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What Counts as Law?

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Lectures

SEEGERS LECTURE

WHAT COUNTS AS LAW?

Frederick Schauer*

I. INTRODUCTION

Among Ronald Dworkin’s noteworthy contributions to contemporary legal thought is his focus on what he called “theoretical disagreements in law.”¹ Dworkin used the term and the idea behind it as part of his larger assault on what he understood as legal positivism, but my goal in this Article is neither to attack nor defend positivism. Nor is it to attack or defend Dworkin. Nevertheless, I want to follow Dworkin in reflecting on the idea of theoretical disagreement in law, and indeed to follow him as well in using *Riggs v. Palmer*² as the initial vehicle for that reflection.³ Still, I will dissociate the idea of theoretical disagreement – and *Riggs* as well – from either an attack on or a defense of legal positivism.⁴ Rather, my aim is to suggest that what *Riggs* may best illustrate is a disagreement about just what sources – or inputs, for those who prefer an uglier but less theory-laden word – count as legitimate legal sources in the first instance.⁵ This disagreement, as opposed to disagreements about how to interpret

* David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Article is the written version of the Seegers Lecture, delivered at the Valparaiso University School of Law on September 8, 2016. I am grateful to the Valparaiso students and faculty for their hospitality and their illuminating questions and comments, and also for the discussion when drafts of this paper were presented at the L’Ecole du Droit, Sciences Po, Paris, on January 19, 2017, at the Workshop on Theoretical Disagreement in Law held on April 1, 2017, at the Duke University School of Law, and at a faculty seminar at the Australian National University on October 20, 2016.

¹ RONALD DWORKIN, *LAW’S EMPIRE* 5 (1986).

² See 22 N.E. 188, 189 (N.Y. 1889) (disallowing claim to inheritance by one who has murdered the testator).

³ See DWORKIN, *supra* note 1, at 15.

⁴ Dworkin’s use of *Riggs* and the idea of theoretical disagreement is vigorously and effectively challenged in Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. R. 1215, 1216 (2009). But it is perhaps worth emphasizing that the account of theoretical disagreement I offer in this Article is best located within and not as a challenge to a broadly positivist understanding of the nature of law.

⁵ The present article thus continues a project exemplified earlier in Frederick Schauer, *Constitutional Invocations*, 65 *FORDHAM L. REV.* 1295, 1305–06 (1997), and Frederick Schauer, *The Limited Domain of the Law*, 90 *VA. L. REV.* 1909 (2004) [hereinafter Schauer, *The Limited Domain of the Law*].

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or apply those sources, is what I understand as a theoretical disagreement, or at least as one form of a theoretical disagreement. What makes the disagreement about the identity of the legitimate sources or inputs a theoretical one is precisely that some sort of theory of what counts as law lies near the foundation of what just law *is* within some jurisdiction. A theory of legitimate (or valid) legal sources is thus at least part of a theory of law, even if that theory is a local (or particular) theory—a theory of law here and now, and not a theory of law in every place and at every time.⁶

I suspect that Dworkin, in using *Riggs* as one of his earliest and most prominent examples,⁷ had something in mind that is in the vicinity of what I want to put forth here. But I suspect as well that Dworkin, who was so set on attacking what he understood legal positivism to be, and who himself was more inclined to see disagreement in the face of largely compatible accounts or interpretations than might have been necessary or desirable, would have been less sympathetic with what I say here than I think he ought to have been. But that is largely by way of an aside, if only to make clear that what follows is an account of a kind of theoretical disagreement that for me was inspired by Dworkin, but which in no way purports to be Dworkinian exegesis. More importantly, what follows is an exploration of the question of just what counts as law or what counts as a legitimate source of law, or an acceptable source of guidance in making legal decisions. This question lies at the heart of understanding how law operates, and is an important dimension of what distinguishes law from other institutions of guidance and decision-making.⁸ The question of theoretical disagreement is a useful entry into this larger question, and it is the larger question—the domain of legitimate legal sources—that is my principal concern in this Article.

⁶ See WILFRID E. RUMBLE, *Introduction*, in JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* vii, xiii (Wilfrid E. Rumble ed., 1995) (distinguishing general from particular jurisprudence); BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 10–12 (3d ed., 2003) (discussing the possibility of a general jurisprudence); John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 34–35 (1892) (discussing different types of jurisprudence); Danny Priel, *Evaluating Descriptive Jurisprudence*, 52 AM. J. JURIS. 139, 157 (2007) (distinguishing descriptive from normative jurisprudence).

⁷ See RONALD DWORCKIN, *TAKING RIGHTS SERIOUSLY* 23 (1977).

⁸ See FREDRICK SCHAUER, *THE FORCE OF LAW* 154–67 (2015) (exploring the differentiation of law from other social institutions). See also Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1082 (1997) (examining various forms of differentiation of law).

II. *RIGGS V. PALMER*, AGAIN

As is well known,⁹ *Riggs v. Palmer* was the 1889 case in which the New York Court of Appeals confronted a series of events that commenced when Elmer Palmer fatally poisoned his grandfather, Francis Palmer.¹⁰ Elmer had been named as the principal beneficiary in his grandfather's will, and killed his grandfather not only to accelerate Elmer's inheritance, but also to forestall the feared possibility that Francis would change his will to Elmer's detriment.¹¹ Elmer's plan was negated when he was apprehended, tried, and convicted for the killing, and then found his inheritance negated by the Court of Appeals.¹² What made the case especially noteworthy, then and now, was that the court denied Elmer the inheritance, notwithstanding the explicit language of the New York Statute of Wills, language which provided that named beneficiaries would inherit upon the death of a testator who was of sound mind when making the will, and language that contained no exceptions for murdering heirs.¹³ Because following the Statute of Wills to its literal indication would have conflicted with the venerable, even if not as explicit, principle that "no person shall profit from his own wrong,"¹⁴ the Court of Appeals majority employed the latter to override the consequences of the former.¹⁵ Although Judge Gray's dissenting opinion¹⁶ relied almost entirely on the words of the New York Statute of Wills,¹⁷ and although the majority

⁹ See CALEB NELSON, *STATUTORY INTERPRETATION* 7-26 (2011) (providing by far the best discussion of *Riggs*, its facts, its history, and its implications). See also BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 40 (1921) (analyzing *Riggs*); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (examining *Riggs*); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 140-41 (1999); A.W. BRIAN SIMPSON, *REFLECTIONS ON THE CONCEPTS OF LAW* 211-12 (Oxford University Press 2011); Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murdering Heir*, 51 *SMU L. REV.* 31 (2000); Roscoe Pound, *Spurious Interpretation*, 7 *COLUM. L. REV.* 379, 382 (1907) (criticizing *Riggs*); *Wills-Murder of the Testator by Legatee*, 3 *HARV. L. REV.* 230, 234 (1889) (describing and commenting on *Riggs*).

¹⁰ *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889).

¹¹ *Id.* at 189.

¹² *Id.* at 191.

¹³ *Id.* at 189 ("It is quite true that [the] statutes regulating the making, proof, and effect of will and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer").

¹⁴ *Id.* at 190 (describing the principles that no one shall be permitted to profit from his own fraud, or take advantage of his own wrong, or found any claim upon his own iniquity, or acquire property by his own crime).

¹⁵ *Id.* at 191.

¹⁶ *Riggs*, 22 N.E. at 191.

¹⁷ *Id.* at 192-93.

agreed with the dissent's understanding on what those words meant,¹⁸ Judge Earl's majority opinion, in reaching a conclusion contrary to the plain meaning of the most plainly applicable statute, relied on Roman law, the Napoleonic Code, the books of various ancient writers, the law of Quebec, and, most notably, the principle (which Judge Earl may or may not have extracted from the foregoing sources) "that no person may profit from his own wrong."¹⁹ What was most important for Dworkin, of course, was this last, because Dworkin believed, probably incorrectly, that the "no person may profit from his own wrong" principle was not something that had been or even could be recognized by a Hartian rule of recognition.²⁰

Dworkin's reading of New York law or of legal positivism aside, however, the contrasting opinions in *Riggs* do suggest that the majority and the dissent had a disagreement about just what was to count as law, with the majority's capacious view encompassing all of the aforementioned sources, and the dissent's much narrower view insisting—indeed quite explicitly—that none of the items in this ragbag of sources counted as law at all.²¹ The theoretical disagreement was not a

¹⁸ See text accompanying *infra* notes 23–24.

¹⁹ *Riggs*, 22 N.E. at 192.

²⁰ As theorized by H.L.A. Hart, a rule of recognition is a secondary rule (a rule about a rule) that determines whether some primary rule of conduct will or will not count as a valid legal rule. H.L.A. HART, *THE CONCEPT OF LAW* 94–110 (Penelope A. Bulloch, Joseph Raz & Leslie Green eds., 3d ed., Oxford University Press 2012) (1961). The ultimate rule of recognition is, for Hart, the system-wide rule that determines what kinds of rules and other sources will count as law within the entire system. *Id.* As I have suggested elsewhere, thinking of the ultimate rule of recognition as a rule at all may be somewhat misleading, and it is probably better to understand it as a set of practices—of lawyers and judges, principally—that serves to make some but not all sources valid, and some but not all forms of argument (sociologically) acceptable. See Frederick Schauer, *Is the Rule of Recognition a Rule?*, 3 *TRANSNATIONAL LEGAL THEORY* 1 (2012).

The most extensive development of the argument that what Dworkin thought unrecognized by a Hartian ultimate rule of recognition was in fact already part of the rule-of-recognition-recognized law is in NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 229–64 (1978). MacCormick's point was largely by way of an existence theorem—what Dworkin claimed could not be recognized had in fact been recognized and adopted as part of the positive law. *Id.* The broader argument that a rule of recognition could recognize moral principles such as "no person may profit from his own wrong" even if they had not been adopted by a narrower conception of positive law is at the core of the incorporationist, or inclusive positivist, challenge to Dworkin's claims. See, e.g., JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 103 (2001) (explaining and defending incorporationism); W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* 74–75 (Oxford University Press 1994) (same, but with different label).

²¹ See *Riggs*, 22 N.E. at 191–92 ("[t]he appellants' argument is not helped by reference to those rules of the civil law, or to those laws of other governments, by which the heir, or legatee, is excluded from benefit under the testament if he has been convicted of killing, or attempting to kill, the testator. In the absence of such legislation here, the courts are not empowered to institute such a system of remedial justice.").

disagreement about the idea of a rule of recognition, as we might imagine a dispute between jurisprududes of different stripes to be. Rather, the dispute here was one about the *content* of the rule of recognition as it existed in New York in 1889—a disagreement about just what *kinds* of sources would be recognized within the jurisdiction and its judicial system as valid legal sources.

III. THEORETICAL DISAGREEMENT?

Most legal disagreements are not theoretical in the sense I offer here. That is, they are not disputes about which items do or do not count as appropriate sources for a legal argument or a judicial decision. When Justices Black and Frankfurter were disagreeing about incorporation—about which rights in the Bill of Rights (or elsewhere) would be understood as part of the Fourteenth Amendment and thus applied to the states²²—for example, they did not disagree about whether the Bill of Rights was part of the Constitution, and they did not disagree about whether the Fourteenth Amendment restricted certain forms of state action.²³ They disagreed “only” about how to interpret the Constitution (including the Bill of Rights), but it is noteworthy that they did not disagree about the makeup of the field of items that they were interpreting.²⁴

Similarly, consider the recent and amusing case of *Yates v. United States*,²⁵ in which the question was whether a fish was to be deemed a “tangible object” for purposes of the destruction of evidence provisions of the Sarbanes-Oxley Act of 2002.²⁶ That Act was plainly directed towards financial institutions and financial transactions, and not towards the prosecution of fishermen charged with taking undersized groupers.²⁷ But as long as fish were understood to be tangible objects, the statute appeared

²² Compare *Adamson v. California*, 332 U.S. 46, 86 (1947) (Black, J., dissenting) (applying the Bill of Rights to the states via the Fourteenth Amendment), with *Griffin v. Illinois*, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring) (arguing against Black’s “jot for jot” view of incorporation). See generally Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 258 (1982) (explaining Justice Black’s argument for the Fourteenth Amendment’s total incorporation of the Bill of Rights); Sanford Kadish, *Methodology and Criteria in Due Process Adjudication – A Survey and Criticism*, 66 YALE L.J. 319, 324–27 (1957) (analyzing historical aspects of the Fourteenth Amendment).

²³ See *Adamson*, 332 U.S. at 85–86; *Griffin* 351 U.S. at 22.

²⁴ See *supra* note 23.

²⁵ 135 S. Ct. 1074 (2015).

²⁶ See 18 U.S.C. § 1519 (2012) (providing that destruction of a “tangible object” with intent to impede an investigation of the United States shall be fined or imprisoned, or both).

²⁷ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 745 (codified at 18 U.S.C. § 1519 (2012)) (penalizing the destruction of evidence in response to the Enron scandal).

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to be as applicable to Mr. Yates' attempt to avoid prosecution by throwing evidence into the sea as it was to the document-shredding practices of financial institutions, the practices that motivated the statutory provision in the first place. The Supreme Court divided along familiar lines,²⁸ with Justice Ginsburg's plurality opinion relying on statutory purpose to exclude Mr. Yates from the reach of the Act, and Justice Kagan's dissent treating the plain language of the statute as virtually conclusive.²⁹ But although there was a disagreement between the majority and the dissenters about the application of the statute, about the principles of interpretation to be applied, and thus about the meaning of the relevant language, there was no (or at least not very much) disagreement about what was being interpreted, nor was there very much disagreement about what kinds of considerations could be brought to bear on that interpretation.

This kind of basic agreement about what is being interpreted—the target of the interpretation—also characterizes much (and probably most) common law adjudication. Thus, although Judge Cardozo for the majority and Judge Bartlett in his dissent disagreed about the outcome in *MacPherson v. Buick Motor Co.*,³⁰ disagreed as well about the answers to the policy questions involved in the case, and disagreed about how to interpret a collection of precedents from New York and other American and common law jurisdictions, they did not disagree about whether these were the sources to be used and interpreted,³¹ and thus appeared not to disagree, or at least not to disagree very much, about the question of what was to count as a legitimate source for a judicial decision.³²

Thus, in contrast to the incorporation cases, to *Yates*, and to *MacPherson*, *Riggs v. Palmer* embodies a disagreement at a deeper level. *Riggs* is not about how to understand an agreed-upon set of sources, but instead represents a disagreement about what constitutes the relevant set

²⁸ See *Yates*, 135 S. Ct. at 1083–87, 1090–93 (disagreeing on whether tossing fish overboard was destruction of a tangible object sufficient to satisfy 18 U.S.C. § 1519 (2012)).

²⁹ See *id.*

³⁰ 111 N.E. 1050, 1055, 1057 (N.Y. 1916).

³¹ Although Judge Bartlett's dissenting opinion relied largely on the precedential effect of several previous New York decisions, his lengthy quotation of the opinions in those decisions, as opposed to merely noting their existence, supports the inference that he agreed with the substance of those decisions as a matter of policy, and was not relying solely on the stare decisis effect of their very existence. *Id.* at 1053, 1055. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 33 (1989) (explaining the nature of an argument from precedent); Frederick Schauer, *Precedent*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 123, 124 (Andrei Marmor ed., 2012) (discussing the difference between vertical and horizontal precedent and the respective weight of authority that they exert on subsequent decisions).

³² See *MacPherson*, 111 N.E. at 1055.

of sources in the first instance. And it is this kind of disagreement that might plausibly be understood as a theoretical disagreement, a form of disagreement that is arguably both different from and deeper than a (mere) interpretive disagreement.

IV. SOURCE DISAGREEMENT AS THEORETICAL DISAGREEMENT

Implicit in the above discussion is that one form of theory about law is a theory about legitimate and illegitimate, or valid and invalid, sources—a theory that, when applied, marks the difference between “counts as law” and “does not count as law.” And thus a disagreement about what does or does not count as law is one form of theoretical disagreement about law. Here again Dworkin is suggestive, although again in ways that he would most likely resist. Thus, in talking about the two stages of interpretation,³³ Dworkin appears to distinguish an initial question of what it is that the legal interpreter is interpreting—the field of interpretation—from the interpretive process that is subsequently applied to that field.³⁴ First the interpreter identifies the field, and then she extracts meaning or import (interprets) from the items in this pre-identified field.³⁵ A theoretical disagreement, which we might contrast with an interpretive disagreement, is accordingly a disagreement about what is in the field in the first place and not about what is to be done with some field.

³³ See DWORKIN, *supra* note 1, at 65–67 (explaining the two stages of the interpretation process).

³⁴ *Id.*

³⁵ These days it is fashionable, especially among some of those with sympathies to original-public-meaning originalism, to distinguish between interpretation and construction. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING*, 5–7 (1999) (analyzing the differing relationships to constitutional text held by interpretation and construction). See also KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 455–56 (2013) (emphasizing the prominent role of constitutional construction in recent theories of originalism); Keith E. Whittington, *Constructing a New American Constitution*, 27 *CONST. COMM.* 119, 120–22 (2010) (discussing the limitations of interpretation and how construction can expand beyond those limitations). But because even the initial stage of interpretation requires not only a law-soaked account of what should be interpreted in the first instance, but also a legally-informed determination of whether the language to be interpreted should be interpreted as ordinary or technical language, it is not at all clear that the distinction between interpretation and construction (or between communicative content and legal content, see Lawrence B. Solum, *Communicative Content and Legal Content*, 89 *NOTRE DAME L. REV.* 479, 503 (2013)), if designed to track a distinction between meaning and legal import, can do the work that is required of it. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 *NW. U. L. REV.* 751, 771–72 (2009) (questioning the interpretation-construction distinction); Frederick Schauer, *Is Law a Technical Language?*, 52 *SAN DIEGO L. REV.* 501, 502–03 (2015) (same).

Interpreters may differ about how, for example, to understand a particular artistic movement—Expressionism, or Impressionism, or Minimalism, or Futurism, or whatever—but the question of how to understand what joins a particular group of artists is different from the question of who is to count as a member of the group in the first instance. Indeed, virtually any form of coherence or holistic reasoning or decision-making involves the same issue,³⁶ because an initial step is to identify the items that will then be used by the decision-maker to construct the explanation, and only after the field is identified can the constructive process begin.³⁷

A theoretical disagreement, however, is not merely a disagreement about the tokens that make up the field. Rather, it is a disagreement about the *types* of materials, sources, or inputs that belong in the field. If, counterfactually, Judge Earl for the majority in *Riggs* had relied on Pufendorf and Blackstone and if Judge Gray for the dissent had relied on Bacon and Rutherford, there would have been a disagreement about the actual makeup of the field of relevant sources, but not a disagreement about the types of items that would or could constitute the interpretive field. In actuality, Judge Earl's reliance on Pufendorf, Blackstone, Bacon, and Rutherford, *inter alia*, represented a willingness to rely on sources of this type, a willingness that Judge Gray did not share,³⁸ and thus there was a genuine and deep disagreement between the majority and the dissent about the very kinds of sources that could be used in addition to the more conventional ones, ones whose use did not appear to be controversial. The majority and the dissent had an interpretive disagreement not about the interpretation of the conventional sources—the New York cases, the New York statutes, and the cases from other American states—but a theoretical disagreement about whether anything other than these sources could permissibly even be part of a legal decision at all.

V. ON THE RELATIONSHIP BETWEEN LAW AND THE SOURCES OF LAW

Implicit in the foregoing is an intentional and admittedly controversial conflation among “law,” “sources of law,” and “inputs into judicial decision.” The issue is hardly beyond dispute. If, with the so-

³⁶ See AMALIA AMAYA, *THE TAPESTRY OF REASON: AN INQUIRY INTO THE NATURE OF COHERENCE AND ITS ROLE IN LEGAL ARGUMENT*, 361–419 (2015) (emphasizing and explicating the distinction between locating the members of the field and deriving a relationship or account that explains the membership).

³⁷ I bracket the important question of the relationship between field construction (or field identification) and field interpretation, especially because it may often be the case that some items initially excluded will be included once a tentative explanation is extracted, and vice versa. See AMAYA, *supra* note 36, at 361–419. In reality, the process is likely closer to reflective equilibrium than the more linear account in the text suggests. *Id.*

³⁸ *Riggs*, 22 N.E. at 191.

called inclusive positivists,³⁹ we understand law as including pretty much anything that the contingent ultimate rule of recognition⁴⁰ recognizes as law, and thus that a society recognizes as law, then law can include almost any conceivable source of guidance or enlightenment or anything else, as long as the relevant recognizers have in fact recognized it.⁴¹ For the inclusive positivists, law could include the commands of morality, the commands of God, or the prescriptions and predictions of astrology as long as the social forces that “choose” an ultimate rule of recognition have decided that to be the case.⁴² This position is potentially problematic, however, because it appears to suggest, or at least allow, that all sorts of propositions of grammar, semantics, arithmetic, empirical fact, and much else can count as law, which seems initially not only to be highly counterintuitive, but also inconsistent with the way in which law is commonly understood to be a particular kind of subset of, and not coextensive with, the field of existing social norms and social facts.⁴³

³⁹ See KENNETH EINAR HIMMA, *THE NATURE OF LAW: PHILOSOPHICAL ISSUES IN CONCEPTUAL JURISPRUDENCE AND LEGAL THEORY* 252–70 (2011) (exploring the distinction between inclusive and exclusive legal positivism); Jules Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 241 (Dennis Patterson ed. 1996) (discussing the traditions behind different versions of legal positivism); ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 294–312 (1998) (identifying the dilemmas facing an incorporationist under the rule of recognition); Kenneth Einar Himma, *Inclusive Legal Positivism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 125 (Jules Coleman, Scott Shapiro & Kenneth Einar Himma eds. 2002) (outlining the conceptual framework of legal positivism).

⁴⁰ See *supra* note 20 and accompanying text (examining the idea of a rule of recognition). See also *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

⁴¹ See *supra* note 20 and accompanying text (explaining that the rule of recognition might cover a vast breadth of potential sources of law).

⁴² Hart uses the term “accept” to designate the process by which those who choose, adopt, or use the ultimate rule of recognition come to take it as authoritative, HART, *supra* note 32, at 90–98, and for him the relevant accepters are officials. There are important questions about whether locating the relevant within the class of officials is correct, and we might instead locate the source of ultimate acceptance within a society as public opinion, broadly understood, or even the views of an ultimate repository of force such as the army, but I will say nothing more about that question on this occasion. On the question in general, see generally Matthew Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *Nw. U. L. REV.* 719, 720 (2006) (exploring “popular constitutionalism” and its moral implications within modern society).

⁴³ See Frederick Schauer, *The Limited Domain of Law*, 90 *VA. L. REV.* 1909, 1944 (2004). See also Ronald Dworkin, *Thirty Years On*, 115 *HARV. L. REV.* 1655, 1660 (2002) (objecting to inclusive positivism because, *inter alia*, “positivism rescued in this way can no longer claim to show what is distinctive about law and legal reasoning, because once we accept the strategy, we can easily regard any community’s moral practices as resting on convention in the same way.”).

Although an excessively capacious understanding of the kinds of things that can count as law appears counterintuitive and misleading, the opposite approach seems problematic as well. According to the so-called exclusive positivists, of whom Joseph Raz⁴⁴ and Scott Shapiro,⁴⁵ are exemplary, and Hans Kelsen is at least one inspiration,⁴⁶ only norms (and other inputs) of a certain type can count as law.⁴⁷ This seems from one perspective more faithful to the reality of legal life, a reality in which the practice of legal argument and the techniques of legal decision making involve much more than law, and a reality in which law constitutes only a subset of the acceptable inputs into legal argument, legal reasoning, and legal decision-making. This approach too has its flaws, for it may wind up explaining too little of what lawyers and judges actually use and actually do. Raz, for example, insists on a distinction between law and legal reasoning,⁴⁸ but if the techniques of, and the inputs into, legal reasoning are largely not understood as law, then it is puzzling to see just how much work the category of law is actually doing.⁴⁹

In the face of this controversy about how we should understand law in the largest sense, or about how we should understand a certain usage of the word “law,” my preferred strategy is to distance myself. Here, and elsewhere, I will leave the definition of “law” to others, and leave the non-

⁴⁴ See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 17 (2d ed. 2009); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 9 (2d ed. 1999) (1975). See also Andrei Marmor, *Exclusive Legal Positivism*, in *OXFORD HANDBOOK*, *supra* note 39, at 104–05 (describing Raz as an exclusive positivist).

⁴⁵ See SCOTT J. SHAPIRO, *LEGALITY* 269–73 (2011); Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 *LEGAL THEORY* 127 (2000). See also Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 355, 360 (Jules Coleman ed., 2001).

⁴⁶ See HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., 1967) (1960). I am thinking in particular of Kelsen’s view that no legal act is completely determined by the law, a position well captured by his metaphor of law being akin to a frame without a picture. See *id.* at 350–51. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 20–21 (Sari Bashi trans. 2005) (noting Kelsen’s comparison of law to that of a frame); Ines Weyland, *Idealism and Realism in Kelsen’s Treatment of Norm Conflicts*, in *ESSAYS ON KELSEN* 249, 258–60 (Richard Tur & William Twining eds., 1986) (referring to Kelsen’s assumption that one can determine the frame of a norm). JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: IN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 63 (2d ed., 1980), relies heavily on Kelsen, supporting the inference of a connection between Kelsen and exclusive positivism.

⁴⁷ See RAZ, *supra* note 44, at 122–23.

⁴⁸ See JOSEPH RAZ, *Postema on Law’s Autonomy and Public Practical Reason*, in *BETWEEN AUTHORITY AND INTERPRETATION* 376 (2009) (distinguishing between law and legal reasoning).

⁴⁹ See Schauer, *supra* note 43. For Dworkin’s somewhat different objections to exclusive legal positivism, See Dworkin, *supra* note 21, at 1666–79. Throughout his extensive writings on law and legal theory, Dworkin studiously avoided ever giving a definition of “law,” or even very much of an analysis of just what law was, except for the implicit claim in all of his writings that law was simply what lawyers, judges, and the legal system do. *Id.*

semantic question of just what law is to others, preferring instead the more modest goal of thinking about just what kind of materials, sources, inputs, and other “stuff” do or do not count as sociologically legitimate in legal argument and legal decision-making. An important question about law, or at least what I take to be an important question about how law and legal argument and legal decision-making actually operate, is the identification of the acceptable (and unacceptable) source and references in a brief or oral argument, the acceptable (and unacceptable) moves in legal argument, and the acceptable (and unacceptable) authorities on which a judge may rely in a judicial opinion. Although I confess to sympathies with defining the acceptable side of each of these dichotomies as “law,” nothing turns on this potentially controversial (especially within the contemporary analytic jurisprudential community) move, and I can be satisfied with saying that the question is important, even apart from whether the answer tells us much (or anything) about the nature of law itself. And from this perspective, I want only to claim that insofar as there is a disagreement about the types of materials, sources, and inputs that count as acceptable or sociologically legitimate, this is a disagreement that in one potentially interesting sense can be understood as a theoretical disagreement. Whether this is a theoretical disagreement about law, or a theoretical disagreement of another kind, is a fight, at least here, in which I have no dog.

VI. A HISTORY OF DISAGREEMENT

A number of historical controversies represent theoretical disagreements of just this variety, theoretical disagreements about what materials and sources are to count (or not to count) as law. If we go back to the nineteenth century, for example, we discover, amusingly to contemporary common law sensibilities, that some number of Christopher Columbus Langdell’s students complained that his teaching, which was dominated by exposition of cases, was “not law.”⁵⁰ For them, as for most pre-Langdellian lawyers, scholars, and students in the pre-nineteenth century common law world, law consisted of enduring legal principles⁵¹ that might happen to be exemplified by cases, and that would typically be collected in learned treatises, but the cases were mere

⁵⁰ Joseph Beale, *Professor Langdell – His Later Teaching Days*, 20 HARV. L. REV. 9, 10 (1906).

⁵¹ The pre-Langdell idea is well-captured by Holmes’s mocking reference to those legal principles as a “brooding omnipresence in the sky.” *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting).

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examples of law, or evidence of law,⁵² and not law itself.⁵³ Thus when Langdell featured cases in his writings and teaching,⁵⁴ and when he did so based on his assumption that the cases were law (or sources of law) and not simply evidence of law,⁵⁵ he was departing from the historical understanding of just what materials did and did not count as law itself.⁵⁶ The disagreement between Langdell and most of those who preceded him, Blackstone perhaps most prominently, was thus a disagreement about just what counted as law, and was accordingly, at least under the definition I am presupposing here, a theoretical disagreement.

Similar controversies exist in the present. Consider, for example, the contemporary controversy about the use by American courts of foreign law.⁵⁷ Although American courts have long made reference to and arguably relied on law from non-American jurisdictions,⁵⁸ such use has been sporadic, and the contemporary controversy dates largely from the Supreme Court's seeming reliance, over objection, on the authority of foreign law in cases dealing with the juvenile death penalty,⁵⁹ with the death penalty for those with mental impairments,⁶⁰ and with homosexual sodomy.⁶¹ In these cases, and in the vast commentary that they have spawned,⁶² the proponents of the use of foreign law can be understood to

⁵² See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69 (describing judicial decisions as the most authoritative "evidence" that can be given to the existence of a law).

⁵³ See *id.* at *66.

⁵⁴ See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 964-66 (2009) (describing Langdell's then-novel use of cases in teaching).

⁵⁵ See James Schouler, *Cases without Treatises*, 23 AM. L. REV. 1, 7 (1889) (analyzing Langdell's use of cases).

⁵⁶ See *id.* at 1 (distinguishing Langdell's approach to cases from the teaching of his Harvard predecessors).

⁵⁷ See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988). Compare Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (offering a sympathetic account of American uses of foreign law), with Ernest A Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005) (presenting a less sympathetic perspective).

⁵⁸ Including in Riggs itself.

⁵⁹ Compare *Thompson*, 487 U.S. at 830-31 (relying on law of other jurisdictions), with *Thompson*, 487 U.S. at 859, 868 n.4 (Scalia, J., dissenting) (objecting to use of foreign law).

⁶⁰ Compare *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citing to foreign law), with *Atkins*, 536 U.S. at 321-22 (Rehnquist, C.J. dissenting) (questioning use of foreign law); and *Atkins*, 536 U.S. at 337, 347-48 (Scalia, J., dissenting) (same).

⁶¹ Compare *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (explaining English legal development regarding sodomy), with *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (arguing that constitutional entitlements do not come about because foreign nations have decriminalized the action).

⁶² See, e.g., Angioletta Sperti, *United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence*, in THE USE OF FOREIGN PRECEDENTS

be claiming that the field of law includes foreign law, and thus that the existence of a precedent from a similar (and admired) country can and should be considered authoritative, even if not conclusively so.⁶³ By contrast, opponents⁶⁴ of the use of foreign law as having precedential or authoritative value typically worry about the problem of Americans not being represented in the process of making foreign law, or about our ability to understand the context of the foreign precedents that are being cited.⁶⁵ But my goal here is not to delve into whether it is the proponents or the opponents who are correct about the use of foreign law by American courts. Rather, the point is simply to observe that the proponents and the opponents are disagreeing not about how to interpret, say, Article 10 of the European Convention on Human Rights, nor about how to understand a decision of the Constitutional Court of South Africa, nor about whether to include the law of Poland in an agreed-upon field of relevant foreign law. Rather, those who dispute about the use of foreign law are disagreeing about whether foreign law, as a type of source, belongs in the category of legitimate legal inputs, or legitimate sources of law.⁶⁶ It is a dispute about what counts as American law, which is a subset of the question of what counts as law.

BY CONSTITUTIONAL JUDGES 393, 403–04 (Marie-Claire Ponthoreau & Tania Gropp eds., 2013) (noting Chief Justice Marshall’s use of laws from England in the *Rose v. Himely* decision). See also ELAINE MAK, JUDICIAL DECISION-MAKING IN A GLOBALIZED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS 170 (2013); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653, 654–55 (2009); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 854 (2012).

⁶³ See, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 115 (2005); Mark Tushnet, *When Is Knowing Less Better than Knowing More: Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1284 (2006). See also FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 80 (2009) (describing the foreign law controversy); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1940 (2008) (same, and questioning the idea of persuasive authority).

⁶⁴ In addition to the opinions of Chief Justice Rehnquist and Justice Scalia, *supra* notes 59–61, see Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL’Y 291, 294–95 (2005); Richard A. Posner, *No Thanks – We Already Have Our Own Law*, LEGAL AFFAIRS, July–August 2004, at 40; Richard A. Posner, *Judicial Cosmopolitanism*, in HOW JUDGES THINK 347, 347–50 (2008) [hereinafter Posner, *Judicial Cosmopolitanism*].

⁶⁵ See Posner, *Judicial Cosmopolitanism*, *supra* note 64, at 347–50.

⁶⁶ Famously, John Chipman Gray distinguished law from the sources of law, e.g., JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW (2d. ed. 1921), but if we understand law itself as largely—or perhaps even intrinsically or necessarily—a source based enterprise, see RAZ, THE AUTHORITY OF LAW, *supra* note 44, at 45–54, 62–66; RAZ, THE CONCEPT OF A LEGAL SYSTEM, *supra* note 46, at 210–14, the distinction between law and the sources of law seems, to put it gently, peculiar.

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Much the same characterization can be applied to another contemporary controversy, the one about the propriety of use by appellate courts of so-called non-legal information.⁶⁷ Consider, for example, Justice Breyer's dissenting opinion in *Brown v. Entertainment Merchants*,⁶⁸ the case in which the Supreme Court rejected, on First Amendment grounds, California's attempt to restrict juveniles' access to violent interactive video games.⁶⁹ The substance of the decision is not important here, but it is noteworthy that Justice Breyer in his dissent cited a large number of empirical studies about the effect of videogames and related images on behavior, studies that Justice Breyer argued served to establish the reasonableness of California's challenged regulation.⁷⁰ In response, Justice Scalia's opinion for the majority observed, plainly with an edge, that none of the information offered by Justice Breyer had been part of the record in the case.⁷¹ Apart from their differences about video games and about the First Amendment, therefore, it is clear that Justices Breyer and Scalia had a disagreement about the extent to which non-legal sources that were not part of the litigation at trial, not part of the appellate record, and not part of any of the briefs of the parties were appropriate sources of information and guidance for appellate decision-making.⁷² Once again, the disagreement was really about what is to count as a legitimate input into a legal decision, or what is to be considered an acceptable source for an appellate judge to use or cite, and thus it was a disagreement that, in the sense that I am using that idea here, was a theoretical one.

Indeed, the disagreement about the kind of information that Justice Breyer used in *Entertainment Merchants* is a disagreement likely to have more lasting relevance and salience than the disagreement about the use of foreign law.⁷³ Some of this lasting relevance is a product of Justice Breyer's own approach to appellate adjudication, for in some number of other cases he has also gone beyond the record, the briefs, and facts found

⁶⁷ See Schauer & Wise, *supra* note 8, at 496 (documenting the growing judicial use of non-legal sources).

⁶⁸ See 131 S. Ct. 2729, 2761–71 (2011).

⁶⁹ See Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 99–100 (2011) (discussing the First Amendment aspects of the case).

⁷⁰ *Brown*, 131 S. Ct. at 2761–71.

⁷¹ *Id.* at 2739 n.8.

⁷² See generally Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. REV. 125, 148 (2014) (discussing the use of non-legal sources as used by Supreme Court Justices); Allison Orr Larsen, *Confronting Supreme Court Factfinding*, 98 VA. L. REV. 1255, 1302–03 (2012) (providing examples of non-legal sources used by the Supreme Court Justices); Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 142–44 (2008) (describing how the internet has affected the judicial fact-finding process).

⁷³ See Larsen, *supra* note 72, at 1279–80.

at trial in bringing so-called non-legal information to bear on the appellate process.⁷⁴ In the important Commerce Clause case of *United States v. Lopez*,⁷⁵ for example, Justice Breyer, again in dissent, similarly used a wide array of independently-located empirical information to argue that the availability of guns in the public schools did indeed have an effect on interstate commerce, which was the question at issue in that case.⁷⁶ Of less significance, Justice Breyer made (slight) use of his independently-located book, *How to Buy and Care for Tires*, in his majority opinion in the important expert evidence case of *Kumho Tire Co. v. Carmichael*.⁷⁷ And of potentially even greater importance, Justice Breyer, once again dissenting, relied heavily on facts and information that he and his law clerks were able to locate from various (presumably public) sources about the very party in the case before him in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁷⁸

Although I have mentioned several opinions by Justice Breyer, it is worth noting that Judge Posner has adopted much the same approach, and has unashamedly described and defended his practice of engaging in post-brief and post-argument independent factual and empirical research to acquaint himself with what he feels he needs to know to make the best decision in the case before him.⁷⁹ As with Justice Breyer's practices, Judge Posner's have not been without controversy,⁸⁰ in part because they raise important due process issues about notice to opposing parties and information obtained outside of the adversary process, and in part because they may be in some tension with traditional notions of judicial notice.⁸¹ But as with the dispute about the use of foreign law in constitutional (especially) adjudication, the dispute about extra-legal sources and independent judicial research is not one I seek to resolve, or even to enter, on this occasion. Rather, I use that dispute, along with others, to identify a particular kind of dispute—a dispute about whether some category of sources, or some category of information—shall be considered acceptable in contemporary legal argument and legal decision-making.

⁷⁴ *Id.*

⁷⁵ 115 S. Ct. 1624 (1995).

⁷⁶ *Id.* at 1659.

⁷⁷ See 119 S. Ct. 1167, 1172 (1999).

⁷⁸ See 127 S. Ct. 2738, 2800, 2837–41 (2007) (Breyer, J., dissenting).

⁷⁹ See RICHARD A. POSNER, REFLECTIONS ON JUDGING 131–48 (2013).

⁸⁰ See *Rowe v. Gibson*, 798 F.3d 622, 638 (7th Cir. 2015) (Hamilton, J., concurring in part and dissenting in part).

⁸¹ See Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51, 60–61, 65–66 (2013).

VII. CONCLUSION

The argument that I have offered in this Article is thus a simple one. An important form of disagreement in law is now, and has been for centuries, about what kinds of materials, sources, inputs, considerations, norms, and what-have-you will be understood as legitimate sources or authorities for legal argument and legal decisions. If one accepts, broadly, a Hartian rule of recognition account of law, then the character of law in a jurisdiction—a legal community—will be determined by the content of the ultimate rule of recognition.⁸²

More particularly, however, the character of law, legal argument, and legal decision-making in a community will be determined by the *types* of sources or inputs that are recognized by the ultimate rule of recognition.⁸³ This will determine not only what lawyers will argue, how judges will decide, and what authorities lawyers and judges will use in their briefs and opinions, but also what courses will be taught at institutions that designate themselves as law schools, what materials will be part of such courses, what subjects will be included on bar examinations designed to certify individuals as lawyers, and what answers on bar examinations will be deemed acceptable by the examiners. In other words, a host of particular institutions are part of the sociologically differentiated general

⁸² It is part of Dworkin's attack on legal positivism that fundamental disagreements about what is recognized by the rule of recognition are inconsistent with the purpose that a rule of recognition is designed to serve, a purpose that requires some degree of consensus among participants in the legal system. See Scott J. Shapiro, *What is the Rule of Recognition (and Does it Exist?)*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 40, at 235, 260–63. Thus, Dworkin appears to presuppose a view of the point of positivism that derives from the law-reform goals that produced the normative positivism of Jeremy Bentham, and that require a degree of guidance and specificity about what counts as law. See Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 *VA. L. REV.* 957 (2015). And although I believe that there is much to be said, both historically and normatively, for Bentham's understanding of legal positivism and for the normative foundations on which it rests, it is clear that much of contemporary legal positivist theory in the analytic tradition has taken a different path. Insofar as this is true, therefore, Dworkin and contemporary positivists seem simply to be talking past each other. Moreover, if we understand the rule of recognition account as based simply on recognizing that what is or is not law is a social determination, then nothing in this skeleton of an account requires that this recognition produce or take the form of a rule. See A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* 77 (2d series) (A.W.B. Simpson ed., 1973). See also Schauer, *supra* note 20, at 173; Anthony J. Sebok, *Is the Rule of Recognition a Rule?*, 72 *NOTRE DAME L. REV.* 1539, 1558–59 (1997). And if the core idea of the rule of recognition is compatible with the rule of recognition being a fluid and substantially amorphous social practice, and if identifying it as a social practice is the basic positivist insight, then nothing about the looseness of the practice is essential to legal positivism, thus rendering Dworkin's critique largely beside the point.

⁸³ See Schauer, *The Limited Domain of the Law*, *supra* note 5, at 1927–28.

institution of law,⁸⁴ and the character of that general institution will be closely connected with—dependent on, in a stronger version of the claim—the difference between the sources that are considered part of that institution and the sources that are not. And although similar claims might be made about other social institutions, those claims have a special resonance and importance when the institution is itself a source-based one, as law almost certainly is.

Because the sociological legitimacy or illegitimacy of certain sources or inputs is so central to the idea of law, when there is disagreement about which types of sources or inputs do or should count as law—when there is disagreement about which types of sources or inputs are or should be recognized by the ultimate rule of recognition—we have what in an interesting way is a theoretical disagreement about the law in some legal community. This is not a theoretical disagreement about the nature of law in all possible legal systems in all possible worlds, but at least for some of us the fact that this theoretical disagreement exists at a sub-conceptual level is far more a virtue than a vice.

⁸⁴ See NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* 235–37 (Elizabeth King-Utz & Martin Albrow trans. 1985) (1972).

