court. Asked about the role of empathy in deciding hard cases, Justice Kagan said, *I think it's law all the way down*.[12] In the context in which the question was asked, Justice Kagan's response was plainly politically and strategically correct. Indeed, in one form or another all nominees to the Supreme Court these days say much the same thing,[13] recognizing that claiming to rely on empathy, policy, politics, ideology, and anything else other than what Ruth Gavison has aptly described as *first stage law*[14] can be hazardous to a nominee's chances of confirmation. But politics and strategy aside, was Justice Kagan right? Is it really just law all the way down? That is the question I seek to answer in this paper.

12 Paul Kane, "Kagan sidesteps empathy question, says 'it's law all the way down.'" *Washington Post*, June 29, 2010.

13 Thus, Justice Sonia Sotomayor, questioned at her hearings about the role of "empathy" and "heart" in judging, responded that "[i]t's not the heart that compels conclusions in cases, it's the law." Arrie W. Davis, "The Richness of Experience, Empathy, and the Role of the Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor," *University of Baltimore Law Forum*, 40 (2009), 1038, at 6. And then there is the widely but misleadingly mocked observation by Chief Justice Roberts that being a judge is like a baseball umpire calling balls and strikes. For a largely sympathetic description and analysis, see Charles Fried, "Balls and Strikes," *Emory Law Journal*, 64 (2012), 641-662. The Chief Justice's critics, perhaps assisted by ignorance of what an umpire actually does, assumed that Roberts was claiming that the process was entirely mechanical, involving no judgment and no close cases. But Roberts was claiming nothing of the kind. Rather, he was only drawing a distinction between making rules and applying rules that are made by someone else.

14 Ruth Gavison, "Comment," in *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Ruth Gavison ed., Clarendon Press, 1987), 21, 30-31; Ruth Gavison, "Legal Theory and the Role of Rules," *Harvard Journal of Law and Public Policy*, 14 (1991), 727, at 740-41. In referring to "first stage law," Gavison means to designate the kinds of things that ordinary people think of as the law, including (the texts of) constitutions, statutes, regulations, and reported judicial decisions, but not including politics, policy, morality, and similar factors. And Gavison's idea can be understood as a descendent of Jeremy Bentham's (normative) view that law works best when it is easily identifiable and easily understandable with minimal intervention by lawyers and judges. See David Lyons, "Founders and Foundations of Legal Positivism," *Michigan Law Review*, 82 (1984); 722-739; Gerald J. Postema, "Legal Positivism: Early Foundations," in Andrei Marmor (ed.), *Routledge Companion to Philosophy of Law* (Routledge, 2012), 30-47; Frederick Schauer, "Positivism Before Hart," *Canadian Journal of Law and Jurisprudence,* 24 (2011), 455-471.

Just Enough Jurisprudence

This paper is hardly the appropriate occasion for offering a comprehensive theory of just what law is, yet it remains the case that some conception of law and its scope is a necessary prerequisite to examining the role of law in the decision of hard cases. More specifically, such an examination presupposes at least some possibly pre-theoretical understanding of what we mean by *law*. And one of the things that makes this presupposition important is that the broader our understanding of law, the less interesting becomes the question of the role that law *qua* law plays in the decision of hard cases. Consider, most prominently these days, the account of law offered by Ronald Dworkin.[15] Although Dworkin repeatedly insisted that neither defining law nor defining the word *law* was part of his agenda,[16] Dworkin's approach is nevertheless characterized by an increasingly capacious understanding of the domain of law. For Dworkin, law is what judges do, and the legal domain – law's empire -- includes not only the kinds of things that appear in law books, but also the vast universe of political and moral principles, even those that cannot be identified by a Hartian rule of recognition.[17] Indeed, it was precisely the alleged inability of the positivist and Hartian picture to explain the actual use by judges of moral and political principles that, for Dworkin, and even in his earliest writings, rendered that picture as descriptively inaccurate as it was normatively unappealing.

15 Especially in Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2008), and Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986). Some distinctive Dworkinian themes begin to emerge in Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), but the conception of law to be found in the earlier work is arguably somewhat narrower.

16 Ronald Dworkin, "A Reply by Ronald Dworkin," in *Ronald Dworkin and Contemporary Jurisprudence* (Marshall Cohen ed., Routledge, 1984), 247, 250; Ronald Dworkin, "Legal Theory and the Problem of Sense," in Gavison, *op. cit.* note 13, at 9, 16. In *Law's Empire*, at 413, Dworkin comes around to defining law as an "attitude," but that assertion does not say very much about the question of which sources or factors count as part of the legal attitude and which do not.

17 Dworkin, as is well known, limited law's empire to the empire of principle, believing that questions of policy were for legislatures and not for courts. *Law's Empire*, *op. cit.* note 14, at 178-184, 221-224. Descriptively, however, this part of Dworkin's program is not even close to correct; making decisions on the basis of policy has long been as much a part of what judges, especially common law judges, do as is making decisions on the basis of principle. See John Bell, *Policy Arguments in Judicial Decisions* (Clarendon Press, 1983); Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988).

Although the account that has come to be known as inclusive legal positivism purports to be able to explain the use of moral principles, political principles, and much else from a positivist perspective,[18] there is little empirical space between Dworkin's position and inclusive positivism, as Dworkin himself insisted.[19] But for my purposes here, the important point is that the inclusivist account threatens to make the answer to the question I address here trivially true. That is, if pretty much anything can count as law as long as judges use it and as long as lawyers argue from it, which is the basic claim of inclusive legal positivism, then it is close to pointless not only to ask about the contribution of law to the decision of hard cases, but also even to raise the kinds of questions that have characterized American Legal Realism.[20]

Thus, the question I ask makes sense only under a view of law's domain that is narrower than Dworkin's and narrower than what is allowed, even if not required, by inclusive legal positivism. This view, which bears some affinity with Ruth Gavison's idea of first-stage law, and also with what has come to be known as exclusive legal positivism,[21] might be caricatured, but not without some accuracy,

18 Wilfrid J. Waluchow, *Inclusive Legal Positivism* (Clarendon Press, 1994); Leslie Green & Thomas Adams, "Legal Positivism," *Stanford Encyclopedia of Philosophy*, www.plato.stanford.edu/archives/win2019/entries/legal-positivism/. See also H.L.A. Hart's posthumous embrace of what he labels "soft positivism" in "Postscript," in H.L.A. Hart, *op. cit.* note 2, and the defense of "incorporationism" in Jules L. Coleman, "Negative and Positive Positivism," *Journal of Legal Studies*, 11 (1982), 139-164.

19 Ronald Dworkin, "Thirty Years On," *Harvard Law Review*, 115 (2002), 1655-1687. See also Adrian Vermeule, *Common Good Constitutionalism* (Polity, 2022), at 8, 190 n.15.

20 One way of characterizing the central Realist claim is as arguing that the universe of traditional legal materials has far less of an effect on judicial decisions in hard appellate cases, and maybe even in litigated cases more generally, than the standard picture of law has long maintained. See Jerome Frank, *Law and the Modern Mind* (Brentano's 1930); Karl N. Llewellyn, *The Theory of Rules* (Frederick Schauer ed., University of Chicago Press, 2011) (1938-1939); Max Radin, "The Theory of Judicial Decision: Or How Judges Think," *American Bar Association Journal*, 11 (1925), 357-362; Frederick Schauer, "Legal Realism Untamed," *Texas Law Review*, 91 (2013), 749-780. The only way to test the Realist claim empirically, however, is by employing a conception of law and legal sources that is narrower than the "anything goes" approach of inclusive legal positivism. See Brian Leiter, *Naturalizing Jurisprudence: Essays in American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007), 121-122, 134-135.

21 See Green & Adams, *op. cit.* note 17; Andrei Marmor, "Exclusive Legal Positivism," in *Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules L. Coleman, Scott J. Shapiro & Kenneth Einar Himma eds., Oxford University Press 2004); Scott J. Shapiro, "On Hart's Way Out," *Legal Theory*, 4 (1998), 469-507.

as understanding law as including, at least presumptively, all and only the material found in books published by the West Publishing Company, or only the kinds of norms, principles, rules, etc., that are taught in basic law school courses, or that that can be found in the books typically collected by law libraries, and so on.

This caricature – law is the stuff found in books published by the West Publishing Company – captures with (or despite) its caricature two important ideas. One is that the understanding of what counts as law is ultimately empirical and sociological, as the Hartian rule of recognition idea reflects. And the other is that law is a limited domain, such that not every socially accepted norm is for that reason a legal norm.[22] Indeed, it might be more accurate to understand the domain of law not so much as limited but rather as non-congruent with the social domain both in terms of what it includes and in terms of what it excludes. Some accepted social norms are not legal norms. Failing to respond to a gift with a thank-you note is not a basis for a legal cause of action despite the fact that the failure breaches a widely accepted social norm. And so too with showing up in sweat clothes at an event explicitly described as *black tie*. Conversely, certain legal norms – stare decisis, for example – provide the basis for a legal argument or legal conclusion but may be far less acceptable outside of the legal system than within.[23]

This account of law becomes even more realistic if we understand the limited domain of legal materials as presumptive and not conclusive. In most advanced legal systems, and perhaps to a greater extent in the American legal system than elsewhere,[24] law-generated results are subject to override when those results appear

22 Frederick Schauer, "The Limited Domain of the Law," *Virginia Law Review*, 90 (2004), 1909-1956.

23 Although stare decisis is not an unfamiliar claim in families with multiple children, for example, its oddness outside the legal system was captured by Oliver Wendell Holmes's observation that it was "revolting" that courts would be bound by precedents that "persist ... for no better reasons than ... that so it was laid down in the time of Henry IV." Oliver W. Holmes, Jr., "The Path of the Law," *Harvard Law Review,* 10 (1897), 457-478.

24 See P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987), arguing that American law is more formal than English law in the sense of being more willing to find ways to avoid outcomes that are literal or accurate products of existing law but which are nevertheless deficient on moral, policy, or pragmatic grounds.

to adjudicators as immoral, impolitic, inefficient, or otherwise unwise.[25] Compared even to other common law systems, American law is largely anti-formal, with American judges appearing to be sociologically and politically empowered to avoid the harshness of first-stage law to a greater extent than is found elsewhere, and with American judges more comfortable than their counterparts elsewhere in understanding this power as part of their role. But even in the United States, it seems safe to conclude that there is a limited domain of conventional legal materials and conventional legal sources – statutes, official regulations, reported judicial decisions, accepted canons of interpretation, and authoritative secondary materials such as the Federalist Papers and the Restatements – that, at least presumptively, is understood to provide the basis for legal decisions. And with this understanding in hand, we can then ask what follows from the existence of this limited domain of rule-of-recognition-recognized legal materials.

The Varieties of Hard Cases

Seeing law as a limited domain of rule-of-recognition-recognized norms, rules, principles, and other authoritative sources allows us to distinguish two importantly different kinds of hard cases. One kind, of lesser importance here, is the hard case in which a legally straightforward or *easy* outcome is nevertheless morally or otherwise objectionable.[26] The legal outcome is hard to swallow.

25 The characterization of the non-conclusiveness of the legal result as an "override" by non-legal factors is shorthand for the much more complex topic of defeasibility, a topic that includes the various mechanisms by which the legal result will not in the final analysis determine the outcome. See Jordi Ferrer Beltrán & Giovanni Battista Ratti (eds.), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012); Luís Duarte d'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (Oxford University Press, 2015).

26 Although the phrase "easy cases" is ubiquitous, it is important to recognize that easy cases – cases in which the law provides a straightforward answer – are not necessarily easy in the sense of the answer being obvious and quickly ascertained. There is a straightforward and non-controversial answer to the question, "What is the number of American presidents to the eighth power divided by the cube root of 115,731 multiplied by the number of nautical miles between South Pomfret, Vermont, and Darwin, Australia," but coming up with that straightforward and non-controversial answer will not be easy. See Leslie Green, "Notes to the Third Edition," in Hart, *op. cit.* note 4, at 319.

Riggs v. Palmer,[27] prominently discussed by Benjamin Cardozo,[28] Henry Hart and Albert Sacks,[29] and more recently by Ronald Dworkin,[30] provides a good example of this kind of hard case.[31] As both the majority and dissenting opinions in *Riggs* explicitly accepted, the most directly applicable authoritative legal source, the New York Statute of Wills, would have allowed the murdering grandson to inherit under the terms of his grandfather's will despite the fact that it was the grandson who caused his grandfather's death by poisoning him.[32] As a matter of positive law narrowly understood, this was an easy case, but the result easily produced by the law was so morally uncomfortable to the majority that it strained to find a way to avoid the most obvious legal result. Much the same, albeit with judges less willing to depart from the straightforward legal outcome, were decisions under the Fugitive Slave Acts.[33] More recent and more amusing is the United States Supreme Court case of *United States v. Yates*,[34] in which the most straightforward legal outcome seemed to a bare majority of Supreme Court justices to be so at

27 22 N.E. 188 (N.Y. 1889).

28 Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), 89-91.

29 Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Masking and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press, 1994) (1958), 68-102.

30 Dworkin, *Taking Rights Seriously*, *op. cit.* note 14, at 23; Dworkin, *Law's Empire*, *op. cit.* note 14, at 15-20.

31 For extensive discussion of *Riggs* and the commentary it spawned, see Caleb Nelson, *Statutory Interpretation* (Foundation Press, 2011), 5-27. And for a perceptive jurisprudential analysis, see Sari Kisilevsky, "Hard Cases and Legal Validity: The Internal Moral Significance of the Law," in Fabra-Zamora & Rosas, *op. cit.* note 8, 197-223.

32 "Elmer was clearly named as a beneficiary in the will, the will was validly enacted, and there was no positive law overriding the Statute if Wills, the governing statute at the time, or prohibiting murders from inheriting." Kisilevsky, *op. cit.* note 30, at 198.

33 Compare Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1984), with Peter Karsten, "Revisiting the Critiques of Those Who Upheld the Fugitive Slave Acts in the 1840s and '50s," *American Journal of Legal History*, 58 (2018), 291-325. And see also Allen Johnson, "The Constitutionality of the Fugitive Slave Acts," *Yale Law Journal*, 31 (1921), 161-182.

34 574 U.S. 528 (2015).

odds with both common sense and with the intent of Congress as to justify an outcome that departed from that most straightforward legal outcome.[35]

For purposes of this essay, the point is not whether courts avoiding the most straightforward legal outcome are behaving properly or not, or whether they are acting consistently or inconsistently with the accepted norms of adjudication. The point is only that this kind of hard case – the case in which there is a straightforward or easy legal answer as a matter of positive law but in which the legal answer is for moral or other reasons objectionable – is different from the more conventional type of hard case -- the case in which the conventional legal materials conventionally interpreted do not provide an answer.

To repeat the point made above, both the definition and frequency of this latter (and more common) type of hard case is a function of just what we understand law to be, and just what we understand the limited domain of the law to include. If law includes not only statutes, regulations, reported cases and so on but also morality and policy, then the likelihood of there being gaps in the law, although still logically possible, as a vast literature on moral dilemmas has made clear,[36] is, for most litigated cases, still vanishingly small as an empirical matter. Although the judges in *Riggs v. Palmer* differed about which sources could legitimately factor in a judicial decision, and although they implicitly differed about whether moral considerations could override the most obvious indications of the most directly relevant positive law source, they did not disagree about the moral question itself. If all of the judges had, counterfactually, agreed that morality was relevant to their decision, it is unlikely that there would have been a dissenting opinion. Thus, the division in *Riggs* is a product of how broadly or narrowly we understand the domain of the law. If we understand law broadly to include considerations of morality and policy, then there may be few genuinely hard cases. But if we understand law more narrowly, then it is likely that there will be an appreciable number of genuinely legally hard cases – cases in which the law narrowly understood does not resolve the matter before the court.

35 Mr. Yates was a small commercial fisherman who had thrown undersized groupers back into the sea to avoid prosecution for taking undersized fish, behavior that literally violated the Sarbanes-Oxley Act, which was designed to penalize banking and related financial fraud, but which by its terms prohibited the destruction of any "tangible object" with the aim of avoiding prosecution. The language was plainly intended to deal with the destruction of records on paper, computer disks, and the like, and not undersized fish, a fact that was dispositive to five justices, but irrelevant to the dissenters, who took the literal language of the statute to be dispositive.

36 See Walter Sinnott-Armstrong, *Moral Dilemmas* (Blackwell, 1988).

Even with this narrower understanding of law, an understanding according to which there are many legally hard cases, these hard cases will come in multiple varieties. One variety is the more conventional type of legal gap – the legally unprovided for case. The world being what it is, and human foresight being what it is,[37] there will be acts and events and disputes that are simply not covered by the law at all. The law is silent. And this is the traditional understanding of the kind of hard case often characterized as a gap in the law.[38]

There is another variety of hard case, however, one that is a function not of too little law but of too much. At times legal rules and principles of roughly equivalent status will conflict, and so there will be hard cases occasioned by a conflict of legal rules, especially, as is usually the case, when there is no second-order rule specifying how such conflicts should be resolved.[39] Consider, for example, the 1978 United States Supreme Court case of *United Steelworkers of America, AFL-CIO-CLC v. Weber*.[40] The case dealt with the permissibility under Title VII of the Civil Rights Act of 1964 of a corporation's race-conscious affirmative action plan regarding hiring and promotion. Without getting into the details of the governing statute, the case involved a conflict between the well-recognized principle of statutory interpretation that clear evidence of congressional intent would trump explicit statutory language to the contrary, a principle accepted by the majority, and the equally well-accepted principle of statutory interpretation, on which the dissent relied, that resort to legislative intent is precluded when the language of the statute is clear. As a result, one rule-of-recognition-recognized principle of positive law pointed to one outcome and another rule-of-recognition-recognized principle of positive law pointed to the opposite outcome, with there

37 As Hart put it, law, whose strictures regulate behavior that post-dates the creation of the relevant legal source, suffers from the "twin handicaps" of ignorance of fact and indeterminacy if aim. Hart, *op cit.* note 3, at 128. In other words, we cannot perfectly predict the future, and we cannot perfectly know what we would want to do when we get there.

38 See Raz, *op. cit.* note 4; Gardner, *op. cit.* note 4.

39 In the civil law world, and in the legal theory produced in that world, the topic of normative conflicts looms large. See Pierluigi Chiassoni & Carla Huerta Ochoa, "The Troublesome Duet: Antinomies and Gaps in Civil Law Jurisprudence," in Luka Burazin, Michael Steven Green, & Giorgio Pino (eds.), *Jurisprudence in the Mirror: The Civil Law World Meets the Common Law World* (Oxford University Press, forthcoming 2023). The topic is far less prominent in common law legal theory, perhaps because the messiness of the common law makes such conflicts far more frequent and, perhaps consequently, far less of a worry.

40 443 U.S. 193 (1978).

being no accepted second-order principle that would resolve the conflict.[41] The consequence is that existence of legal sources pointing in different but mutually exclusive directions creates a hard case.

The third variety of hard case arises, relatedly, from the fact that in most common law systems there are no principles of priority – *rules of order*, with due respect to Colonel Roberts – among the rule-of-recognition-recognized sources. Here *Riggs v. Palmer* is again instructive. Assuming, controversially, that the majority was correct in saying that broad legal principles such as *no person may profit from their own wrong*, ancient treatises such as Rutherford's *Institutes*, United States Supreme Court opinions dealing with a different situation under a different statute, and the law of Quebec, among others, all counted as legitimate (even if permissive and not mandatory[42]) legal sources, then how was a court to determine the priority among the different sources? Hart casually noted the problem in *The Concept of Law*,[43] and seemed to imply that a type of secondary rule would deal with the problem, but in fact, and unlike the case in many or even most civil law jurisdictions, neither the system that Hart knew best nor most other common systems have many such rules of priority among conflicting types of recognized sources. The existence of such rules would not eliminate the possibility of such hard cases, either because the rules of priority would themselves have penumbras or because there might still be conflicts among second-order priority rules that are not resolved by third-order rules. Still, we might reasonably expect that priority rules would reduce the frequency of genuinely hard cases, and, conversely, we should not be surprised that the lack of such rules in most common law systems at least partly contributes to the concern about hard cases that pervades the literature in such systems.

On the Role of Law in Legally Hard Cases

If we put aside those hard cases that are hard because the legally easy or straightforward outcome is hard to swallow for moral, political, or pragmatic reasons, we are then left with hard cases that are legally hard because the

41 The ubiquity of this problem with respect to the canons of statutory interpretation was famously documented in Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision, and the Rues or Canons about How Statutes Are To Be Construed," *Vanderbilt Law Review*, 3 (1950), 395-406.

42 See Gardner, *op. cit.* note 4. See also the distinction between mandatory and optional sources in Frederick Schauer, "Authority and Authorities," *Virginia Law Review*, 95 (2008), 1931-1961.

43 Hart, *op. cit.* note 3, at 95 (noting but not discussing that a rule of recognition might specify an "order of superiority" among conflicting rules).

law, understood in a narrow and positivist way, is either silent or in some way internally multi-vocal, arguably supporting any of multiple opposing outcomes. And it is here that the conventional positivist approach is to acknowledge that in such cases the decision-maker must exercise discretion, and to exercise that discretion in much the same way as we might expect a legislator making a policy decision to act.[44]

In important respects, however, this traditional positivist account is too simple, failing to offer an empirically accurate account of just what judges actually do when they are confronted with one of these hard cases.[45] And to understand why the Hartian *act like a legislator* account is too crude and consequently inaccurate, we should look to part, but only part, of the Dworkinian account.

Dworkin's account of judicial decision-making in fact consists of two distinct components, one of which is somewhere between controversial and wrong, but the other of which is highly instructive and arguably descriptively accurate. The more controversial part, or perhaps parts, of Dworkin's account include three related claims -- first, that every application of law involves interpretation in a rich sense; second, that interpretation necessarily requires recourse to moral considerations; and, third, closely related to the first two, that what we think of as *the law* necessarily includes a host of considerations of a jurisdiction's political morality, thus undercutting the positivist distinction between law and non-law, or between law and other considerations of principle, even if not of policy.[46] And although this is not the place to evaluate this account in depth, I note here that one of the things that makes Dworkin's account controversial, and arguably wrong, is that it ignores the way in which a positivist conception of rule-of-recognition-recognized sources – *the law* -- might have presumptive force even if on occasion this presumptive force is overridden. It is not irrelevant, for example, that most courts dealing with the kind of situation presented in *Riggs v. Palmer* have allowed unworthy beneficiaries to inherit, even beneficiaries who

44 By far the best and most thorough analysis of this quasi-legislative role and attitude is that provides by Geoffrey Marshall. G. Marshall, "Positivism, Adjudication, and Democracy," in Hacker & Raz, *op. cit.* note 4, 132-144.

45 See Gardner, *op. cit.* note 4, persuasively arguing both that the Hartian legislative account is inaccurate but also that the Dworkinian "one right answer" account fails to recognize that the exercise of judgment and discretion in hard cases need not either point to a singularly right answer or require going beyond the boundaries of law, positivistically defined.

46 See Dworkin, "A Reply," *op. cit.* note 14, at 263.

were in some way culpably responsible for the testator's demise.[47] To be sure, *Riggs* represents an example of a decision in which the presumption that the conventionally and narrowly understood law would control was overcome, but it is a mistake to take the occasional example of first-stage law not controlling as representing an accurate picture of how law routinely operates.[48] Although especially egregious outcomes produced by following the first-stage law might, as in *Riggs*, lead a court to look for ways of avoiding such outcomes, far more often courts follow the law even when the legal outcome would vary from the all-things-other-than-the-law-considered outcome, and especially so when the law-based outcome, even if suboptimal, falls short of representing a moral or political outrage.[49]

47 I have developed this argument, with examples from the case law, in Schauer, "The Limited Domain of the Law," *op. cit.* note 21, and also in Frederick Schauer, "Constitutional Invocations," *Fordham Law Review*, 65 (1997), 1295-1312.

48 In his discussion of why the standard speed limit is or is not an easy case, *Law's Empire*, *op. cit.* note 14, at 353-354, Dworkin argues that a car exceeding the posted speed limit looks easy only because we have presupposed the answer to the embedded questions of political morality but not because those questions are not presented. Duncan Kennedy seems to say much the same thing in arguing that as long as judges have the power to set aside the literal meaning of the law in some cases, then *every* case presents the issue of whether this is a case in which that literal meaning should be set aside. Duncan Kennedy, "Legal Formality," *Journal of Legal Studies*, 2 (1973), 351-398. But both Dworkin and Kennedy appear to ignore the psychological or phenomenological importance of the way in which in most legal systems the most straightforward reading of the positive law precludes recourse to other factors unless the positive-law-avoiding factors are so egregious as to intrude on what otherwise is a straightforward or "easy" case in which such factors are not even considered. See Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon/Oxford, 1991), 145-146.

49 There is considerable support for the proposition that ordinary citizens and non-legal officials will rarely follow the law when it diverges from what those citizens and officials would do absent the law unless following the law is supported by sanctions for non-following. See Frederick Schauer, *The Force of Law* (Harvard University Press, 2015), 57-74, 201-205 (describing and referencing the social science literature). But because judges may have preferences for law *qua* law, or preferences for working with and within the law that lay people do not have (see Richard Posner, "Social Norms and the Law: An Economic Approach," *American Economic Review*, 87 (1997), 365-369; Frederick Schauer, "Preferences for Law,?" *Law & Social Inquiry*, 42 (2017), 87-99), it is not surprising, as many of the unworthy beneficiary cases other than *Riggs* show, that these preferences for law by judges will often produce outcome other than those that would have been produced by the same decision-makers making decisions not governed by law.

Although Dworkin's conception of the size and scope of law's empire is thus open to challenge, the question of what counts as law is analytically distinct from the question of what to do with the law that counts. And here we have much to learn from Dworkin's earlier contributions, even if we largely reject the expansion of law's domain that we see in his later work. Consider, for example, two of Dworkin's earlier examples. In describing what the chess official should do when one player accuses another of aggressive and distracting smiling, an activity not literally covered by the rules of chess, Dworkin suggests that the good official will make the decision most compatible with the underlying point of the game.[50] Importantly, it is not the morally best decision, or the politically best decision, but, more narrowly, the decision most compatible with the smaller category of the rules and principles and function of the *character* of the *enterprise* of chess. The theory of chess, if you will, but not the theory of games, and not the theory of human interaction, and not the theory of morality.

Or consider Dworkin's roughly contemporaneous example of the interpreter of literature attempting to assess whether David Copperfield had a homosexual relationship with Steerforth, a question that the novel does not explicitly answer.[51] Importantly, the interpreter does not attempt to determine whether one answer or another is most compatible with the entire Dickens *oeuvre*, or most compatible with nineteenth century English literature, or with nineteenth century England. And certainly not with which answer is politically or morally better. Rather, the interpreter engages in a task that is in some sense internal, reaching the conclusion that fits best with everything else that is in *this* novel, and only in this novel.[52]

These examples are directly relevant to the task we address here. If the positive law does not give us an answer to the question of how to decide a particular hard case, a judge with more modest decisional ambitions than Dworkin's Hercules might simply try to make the decision most compatible with the area of law within which the question arises, or with an even narrower conception of the relevant field with which this decision should fit. This will require judgment, to be sure, and there may not be a single right answer to how this judgment will or should be exercised, but, importantly, it does not necessarily require recourse to *extra-legal* sources.[53] The well-known *in pari materia* principle of statutory interpretation,[54] according to which a statute should be interpreted in a way

50 Dworkin, *Taking Rights Seriously*, *op. cit.* note 14, at 101-105.

51 Dworkin, "No Right Answer?" *op. cit.* note 4, at 73-82.

52 My colleague Leslie Kendrick, who knows about such things, informs me that this "internalist" view is what characterizes the so-called New Criticism in literary theory.

53 Gardner, *op. cit.* note 4.

54 See Nelson, *op. cit.* note 30, at 486-506.

that makes the entire statute internally coherent, or that makes the statute as interpreted compatible with other statutes dealing with the same subject, is the positive law embodiment of what Dworkin seems to be attempting to say with these two examples. But the principle of *in pari materia* does not instruct the interpreter to make the decision that best fits with the entire *corpus juris*,[55] and certainly not with the norms, values, and principles of society at large.

The message here is that a decision-maker faced with a question not clearly answered by the positive law, whether because of absence of dispositive legal guidance or because of multiple and conflicting legal rules and principles, can still make a decision solely on the basis of the law. This might involve making the decision most compatible with other parts of the law, or it might involve reaching the conclusion that best furthers the underlying point or purposes of the more particular area of law. Or it might involve analogizing the particular problem before the court to some previous similar but not identical decision.[56] And in almost all such cases the only resources at work appear to be legal resources narrowly understood.

None of this is to deny the problem of underdetermination. Just as no one theory can uniquely explain a series of empirical observations,[57] so too is there no uniquely correct interpretation of a work of literature, or of the rules of chess, or of a body of law. But just as the possibility of different interpretations

55 But for the documented suggestion that the Roberts Court is increasingly doing just that in its statutory interpretation cases, see Anita S. Krishnakumar, "Cracking the Whole Code Rule," *NYU Law Review*, 96 (2021), 76-159.

56 Whether analogizing from existing law to new situations involves going outside of the law implicates longstanding debates about analogy and precedent, and about whether the determination of similarity is internal to the items compared or necessarily demands recourse to considerations external to the compared items. See Larry Alexander & Emily Sherwin, *Advanced Introduction to Legal Reasoning* (Elgar, 2021), 114-130. For what it is worth, my own view is that locating similarity and analogy necessarily involves going outside of the existing law, but not so far outside as to be usefully compared with legislation. See Frederick Schauer & Barbara A. Spellman, "Precedent and Similarity," in Timothy Endicott et al. (eds.), *Philosophical Foundations of Precedent* (Oxford University Press, forthcoming 2022); Frederick Schauer & Barbara A. Spellman, "Analogy, Expertise, and Experience," *University of Chicago Law Review*, 84 (2017), 249-268.

57 See Pierre Duhem, *The Aim and Structure of Physical Theory* (P. Wiener trans., Princeton University Press, 1954 (1914); Willard Van Orman Quine, "Two Dogmas of Empiricism," in *From a Logical Point of View* (Harvard University Press, 1951), 20-46. See generally Kyle Stanford, "Underdetermination of Scientific Theory," *Stanford Encyclopedia of Philosophy*, www.plato.stanford.edu/archives/win21/entries/scientific-underdetermination (2021).

does not make it impossible to adopt the *attitude* (Dworkin's word) of trying to locate the best interpretation, so too, whether in literature, in chess, or in law, can we imagine a decision-maker faced with a hard case as seeking to locate the answer that fits best with the existing law on some subject, or the existing law more broadly, but still not drawing on resources other than those that would be available to a judge who restricts her inquiry and her research to legal sources identified as legal by the prevailing rule of recognition.

Although the problem of underdetermination can thus be thought of as not necessarily fatal to the interpretivist enterprise positivistically understood, it remains the case that some judge or other legal decision-maker might still find that after exhausting all of the available legal resources the law not only does not provide a uniquely correct answer but also does not seem to provide an answer that is legally superior to some number of alternatives. And it is at this point that legal positivists would say that judges must exercise their discretion in a strong sense and make a decision drawing on many of the sources and resources that a legislator would employ in making new law. Or, to put the same point in different language, the positivist position is that such decisions, even if made by judges, are not actually *legal* decisions, except insofar as it is the law in its empowering mode the puts the judge in the position of having to reach a decision in such cases. Each in their own way, both the earlier Dworkin and John Gardner[58] caution us not to assume too quickly that the law and its characteristic methods do not suggest an approach to the decision of hard cases; but agreeing that that is so does not mean that there will not be cases in which neither the law not its methods will suggest an answer, even if not the one right answer. And for this admittedly small category, it will be both expected and legitimate for legal decision-makers to depart from the law and, roughly, act as if they were legislators.

A Sociological Coda

By itself, the claim that the law answers many questions, but that when the law runs out judges must exercise non-legal discretion, does not seem especially problematic. Perhaps it seems problematic if we start with the assumptions that most judges are not elected, that their democratic legitimacy is therefore in question, and that allowing judges to authorize state coercion based on judgments that do not rely on the comparative advantage of the judge is itself problematic. This seems part of the concern that motivates Dworkin, a concern that is perhaps alleviated if we think of judges deciding hard cases as relying on the law, and thus doing something that is within the special province of legally trained and legally experienced judges. Under this view, a view that Justice Kagan's statement

58 *Op. cit.* note 4.

quoted above reflects, and that echoes similar statements made by all other recent nominees, judges who are not experts in policy or empathy preserve their legitimacy by sticking to the law. And if there are cases that cannot be decided according to the law, then judges maintain the aura of legitimacy and expertise by insisting, even if disingenuously, that it is *law all the way down*.

The problem with this view is that it is either wrong or that it presupposes a capacious understanding of law that treats as law, by definition, all of those things that would factor in a decision even when the positive law, narrowly defined, does not provide an answer. In other words, defining law broadly serves strategic and political purposes. But it does so at the expense of softening the boundaries between positive law – first stage law, in Gavison's sense – and everything else. If lawyers and therefore judges are indeed masters of all they survey, then this strategic move is both understandable and defensible. But if there is something that is the comparative advantage of judges as compared to economists, philosophers, administrative officials, and elected policy-makers, then defining law too broadly risks losing the sense of this comparative advantage, or at least distinctiveness.

Definitions of law, and especially public rather than academic ones, can accordingly be understood as serving strategic, political, psychological, and sociological purposes. If we say, with Kelsen and Hart and the positivist tradition,[59] that many of the various things that judges do and judges use are not part of the law, however legitimate it may be for judges to do them and use them, we are being modest about what law is and what law can do, and therefore being modest about what lawyers do. But if we say, with Dworkin, that law's empire includes the full range of moral principles, including the principles of political morality, we are setting up lawyers and judges as having a comparative advantage that little in their training or selection leads us to believe they actually have. Questions about what judges should use in the decision of hard cases are consequently questions that go to just what lawyers and judges are good at and good for. Insofar as the Dworkinian answers this question in such a capacious way as to make it surprising when coming from other players of vital social roles such as dentists and plumbers, we are left to wonder about what it is that leads lawyers but not dentists,[60] judges but not plumbers, to have such a hegemonic and non-modest conception of their place in a complex society.

59 And so too, prominently, with Joseph Raz, who distinguishes between law and legal reasoning, arguing that much that lawyers and judges do, even if legitimately so, does not draw on law as Raz and other exclusive positivists narrowly define it. Joseph Raz, "Postema on Law's Autonomy and Public Practical Reasons," *Legal Theory*, 4 (1998), 1-20.

60 My casual research indicates that there is no book entitled "Dentistry's Empire." And I suspect that if there were, it would be about teeth and gums and little more.

Much of the foregoing can be seen as compatible with the view, controversial in some jurisprudential circles, that our understandings of law and of the word *law* are not merely descriptive. If we recognize, as I think we should recognize, that we as a society *create* our concept of law in light of larger or deeper purposes,[61] then we can see that how we understand the role of law in the decision of hard cases is a function not only of what we understand a hard case to be but also what we understand law to be. And once we understand this, we can see that many conceptions of law are themselves products of views about what judges are doing in deciding hard cases, what resources they bring to bear in making those decisions, and whether there is reason to believe that judges as a class especially and comparatively competent in deploying those resources.

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61 See Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *Oxford Journal of Legal Studies*, 25 (2005), 493-501. See also Frederick Schauer, "Normative Legal Positivism," in Patricia Mindus & Torben Spaak (eds.), *Cambridge Companion to Legal Positivism* (Cambridge, 2021), 61-78; Frederick Schauer, :Law as a Malleable Artifact," in L. Burazain, K. Himma, & C. Roversi (eds.), *Law as an Artifact* (Oxford, 2018), 29043; Frederick Schauer, "Official Obedience and the Politics of Defining "Law,'" *Southern California Law Review*, 86 (2013), 1165-1194.