1 Introduction

> *Philosopher*: We have hitherto spoken of Laws without considering any thing of the Nature and Essence of a Law; and now unless we define the word Law, we can go no farther without Ambiguity, and Fallacy, which will be but loss of time; whereas, on the contrary, the Agreement upon our words will enlighten all we have to say hereafter.
>
> *Lawyer*: I do not remember the Definition of Law in any Statute.
>
> (Hobbes [1681] 1971, 69)

Different kinds of philosophical questions can be asked about law. John Rawls's major works (1996, 1999) can be seen as treatises on what the content of law should be if a state is to be both legitimate and just. Other inquiries lie more clearly within legal theory in that they evaluate different ways of designing the kind of governance structure we call law (Kornhauser 2004): Should we prefer formally realizable legal rules (Kennedy 1976), or more open standards? What principles must legal rules or standards satisfy to realize the moral ideal of the rule of law, and thus govern us appropriately as responsible agents?

Though this book touches on such questions, this is usually to contrast them with my main topic, which is the nature of law. There are two main questions, though my focus is overwhelmingly on the first of them. When we ask what makes law, we may have in mind the question of how we determine the content of the law in force. This is the question of the grounds of law. The ancient issue here – though it has become a major

concern of philosophy only over the past two hundred years or so – is whether moral considerations are ever relevant when we are trying to find out what the law is, as opposed to what it ought to be. The other question we may have in mind, which I will not reach until the end of this book, is that of what makes a normative order an order of law, rather than something else, such as conventional morality, or etiquette, or a code of honor among thieves.

Of the two main parties on the issue of the grounds of law, those who deny that moral considerations are always relevant when figuring out the content of law go by the name of "positivists." The opposing camp, which holds that moral considerations are always relevant, has lacked an appropriate name – so I just call it "nonpositivism." An enormous amount has been written about this debate since H. L. A. Hart first published *The Concept of Law* in 1961 (Hart 1994), and especially since Ronald Dworkin began his attack on positivism in his article "The Model of Rules" in 1967 (in Dworkin 1978). The next three chapters of this book aim to lay out the bare bones of this debate. It is not my intention to do justice to its many twists and turns. Rather, I hope to motivate the two positions, to explain what each side most fundamentally believes, and to present their positions in what seems to me to be their most favorable light. This will mean ignoring many complications and, on occasion, helping myself to revisionist interpretations of the main texts.

Chapter 2 explains the crucial difference between a theory of what makes the content of law what it is – the issue of the grounds of law – and a theory of how judges and other legal decision makers should decide cases. Understanding this distinction is crucial to any understanding of the debate about the grounds of law. I also provide an extremely short introduction to the two positions and the history of the debate. More detailed accounts of positivism and nonpositivism are provided in the following two chapters.

Chapter 3 takes Hart as our paradigm positivist, though reference is made to the two other most important defenders of this position, Hans Kelsen and Joseph Raz. It is in my interpretation of Hart that I take

perhaps the greatest liberties, in an attempt to get to what I believe is the most forceful and plausible version of his theory of law; I do not spend very much time discussing the complexities and occasional infelicities of his own text nor much of the voluminous literature about it. Chapter 4 is mostly about the most important nonpositivist philosopher, Ronald Dworkin. Here too I am brief. I unpack Dworkin's position into a number of distinct claims that are, together, a compelling package, but that are not all essential to nonpositivism as I understand it. Nonpositivism is the view that moral considerations are always relevant to determining the content of the law in force. Dworkin believed that, but he believed much else besides, and it is important to understand that one could embrace nonpositivism while disagreeing with some of Dworkin's other claims.

There are many excellent scholarly works about both Hart and Dworkin that are more comprehensive than my two chapters. My aim is to set up two clear and attractive positions so that we can get on with the problem of how we might decide between them.

This is a big problem. One main claim of this book is that the two camps represent two fundamentally opposed visions of the kind of thing law is, and that nothing so much as an argument is likely to move either side closer to the other. As I explain in detail in the core chapter of the book, Chapter 6, I believe that no argument for either side is likely to carry more conviction than the foundational initial stance that each brings to the table. For positivists, law is grounded in fact alone. For nonpositivists, though law connects with social and political fact, it is also in its nature something good, or at least potentially so – so of course morality is relevant when figuring its content. I am unaware of any argument that makes use of premises that don't, in effect, require either side to give up its foundational commitment.

This standoff perhaps sheds light on an often noted feature of the debate about the grounds of law: many lawyers and philosophers believe that it is entirely empty and pointless. That view is on the face of it surprising, since it could only not matter how we determine the content of law if it doesn't matter what the law is. Frustration with the standoff is not

itself a good enough reason to dismiss the debate. A serious attack on the importance of the question of the grounds of law requires defending the view we don't, in fact, need to know what the content of the law is. This "eliminativist" option is discussed at length in Chapter 6. But though it must be taken seriously, it must be wrong. There is an important contrast to be drawn between the question what is law and questions about other contested political ideas, such as what is democracy, what is liberty, and what is the rule of law. To set up the contrast, I discuss in Chapter 5 several examples of "What is X?" disputes in political philosophy and reach the conclusion that these debates really don't matter. They don't matter because we can continue to talk about all the political issues that matter to us without agreeing exactly about what, say, democracy *really is*. The case is different for law, because we cannot replace talk about what the content of the law is with talk about something else – such as what judges should do.

The main reason we cannot just forget about the content of law is that, depending on the legal subject, there is often strong moral reason to comply with it. Chapter 7 discusses the old question of whether there is a standing (but overridable) moral duty to follow the law. The position I defend is instrumental, or consequentialist – people should follow the law when this will do more good than some alternative action. This means that for private individuals compliance with law will frequently not be morally required. But – and this is the main claim of the chapter – I believe that government officials, especially high-ranking officials, typically have very strong moral reasons to comply. Coupled with the argument in Chapter 8 that states, especially powerful states, typically have strong moral reasons to comply with international law, this amounts to the position that "law for states" (Goldsmith & Levinson 2009) matters greatly, and provides the main reason the whole issue of the grounds of law is important.

My two conclusions, that law (especially for states) matters, but that opposing views about how to figure out the content of the law seem to be intractable to argument, leave me with a problem. If the content of

law matters so much, and the two views reflect fundamentally different strongly held views, how is it that so many lawyers, politicians, and ordinary people are not at all concerned about the debate between positivism and nonpositivism? If we have to know which view is right before we can know the content of the law, and if the content of the law matters, why aren't we all arguing about this problem all the time? The answer to this question, I argue in Chapter 6, is that the two views overlap considerably in the direction they give us about how to figure out the content of law. Though one side says morality is never relevant and the other side says it always is, this fundamental disagreement is frequently not engaged. So, though in many cases the different views will yield different answers to the question of what the law around here is, in many more cases they will not. My concluding chapter offers some brief thoughts about how much we should be concerned about the cases where the two views yield different conclusions.

The second main question about the nature of law, what makes law law rather than something else, is discussed in Chapter 8. That chapter surveys several issues that international law and other forms of law beyond the state raise, including how positivist and nonpositivist views play out in that domain. But the main focus is on the questions of whether international law qualifies as a legal system and whether law beyond the state can be thought of as a form of law at all – rather than, say, conventional morality among global actors. In discussing this latter issue, I venture a view. While the availability of coercive enforcement cannot be seen as a necessary condition for a normative order counting as a legal order, I do believe that when it is law we are talking about (rather than, say, morality or etiquette), we hold that coercive enforcement is in principle appropriate. In venturing a view that I hope might be compelling to any reader, I here show that I do not believe that disagreements about what makes law law reflect the kind of foundational standoff we see with the issue of the grounds of law. But of course I may be wrong about that.

2 Morality and the Grounds of Law

Adjudication and the Grounds of Law

The main traditional dispute about the nature of law, and the one that is the main focus of this book, is a dispute about what morality has to do with figuring out the content of the law in force in any particular place.

On the one hand we have matters of fact, such as the meaning of what is written in some document that is issued by some legal institution such as a legislature. On the other hand we have moral considerations, in the broad sense that includes not just individual right and wrong but also normative political theory (about, say, social justice or the proper limits of state power). Everyone thinks that matters of fact are relevant to determining the content of current law. The main dispute about the nature of law is a dispute about whether moral considerations are also relevant. This is a dispute about what Dworkin (1986, 4) called the grounds of law – of what makes legal propositions true.

This dispute is obviously distinct from the question of whether moral judgment does or should influence those who make law. We can take for granted that it should and to some extent does. The question is whether moral considerations are relevant to figuring out what the law already is.

What may not be so obvious is that the issue of the grounds of law is also distinct from that of whether judges should appeal to moral considerations when adjudicating disputes. Explaining this contrast is perhaps the best way to bring the traditional debate about the grounds of law into focus.

Any government official whose role it is to determine the legal rights and duties of others requires a theory of legal decision making. In the case of judges, we call this a theory of adjudication. Officials from other branches of government also make decisions about the legal rights and duties of others, which will be important in later chapters, but judges provide the central case and the natural place to start.

A judge's theory of adjudication may be sketchy and perhaps only implicitly believed, but she must have one. Decisions about people's legal situations obviously cannot be made without having views about which considerations it is appropriate to take into account. It is not essential, by contrast, that judges have a theory of the grounds of law – a theory that would tell them whether and when moral considerations are relevant to the question of what the law (already) is.

A record of the reasoning behind a judicial decision may cite many factors that were thought to be relevant, such as the contents of constitutions, statutes, prior judicial opinions, the prevailing custom in a particular industry or place, the opinions of legal scholars, and considerations of social welfare, justice, and fairness. A judicial opinion (in common-law jurisdictions, at any rate) explains how and why a decision was reached, and therefore tells us a lot about the judge's theory of adjudication, but it will not necessarily reveal her views about which of the factors on which the decision was based were part of already existing law.

If judges were called on always to announce the state of the prior law as they found it, they would need to reveal their views, for example, about whether considerations of fairness are part of the law or rather fall into the category of considerations not part of law that are nonetheless legitimately taken into account in adjudication. Such categorization requires a theory about which kinds of factors are, in principle, relevant to figuring out the content of the law; it requires a theory of the grounds of law. It is typically not necessary for judges to engage in such categorization, and so it is typically not necessary for judges to have a theory of the grounds of law.

This holds true even when common-law courts explicitly "overrule" or "decline to follow" a precedent. Such a statement leaves open whether the discredited precedent was, in the view of the court, formerly part of the law, which is now changed, or instead a mistake that was never part of the law properly understood. Both views are found in traditional common-law thinking, but judges working within the common law need not take a stand.

Some judges and some legal theorists believe that all normative considerations that judges are authorized to take into account when deciding a case are necessarily part of the existing law. We can call this the adjudicatory or adjudicative (Perry 1987) view of law. The implication of the adjudicatory view is that there is no interesting gap between determining what the law is and marshaling the considerations relevant to resolving a particular dispute before a court.[1] If the adjudicatory view of law is correct, then it is misleading to say that it is not necessary for judges to have a theory of the grounds of law. But the adjudicatory view of law may or may not be correct, and it is not necessary for judges to have a view about whether it is.

The majority and the dissent in the nineteenth-century New York case *Riggs v. Palmer*[2] disagreed about statutory interpretation. Francis Palmer's will, formally valid under the relevant statutes in New York State, left his estate to the person who murdered him. The majority argued for the relevance of the fact that the legislature, had it ever considered such a case, would never have intended to allow a murdering heir to inherit. It also argued that statutes should be interpreted in light of "fundamental

[1] There will still be a gap, on any plausible view: mathematics and logic can help determine the outcome of a legal dispute, but no one believes that they are part of the law in force. The terms of a contract will in part determine the outcome of a contract dispute. It seems natural not to regard those terms as part of existing law, but some may prefer to talk that way – to treat the contract as private legislation between the parties. But this is not an interesting disagreement. What matters is whether the normative considerations of fairness, justice, and the rest are, if legitimately appealed to in adjudication, therefore part of the law in force.

[2] 115 N.Y. 506 (1889).

maxims of the common law." The dissenting judges argued for a straightforward application of the literal meaning of the words of the relevant statutes. Dworkin characterizes this dispute as one "about what the law was, about what the real statute the legislators enacted really said" (1986, 20). But while the judges clearly disagreed about proper adjudication, we simply do not know whether they all embraced the theory of the grounds of law according to which all normative factors legitimately taken into account in adjudication are at the same time relevant to determining the content of the existing law. They did not say. They did not take a stand on the nature of law because it was not necessary.

It is sometimes claimed that all, or almost all, judges hold the adjudicatory view of law. If this were true, it would provide some support for it. But the evidence does not support the claim. In the United States, prominent and scholarly judges who have addressed the issue – from Oliver Wendell Holmes Jr. to Learned Hand to Richard Posner – have thought it obvious that judges must, on occasion and under constraint, "legislate."[3] Benjamin Cardozo (1921) elaborated a theory for such legislative adjudication – using what he called the "method of sociology," a judge should fill gaps in the existing law with recourse to community morality. Most judges, however, neither announce their theory of law in their opinions nor write books or articles about the judicial process, so it is hard to know what theory of law they hold.

It is true that in recent times it has become typical for judges and aspiring judges in the United States publicly to disavow "legislating from the bench." But many of these same judges would equally adamantly deny that applying the law ever requires them to have recourse to "their own" moral or political views. As it would precisely be inclusion of moral judgment within the bounds of law that would give existing law the resources

[3] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917, Holmes, J., dissenting). Hand (1952) takes a similar view, as does Posner (2008, 81–92).