

Criteria of Validity

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This article revisits the debate between inclusive and exclusive legal positivism, arguing that the question around which it is founded – about whether morality can function as a condition of legal validity – obscures a more basic and fundamental truth about the nature of law: that the norms composing a legal system’s criteria of validity have a formal as opposed to substantive nature. Recognising this, I argue, helps to clarify some important aspects of the relationship between the ultimate norms of any legal system and its constitution. It also helps to explain away much of the debate between exclusive and inclusive positivism.

INTRODUCTION

In his influential early essay ‘The Model of Rules’ Ronald Dworkin defined legal positivism, or more accurately the version of that theory he found in the work of H. L. A. Hart, in the following ‘skeleton’ way: according to positivism, Dworkin suggested, the law was to be understood as ‘a set of special rules [that] can be identified and distinguished by specific criteria, by tests having not to do with their content but with their *pedigree* or the manner in which they were adopted or developed’.¹ This was Dworkin’s reading of Hart’s doctrine of recognition, the latter’s claim that for every legal system there existed a rule, or series of rules, borne out in the practices of its officials, that identified what was to count as its law.

Dworkin’s aim in the passages that followed was to cast doubt on this understanding by arguing that it failed to accommodate the possibility of legal principles, such as the principle that no person may benefit from their own wrong. Principles, Dworkin argued, have their effect in law not because of their pedigree or mode of origin – they are not enacted nor, he suggested, established through precedent – but instead because of ‘a sense of [their] appropriateness’ amongst legal actors (his later writings would lose this psychologising gloss: principles were part of the law because they help *justify* it, not because they pass any test of provenance).² This argument paved the way for Dworkin’s rejection of positivism – the view that law is a consequence of a certain kind of

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1 Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth 1978) 17.

2 *ibid.*, 40. See, for the first detailed articulation of the later view, *ibid.*, ch 4.

intentional action: the act of positing rules – and its replacement with the idea of legal decision-making as an exercise in moral reasoning.

Respondents to Dworkin accused him of caricaturing the theory he intended to criticise, not least of all Hart himself who denied, in the posthumously published postscript to *The Concept of Law*, that his doctrine of recognition should ever have been understood as a test of pedigree. While recognition rules might in certain legal systems be concerned only with matters of historical provenance – Hart held up as an example of this type the rule that in the UK whatever Parliament enacts is law – in others they might not: ‘In some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.’³ This, Hart suggested, allowed him to reckon with the possibility of rules whose validity depended on ‘their content not ... their pedigree.’⁴

By making this move Hart followed a path already well-trodden by a number of his contemporaries in declaring himself a ‘soft’ or inclusive positivist, a positivist who accepts that there can be moral tests for law not because, as Dworkin wanted to argue, law of its nature must satisfy some demand of morality, but because the customary practices of law’s officials in particular legal systems might allow for the possibility. ‘Cruel and Unusual Punishments’⁵ prohibited, or unfair terms in consumer contracts proscribed,⁶ not because morality so requires, but because the law ‘incorporates’ moral standards that do.⁷

Exclusive positivists reject this: appearances to the contrary, they argue, morality cannot function as a condition of legal validity.⁸ What might at first blush appear to be moral tests for the existence of law are instead instructions to judges to make law based upon their own understanding of these precepts.⁹ What reason does the exclusive positivist give for this? The most influential argument is that of Joseph Raz: law is an authoritative institution and the point of authority is to settle what we have reason to do, not to incorporate these very reasons into its dictates.¹⁰ The identification of law must consequently be confined to

3 H. L. A. Hart, *The Concept of Law* (1961, Oxford: OUP, 3rd ed, 2012) 247. Indeed, had Dworkin read Hart closely he would have seen that Hart had consistently countenanced such a possibility. See *ibid.*, 69–70.

4 *ibid.*, 265.

5 US Constitution, 8th Amendment.

6 See, for example, Consumer Rights Act 2015, s 62.

7 Some of the most important contributions are: Philip E. Soper, ‘Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute’ (1977) 75 *Michigan Law Review* 473; David Lyons, ‘Principles, Positivism, and Legal Theory’ (1977) 87 *Yale Law Journal* 415; Jules L. Coleman, ‘Negative and Positive Positivism’ (1982) 11 *The Journal of Legal Studies* 139; Wilfrid Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press 1994); Matthew H. Kramer, *Where Law and Morality Meet* (Oxford: OUP, 2004) and Kenneth Einar Himma, *Morality and the Nature of Law* (Oxford: OUP, 2019).

8 See, in particular, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979, Oxford: OUP, 2nd ed, 2009) ch 3; Joseph Raz, *Ethics In The Public Domain: Essays In The Morality Of Law And Politics* (Oxford: Clarendon Press, 1994) ch 10; Scott Shapiro, ‘On Hart’s Way Out’ (1998) 4 *Legal Theory* 469 and Andrei Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001) ch 3.

9 Raz, *Ethics In The Public Domain* *ibid.*, 241–253.

10 *ibid.*, 210–221. See, for a related argument, Shapiro, n 8 above, 487–499.

its sources as only these are ‘capable of being described in value-neutral terms, and applied without resort to moral argument’.¹¹

In what follows I want to suggest that this debate – the debate about whether morality can function as a condition of legal validity – has obscured a more basic and fundamental truth about the nature of law: that the norms that compose a legal system’s criteria of validity have, of necessity, a formal nature. This means that substantive conditions on legality – conditions that include ‘principles of justice or substantive moral values’ – can form no part of the existence conditions for law. Recognising this helps to clarify some important aspects of the relationship between the ultimate norms of any given legal system and its constitution. It also helps to explain away much of the debate between exclusive and inclusive positivism.

I begin with the inclusive legal positivist’s permissive conception of validity and the problem for that understanding created by what Hans Kelsen called the paradox of the unconstitutional statute: that unconstitutional law is still law and hence cannot be beyond the rules of the legal system. To understand this fact, I argue, we must distinguish between the formal conditions for the existence of law, and the legal system’s regulative rules, including those that regulate the exercise of law creation in moralised terms. In the second section I consider and reject the exclusive positivist’s understanding of evaluative constraints on legality, as dependent on a flawed understanding of the functioning of moral concepts in the law. Finally, in the third section, I move to discuss some of the broader issues raised by understanding jurisprudence through the prism of the relationship between law and morality.

THE PARADOX OF THE UNCONSTITUTIONAL STATUTE

Inclusive legal positivism is often thought to get off to a better start than its competitor through a more straightforward reading of the practice of constitutional adjudication. As Wil Waluchow notes:

The American Bill of Rights, as it has been interpreted and applied over the years in adjudicating constitutional disputes, *does* seem to permit citizens to challenge legal validity on moral grounds. For example, the Due Process Clause is widely regarded as specifying a constitutional test of fairness. And it does seem that this standard of fairness serves as a norm consistency with which is among the criteria for legal validity within the American legal system – just the kind of possibility contemplated by Hart and other inclusive positivists.¹²

11 Raz, *The Authority of Law* n 8 above, 39–40.

12 Wilfrid Waluchow, ‘Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism’ in Matthew D. Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (Oxford: OUP, 2009) 124–125. Waluchow is here defending what is to my mind the most plausible and intuitive version of inclusive positivism, according to which moral considerations can circumscribe the effect of legal directives, for example by stating that what would otherwise be a valid statute is not, because it fails to abide by some standard of justice. A more expansive version of inclusivism allows that the moral worth of some putative norm might itself establish its validity, provided the legal system in question ‘recognises’ morality as a ground for law. See,

On this view, because the American constitution permits individuals to challenge statutes on moral grounds it should be understood as making morality part of its test for the existence of law. But what does it mean ‘to challenge legal validity’ and what, in particular, is the *object* of that challenge? No doubt a statute passed by Congress that is antithetical to the Due Process Clause might be brought before the courts and declared unconstitutional. But what is the nature of the act that is in the first place subject to such challenge? Is it a statute in the ordinary sense of the term – a document that creates binding legal norms – or a statute in name only, a pretence to validity marked out as such by its failure to comply with the rules of the constitution?

Questions of this kind have long concerned the courts. In *Marbury v Madison*, for example, the Supreme Court of the United States reasoned that if ‘the Constitution is ... a superior, paramount law ... then a legislative act contrary to the Constitution is not law’.¹³ To hold otherwise, it suggested, would be to render ‘written Constitutions ... absurd attempts on the part of the people to limit a power in its own nature illimitable’.¹⁴ Because the constitution is controlling – indeed, because the constitution is the ultimate law of the legal system – so any legislative act that is contrary to its requirements must count as an imitation of a genuine statute, a document with, as another court would memorably put the point, ‘no more force or validity than a piece of blank paper’.¹⁵

There are problems with this. For one the unconstitutional statute ‘is not merely blank paper’.¹⁶ Until, for example, the Supreme Court in *Roe v Wade* set aside Texas’ restrictive legislation, it was unlawful to have an abortion in that state for any other reason than threat to the life of the mother.¹⁷ And if the court had not taken the decision it did in *Brown v Board of Education*, that ‘separate but equal’ schooling was contrary to the equal protection clause, segregation would have remained not only the *de facto* situation but also a *de jure* reality in a number of states across the US.¹⁸ What explains these facts? The obvious answer is the legal effect, and hence validity, of the relevant statutory provisions prior to the court’s judgments.

It is well known that each of these cases broke new constitutional ground and so it might be thought that the reason for the effect of the relevant statutory rules lay in the fact that the doctrines under which they were found to be unlawful had not yet been articulated, as valid because *not yet* unconstitutional. But it is also true of judgments that merely follow established constitutional rules that they have the consequence of modifying or cancelling the effect of legislation that would otherwise determine the legal position of those subject

for the more expansive argument, Coleman, n 7 above and Kramer, n 7 above, chs 1–4. For the distinction between these two versions of inclusive positivism, see Kenneth Einar Himma, ‘Inclusive Legal Positivism’ in Jules L. Coleman and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: OUP, 2004).

13 *Marbury v Madison* 5 U.S. 137 (1803) 177.

14 *ibid.*, 177.

15 Earl Crawford, ‘The Legislative Status of an Unconstitutional Statute’ (1951) 49 *Michigan Law Review* 645, 646, citing *Seneca Mining Corporation v Ozmun* 82 Mich 573 (1890).

16 Crawford, *ibid.*, 646 citing *State v Corker* 67 NJL 596 (1902) 601.

17 *Roe v Wade* 410 U.S. 113 (1973).

18 *Brown v Board of Education* 347 U.S. 483 (1954).

to it.¹⁹ The difference between the obviously unconstitutional statute and the soon to be or questionably unconstitutional statute is not between the valid and the invalid, but between instruments that are *more or less likely* to be invalidated.

This, moreover, is not a local truth about American legal practice but a general one about the function of constitutional norms. The unconstitutionality of a statute, legal decision or directive is, as Kelsen made clear, not a marker of its invalidity at time of origin – an invalid law being, strictly speaking, a contradiction in terms – but of the fact that it ought to be invalidated, struck down or disapplied by a competent court.²⁰ This is revealed most clearly in legal systems where declarations of unconstitutionality are reserved for apex courts, in which case other law-applying agents – judges not tasked with maintaining the commitments of the constitution – are unable to disapply constitutionally offensive norms before they find their fate at the hands of anointed constitutional courts. But it is also revealed in every legal system that engages in the practice of judicial review by virtue of the fact that the unlawful but unchallenged act has, unless and until struck down, the legal effect claimed for itself.²¹ If no challenge is brought, or if the courts mistakenly rule the relevant provision to be constitutional, then the norm in question retains its place in the legal landscape and determines the normative position of those subject to it. The mistake involved in the blank paper theory comes from thinking that an unconstitutional statute is a statute that is missing an ingredient – its force or legal effect – when in reality it is a statute that has an additional property: that it ought to be invalidated ‘according to a special procedure’, namely being declared unlawful by the courts.²²

All of this puts the inclusive positivist on the back foot. For they want to suggest that the limiting provisions of constitutions might count amongst the ultimate rules of legal systems, that, for example, the ‘Due Process Clause [specifies] a constitutional test of fairness ... which is among the criteria for legal validity within the American legal system’.²³ But if the unconstitutional statute is valid unless and until set aside there must exist a prior rule that accords such

19 A useful example of this fact is the series of ‘heartbeat laws’ passed by a number of states in the lead up to *Dobbs v Jackson Women’s Health Organization* 597 U.S. 215 (2022) (*Dobbs*). These statutes prohibit abortion after the point of foetal heartbeat detection and were designed, by virtue of their obvious unconstitutionality, to force a challenge to *Roe v Wade*. Each of these statutes had, following *Roe v Wade*, either been overturned or had its effect temporarily blocked. Following *Dobbs* many of these statutes are now law.

20 Hans Kelsen, *Pure Theory of Law* (1960, Berkeley, CA: University of California Press, Max Knight tr, 1967) 271. For discussion of the notion of validity as the ‘mode of existence’ of legal norms, see *ibid*, 10.

21 Lawyers and judges sometimes describe situations such as this as involving a ‘presumption of validity’ in favour of unconstitutional but not-yet-definitively-declared-as-such legislation. But this is just another way of saying that the relevant legislation is binding (and hence valid) unless and until set aside.

22 Kelsen, n 20 above, 271. This point is often obscured by the language of the courts, prone as they are to suggesting that unconstitutional acts or decisions are ‘null’ or ‘void ab initio’. In their next breath, however, the very same institutions move to invalidate or strike down such laws. But a legal norm cannot both be invalid and at the same time subject to the process of invalidation. As Kelsen suggests, for a legal system to authorise ‘the annulment of a norm it must first recognize this norm as [a] valid ... legal norm’. See *ibid*, 268, 278.

23 Waluchow, n 12 above, 124.

a directive its initial, albeit defeasible, authority: that which specifies the conditions in accordance with which the legislation was created in the first place. This being so, the notion that constitutional constraints might form part of the *ultimate* criteria of validity looks to trade on a mistake.²⁴

Indeed, the issue is not just about the ultimacy of such norms, for rules of this kind do not function as criteria of validity. A validity condition is a condition on the existence of a norm, for example that a statute is validly created if it passes through both legislative chambers and is signed into law by the president. Such a norm constitutes the authority of the legislature by specifying the conditions under which it is able to make law. Constitutional limits, by way of contrast, do not function as conditions on the existence of legal norms – an unconstitutional statute is as much a statute as a constitutional statute. Instead, such rules require the courts to render ineffective legal norms that run contrary to their requirements: to invalidate, strike down or refuse to enforce. Such provisions impose duties upon judges. They do not establish the powers of legislatures.²⁵

It might be suggested that the contrast between power and duty drawn in the previous paragraph is a superficial one. The fact of legislative power, after all, depends upon a judicial duty to apply the norms issuing from the exercise of such power. The legislature has authority because the judge is duty-bound to apply the statutes that it passes.²⁶ So in reality we have two duties – the duty on the courts to apply duly enacted legislation and their duty not to apply constitutionally repugnant statutes – or, it might be argued, two different aspects of a single duty – the duty to apply *only* those rules that are consistent with the basic requirements of the system, constitutional or otherwise.

24 For a similar argument which ultimately sides with exclusive legal positivism, see Michael Giudice, 'Existence and Justification Conditions of Law' (2003) 16 *Canadian Journal of Law & Jurisprudence* 23. See also Matthew D. Adler and Michael C. Dorf, 'Constitutional Existence Conditions and Judicial Review' (2003) 89 *Virginia Law Review* 1105.

25 Could it not be argued that constitutional limits function as validity conditions, albeit of a different kind from formal criteria of validity? This would be a mistake. For one, as Kelsen reminds us, validity is the mode of existence of legal norms, and a legislative rule exists if it passes the requisite formal processes. Second, compliance with constitutional rights is not a condition of the validity of relevant statutory norms; such norms will continue to apply unless invalidated by the courts. Finally, in much the same way that death presupposes life, a procedure for the invalidation of a statute presupposes its validity. For a statute to be invalidated it must in the first place have been valid. For the argument that constitutional limits form a distinct kind of validity condition see Waluchow, n 12 above, 137–142.

26 In this analysis I depart from Hart's suggestion that we must distinguish recognition rules from a legal system's rules of change, the rules that enable the modification of law. In the case of law-making authorities these are, in reality, two different ways of looking at the same thing: the judicial duty to apply acts passed by the legislature is equivalent to the legislative power to change the law and vice versa. Jeremy Waldron has argued that facts of this kind establish that the rule of recognition is nothing more than an epiphenomenon of a legal system's rule of change. But the point might equally be made in reverse. The more interesting case concerns static as opposed to dynamic sources of law. If the legal system treats, for example, the Talmudic scriptures as a source of law then this would involve recognition, but without encoding any capacity to change the law. For Waldron's argument, see Jeremy Waldron, 'Who Needs Rules of Recognition?' in Adler and Himma (eds), n 12 above. For Hart's original analysis, see Hart, n 3 above, 95–96 and for a defence of his view, see John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: OUP, 2012) 103–106.

This analysis should be rejected. For one, as we have already noted, in many legal systems the duty to strike down unconstitutional norms rests only on apex courts, whereas the duty to apply valid law impinges upon all. Such a possibility depends on our ability to distinguish between two duties: the duty to uphold valid legislation and the duty to invalidate unconstitutional law. More importantly, however, it is only by falling under the auspices of an initial validity-conferring rule that a norm comes to be subject to the regulative constraints imposed by the constitution. This explains why a directive issued by the legislature is an appropriate candidate for assessment in terms of the protections afforded by the constitution but, to use Kelsen's memorable example, 'a "statute" issued by 'a patient in an insane asylum' is not.²⁷ So too, while Congress may act contrary to the First Amendment, I may not however much I interfere with your speech. We are only able to draw these distinctions, however, if we accept that there are two sets of rules in play: those conferring validity on the acts of the legislature, and the constitutional provisions on the basis of which the courts are entitled to rule on their ongoing effect. Moreover, because we would want to draw such a distinction in any legal order, we must accept that such an analysis applies to every legal order.

What, then, is the nature of validity conferring rules? Such norms specify the conditions in accordance with which valid rules are created, for example that whatever Parliament enacts is law or that a bill that passes through both houses of Congress and is signed into law by the President is binding. Doubtless there can be questions about whether a particular act *is* a legislative act and sometimes the courts may be called on to settle such matters.²⁸ However, in the clear case of failure to abide by the rules that establish such authority – the asylum 'statute' or the parliamentary bill that never makes it to the final reading – there is nothing for the courts to respond to.²⁹ By way of contrast even the most flagrantly unconstitutional act – that contrary to a long established right, for example – requires the courts to step in to cancel its effect. This is so because it has been created in accordance with the legal system's existing criteria of validity. This marks an important distinction between rules that constitute legal authority and rules that regulate such authority. For although it is true that the legislature only has the power it does as a result of the general practice of the courts – their practice of recognising the legislature's law-making authority – no particular judicial decision is required to render its legislation valid. By way of contrast an authoritative judicial determination is always necessary for an unconstitutional statute to be also an invalid statute.

One response to this line of thought is to suggest that it gains its plausibility through focus on statutory as opposed to other forms of law-making authority. For while legislative assemblies often have their powers specified in general terms, administrative authorities and courts are most commonly conferred limited powers for limited purposes. If a government agency is bestowed power to

27 Kelsen, n 20 above, 278.

28 See, for discussion, Waluchow, n 12 above, 139. For an argument that such disagreements will be rare in stable legal systems see Bill Watson, 'Explaining Legal Agreement' (2023) 14 *Jurisprudence* 221, 233–234, 240–241.

29 Kelsen, n 20 above, 278.

determine issues relating to the purity of waterways then, it might be suggested, it only has the legal authority to regulate such matters. And if a judge is bound by the decision of a superior court then they must comply with this decision in order for their own to count as binding. These limitations, it could be argued, involve substantive and not merely formal conditions on validity. But an administrative act in excess of jurisdiction is, like any other unlawful administrative act, one that requires the courts to invalidate it.³⁰ So too a decision contrary to a binding precedent remains a valid judicial decision, albeit one that ought to be overturned by a competent court. In each case the validity of the decision depends upon the formal conditions that establish the relevant authority – as the administrative agency identified in the relevant statute or as the court capable of issuing binding decisions – but not on it acting within the scope of its substantive authority.

Why, then, as a conceptual matter, can't validity conferring rules include, alongside formal requirements, substantive conditions, for example by stipulating that only those rules passed by a legislative assembly that achieve a minimum standard of justice are law? The answer has to do with the fundamental conditions on the existence of norms. The most basic insight of positivism is that legal rules are the result of human agency, that law comes into existence through acts of willing, relying upon or invoking norms.³¹ Now, of course, not every act of will is sufficient for the creation of law and so the most fundamental rules of the legal system – its criteria of validity – are there to determine which such acts count as authoritative law-making acts. The question of whether this is a statute enacted by the legislative assembly or whether this is a decision handed down by the relevant regulatory body is precisely a question about whose will is to matter. By way of contrast questions about the justice of such measures are questions of a different kind; not about whether there has been an authoritative law-making act but about the justifiability of any such act. The first has as its truth maker facts about human agency, whereas the second does not. This is why considerations concerning whether the bill was duly passed can count amongst the truth conditions of legal propositions, but considerations about its justice or injustice cannot.

In turn, just as legal norms only come into existence as a result of human agency, so they only cease to apply through operation of the same. Unlike persons, the birth and death of legal norms occurs by operation of the same processes. As a result, where substantive constraints are used to condition the effect

30 See, for further discussion of this and related issues, Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76 *The Cambridge Law Journal* 289.

31 Positivism, of course, means many things to many people. Nonetheless, a consistent thread running through thinkers as diverse as Hobbes, Bentham, Austin, Kelsen, Hart and Raz is the notion that law is at base a matter of action and artifice. Their dispute is about the kind of act the law is constituted by (the command of the sovereign, the issuance of an authority whose directive features in a chain of validity that refers back to the historically first constitution, the validity of which is presupposed, or to a rule of recognition that is the practice of the legal system's law applying officials). The common denominator is the idea that a norm is a legal norm only because created by some agent. Leslie Green makes the point: 'Anything is there in the law because some person or group put it there ... Legal philosophers often use an antique term to cover things set by intervention like that: they say they are 'posited'. Someone who thinks all law is posited is a legal positivist'. See Leslie Green, 'Introduction' in Hart, n 3 above, xix.

of rules created by law-making institutions, such norms depend, for their effect, on the applicative decision-making of the courts; overturning, invalidating or otherwise modifying the relevant norms. It is these authoritative acts that transform the law's injunctions against, say, unjust legislation, into concrete consequences for the validity or invalidity of particular acts. For these reasons a legal system that claims to make justice a condition of validity must instead be understood as one that makes injustice a condition of a judicial decision resulting in invalidity.

While inclusive positivism's mistake came from its attempt to collapse substantive constraints on legality down into the legal system's criteria for validity, Kelsen ultimately erred in the other direction. Having shown that directives contrary to the prohibitive aspects of the constitution have, until cancelled, the legal effect claimed for themselves, he went on to suggest that the constitution itself must count as the source of their validity: 'So-called unconstitutional statutes are constitutional statutes which, however, may be rescinded in a special procedure. In these cases [p]rovisions of the constitution regulating legislation have [an] alternative character. The legislative organ has the choice between two paths: the one prescribed explicitly by the constitution and the one [embarked upon] by the legislative organ itself.'³²

That a statute should be invalidated by the courts if it is passed via the latter route led Kelsen to conclude that the constitution, 'whilst unable to exclude the second path, prefers the first'.³³ But this is too revisionist. It is not that the US Constitution, for example, *prefers* legislation that accords with its rights-based requirements. An unconstitutional statute is what it says it is: a statute *contrary* to the requirements of the constitution. True, if what I have been suggesting is correct, constitutions cannot exclude the possibility of unlawful but valid legislation, but this is not the same as saying that the constitution is the *reason* for its validity.³⁴

Indeed, it is a point missed by many that the constitution itself, as valid law, must have authority based on the legal system's criteria of validity. As John Gardner memorably put the point, 'even the constitution needs to be constituted somehow'.³⁵ In some systems this is achieved, initially at least, through a formal process of ratification or amendment, with the rule of recognition directing judges to uphold any norm that results from such a process.³⁶ In

32 Kelsen, n 20 above, 274.

33 *ibid*, 274.

34 Kelsen's mistake followed from his insistence that legal authority must always be self-validating, that all law must draw its authority from further law and hence ultimately, as the highest form of legal authority, from the constitution. This way of thinking not only required him to postulate a device preventing his slide into infinite regress – the constitution was valid, Kelsen suggested, not because of some further legal rule, but because of a hypothetical basic norm the presupposition of which was a 'condition of legal thought' – but also to overplay the role of constitutional law in the legal order. The constitution governs the exercise of legal authority, but that authority must itself be constituted by a prior set of rules not subject to the requirements of the constitution: the system's ultimate criteria of validity. See *ibid*, 202.

35 Gardner, n 26 above, 107.

36 I say at least initially because over time judicial interpretation of the constitution will layer over the top of norms created through formal processes distinctive meanings and understandings that were not themselves a part of the day-one constitution.

others the result is achieved less formally, through acceptance by the judiciary of certain norms as customary norms of the constitution. In the latter case the gap between the requirements of the legal constitution – as judicially enforced norms designed to control the exercise of political power – and those of the rule of recognition – as judicially accepted norms requiring that judges obey, amongst other norms, the norms of the constitution – might seem dizzyingly slight, but it is a logical feature of their practices nonetheless.³⁷

Does this argument, by placing the ultimate criteria of validity above the constitution, not stand in opposition to our understanding of constitutional law as controlling and, in some sense at least, composing the most fundamental rules of the legal system? It does not. For one, that the constitution requires the courts to overturn a statute passed in contravention of its requirements certainly involves the constitution controlling that statute.³⁸ Second, we can still hold that the constitution retains its status as *fundamental law*. True on this picture the ultimate criteria of validity sit behind its provisions and are in a sense prior to it, but as Hart himself was at pains to point out we should not be so quick to describe such rules as legal rules. Validity is the property of norms that form part of a legal system – that this administrative proclamation is valid, or that statute – whereas the rule of recognition marks the most fundamental conditions for membership of the system.³⁹ Because this rule forms the basis, directly or indirectly, of our assessment of a norm as a norm of the legal system, it is not itself an appropriate candidate for the question ‘is this a legal rule?’. In this way it is precisely because the constitution does not form part of the ultimate criteria of validity that we are able to hold that it retains its status as ultimate law.

It is worth recognising how the distinction between the formal conditions that compose a legal system’s criteria of validity and the regulatory provisions of its constitution helps to explain the existence of a perennial question about constitutional law in the United Kingdom: does the UK actually have a constitution? No doubt it has a number of bodies – Parliament, courts and the executive – vested with inherent or original powers but does it have a legal constitution? Students commonly respond to this challenge by noting that while the UK does not have a single canonical document labelled ‘The Constitution’ there exist a number of sources – including seminal judicial decisions such as the *Case of Proclamations* and enactments such as the Human Rights Act – which together form the patchwork of its constitution. But perhaps the real

37 On which see Gardner, n 26 above, 107–109. But cf Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 *The Yale Law Journal* 823, 852–853 for the argument that judicial customs cannot be valid under the rule of recognition because the rule of recognition is itself a judicial custom.

38 So the *Marbury v Madison* duality turns out to be a false one. It is not that either the constitution is controlling or that legislation contrary to the constitution is not law: legislation contrary to the constitution is law, but law that is controlled by the constitution.

39 Hart, n 3 above, 108–109. How is it that the legal system’s ultimate criteria of validity are themselves established? They have their status, Hart argued, because accepted by law-applying institutions as ‘critical reflective’ standards for their behaviour. Such norms are rarely ‘expressly formulated’ but rather ‘shown in the way in which particular [legal] rules are identified’ in the judgments of the courts. See *ibid*, 55–57 and 100–103.

complaint is not that the UK does not have an overarching codified constitution so much as that the emphasis placed on political accountability and the legally untrammelled power of Parliament, established through the doctrine of parliamentary sovereignty, stands in opposition to the regulative ideals we associate with constitutionalism.

The argument might be put like this: the rule of recognition in the United Kingdom confers power on Parliament to legislate. In turn the doctrine of sovereignty protects the enactments of this body from encroachment either a) by prior iterations of Parliament (in the case of conflict the later statute takes precedence) or b) from rules created by other institutions; no other body can, of its own volition, overturn an Act of Parliament.⁴⁰ And so the claim would be that the UK does not have, because the doctrine of sovereignty means that it cannot have, legal rules that regulate the exercise of this law-making power. No doubt non-legal rules and conventions might affect the exercise of legislative authority, but this is a reason for holding that the UK has a political as opposed to legal constitution.

The argument oversimplifies the picture in a number of respects. For one, that legislation cannot be used to limit the sovereignty of Parliament does not mean that it cannot be used to regulate other institutions with inherent authority, for example the executive in its use of prerogative powers, or the courts in their exercise of common law powers. The rules that establish these possibilities form a central part of the UK's constitutional architecture.⁴¹ Moreover, that legislation cannot be used to detract from the sovereignty of future Parliaments does not mean that it cannot be used to control the exercise of their powers in ways that fall short of this standard. This, for example, is the constitutional role of the Human Rights Act, a statute which requires the courts to interpret legislation consistently with the European Convention on Human Rights, and if unable to do so to issue a non-binding 'declaration of incompatibility' as between the constitutionally offensive legislation and the relevant right or rights.⁴² All of this is compatible with the orthodox understanding of sovereignty: Parliament retains the capacity to make any law it chooses, including law that repeals the Human Rights Act. Finally, and perhaps most importantly, the resolution of ambiguities concerning how Parliament's power manifests itself implies the necessity of substantive constitutional constraints. That under the UK's constitutional framework Parliament retains its sovereignty across time means that legislative acts designed to bind future Parliaments cannot be given effect to by the courts.⁴³ To hold otherwise would be to deprive Parliament of its ongoing capacity to make law. Parliament's diachronic sovereignty implies a limit on its

40 In Dicey's canonical formulation: 'The principle of Parliamentary sovereignty means ... that Parliament has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.' A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co. Ltd, 10th ed, 1959) 39–40.

41 See, for example, *Attorney General v De Keyser's Royal Hotel* (1920) AC 508.

42 See Human Rights Act 1998, ss 3–4.

43 The classic example is *Ellen Street Estates v Minister of Health* [1934] 1 KB 590.

momentary authority and this forms one of the most important regulative rules of the UK's constitution.⁴⁴

Reflections of this kind show that no system of law can in the end be without a legal constitution, however minimal, because any coherent specification of constitutive power necessarily implies the existence of rules that regulate the exercise of that power one way or another. So whilst the presence of such norms is more obvious in systems like the US where political and civil rights imply wide-ranging regulative powers on the part of the courts, they form a part of all legal systems by virtue of their need to rationalise the exercise of their most basic powers.

Gardner put the distinction between the norms that form part of a legal system's rule of recognition and those that compose its constitution as the difference between rules that give rise to original or inherent powers and rules that regulate such powers.⁴⁵ The above argument explains this difference. A system's rule of recognition should be thought of as giving rise to inherent powers because it places the courts under a duty to recognise as authoritative rules that result from certain formal processes, for example being passed or accepted by appropriately constituted bodies, whereas its constitution controls the exercise of these powers. In this way, whether or not Dworkin was right in his description of Hart's own theory, he was right in his understanding of the criteria of validity: as norms that identify rules as rules of law not in light of 'their content' but by virtue of 'their *pedigree* or the manner in which they were adopted or developed'.⁴⁶

Attentive readers will no doubt be aware of symmetries between the argument that I have been developing and the 'sources thesis' of exclusive positivism: that the criteria for the existence of law depend upon its sources, and not its merits.⁴⁷ Am I not suggesting that the validity of law is to be determined on the basis of its formal qualities – from it having a source, in other words – to the exclusion of substantive constraints on legality? In this way have we not arrived (perhaps via a more tortuous route) at the exclusive positivist position that morality cannot function as a condition of validity? In the next section I will try to explain why the soundness of the above argument depends on rejecting much of what exclusive legal positivists have to say about law.

SOURCES, DIRECTED POWERS AND THE LAW AS CODE

According to the sources thesis of exclusive positivism, moral considerations can feature neither as conditions on the validity of law – there can be no moral tests

44 So too if Parliament had instead been attributed with what Hart called 'self-embracing' sovereignty – whereby its authority manifested synchronically in the capacity to bind its successors – then this would imply the existence of a different set of constitutional norms, namely those by virtue of which it had bound its future self. For this distinction see Hart, n 3 above, 147–150.

45 Gardner, n 26 above, 103–105.

46 Dworkin, n 1 above, 17.

47 Raz, *The Authority of Law* n 8 above, ch 3 and Raz, *Ethics In The Public Domain* n 8 above, ch 10.

for the existence of legal norms – nor as factors relevant to its interpretation and understanding. Raz suggests: ‘A jurisprudential theory is acceptable ... only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument.’⁴⁸

So exclusive positivism stands both against the inclusivist claim that ‘the ultimate criteria of legal validity might explicitly incorporate ... principles of justice or substantive moral values’ and also against the more general idea that moral reasoning is relevant to determining the content of the law.⁴⁹ I want to focus first on the aspect of the theory having to do with the criteria of validity and later on that having to do with the law’s meaning and interpretation.

What, then, are we to make of the exclusivist conception of validity? How should we respond to its injunction that moral conditions *in particular* be excluded from the criteria of validity? The difficulty with this is that it involves us drawing a distinction that is inconsistent with legal practice. For while it is certainly true that the law is capable of regulating itself in moralised terms – for example, through prohibition on cruel and unusual punishments – much more of the day to day of law’s self-regulation does not fit this picture. The law in many jurisdictions controls irrational or unreasonable exercises of power, for example; evaluative constraints on legality but not necessarily morally evaluative constraints.⁵⁰ So too the central task of many constitutions is less the appraisal of power in evaluative terms and more the allocation of authority between institutions: the Tenth Amendment to the US Constitution, for example, bestows all powers that are neither explicitly denied to the states nor allocated to the federal government on the states (‘states’ rights’). The Treaty of the European Union confers competence on EU institutions to legislate on a specific range of subjects: the Union’s exclusive competences, concerning its customs union and competition rules, and those shared with member states, such as the environment and transport.⁵¹ According to the exclusive positivist such non-moral constraints on legality should be understood differently from their moral counterparts. Where the former can, the latter cannot function as part of the criteria of validity. However, legal practice marks no distinction between regulative rules of these two kinds. A constitutional rule designed to prevent federal as opposed to state institutions from extracting certain kinds of personal taxation, for example, functions in much the same way as one prohibiting the imposition of cruel punishments. Neither operates as a condition of legal validity, but both require the courts to invalidate legislation contrary to their requirements.

The sources thesis engenders, then, a conceptual problem, for our social practices do not distinguish between kinds of regulative standards in the way that it does. But it also engenders a definitional problem: namely how to distinguish

48 Raz, *The Authority of Law* *ibid.*, 39–40. For endorsement of the sources thesis see Gardner, n 26 above, 22; Leslie Green, *The Germ of Justice: Essays in General Jurisprudence* (Oxford: OUP, 2023) 2 and Marmor, n 8 above, 49.

49 Hart, n 3 above, 247.

50 The locus classicus is *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

51 See Treaty on the Functioning of the European Union, Arts 3–4.

the merely evaluative from the morally evaluative? For if we are to say that moral considerations in particular are excluded from the criteria of legal validity we need to know what counts as such a consideration as opposed to any other. Justice and fairness are moral standards, but what of propriety or good faith? This problem is compounded by the fact that what might at first appear to be moral concepts at work in the law can turn out to be legal approximations or even perversions of such standards. As any good lawyer knows, what the law considers to be fair or just may differ substantially from what really is fair or just.⁵²

Perhaps in awareness of these difficulties Raz came, in later work, to define the sources thesis more expansively, as precluding resort to *evaluative* considerations, not merely morally evaluative considerations, in the identification of law. 'A law is source-based' on this conception 'if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument'.⁵³ One question is whether such an interpretation still excludes from its reach purely allocative norms – such as those that grant competences to certain institutions – but perhaps there is a sense in which all substantive legal limitations involve evaluative determinations, namely the evaluation of the target law in light of the relevant standard ('is this a decision within competence?'). This issue aside, however, the bigger problem is that it is less than clear that the reformulated sources thesis can play the theoretical role intended for it, as a contribution to our understanding of the relationship between law and morality. As Leslie Green notes: '[t]he question of whether the criteria [for law] can include moral principles is not the same as the question of whether these criteria are matters of pedigree. There are two possible contrasts with "pedigree". There is a contrast with *substance* and a different contrast with *morality*.'⁵⁴

The sources thesis is meant to mark out a distinctive aspect of law's relationship with the latter. On the narrower reading – that which contrasts source-based reasoning with moral evaluation – it does, but at the cost of distinguishing between norms in a way that is foreign to the law.⁵⁵ On the wider reading – that contrasting source based law with evaluative judgement generally – the

52 On which see Green, n 31 above, xli. Green takes considerations of this kind to tell against inclusive legal positivism, by revealing what might appear to be moral conditions on legality in fact to be otherwise. But the point might be thought equally to count against exclusive positivism by revealing the lack of precision around the central distinction on which it relies.

53 Raz, *Ethics In The Public Domain* n 8 above, 211.

54 Green, n 31 above, xxxix. Green's aim in making this distinction was to suggest that Hart, in following Dworkin's use of the language of pedigree to describe possible permutations of the criteria of validity, had introduced a confusion into the debate. Believing that 'the pedigree metaphor is ... likely to mislead', Green suggests we should 'dispense with it in favour of a distinction between matters of social fact and matters requiring moral judgement'. For the reasons set out above I believe we should aim for the opposite: dispensing with the contrast between social fact and moral judgement in favour of a distinction between form and substance. See *ibid*, xl-xli.

55 A point implicitly recognised by Shapiro who, as part of his most recent defence of exclusive legal positivism, suggests that the defining issue is not so much whether law can incorporate moral concepts – in contrast with Raz, he recognises it can – but whether rules should be classified as legal rules based solely on their social pedigree. See Scott Shapiro, *Legality* (Cambridge, MA: Belknap Press of Harvard University Press, 2011) 271–272. But see Shapiro, n 8 above, 499–502 for Shapiro's earlier defence of the orthodox position.

thesis loses contact with the debate it is supposed to play a part in, folding the question about the functioning of moral standards in the law into the broader question concerning the nature of substantive constraints on legality.⁵⁶ By way of contrast, recognising that validity is a formal property allows us to understand why evaluative criteria cannot function as existence conditions for law. Moreover, the explanation of this follows not from some specific fact about the relationship between law and morality but from some general fact about the role of agency in the creation of law. The question of whether there has been a good decision or an efficient decision is different from whether there has been a decision, and it is the latter that matters for the existence of legal norms.

The preceding issues have to do with the scope of the sources thesis. Equally important, however, is the question of how exclusive positivism treats rules the meaning and application of which can only be determined based on moral reasoning. Such norms are, after all, a common part of legal practice. Not only is it true that constitutions bestow on individuals rights that are enumerated straightforwardly in moral terms – consider in this regard the prohibition on cruel and unusual punishment – but the content of the law in many other areas follows a similar pattern. The law may require, for example, that individuals be released from their contracts if they contain unfair terms. It may insist that no person maliciously wound others, or that individuals be unable to profit from their own wrongs. And while, as we have just noticed, it is possible that such concepts may find their use in the law as terms of art bearing only family resemblance to their moral counterparts, it is equally possible that they bear their ordinary moral meaning. How does exclusive positivism suggest we understand them when they do? According to the sources thesis, norms that cannot be ‘applied without resort to moral argument’ do not themselves contribute to the content of the law. Such rules instead generate ‘gaps’ in the law, gaps to be filled out by exercise of judicial discretion.⁵⁷ More concretely, where the law might appear to impose moral requirements, it must be seen instead as having encoded judicial authority to make law – a ‘directed power’, as Raz calls it – in a way that replicates these moral demands.⁵⁸ A law requiring that consumers be released from the unfair terms in their contracts, for example, must be understood as

56 Raz has suggested that the broader version of the sources thesis retains its connection with the question of moral judgement because even evaluative questions which might appear at first blush not to involve matters of moral import may turn out to do so. He cites the example of a ‘duty to [increase] social benefits in line with inflation’. Whilst it might appear that this matter ‘can be calculated without resort to any moral reasoning’, Raz suggests, this would be ‘a mistake’: ‘The question of what is the best measure of inflation is more than a purely factual question. It may well involve moral judgment. (In Britain after the 1979 election the government introduced a new index which reflected the change in the combined level of prices plus taxes as a truer measure of inflation than the ordinary cost-of-living index.)’ This way of thinking confuses two issues. The question of what counts as a measure of inflation is not itself a moral question although choice between one or another measure is a decision which may well have important moral consequences. If the sources thesis is meant to exclude from the remit of law-identifying considerations any matter of interpretation which has moral consequences, however, then this leaves us with little if anything in the category of authoritative legal source. See Raz, *Ethics in the Public Domain* n 8 above, 243–244.

57 Raz, *Authority of Law* n 8 above, 39–40, and 75.

58 Raz, *Ethics in the Public Domain* n 8 above, 241–250. Notice that my earlier argument against inclusive legal positivism was directed at their characterisation of substantive constitutional

one that grants the courts discretion to make law which would then have the effect of so releasing them.⁵⁹ Before the courts move to exercise this option, however, the law provides the consumer with no such right. The implications of this revisionist picture of legal practice will concern us later, but first it is worth saying something about its motivation.

There are, of course, several well-known substantive arguments for exclusive legal positivism: Raz's claim about the conceptual conditions necessary for law to have authority⁶⁰ and Shapiro's related argument concerning the guidance function of legal rules.⁶¹ However, much of the allure of exclusive legal positivism comes less from the endorsement of these particular claims and more from a background belief that in the end only it validates the core tenets of positivism: that law is a social construct, and that the 'is' of legality ought never to be confused with the 'ought' of morality.⁶² To understand the force of this reasoning we should return to the origins of the debate between inclusive and exclusive legal positivism.

Dworkin's first criticisms of positivism were understood by many to require only minor modification of the picture under attack: while Hart had provided a description of law as a system of rules, Dworkin urged on us an understanding of law as both a system of rules *and* principles. Where rules functioned in legal reasoning in an 'all-or-nothing' fashion – with behaviour either falling under the remit of a particular rule or not – principles, Dworkin suggested, had a 'dimension of weight or importance' meaning that their force and application would vary depending on the context.⁶³ On this understanding Dworkin had provided us with a richer picture of the phenomenology of adjudication but had not challenged the fundamental features of the positivist picture of law. Principles could be admitted to that understanding alongside rules, both on the basis of their acceptance by the courts.⁶⁴ Whether or not this was the intention of Dworkin's original argument – and the evidence here is mixed – he soon made clear that his real target was a different one. The point, Dworkin argued, was not so much about the *function* of principles in law but about their ontological basis. Principles (and, indeed, legal standards

constraints – as validity conditions – but not against the idea of such norms as genuine legal norms. After all, these rules impose legal duties on judges to invalidate law contrary to their requirements.

59 See Raz, *Authority of Law* n 8 above, 75 for discussion of a similar example.

60 That law aims to settle the question of what we have most reason to do, and so cannot itself incorporate into its prescriptions those reasons. See Raz, *Ethics in the Public Domain* n 8 above, 210–221.

61 That rules make a practical difference to the decision-making of those who accept them, and moral standards make no such difference. See Shapiro, n 8 above, 487–499.

62 See for example Raz, *Authority of Law* n 8 above, ch 3 for the argument that only the sources thesis, here described as 'the strong social thesis', represents the true nature of legal positivism. See also Liam B. Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge: CUP, 2014) 42–44.

63 Dworkin, n 1 above 24, 26.

64 See, for example, Rolf Sartorius, 'Social Policy and Judicial Legislation' (1971) 8 *American Philosophical Quarterly* 151, 153–156 and Hart, n 3 above, 263–265. Although cf Mitchell N. Berman, 'Principled Positivism' (unpublished manuscript) for the argument that Dworkin's criticism requires a more wholesale revision of the positivist picture of law in order to accommodate legal principles.

more generally) were part of the law, he suggested, not because of some act of endorsement but because they helped to *justify* legal practice. They were law not as a result of deed or event, but because of their independent moral force.⁶⁵

Inclusive legal positivism began life as a response to the phenomenological aspect of Dworkin's argument but ended up endorsing in addition its ontological element. The resulting picture was one on which morality could become part of the law, but only if 'incorporated' through the practice of judicial recognition:

A distinguishing feature of inclusive positivism is its claim that standards of political morality, that is, the morality we use to evaluate justify, and criticize social institutions and their activities and products, e.g. laws, can and do in various ways figure in attempts to determine the existence, content, and meaning of valid laws. Political morality, on this theory, is included within the possible ground for establishing the existence and content of valid, positive laws, that is, laws enacted and developed by human beings in legislatures, courts of law or customary practice.⁶⁶

The emerging problem is this: positivism is committed to a picture of law as a social construct and, indeed, a social construct that is to a remarkable degree subject to the vicissitudes of human agency. Through authoritative expression of will the law can be created or changed because the law is, in the end, nothing more than the authoritative expression of will. But none of this is true of morality. Realist theories reject in full the idea that morality is a social construct – it is a set of standards that bear on our actions, not something fashioned from them – and even those tempted by subjectivist or constructivist pictures of the moral domain deny that agential control over morality is anything like agential control over law. Much of the law can be changed in a moment, through a single authoritative act, but we cannot in the same way change our morality.⁶⁷

What has gone wrong here? In attempting to make clear that the law can adopt moral standards – an obvious and important truth, and one that underpins the phenomenological aspect of Dworkin's attack – the inclusive positivist ended up suggesting that law might, in some sense, incorporate morality, that 'legality and morality [be] brought together, the one being a condition of the other'.⁶⁸ There is important space, however, between the idea that the law incorporates moral concepts and the notion that law incorporates morality. Consider:

65 cf Dworkin, n 1 above, 76: 'My point [is] not that "the law" contains a fixed number of standards, some of which are rules and others principles. Indeed, I want to oppose the idea that "the law" is a fixed set of standards of any sort', see for explanation Scott Shapiro, 'The Hart/Dworkin Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge: CUP, 2007) 30–31.

66 Waluchow, n 7 above, 2–3.

67 I owe this argument to Leslie Green. As Green puts the point, morality cannot be part of the law because law is (and morality is not) subject to a legal system's rules of change. See Leslie Green and Thomas Adams, 'Legal Positivism' (Stanford Encyclopedia of Philosophy, 3 January 2003, substantive revision 17 December 2019) at <https://plato.stanford.edu/entries/legal-positivism/> [<https://perma.cc/H7NV-RHMX>].

68 Wilfrid Waluchow, 'Legal Positivism, Inclusive Versus Exclusive' (Routledge Encyclopedia of Philosophy, 2001) at <https://www.rep.routledge.com/articles/thematic/legal-positivism-inclusive-versus-exclusive/> [<https://perma.cc/5QK6-T85B>]. See Coleman, n 7 above, 155–163 for an earlier articulation of this view.

all natural languages we are familiar with contain a wealth of moral concepts. Does this imply that language in some sense joins with morality or that people who use such concepts thereby ‘incorporate’ morality into their speech? I think that the answer to both of these questions is no and not – as will become important imminently – because their inverse is true; natural languages do not ‘exclude’ morality either. Languages contain moral concepts, but they do not for this reason *contain morality*. And that which is true of language is equally true of law. The law’s use of moral concepts – unfair terms in consumer contracts, cruel and unusual punishments – no more means that it ‘incorporates’ morality into its dictates than its use of mathematical or logical concepts mean that mathematics or logic become part of the law. We need to distinguish between employment of the term ‘unfair’ in some doctrine or constitutional provision and the reasons that make contractual terms of certain kinds unfair. The law’s use of moral language will standardly make considerations of the latter kind relevant to determining what it requires, but this is not the same as the idea that morality is itself a part of the law. Dworkin wanted to erase this important distinction and, indeed, his career’s work might be thought of as a series of steps on the way to the yet more radical conclusion that law was in some sense a part of morality.⁶⁹ Inclusive legal positivism followed him on the first of these steps and in doing so brought a conceptual confusion into the heart of its own thinking about law and morality.

What does this tell us about exclusive legal positivism? We can think of the situation as one involving a pendulum having swung too far in one direction and then in the other. In wanting to deny (rightly) that morality itself might become part of the law, the exclusive legal positivist went on to deny the premise underlying Dworkin’s phenomenological claim: no norm could be a legal norm unless both its content and existence could be determined ‘without resort to moral argument’.⁷⁰ And whilst the existential part of this claim might be thought of as central to positivism – no rule is a legal rule because it should be a legal rule and no rule is a legal rule because it would be a good legal rule – the notion that the law’s content must be determined without resort to moral argument results in incoherence in situations where the law itself employs moral concepts. When the law instructs judges not to enforce unfair contracts, or demands that they treat cruel punishments as unconstitutional, it *requires* them to engage in moral reasoning.

Gardner says that the exclusive legal positivist treats the use of moral language in the law as ‘a lawyers’ code’:

69 Here is Dworkin’s final position on the relationship between law and morality: ‘We have now scrapped the old picture that counts law and morality as two separate systems and then seeks or denies, fruitlessly, interconnections between them. We have replaced this with a one-system picture: we now treat law as a part of political morality’, see Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press of Harvard University Press 2011) 405–407. For discussion of the evolution in Dworkin’s thought, see Jeremy Waldron, ‘Jurisprudence For Hedgehogs’ at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309 [<https://perma.cc/UBK3-4SSV>], although cf Nicos Stavropoulos, ‘The Debate That Never Was’ (2016) 130 *Harvard Law Review* 2082 for the view that Dworkin’s late period view was always immanent in his thinking.

70 Raz, *Authority of Law* n 8 above, 39–40.

... legal norms as formulated in legislation or in other legal materials often give the impression that [the law incorporates morality] but this is only because they are formulated elliptically.... When fully spelt out (with the lawyers' code decoded) each norm includes an instruction to some legal official.... to settle authoritatively whether the relevant immorality obtains. It is always the official's determination of the immorality, not the immorality itself, that bears on the action's legality... Cruel punishments, in other words, do not per se violate the Eighth Amendment. What violates the Eighth Amendment are punishments that have been authoritatively determined to be cruel.⁷¹

But there is space between these options. When the law employs moral concepts this does not, contra Dworkin and the inclusive positivist, make morality a part of the law. But equally the use of such language means that it is impossible to understand what the law itself requires – for example, that legislation which imposes cruel and unusual punishments be struck down – without engaging in moral reasoning.⁷² The social facticity of the Eighth Amendment, however, is no more called into question by this than the social facticity of *The Republic* is imperilled by the fact it involves an extended mediation on justice. Where inclusive legal positivism went wrong in its belief that to accept Dworkin's phenomenological argument it needed also to accept his ontological argument, exclusive legal positivism went wrong in the belief that in order to reject the ontology it needed also to reject the phenomenology.

These motivational concerns aside it is worth recognising some of the ways in which the exclusivists' code falls short as a description of the law.⁷³ The directed powers approach prevents us from saying, for example, that the Eighth Amendment actually proscribes the behaviours that it mentions, or that individuals have a legal right against such treatment.⁷⁴ Rather than prohibiting cruel and unusual punishments the provision 'gives discretion to the courts and directs them to use it in light of the best ... moral understanding of what is cruel'.⁷⁵ It is only after the exercise of this discretion that the law can be taken to forbid any particular kind of wrong, and then only those specific wrongs that have been identified by the courts and transcribed into the sources of law (for example, in *Wilkerson v Utah*, being 'emboweled' or 'burned alive').⁷⁶ Indeed,

71 John Gardner, 'Justification under Authority' (2010) 23 *Canadian Journal of Law & Jurisprudence* 71, 71.

72 Hence Shapiro's suggestion that exclusive positivism allows that 'the law can contain moral concepts' while denying that 'moral facts can be responsible for [its] content' collapses. If the law contains a prohibition on cruel and unusual punishments, then moral reasoning is required to apply such a provision. See, for Shapiro's argument, Shapiro, *Legality* n 55 above, 271–273.

73 For similar criticisms of the exclusivist picture, see Waluchow, n 7 above, 155–163.

74 In response to the charge that his account prevents us from being able to say of evaluative constitutional provisions that they confer rights on individuals, Raz has suggested otherwise. Whilst rules of this kind do not confer rights concerning the subject matter of their provisions they do confer a right of access: 'it means that [individuals] can approach the courts and demand that they use their directed powers to make rules for the implementation of the right'. But this reinterpretation asks us to take substantive rights and to treat them as procedural. I still do not have the right described by the constitution. See, for Raz's argument, Raz, *Ethics in the Public Domain* n 8 above, 250–252.

75 Joseph Raz, 'Dworkin: A New Link in the Chain' (1986) 74 *California Law Review* 1103, 1110.

76 *Wilkerson v Utah* 99 U.S. 130 (1878) 133–134.

until the courts weigh in and declare specific forms of punishment to be in violation of the Eighth Amendment, we cannot say that the constitution itself prohibits *any* form of punishment, however barbaric or unfair.⁷⁷

Notice that this is different from the commonplace idea that the courts will sometimes develop the law and in doing so treat behaviour that was previously constitutional as unconstitutional. Conduct of this kind was evidenced, for example, in the US Supreme Court's controversial decision in *Citizens United v Federal Election Commission* – political donations as speech and corporate bodies as people capable of exercising constitutional rights, with the consequence that campaign finance rules targeting corporations were held to be invalid under the First Amendment.⁷⁸ The sources thesis applies as much to decisions that involve 'correct application ... of doctrine' as to cases that do not fall under the extension of the relevant rules.⁷⁹ Even in this context, it is suggested, there can be no law until the judge has made their decision. There is a looking glass quality to this: in a reversal of the line touted by originalists that only the founding law is the true law, exclusive positivism proclaims that, where moral language is at issue, the only law is that which follows from the determinations of the courts.⁸⁰

While Gardner understood conclusions of this kind to be counter-intuitive and in need of explanation – 'the lawyers' code' – Raz is less conciliatory. The directed powers approach represents, he suggests, 'the common view of the legal profession'.⁸¹ In arguing for it, Raz tells us, he is 'only repeating generally acknowledged facts'.⁸² What are these 'generally acknowledged facts'?

When we survey the development of the American Supreme Court decisions on, say, freedom of expression, and even when we confine our attention to those which correctly apply the First Amendment of the American Constitution, we are aware that the general view is that those decisions have greatly developed the legal protection of freedom of expression in the USA and that many of the doctrines which govern freedom of expression have become part of the law in recent times. They correctly apply the First Amendment. But they were not legally binding until enshrined in the jurisprudence of the court.⁸³

77 The point, therefore, is not one about indeterminacy, for the sources thesis applies to actions, decisions and rules that fall squarely under the relevant moral standards. According to exclusive positivism, torture, as a form of punishment, would not be prohibited by the Eighth Amendment until a court certified as such. For an attempt to save the sources thesis by confining its 'surprising' results to cases of indeterminacy, see Timothy Endicott, 'Raz on Gaps – The Surprising Part' in Lukas H. Meyer, Stanley L. Paulson and Thomas Winfried Menko Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: OUP, 2003) 110–111.

78 *Citizens United v Federal Election Commission* 558 U.S. 310 (2010).

79 Raz, *Ethics in the Public Domain* n 8 above, 247.

80 And, indeed, the problems do not stop at this point. What if, as often happens, a judicial ruling on the application of a particular regulatory provision is itself framed in moral language? Does the ruling itself cease to qualify as law and become yet another 'directed power'? We need a way out of this.

81 Raz, *Ethics in the Public Domain* n 8 above, 247. For criticism of Raz's approach as *contrary* to the self-understanding of sensible lawyers see Endicott, n 77 above, esp 101–103.

82 Raz, *ibid*, 247.

83 *ibid*, 247–248.

There are several ambiguities here. For one it is true that decisions that correctly apply the First Amendment themselves contribute to ‘the protection of freedom of expression’, but this is not because such decisions have the effect of transforming non-legal standards into legal doctrine. It is because they have important consequences for the validity of law. The authoritative invocation of the First Amendment involves a court applying that rule to legislation and, if the latter is found wanting, invalidating it or setting it aside. The distinction between unconstitutionality – a matter of failing to abide by the norms of the constitution – and invalidity – the result of a court judgment applying those norms – also helps to explain why correct applications of the First Amendment are not binding on the parties ‘until enshrined in the jurisprudence of the court’. This, again, is a fact about remedies, not a fact about the relationship between law and morality.

It is easy to see, then, both how the directed powers account gains its initial plausibility and why it ought to be rejected. The theory garners intuitive appeal from the fact that the regulation of law-making power occurs through the agency of the courts.⁸⁴ Where, for example, the constitution bestows on individuals a right against cruel and unusual punishments such a right involves both power on the part of the courts to invalidate legislation and a duty to do so in a manner consistent with the relevant right. The problem for the directed powers account appears when it comes to specifying the content of such a right. For its defenders cannot say that the law itself contains a right against cruel and unusual punishment, such that the courts are legally required to invalidate legislation that runs contrary to such requirements. Moreover, it is entirely unclear how the law could direct the courts to invalidate only those statutes and decisions that involve cruel and unusual punishments except through incorporation of these very concepts. If it does, then the exclusivist claim that the content of the law never depends on moral considerations is false. But if it does not, then we have no way of understanding why certain kinds of moral consideration are relevant to the appraisal of the target legislation – namely those that bear upon its cruelty – and others not, for example those having to do with its injustice or obscenity.⁸⁵

Recall that this is not only a point about constitutional constraints, for the exclusivist’s problem replicates across the law. In any case where the law makes a moral term a condition of some right or duty, exclusive positivism is required to

84 Hence Andrei Marmor, as part of his defence of the directed powers approach, places special emphasis on the fact that it is ‘never simply up to us ... to decide for ourselves ... whether to abide by a given law if it seems to infringe a constitutional requirement of fairness’. Instead, it is ‘always the judges who decide these matters, and it is only their decision which could carry any authoritative weight’. See Andrei Marmor, ‘Exclusive Legal Positivism’ in Jules L. Coleman and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: OUP, 2004) 116–117.

85 Consider, in this regard, the way in which Marmor suggests the function of ‘moral precepts embodied in [directed powers to be] to limit either the *kind of purposes* judges should take into consideration ... or the *kind of reasons* they should rely upon’. He notes, for example, that the purpose of the Eighth Amendment ‘is to require judges to invalidate legal institutions which amount to cruel forms of punishment’. The question is how judges can be under a legal duty to invalidate only such provisions without the law itself incorporating the concept of cruelty. See *ibid.*, 121.

deny appearances. My right to be released from the unfair terms in my contract is no such thing. The prohibition on malicious wounding is a licence to judicial activism as opposed to any obligation on subjects. By way of contrast if we treat validity as a formal property we are able to endorse much that is plausible about exclusive positivism – that law is at base a social construct, that evaluative argument is irrelevant to the existence of law – while holding on to the idea that a legal right or duty specified in moral terms is just that; a legal right or duty specified in moral terms.

To this it will no doubt be said that the argument misses the point. The directed powers account is, after all, a downstream consequence of the sources thesis which is itself a downstream consequence of Raz's account of authority – as a way of mediating between subjects and their reasons. So the real action lies in whether the 'service conception' is a sound explanation of practical authority (a matter which is subject to a vast secondary literature⁸⁶) not in whether the directed powers account, a 'code', after all, describes the architecture of the law in a way which is intuitively compelling. This, I think, gets the order of explanation the wrong way round. If an account of authority has the implication that the law cannot be as the law is, then the account of authority has to go, not the law. More importantly, however, the scholarly focus on this aspect of Raz's thought stems largely from the fact that it stands as a contribution to the debate about 'whether moral criteria are ... amongst the truth conditions of propositions of law'.⁸⁷ Since Dworkin this has been taken by many as a, if not *the*, central question for general jurisprudence, with rival schools of thought: Dworkin and associated theorists arguing 'yes, always', inclusive positivism arguing 'possibly, and therefore sometimes' and exclusive positivism arguing 'no, never'.⁸⁸ In the final section I want to reflect on the usefulness of understanding jurisprudence through the prism of this debate.

LAW AND MORALITY, REDUX

For one, the question about the 'grounds of law', as it has come to be known, is certainly not the only question for general jurisprudence, a subject that is also concerned with whether (and if so in what way) law is an institutionalised

86 See, most importantly, Scott Herschovitz, 'Legitimacy, Democracy and Razian Authority' (2003) 9 *Legal Theory* 201 and Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal' (2010) 120 *Ethics* 257.

87 Ronald Dworkin, *Justice In Robes* (Cambridge, MA: Belknap Press of Harvard University Press 2006) 2.

88 For this way of understanding the terrain see Shapiro, n 65 above, 50; Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157, 157 ('A central – perhaps the central – debate in the philosophy of law is a debate over whether value facts are among the determinants of the content of the law'); Scott Herschovitz, 'The End of Jurisprudence' (2014) 124 *Yale Law Journal* 1160 1162; Murphy, n 62 above, 1–2 and Mitchell Berman, 'Toward Principled Positivism' (2020) unpublished manuscript, 1–2 ('What gives law the content that it has? ... Many people working in analytic jurisprudence agree that answering this question remains the central challenge of legal philosophy').

form of order,⁸⁹ about what it means to make law or to have the authority to do so,⁹⁰ about the nature and (in)determinacy of legal rules and reasoning,⁹¹ about whether legal systems are (essentially) coercive,⁹² whether the distinctiveness of law depends on its means or its end,⁹³ whether municipal law and international law are related by identity or analogy,⁹⁴ and about the relationship between law and state,⁹⁵ among other topics. Nor indeed, it is important to add, is the question about the grounds of law the only philosophically important question about law and morality. Alongside this there exist questions about whether law is itself a valuable thing and if so what values it serves,⁹⁶ the question of whether the rule of law comprises a genuine or artificial virtue⁹⁷ and the question about whether, alongside its virtues, law might also come with its own vices.⁹⁸ This latter issue, which focusses our attention on the risks associated with the impersonal, comprehensive and compulsory nature of law's authority, is less about law's affirmative relationship with morality and more about its potential moral cost.

How did Dworkin respond to the impetus provided by these different sets of questions? In relation to issues having to do with law's institutional dimension he argued that 'we must take care to distinguish two questions, both of which might be described as questions about the nature of law':

The first is sociological: what makes a particular structure of governance a legal system rather than some other form of social control, such as morality, religion, force, or terror? The second is doctrinal: what makes a statement of what the law of some jurisdiction requires or permits true? ... The sociological question has neither much practical nor much philosophical interest. The doctrinal question,

89 See, for example, Hart, n 3 above, chs 5 and 6; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford: Clarendon Press, 2nd ed, 1980) and Keith Charles Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford: OUP, 2010).

90 See Raz, *Authority of Law* n 8 above, ch 10 and Gardner, n 26 above, ch 3.

91 See Frederick F. Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991); Timothy Endicott, *Vagueness in Law* (Oxford: OUP, 2000) and Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: OUP, 2007) chs 1 and 2.

92 See Kelsen, n 20 above, 24–58; Hart, n 3 above, ch 2 and Frederick F. Schauer, *The Force of Law* (Cambridge, MA: Harvard University Press, 2015).

93 See John Finnis, 'Law and What I Should Truly Decide' (2003) 48 *American Journal of Jurisprudence* 107 and Green, n 48 above, ch 2.

94 See Samantha Besson and John Tasioulas, 'Introduction' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford: OUP, 2010) and Oona Hathaway and Scott J. Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 *Yale Law Journal* 252.

95 See Kelsen, n 20 above, ch 6 and Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: OUP, 1999) chs 2 and 7.

96 See John Finnis, *Natural Law and Natural Rights* (Oxford: OUP, 2nd ed, 2011) chs 9 and 10 and N. E. Simmonds, *Law as a Moral Idea* (Oxford: OUP, 2007).

97 See Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, Rev ed, 1969) chs 2 and 4; Raz, *Authority of Law* n 8 above, ch 11; Matthew H. Kramer, 'On the Moral Status of the Rule of Law' (2004) 63 *The Cambridge Law Journal* 65; N. E. Simmonds, 'Straightforwardly False: The Collapse of Kramer's Positivism' (2004) 63 *The Cambridge Law Journal* 98 and Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Cambridge, MA: Harvard University Press, 2023).

98 See Green, n 48 above, ch 7.

on the contrary, is a question of enormous practical and considerable philosophical significance.⁹⁹

What considerations led Dworkin to dismiss the importance of matters having to do with law in its ‘sociological’ register? The answers to such questions, he suggested, were determined by a vague institutional concept, a concept that had ‘no precise or settled boundaries in ordinary language’.¹⁰⁰ As a result any attempt to say anything about them which strayed beyond the loose, shared awareness, for example, that ‘Massachusetts has a legal system’, would result in ‘verbal not substantive disagreements’.¹⁰¹ Philosophers asking ‘whether a wicked regime constitutes a legal system and whether international “law” is really law’ were consequently wasting their time on matters that were resolvable either by act of verbal stipulation or not at all.¹⁰²

By way of contrast, Dworkin argued, questions concerning law in its ‘doctrinal sense’ had both obvious practical and philosophical importance:

Are propositions of law even candidates for truth or falsity? If so, what makes them true? Are propositions of law, in the end, only social facts about the behavior of political officials? ... Or can the truth of a proposition of law also depend, at least sometimes, on the truth of moral principles or claims? ... These questions about law are targeted formulations of much more general issues in moral and political philosophy, metaethics, the philosophy of language, and the theory of truth and they cannot be adequately considered without taking up positions, self-consciously or not, about those larger philosophical issues.¹⁰³

Dworkin is right to notice the connection between, for example, the question of truth in law and wider questions concerning the veracity of deontic statements¹⁰⁴ and about the relevance of philosophy of language to a number of important debates in legal philosophy.¹⁰⁵ But he is wrong to suggest that his ‘doctrinal question’ can be so easily cleaved from the ‘sociological question’ of the nature of law. For one, it is only in the context of a functioning legal system that statements of law have any force, claims of legal right in failed states being of, at best, rhetorical effect.¹⁰⁶ So whatever the answer to Dworkin’s doctrinal question, we know that it is going to presuppose an answer to his sociological one, with the latter inheriting all of the importance, philosophical or otherwise, of the former.¹⁰⁷ Moreover, the vagueness inherent in the division between

99 Ronald Dworkin, ‘Hart and the Concepts of Law’ (2006) 120 *Harvard Law Review Forum* 95, 97–98.

100 *ibid.*, 98.

101 *ibid.*, 98.

102 *ibid.*, 98.

103 *ibid.*, 99.

104 The most important work on which is G. H. von Wright, *Norm and Action: A Logical Enquiry* (London: Routledge & Kegan Paul, 1963).

105 See for example Andrei Marmor, *The Language of Law* (Oxford: OUP, 2014).

106 On the implications of which see Thomas Adams, ‘The Efficacy Condition’ (2019) 25 *Legal Theory* 225.

107 A fact implicitly acknowledged by Dworkin himself who, in his final writings, argued that we can only make progress in answering the question of how to identify the requirements of international law by presupposing the existence of an international court with compulsory jurisdiction

legal and other forms of social ordering need not belie the importance or philosophical tractability of questions premised upon it. The boundaries between the democratic and the autocratic are similarly imprecise but no one takes this as reason to abandon analysis of the concepts involved.

What of questions that bear more closely on law's relationship with value? The tendency on Dworkin's part was to treat such matters as downstream and hence largely determined by the issue concerning the contribution of moral principles to the content of the law. As part of his compressed late career entry on the rule of law, for example, Dworkin proposed we understand accounts of the existence and content of law as, at the same time and without further argument, theories of the rule of law. Hence Hart's doctrine of recognition was to be understood, alongside his own theory of law as integrity, as an account of 'the value of legality'.¹⁰⁸ This not only seriously distorts Hart's view – intended, as it was, as part of a 'general and descriptive' account of a 'complex social and political institution', not as an account of any value – but renders incomprehensible the obvious truth that the law itself might be used to undermine the rule of law. For example, if the legislature passes a statute that retrospectively imposes a new criminal liability, or which contains conflicting requirements, then the rule of law is threatened precisely *because* the law has the content it does. We can only acknowledge this fact, however, if we distinguish between the grounds of law on the one hand and the rule of law on the other.¹⁰⁹

Beyond the narrowing of horizons represented by the above, focus on the law/morality nexus has had the effect of reducing debate within the discipline to a series of warring intuitions or, rather, warring theoretical commitments, out of which little in the way of insight can be gained. In his recent book on the subject Liam Murphy suggests against the likelihood of progress being made on what he calls 'the main question' of the nature of law: 'whether moral considerations are ... relevant when we are trying to find out what the law is'.¹¹⁰ This is so because of the contrasting commitments of those in opposing camps (Murphy has in mind exclusive positivists and Dworkinian interpretivists, which he regards as having developed the two most compelling responses to his 'main question'): 'It seems certain that, for our question of whether the content

over all nations. Despite recognising the 'counterfactual nature' of such an exercise, Dworkin suggested, it was the only way to make tractable the question of the 'rights and obligations of states'. See Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2, 13–15. For further criticism of Dworkin's distinction see Gardner, n 26 above, 270–272.

108 Dworkin, n 87 above, 170 and more generally 168–186.

109 It is worth noting that even theorists who draw a tight connection between the concept and the rule of law allow for this possibility. Fuller, for example, recognised that individual legal directives could be used to undermine the value of legality without yet calling into question their status as law. His fictionalised account of Rex—the king who attempted to rule entirely through radically deficient legal techniques—is the story of a limit case in which the total failure to abide by the rule of law calls into question the existence of the legal system. This leaves space for the possibility that the law might threaten the rule of law without yet undermining the identity of the legal order. So too Waldron, who is broadly receptive to Dworkin's arguments, nonetheless denies a one-to-one identity between the rule of law and the content of the law, instead treating 'the rule of law as a normative ideal that arises out of our understanding of what law is'. See Fuller, n 97 above, ch 1 and Waldron, n 97 above, 72 and more generally ch 2.

110 Murphy, n 62 above, 2.

of the law can be determined in part by moral considerations, there will be no convergence at the level of criteria, because there will be no convergence at the level of example. Could there be a valid law of racial slavery in the United States? No, say some. Yes, say others.¹¹¹ And so, Murphy suggests, it is with such disagreement that things must lie, at least for now.¹¹² Others go further and argue, partly in light of the supposed intractability of this debate, that we should banish from our thinking the ‘doctrinal concept of law’,¹¹³ or perhaps even call time on the possibility of resolving the question of what the law, as a distinct normative domain, requires of us.¹¹⁴

All of which is quite dispiriting. But perhaps progress can be made by approaching old examples in a new light. As part of his discussion of the differences in approach to understanding law engendered by exclusive positivism and Dworkinian interpretivism, Murphy asks us to consider the question of same-sex marriage in New York State prior to the Marriage Equality Act 2011, which legalised such unions. ‘Whether the exclusion of same-sex couples from the institution of marriage in New York was in violation of the state constitution in, say, 1995 depends’, Murphy suggests, ‘on the grounds of law’:

Some people believe that the content of the law is determined entirely by legal sources: statutes, constitutions, judicial opinions, and so on, all interpreted in a fashion that never requires the independent moral judgment of the interpreter. If we take this view, we will probably conclude that the existing legal sources did not determinately settle the legality of same-sex marriage in New York in 1995, and so the matter remained open until the Court of Appeals settled it, in the negative, in the 2006 case of *Hernandez v. Robles*. Subsequently, the Marriage Equality Act of 2011 changed the law. Others believe that the content of the law is determined by the best, the morally best, interpretation of the existing legal materials. If we take this view and also believe that equal protection, properly interpreted, implies equal participation, regardless of sex or sexual orientation, in important social institutions such as marriage, we will have little difficulty in reaching the conclusion that the

111 *ibid*, 82.

112 *ibid*, 183–187.

113 See, for example, Lewis A. Kornhauser, ‘Doing without the Concept of Law’ [2015] NYU School of Law, Public Law Research Paper and Hillary Nye, ‘Does Law “Exist”? Eliminativism in Legal Philosophy’ (2023) 15 *Washington University Jurisprudence Review* 29. Kornhauser’s argument is that, for practical purposes, we do not need a theory which explains what it is for the law to have the content that it does because judges and lawyers can instead get by with a theory of how to decide cases. But, of course, judges and lawyers can (and do) know what the law is without having any theory of law whatsoever. To be a good lawyer you need to know your Hart and Wechsler not your Hart and Dworkin. Part of the job of jurisprudence is then to explain what it is that they know, when they know it. Nye, by way of contrast, focusses her argument less on the theoretical needs of practitioners and more on the issues that she believes philosophers can sensibly be concerned with when they ask ‘what is law?’. Sometimes when we ask this question, she suggests, we are concerned to understand how governmental power will be exercised over us and at other times we are concerned with the question of how legal disputes ought to be resolved, morally speaking. Neither approach, she suggests, implies a definitive answer to the question ‘what is law?’. And this is certainly true, but this is because law is distinct from both governmental power (which may, for example, be exercised over us lawfully or unlawfully) and the morality of judicial decisions (to understand their morality we need first to know what is a judicial decision).

114 See Hershovit, n 88 above.

exclusion of same-sex couples from the institution of marriage in New York violated ... the equal protection clause of the New York State Constitution in 1995. We could also conclude that the holding to the contrary in *Hernandez* was a mistake and that the legislation of 2011 recognizing same-sex marriage was strictly speaking unnecessary. On the one view there was no answer to the legal question before *Hernandez*; after that decision, there was for five years the clear answer that same-sex marriage was not legally available in New York until the New York State Legislature changed the law. On the other view, it has for a long time been contrary to law to exclude same sex-couples from the institution of marriage in New York. Different views of the grounds of law, different conclusions about what the law is.¹¹⁵

But neither of these, it strikes me, is the right description of the legal situation. Was same sex marriage permitted in New York State prior to the Court of Appeals' ruling on the matter? It was not, because existing marriage statutes, passed in accordance with the criteria of validity in that state, presupposed that marital union was between members of the opposite sex ('the parties must solemnly declare that they take each other as husband and wife', the property of 'a married woman shall not be subject to her husband's control', etc) and no court had either overturned these provisions or sought to interpret them in a more permissive light. *Hernandez*, in refusing to strike down the pertinent parts of these laws, maintained the existing legal situation. Was *Hernandez* itself decided in accordance with the law? That depends on whether the Court of Appeals correctly interpreted the relevant provisions of the State Constitution ('Equal Protection of the Laws').¹¹⁶ Answering such a question might well involve moral judgement, but it would not for this reason take us outside of the remit of the law or legal decision-making. Here and more generally, the law can incorporate moral concepts, without yet incorporating morality. Assuming that the court in *Hernandez* made a mistake in its application of these norms, does this mean that same-sex marriage had in fact always been permissible in New York State and that 'the legislation of 2011 recognizing same-sex marriage was strictly speaking unnecessary'? It does not, because the effect of substantive constitutional constraints always depends on the courts moving to overturn unconstitutional acts or directives, themselves valid in light of the legal system's existing criteria of validity.

CONCLUSION

Dworkin is often criticised for failure to treat the claims of his interlocutors with care and precision.¹¹⁷ Indeed, his 'skeleton' description of positivism has

115 Murphy, n 62 above, 15.

116 And see now the Supreme Court of the United States' decision in *Obergefell v Hodges* 576 U.S. 644 (2015).

117 See, for example, Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: OUP, 2001) 104–107, 155. Although Dworkin shot back: see Dworkin, n 87 above, 216–222. For discussion of the effect of Dworkin's way with Hart's work on Hart

been held up as an example of this.¹¹⁸ Be that as it may, I believe that the pedigree thesis – a thesis that Dworkin himself went to great lengths to reject – in fact captures an important, indeed, foundational truth about the nature of law: that a legal system's criteria of validity have a formal nature.¹¹⁹ This reaffirms the basic truth of positivism, that a norm is a legal norm because posited by some person or group, and not because it passes any substantive criterion of correctness, moral or otherwise.

himself, see Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: OUP, 2004) 330.

118 See, for example, Leiter, n 91 above, 155–157.

119 It is of some irony, then, that the gravitational pull of Dworkin's own arguments led many, including many of his own critics, to the view that the most important question in jurisprudence is a question the very framing of which obscures this fact.