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Legal Positivism in the Case of *Florida v. Jardines*

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Abstract

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Abstract: Legal Positivism is the claim that morality need not be tied to law. There are many versions of positivism, each appealing to different conditions for their validity. One particular theory, Omega Positivism, stands out as the best of the competing theories in terms of criteria many positivists share. *Florida v. Jardines* is a United States Supreme Court case in Fourth Amendment law. The appropriate ruling in that case takes into account principles of political morality infused into the law, according to Omega Positivism. The majority opinion did not note those principles as meaningful, however, and remains inadequate. A truly positivist reading of that decision, that is, an Omega Positivist reading, demands a re-evaluation of that case.

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I would like to thank the Philosophy Department of Emory University for having me, the debate community for keeping me, and my friends and family for keeping me sane. You all push me to greatness.

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Introduction

Project

This thesis is a work in philosophy of law. Specifically, it is a work in legal positivism. Even more specifically, it looks at a Supreme Court case, *Florida v. Jardines*, in light of legal positivism.

Law is a permanent fixture in human society. Questions in the philosophy of law address the perennial issues arising from its complications. Chief among these is the question "what is law?" It is this question that legal positivism strives to answer.

"Legal positivism" is the view that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality."[1] As a class of legal philosophy, legal positivism distinguishes itself from "natural law" theories. Those theories hold that it is a necessary truth that law, simply by its nature as law, satisfies some demands of morality.

Florida v. Jardines is a United States Supreme Court case in Fourth Amendment jurisprudence. The Fourth Amendment prohibits unreasonable searches and seizures. In *Florida v. Jardines*, police detectives Pedraja and Bartelt, who lacked a warrant, brought a drug dog up to Joelis Jardines' doorstep to test for drug odors. The main issue in the case is whether, according to the Fourth Amendment, the actions of detective Pedraja and Bartelt constituted a search.

Process

In Chapter One: Criteria, I will develop the criteria I will use to discuss judge theories of law in later chapters. I have three criteria I will use. The first criterion, "descriptivity," assesses

[1] H. L. A. Hart, *the Concept of Law* (Oxford: Oxford University Press 1961) pp. 181.

whether a theory of law is consistent with the empirical elements of the inner workings of real legal systems. The second criterion, "generality," assess whether a theory applies to a wide range of societies. The third criterion, "practicality," assesses whether a theory leads to particular decisions in particular cases.

In Chapter Two: Conceptions, I will present and evaluate the works of notable positivist thinkers. I will eventually come to a conclusion about the positivist theory that most coheres with the criteria I advance in Chapter One. The theory of positivism I will support attempts to adapt the theory of archetypal positivist H. L. A. Hart to meet the objections of some recent commentators. I will call my theory Omega Positivism.

Hart's theory is characterized by three significant features. First, it situates law as a system composed of rules. Second, it locates the test for law in a rule of recognition. Third, it posits the need for discretion to resolve indeterminate cases. Omega Positivism modifies the first feature by claiming that law contains both rules and principles. Omega Positivism discards the second feature by maintaining that there is no fundamental social test for the validity of principles, though there is for rules. Omega positivism maintains the use of discretion for cases with unclear or equal principles, but discards its use for applying rules.

In Chapter Three: Cases I use Omega Positivism to assist in creating the correct ruling in *Florida v. Jardines*. The original majority opinion in the case ruled that bringing a drug dog to a doorstep is a trespass for Fourth Amendment purposes and is therefore a search. The concurring opinion argued that, in addition to being a trespass, doing so also violates a reasonable expectation of privacy. The dissenting opinion argued that it was neither. I rule that bringing a drug dog to a doorstep is not a trespass but does violate a reasonable expectation of privacy. Omega positivism assists in making such a conclusion.

Relevance

The theory of law one has directly affects the tangible legal decisions that are correct and incorrect. A different theory of law can, and often does, lead to a different conclusion in terms of ruling in a case. So, philosophy of law considerations are useful to legal analysts, judges, lawyers, and others who engage with the legal system. As I will show in Chapter Three, the theory of positivism most consistent with my criteria does, in fact, yield a different decision than the one that prevailed in *Florida v. Jardines*. In this sense, the relevance of philosophy of law in this context will be demonstrated, not merely asserted.

Unlike some other areas of philosophy, philosophy of law is not so easily ignored. Law is a feature of every major human civilization. Understanding how it works is not mere academic stargazing. Millions of individuals every day engage meaningfully with the law in a way that does not happen for epistemology. Those engagements result in transfers of goods, forced confinement, and, in some cases, death. Understanding law is therefore vital, in more ways than one.

Moreover, law is a physical fixture in human societies. Specific legal systems are controlled by specific societies. As such, legal systems change over time in a way that metaphysics does not. Therefore, new works in philosophy of law are important to the continued accuracy of the relevant theories. An academic consensus on the status of law in 900 AD, for instance, will almost certainly need updating if it is to apply today. A treatise on the status of God, on the other hand, continues to be true if it was then, even now.

Finally, *Florida v. Jardines* is a relatively recent case in United States law. As such, not much formal, academic attention has been devoted to it, philosophy of law or otherwise. Thus, this work will fill a gap in the literature base. At least, it will give those with an interest in the case an important perspective.

Chapter One: Criteria

Introduction

In this chapter, I will discuss the criteria that I will use to evaluate theories of law in Chapter Two. This chapter will contain a lengthy discussion of the reasons I chose the criteria I did, some possible responses to those criteria, and what impact the meaning of "positivism" has on either criteria selection or the thesis project writ large. It also contains a discussion of some important, remaining meta-level issues for the thesis as a whole.

Scope

Participants in a contested argument will get nowhere if there is not agreement about what will count as argument success. Unstated and distinct satisfaction conditions do not create unique disagreements, but tends to mask where disagreements are located. Arguers could, after all, agree on all of the relevant facts surrounding a point, or even on the logical merit of claims. But in some of those cases, on evaluating those facts, each participant declares themselves the winner upon the fulfillment a privately held satisfaction condition. There, the argument is truly about some never clarified premises. Clarification helps establish whether a disagreement is soluble. Specific criteria ensure that two participants are not simply talking past each other.

The need for specific criteria as a benchmark for success is obvious, but deciding upon criteria is more difficult. Advancing lines of argument in support of particular criteria for a good philosophy of law requires tying specific criteria to other normative commitments. I will not pretend that debating about what features are criteria recommending is not tied to broader moral questions. Any feature it is possible to use for recommendation is open to questions such as "why

does that feature make this criterion better than another?" Any answer given is itself subject to further questioning until the specific commitments of a moral system are invoked.

It is beyond the scope of my thesis to argue for the merits of any moral system. The burden of proof for the success of any of those arguments is substantial, and the literature bottomless. The purpose of this piece is to investigate questions in philosophy of law. Spending too much time on discovering a "true" ethical theory, in research or paper-proper, trades-off with that purpose.

So, this paper must identify specific criteria for a philosophy of law, but must do so without justifying those criteria normatively. As such, the three criteria I put forward here are put forward conditionally. If one thinks of oneself as committed to these criteria, or to normative principles linked to those criteria, then these criteria will help determine what legal principles figure into the one's extent web of beliefs. Someone who does not find him or herself committed to my criteria will not find Chapters Two and Three, which show that a specific theory of law meets those criteria, satisfying.

Most natural law theorists, in particular, will be unsatisfied with many of the criteria laid out here. The aim of this piece is to settle a debate about the superiority of some types of positivism over others. Criteria that will decide that debate are likely to not simultaneously settle debates between positivists and proponents of natural law.

This will not be too much of an issue in this case, however. This is because many claims made by natural law proponents against positivism appeal to some of the same criteria that positivists do. So, defenders of natural law will find some of the discussion in Chapter Two illuminating for the debate they want to have with positivists.

This paper can thus be seen to be making a weak claim. Although I certainly hope that at least some of my criteria have widespread appeal, I do not expect that all of them will, even among

a majority of thinkers. My principles are defended by at least some positivists, perhaps even many positivists. Positivists that find that they share all or most of these criteria will find the subsequent evaluation of positivist theories the most impactful.

There is at least something that can be said in what one might call "support" for particular criteria. One fact that distinguishes criteria from other similar criteria, for my purposes, is the need for my thesis to accomplish its goals. Some criteria advance these goals more successfully than others. While an objection to these sorts of arguments on the grounds that the thesis should have had different criteria makes sense, it would be difficult to find these arguments persuasive because they amount to the claim that I should have written a different thesis. Ultimately, my goals are my own.

Additionally, while these criteria are not defended as normative ideals, they might suffer from being poorly applicable, unclear, or un-evaluable given the goals of my thesis. Some objections to my three criteria on these grounds are discussed below. As most of the responses will show, most of these types of objections can be resolved with relatively minor clarifications.

Criteria Proper

My three criteria are descriptivity, generality, and practicality. I will discuss them in turn.

The first criterion is that the theory of law captures the way legal systems are actually laid out. From here on, the term "descriptivity" will be used to refer to this criterion. This measures the depth of relation a theory has to the internal operations of real legal systems. A theory of law makes a certain number of descriptive claims, or at least assumptions, about the way law is carried out. This is particularly true of positivist theories of law. Descriptivity measures the convergence of those descriptive claims with the realities of specific legal systems.

Many positivists think of the descriptivity of his or her theory as one of its virtues. As Wil Waluchow notes, "[i]t is perhaps worth pausing to consider the extent to which … the theories being defended or challenged are descriptive/explanatory in nature. It is clear that Bentham, Hart, McCormick, and Raz have offered theories of precisely this character…"[2] Waluchow himself identifies descriptivity as his goal, saying that "[o]ur principle aim is to show that inclusive positivism is a better descriptive-explanatory theory than its rivals so understood."[3]

But perhaps this sort of criterion as it is laid out is circular. After all, a critic might claim, to call something a legal system is to already claim that it is a system with laws. The whole pursuit of theories of law, and of a descriptivity criterion for those theories, is to determine what counts as the legal system in the first place. By implication, this criterion would be useless because it demonstrates only that a good philosophy of law is one that is the most like law. It can therefore recommend no particular theory of law without begging the question.

To base theories of law after an opinion of a legal system could be circular. It need not be, however. A legal system here means what is so termed in societies. Specific societies have what their inhabitants call legal systems. Those institutions, commonly noted, are empirical facts. The term "legal system" refers to these. As a term in common usage, "legal system" rarely has metaphysical or evaluative connotations. For particular communities, "legal system" indicates particular institutional arrangements that deal with trials, imprisonment, and the government. This should not be too difficult to imagine. No special claim is made about the inherent status of any of these systems. While a natural law theorist might cry bloody murder about my assumptions here, I suspect a positivist would not.

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[2] W. J. Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press 1994) pp. 91.

[3] Ibid., 30.

A theory is more descriptive than another if, on balance, it gets more of the internal workings of legal systems right. It would be inane and likely impossible to represent this numerically. A focus on set of legal features a theory gets right and a focus on what it gets wrong allows the generation of real conclusions. The more central and wide-reaching particular elements of legal systems are that are gotten right or wrong will impact whether a theory is descriptive. An element that is central or wide-reaching is one that impacts other areas of the law. For example, a theory that gets everything right except for the estate tax, which it bungles, is more descriptive than a theory that gets everything except the courts, which it completely leaves out. The estate tax is less isolated from other legal system operations than the courts, who evaluate almost all of it.

People regularly disagree about what things are descriptive. There might be disagreement among reasonable people on the relevant facts. Luckily, however, these disputes admit of empirical resolution. Even disputes about something like the centrality of a feature of a system could be resolved by tracing the aggregate impact of that feature on other legal features, holding those features constant. And while there will still be disagreement among reasonable people on even issues like these, those disagreements are, in theory, soluble.

Consider a brief example of a non-descriptive theory. A new theory of law comes on the scene. Its proponent terms her theory "Pyramidism." According to Pyramidism, rulings about what is law are made by a centralized body of officials. Then, courts at increasingly local levels give more authoritative rulings that supersede those centralized decisions. At the final, most local and specific level, judges issue an ultimate ruling which affects only the decision at hand, and which is not open for review. The sum total of all of those individual decisions are called law.

Pyramidism fails the descriptivity test because the picture of law it gives relates so poorly to the way that the inner operations of legal systems exist. Typically, more centralized, higher

court decisions trump lower court decisions. Judge rulings also persist in application from case to case and affect one another. The vast majority of legal systems, and probably all of them, cannot be described this way. As such, Pyramidism cannot pass descriptive muster.

The second criterion can be considered a subset of the first criterion, but is both meaningfully distinct enough and important enough to warrant consideration as a separate virtue. This second criterion is "generality." By generality, I mean that a theory of law must be sufficiently applicable to a wide range of existing legal regimes. That is, a theory must be sufficiently general to account for variation among the particular legal systems that exist.

While descriptivity measures the depth of relation that individual theories have to specific legal systems, generality, in this description measures the scope of legal systems that depth of relation extends to. Evaluating the generality of a system hinges on things like type of government.

Take a hypothetical theory of law, "Unitextism." This theory tries to explain the codification of law by claiming that the authority of the law rests in a single written document that defines that government, that Unitextism's creator terms "the Document." All propositions of law can be traced back to this document. Unwritten dictates claiming to be law are mere hogwash.

Even if Unitextism lays out the operations of legal systems with written constitutions perfectly, it would lack generality because the world contains many legal systems without written constitutions. To say that this theory is not descriptive is ambiguous. It is better to say that it lacks generality because it cannot be applied across a diversity of country government systems.

The third criterion is called "practicality." A theory of law is practical if it helps to render specific decisions in specific cases. Legal adjudicators face cases they must decide. A theory of law that cannot help produce decisions for those people at the moment of their deliberation is

impractical. The distinctions it draws between legal and non-legal things is of no consequence to the persons actually making legal decisions.

The genesis of this criterion is that one of the main goals of this thesis is to decide *Florida v. Jardines*. I hope that using a theory of positivism to decide *Florida v. Jardines* will shed some light on the debate over positivism as a whole and on Fourth Amendment jurisprudence. This goal is dashed if the theory I come to is useless when deciding particular cases.

A possible objection here is that evaluations under this criterion must be normative. Usually claiming that something is practical means that it is better than an alternate option, that doing it would produce benefits that exceed its costs. But the word "better" is generally thought to be normatively loaded. If this claim is true, determining what meets this criterion involves determining ethical merit, which cannot be done in this piece.

Practicality, as I mean it here, does not entail ethical commitments. What it means is that a legal adjudicator can, given the facts of a case and armed with a theory of positive law, render a specific decision. That theory of law is practical in the sense that it is capable of, or indeed does, incline an adjudicator toward a specific decision. By practical it is not meant that the decision is necessarily better or worse than other possible decisions. To do so would be to make a host of normative claims.

Even if this argument is true in its entirety, it only proves that further work must be done on the project of this thesis, not that the project was flawed at the outset. And even if the particular "ethical" stance endorsed in this article is not defended in this article, it is certainly defended in others. It could be that I endorse is useful only if one has a certain set of ethical commitments. This would present few problems. It is no different from the sorts of caveats in the last section.

An illustration will bring out what I mean by this criterion. A metaphysician pens a book defending a new theory of law he terms "Positivistic Idealism." Positivistic Idealism is the thesis that laws are issued from a legal representative to persons under him or her. Those laws by themselves are perfect representations of permitted and prohibited actions. These are true laws. However, legal matters at the level of particular cases are hopelessly complex. Once the pure law touches an individual dispute, it becomes hopelessly mired in particularity and it becomes unclear what applies and what does not. Judges, carrying delegated authority imposed by an act created by a present or past legislative, democratic act, are undoubtedly part of the legal system. The directives that they issue to citizens, too, are law because they have delegate authority. But a judge decision cannot truly be decided on grounds that are law since any particular case cannot be legally related to a legislative act.

Positivistic Idealism is plainly impractical because it cannot possibly inform a judge what decision they should make in a case. It says, after all, that extension of legislation to cases is hopelessly complex and a judge cannot make their decision in a way that really relates to laws. It might be wrong for a host of other reasons, but Positivistic Idealism cannot be practical because no plausible reading of it can lead to a particular decision.

Those three criteria are sufficient for this analysis. There are many more that could have been chosen. If someone feels that a particular criterion is justified, then that is welcome criticism and could be the topic of additional dialogues.

Persistent Questions

There are three other meta-level issues that I must address.

First, there is the issue of the perspective I will take. Much of what I will say will focus on the decisions of judges in cases, via the courts. Insofar as the conclusions generate thereof apply

to other areas of the law then they are decisive for those areas. They may apply in other cases; I see no reason why they would not. But I will not confront extra-judicial point-of-views directly.

There are several reasons I adopt this perspective. First, many of the writers who I will discuss in Chapter Two base their accounts of law on theories of adjudication. To stay consistent with the debate as it unfolds across theorists, it helps to be as specific as possible.

Second, the ultimate goal of my thesis is to analyze a decision in a specific Supreme Court case. Thus, elements of adjudication as they relate to law are central.

Third, judges in most legal systems are the ones on the ground that have to make decisions about what the law means. No other body is tasked with such a determination. So, judicial conclusions generated here are directly relevant to decisions about what is the law and what it is not. Other legal actors are not as relevant to that question.

There is one argument I came across that purports to prove that a theory of adjudication is not enough as a theory of law. Wil Waluchow makes an argument that connecting a theory of adjudication with one of law is flawed because judges have different duties when it comes to the law. Depending on their level in the legal system, Waluchow claims, judges could have the duty to apply the law, or to dispense with it. Waluchow identifies lower court judges as being bound by the dictates of the law. Higher court judges, on the other hand, review the actions of lower courts, which, though they are law, the upper court judge could be under obligation to change if they feel it is inconsistent. The laws are not binding on them, as it were. The judge might be under the express legal duty to not apply that law. Given that judges may not be bound by existing laws, Waluchow's argument runs, equating a theory of adjudication with one of laws in general is inaccurate. [4]

[4] Ibid., 33-37.

This argument seems rather weak. Higher court judges do not truly have obligations against the law in spots where they feel the lower courts have messed up. Rather, he or she identifies a duty to following the law that, in his or her opinion, the lower court has not accounted for. Judges consider themselves applying what is the law in each case, though the law may be unclear about what exactly they should do. Their task is not different from that of lower court judges in any real sense. Lower court judges may act in a way that is more open to review than upper court judges. But that does not indicate that the goals of each changes. Therefore, judges are bound by "the law" in the same way, whatever their level on the judicial hierarchy. It is just the case that some judges, when confronted with specific laws, have more license to interpret them in contradiction with precedent. Judges, however, are always bound to do what they identify as a command of law, the meaning of which is different, by definition, for judges at different levels on the judicial hierarchy.

A final note about my restriction here: while I will talk mostly in the context of judge decisions, I will accept non-judge point-of-view claims as a counterargument against some of my more sweeping claims about law. I acknowledge that I may have missed some relevant non-judicial reason. It would be foolish to exclude it entirely if it represents a relevant counter-argument. But it is the burden of one advancing this argument, clearly, to relate it to the logic of the claims that I make here. Having done so, their arguments will certainly hold some weight.

The second meta-level issue is the definition of positivism. This comes fairly late in this chapter, which might come off as odd. But my tardiness is by design. Some of the arguments in this section depend on an understanding of what I have said above. The reverse, that understanding the discussion of the three criteria requires understanding what I am about to say, is not true.

Not having a definition of positivism offers obvious dangers. It is worrisome that, without a formal definition of positivism, it is unclear whether the theory fully drawn out in Chapter Two

is positivism, or whether the thinkers I discuss are. The danger is compounded because the criteria used to judge the theories presented here are under discussion because of their affinity for positivism generally. One of the effects this has is to exclude natural law-type responses. After all, what recommends a natural law theory is typically different than what would do the same for a positivist one.

But I hesitate to defend a specific definition. This is because I do not wish my thesis to encourage debates about the definition of positivism. Though I do have an affinity for the arcane, I absolutely could not care less about that debate. Semantic deliberations about how far the term positivism should extend yield no substantial insight about the truth of any argument in the positivism/natural law debate. It is therefore useless to everyone other than academics.

For that reason, the formal definition of positivism offered here will not be defended. It comes from Hart and is the affirmation that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality."[5] This is the definition I used in the introduction.

I have purposefully chosen a definition that does not, at least to me, appear to exclude any of the writers I will discuss. It is a stipulation. Someone wanting a lively debate about its merits should seek distant shores. Figuring out which writers should be included in Chapter Two was a historical consideration. Works that were indisputably positivist historically formed the backbone of my research project. Texts that directly responded to those works were added on. Most, if not all, historical accounts indicate that writers such as J. L. Austin and Hart were positivist.

Additionally, there are at least three reasons why the overall worry about the impact a weak definition of positivism would have, on my thesis as a whole, is overblown. First, the biggest danger in mis-defining positivism is the danger that an interpretation is too restrictive; a belief that

[5] H. L. A. Hart, *the Concept of Law* (Oxford: Oxford University Press 1961) pp. 181.

should have been introduced into the discussion for deliberation was unable to influence the discussion. This danger of accidentally including some natural law positions into the discussion does not carry the same gravity, because although additional views can be acknowledged and can affect the tenure of the discussion, they are subject to the same criteria as any other argument and might simply not make the cut on their own merits.

Second, the reason for the criteria restrictions in the first place was the difficulties with addressing the truth value of normative considerations. If it turns out that commitment to these criteria leads to a conclusion that is a form of natural law theory, but does not require that those beliefs have normative truth value, then that truly is not too much of a problem on this account.

Third, these are criteria, not evaluations. The only thing that can be derived from the conclusions these criteria generate is that a theory of law fits with some traditionally positivist criteria. It might be that applying positivist criteria to positivist thoughts yields a natural law conclusion. That just means that those who claim to be committed to positivist tenets should endorse a form of natural law. It does not claim to mean that natural law theorists, who may have different commitments, should endorse this form of natural law against positivism, or against other forms of natural law. That debate is separate and not breached here. Thus, limiting natural law theories from applicability at the outset is not as big a danger as one would suppose.

The third issue is rather brief. A concern that arises in the course of these criteria is whether the criteria will be re-evaluated or otherwise considered in light of the work I end up doing in Chapters Two and Three. Perhaps, it could be said, the salience of these criteria, or lack thereof, is made clearer, confirmed, or refuted by the discussion.

I will devote some time to these considerations in this thesis' conclusion.

Conclusion

So much for criteria for evaluating positivist theories. Chapter Two will deal with the overall coherence of those theories in relation to my criteria. Chapter Three will detail how the version discussed and defended in Chapter Two maps onto *Florida v. Jardines*.

Chapter Two: Conceptions

Introduction

This chapter has three main aims. First, it will survey some of the central positivistic scholarship. Second, it will evaluate how the theories surveyed stack up in terms of the last chapter's criteria. Third, it will present a composite theory for use in the next chapter. That theory will by the theory that is most consistent with my criteria. I will lay out a theory in each section and evaluate it within the same section, generally. However, once I get to the section on Hart, the positivist scholarship will constitute some of the evaluation. So, when I get to Hart, treat subsequent sections as evaluating Hart. Structurally, all sections after the Hart section should be read together with the Hart section. They will address the same issues.

I will examine the following authors and works: Jeremy Bentham/J. L. Austin (*Laws in General*/*the Providence of Jurisprudence Determined)*,[6] [7] Hans Kelsen (*Pure Theory of Law*),[8] H. L. A. Hart (*the Concept of Law*), Lon Fuller (*Positivism and Fidelity to Law: a Reply to Professor*

[6] Jeremy Bentham, *Of Laws in General*, ed. H. L. A. Hart (The Althone Press 1970).

[7] John Austin, *the Providence of Jurisprudence Determined* (London, 1832).

[8] Hans Kelsen, *Pure Theory of Law*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Vienna: Franz Deuticke 1934) doi: 10.1093/acprof:oso/9780198265658.001.0001.

Hart),[9] Ronald Dworkin (*Taking Rights Seriously*),[10] and W. J. Waluchow (*Inclusive Legal Positivism*).[11] They are presented in that order to keep the chronology of their debate clear.

Bentham and Austin

Austin and Bentham's theories are slightly different, but for the purposes of this analysis, the theories will be treated as one theory: the command theory of law. For Bentham and Austin, laws are commands issued by the sovereign.[12] Commands are direction to do or forebear acts. Permitted acts allotted by the sovereign as something the sovereign commands be permitted to be done by persons. The sovereign is the entity in society who is habitually obeyed and does not habitually obey another. An actor cannot be the sovereign if it regularly answers to the authority of a superior force because it would just be that this higher force was the sovereign.[13]The sovereign need not be one single person; the sovereign could easily be a corporate body, made up of multiple persons but acting as one unified entity. Determining whether something is law requires tracing it to a command issues by the sovereign. If the sovereign is correctly identified, and a command issued by that sovereign is the source of the current enactment, then that act is appropriately law.

To start with a merit of this theory, it is practical enough. To determine if something is a law, one must do a pedigree test up to what the sovereign has validated as law. If whatever the

[9] Lon L. Fuller, "Positivism and Fidelity to Law: a Reply to Professor Hart", *Harvard Law Review* 71, no. 4 (February 1958): pp. 630-672, http://www.jstor.org/stable/1338226.

[10] Ronald Dworkin, *Taking Rights Seriously*, (Cambridge MA: Harvard University Press 1977, 1978).

[11] W. J. Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press 1994) Page Number.

[12] John Austin, *the Providence of Jurisprudence Determined* (London, 1832) pp. 18-19.

[13] Hart, *The Concept of Law*, pp. 64-65

sovereign decides is law, judge determinations are relatively simple. Austin and Bentham have confidence in the judge's ability to locate the will of sovereign.

The command theory of law has vices with respect to both descriptivity and generality. The theory is not descriptive of legal systems generally. H. L. A. Hart, a positivist I will discuss later, outlines a number of reasons for this; I will note two. Top legal authorities are regularly restricted by other authorities, such as legislatures.[14] However, for the command theory of law, the sovereign is one who habitually obeys no other forces. If the sovereign regularly followed the dictates of another, that entity would, in fact, be the sovereign. But, if multiple arms of the government in different societies all impose restrictions on each other that each does not have the authority to dispense with, then none of those parts is itself the sovereign.[15] Mature legal systems involving granting authority to lesser legal entities to ensure that higher ones may not act in certain ways. This breaks down the simple picture of sovereignty in legal systems that the command theory of law implies.[16] A sovereign is a necessary component of the command theory of law because, in order for law to be a system of commands, it must be clear in what direction commands are addressed. Without an entity that does give commands, the theory falls apart.

An easy response a defender of the command theory of law might have is that the body that exerts authority over the executive is simply also part of the sovereign. The sovereign is the entity who demands habitual obedience. If prongs of the government regularly check what each other will do, but are not checked by the body politic, it just is the case that the whole apparatus is sovereign. The government apparatus, composed of multiple branches, regularly issues dictates

[14] Ibid., 70-71.

[15] Ibid., 64-65.

[16] Ibid., 68.

that are habitually obeyed by the public. That apparatus is therefore sovereign, and its dictates commands. The tendency to think that multiple branches of the government could not be a unified sovereign comes from the desire to think of a sovereign as one person, rather than as a corporate body. The argument above is false, therefore because it purports to show that there is no sovereign in a command theory sense but identifies a more expansive sovereign instead.

I have several responses. First, it is not at all clear that the government apparatus is unconstrained by the public. No confidence procedures and amendment introduction procedures are just some of the examples of a public check on government authority. Second, it is a fiction to subsume all authoritative aspects of the government under the sovereign. A sovereign can be a corporate body. But a corporate body is not simply a sum of a bunch of different entities. Those entities must act as one unified element, and their dictates must exist that way. In sufficiently complex societies, decisions do not come from "the government" one entity. Instead, decisions come from a number of different branches of government, each of which have certain things they may or may not do. Differentiation exists between actions of the legislature and actions of the courts. The commands are of different types, and are perceived as such. Each branch is often procedurally distinct and composed of different persons. Thus, this argument is a form of sleight-of-hand. It mashes together the elements of a government that check each other and tries to produce a unchecked corporate sovereign. No such sovereign could really exist in a corporate way. Therefore, this argument is unsound.

Second, some forms of law, like those specifying the satisfaction conditions for a contract, can hardly be said to be commands with a sanction for non-compliance. They merely designate that, for an item to be a contract, there must obtain certain conditions. Administrative laws that

merely specify the conditions for the attainment of certain legal operations do not seem to be commands.[17]

But, a defender of the command theory of law might say, there are sanctions. Administrative parts of law do not merely specify, for example, the date that taxes are to be paid. If taxes are not paid by that date, persons are subject to specific legal sanctions. Similarly, executing a contract not properly so termed may land someone in jail for fraud. Administrative dictates are not self-contained. They specify the procedures for other dictates. Those dictates have sanctions attached to them. Therefore, it makes sense to speak of the administrative laws as part and parcel with the laws they try to define. The administrative laws are not structured as commands themselves. But they should properly be considered an aspect of another dictate, which is a command. Dictates that direct action, combined with the administrative laws that specify how they are to be executed, are commands. There are sanctions for non-compliance with those commands. What sanctions are executed is a function, often of the administrative dictates that are part of the direction. Thus, the command theory of law does have a place for administrative rules of enforcement. Those rules are part of commands, though they are not commands entirely by themselves.

This is a clever move, but it does not really succeed in repelling my charge. This is chiefly because those administrative dictates are considered separate laws in actual societies. They are contained in separate parts of the universe of legal codes and, more importantly, apply to a wide array of different directives simultaneously. This interpretation would mean that a single administrative dictate would be a separate command in each instance that it applies to any number of directives. That is absurd. Take, for example, the administrative dictate that "a contract, to be a

[17] Ibid., 77.

contract, must be signed in the presence of three witnesses." To call this part of the command that breaking a contract justifies legal penalties seems absurd. But it is even more absurd, granting that it could, to suppose that it is also a command when it is simultaneously part of every single dictate that relies on that definition. Legal communities consider administrative rules laws. But they do not consider them laws insofar as they are contained in everything that could use them, separately.

This theory is also not suitably general, chiefly because it does not apply to democratic regimes. To say that a sovereign is one who is habitually obeyed and does not habitually obey others relies on a distinction in kind between those who obey and those who are to be obeyed. However, in democracies, the mass of people who would be said to obey the sovereign are themselves the ones who issue the commands. The sovereign, in that case, is a fully corporate body that constitutes most of society. The appeal of this sort of system, which thrives on a distinction to determine what counts as the sovereign, is in doubt.[18] After all, the idea of habitual obedience to oneself seems farcical. Bentham and Austin's theory lends itself to confusion quite quickly when exposed to some differing forms of government.

Some notable philosophers, such as Immanuel Kant, founded an ethical system on the idea of commands to oneself.[19] But the kinds of commands Kant talks about are not of the same type as the ones Bentham and Austin do. For the command theory of law, a command is not such if there is not a sanction for non-compliance. Kantian commands are exactly of this sort. In addition, the problem is not so much that the idea of commanding oneself in the abstract makes no sense. It is instead that the command theory of law thrives on the distinction between sovereign and non-

[18] Ibid., 73.

[19] Robert Johnson, "Kant's Moral Philosophy", *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, (Summer 2014 Edition), http://plato.stanford.edu/archives/sum2014/entries/kant-moral/.

sovereign entities. A sovereign issues orders that are habitually obeyed, and does not habitually obey. A democracy as sovereign habitually obeys and issues orders that are habitually obeyed. If there is no non-sovereign entity in a society, then the command theory of law does not work.

Despite the failings of the theory of law they posited, Bentham and Austin's theory does shed light on an important fact about the positivism debate writ large. Bentham and Austin's theory was not designed to exclude ethical considerations from the field of law entirely. In fact, their goal was quite the opposite – to bring law into an area where it could be attacked on ethical grounds. Historically, the natural law tradition meant that calling something a law carried with it inherent, positive normative value. The codes that were laws were thus unassailable on specific moral grounds. Once granted the status of law, a code was already infused with a positive moral weight. That made social criticism of laws on moral grounds quite difficult. The project of Bentham and Austin decouples legal designation from inherent positive or negative normative value. Their project served to make social critique possible because debates about what things were laws could be easily dissolved. That allowed conversation to shift to debates about the ethical value of particular laws. Hans Kelsen puts the positivist project nicely: "[w]hat is rejected thereby is not, of course, the dictate that the law ought to be moral and good; that goes without saying, though what it really means is another question. Rather, what is rejected is simply the view that the law as such is part of morality, and that therefore every law, as law, is in some sense and to some degree moral."[20]

Therefore, far from being an effort to distance the law wholesale from ethical considerations, positivism was an effort to move that debate onto the area of philosophy designed explicitly to deal with questions of right in the first place. Bentham, in particular, had a highly

[20] Kelsen, *Pure Theory of Law*, pp. 15.

specific ethical theory in mind to deal with those issues. As a prominent utilitarian, Bentham's theory was envisioned to allow attacks on law on utilitarian grounds.[21] So, while Bentham and Austin's theory of law did not have a place for ethics in what constitutes a law, their efforts were not designed to distance law from ethics entirely. Instead, it was designed to move debate onto a plane where a richer ethical discussion could occur.

Even for the first positivists, morality has some place in the overall universe of law. That place might not be laid into the legal framework itself, but it was certainly some of the animating force behind the command theory of law's adoption.

Kelsen

For Kelsen, law is a combine of practices with social meanings. The social meanings laws exhibit are contained in norms. Those norms exist in a system. Within that system, there exists one basic norm, from which all other norms are derived. Other norms are valid insofar as they relate back to the basic norm. The validity of legal norms is a function of each's pedigree. The content of a particular norm is not relevant to a norm being law.[22] It only matters that the norm "was created in accordance with the basic norm."[23] The basic norm, as the source for all claims of norm pedigree, can appeal to no pedigree chain to validate itself and must instead be presupposed.[24]

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[21] James E. Crimmins, "Jeremy Bentham", *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Spring 2015 Edition), http://plato.stanford.edu/archives/spr2015/entries/bentham/.

[22] Kelsen, *Pure Theory of Law*, pp. 55.

[23] Ibid., 57.

[24] Ibid., 59.

Kelsen is skeptical of both the non-question-begging debate-ability and the independent validity of moral principles. He thinks moral principles purport to rest on sound deductions when, in fact, they are tautological and without base. Kelsen says of moral deduction that:

> Until now, all attempts along these lines have led to completely empty formulas, such as: 'do good and avoid evil', 'to each his own', 'hold to the golden mean', and the like. … If one turns to cognitive science for a determination of the absolute value designated by 'ought', one learns only that you ought to do what you ought to do. Behind this tautology lurks the logical principle of identity, in multifarious forms and painstaking disguise, the insight that the good is good and not evil, that the just is just and not unjust, and that A is the same as A and not the same as not-A. … This … is the inevitable result of forcing into a logical scheme an object that is at bottom alien to logic.[25]

Therefore, describing law positivisitically, that is, as it simply is excepting its merit, requires a certain distance from moral principles.[26] That requires both the decoupling law from evaluative modes of its presentation, as well purging from status-quo legal terms and meanings moral-philosophical connotations. The sorts of reasons laws generate are forms of transcendental causality; some specific act ought to be followed by a legal consequence, in the same way that pen. In doing so, Kelsen hopes to distinguish between legal "duties," which are attachments of consequences to certain actions, and moral ones.

The positivist commitment to distancing the definition of law, and the application of law, from moral and metaphysical concepts requires removing from law the moral connotations attached to concepts like personhood and rights.[27] Current legal structures invoke concepts like autonomy without removing the holdover moral-philosophical connotations that make up their executed meanings. Ideally, legal principles like autonomy can be executed mechanically with

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[25] Ibid., 17.

[26] Ibid., 19.

[27] Ibid., 38-40.

respect to a certain set of factual circumstances. Currently, however, they retain their meanings from when those concepts were imported into law.

When appropriate legal norms are identified, it is the task of legal adjudication to bring specific legal cases as existing under specific norms. To do so requires selecting between large numbers of equally valid interpretations of how that might be so. For Kelsen, there can be no basis for distinguishing these legal interpretations from each other on their merits. Even the decision about whether to adhere to the strict text of a statute or the legislators will behind that statute is subject to radical interpretation.[28] Although there is always one actor who is specifically tasked with the adjudication, the decisions that come out of that actor cannot be held to strict interpretive standards.[29] Thus, legal adjudication is distinctly discretionary.

Kelsen's theory at first glance seems to pass the generality test. One can imagine a defender of Kelsen here: Kelsen's theory is highly general; the logical conclusion is that it applies to many different societies, which each have law insofar as the elements of their legal systems are pure. The theory can account for variation among different society because it only calls law a certain number of things in any given legal system. Kelsen treats all of the manifold legal systems the same; the things that he isolates as law do not differ from regime-type to regime-type.

But while it is true that Kelsen's theory is not more descriptive of some legal systems over others, this is only because it privileges no real legal system at all. That is, it flunks the descriptivity criterion. While the applicability or reach of the theory is large, that it is, ultimately, only because empirical claims about the features current legal systems actually exhibit should not figure as important. Kelsen's theory relates identically across legal systems: askance. The whole point of

[28] Ibid., 78.

[29] Ibid., 84.

his theory is to put himself at such a distance. Therefore, if Kelsen's theory is general, it is only artificially so.

The disagreement I have with Kelsen, therefore, is not so much a factual disagreement as a disagreement over what criteria are appropriate. He would not use descriptivity as a benchmark. So, my work would be unlikely to convince a defender of his works that they are incorrect.

It is one thing to assert that Kelsen does not think descriptivity relevant and another to assert that Kelsen's theory is not descriptive. The latter assertion would involve separate arguments about how Kelsen's theory does not adequately capture the empirical facts of legal systems. This move, while separate, is quite easy to make. Keslen asserts that pure legal systems do not contain normatively loaded terminology, although actual ones do. For Kelsen, concepts of personhood and rights should have a legal meaning separate from their moral meanings but currently do not. Kelsen's description of the legal status quo as normatively loaded is just the sort of explanation that would count against it for my purposes. Law is not currently pure, and a defender of Kelsen could even concede that it would never be and still be self-consistent.

Kelsen might well be correct about the status quo nature of law; that would count as evidence against his theory. Kelsen's description of the legal system in the middle of the twentieth century might, however, not be true today. And perhaps it was not true, even then. But descriptivity, after all, is a criterion whose evaluations change as times change. To say that a theory of law is descriptive is to say that the way it claims law works matches the facts about present day legal systems. The past is another country, with potentially, though not necessarily, different legal-system facts. Thus, while the past is instructive in what sorts of legal principles match legal structures, a more recent that past is all the more instructive. 85 years is quite some time. So, more recent legal system descriptions should be undertaken in order to figure out what facts are still

extant. Those more recent evaluations will take place when I discuss other thinkers. Although the factors that Kelsen cares about when constructing a system of law do not change over time, the factors I care about do.

Pending a determination of whether Kelsen's theory is truly descriptive, is it practical? Kelsen's theory of discretion makes it hard to argue that it is. On his account, no legal decision can ever be entirely determinate because there will always be some degree of uncertainly inherent in the process of application. When it comes time for a legal adjudicator to apply a higher level norm to a lower level norm or situation, his or her evaluation is not determined by law. While there always exists some authority whose job it certainly is to apply and interpret the law in a case, the legal interpreter is not held to genuine standards when deciding between many equally valid interpretations. Kelsen puts it nicely:

> From the standpoint of the positive law, however, there is no criterion on the basis of which one of the possibilities given within the frame of the norm to be applied could be favoured over the other possibilities. In terms of the positive law, there is simply no method according to which only one of the several readings of a norm could be distinguished as 'correct' …From the standpoint of the positive law, it is a matter of complete indifference whether one neglects the text in order to stick to the legislator's presumed will, or strictly observes the text in order to avoid concerning oneself with the legislator's (usually problematic) will.[30]

If Kelsen's theory of law concludes that there is no specific mechanism a legal authority must use to resolve legal questions, then his theory cannot be practical, in the way that I use the term practical. The use of his theory does not lead to decisions in particular cases. It makes claims

[30] Ibid., 81.

about the overall structure of the legal system, but is no help to anyone solving specific legal disputes. According to the criterion presented, the theory is impractical.

Given the failure of Kelsen's theory, at least at the practical level and probably also at the descriptivity level, it will not help me much.

Hart

For Hart, the peculiar character of law that previous positivist thinkers tried to capture was its normativity. It seems to exert some force on the actions of persons, irrespective of specific cost-benefit calculations about sanctions. It gives persons reasons to act. Bentham and Austin sought to capture this intuition by positing the law as a command, a direction.[31] But Hart notes that being obliged and being obligated are distinct; threat of force for non-obedience does not fully express the nature in which law compels action. Law gives reasons to act. Merely acting habitually in accord with the dictates of some entity does not itself reflect the sense of obligation that Hart thinks is central to how law works. Therefore, law is not a system of commands.[32]

For Hart, it is vital that the reasons law gives are separate from other sorts of reasons in human experience. That is, the reasons that law gives are only valid from a certain point of view: the point of view of law. Suppose I am deliberating whether to go into a shop and make off with some small quantity of knick-knacks, whatnots, and assorted candies without paying. I could say that I have a moral reason to refrain from such an action; stealing, my conscience impresses upon me, disregards the inalienable property rights of persons. But I also have a reason, it seems, to refrain from this thievery because doing so violates the law. Central to Hart's account is that these two reasons are experienced as distinct. It is not inconceivable that I do not recognize the specific

[31] Hart, *The Concept of Law*, pp. 6

[32] Ibid., 79-81.

points of the immorality of shoplifting but feel like I have a separate sort of reason not to shoplift because I know doing so is against the law.[33] Hart calls this segregation of the normativity given by law from other social domains "internality."[34] It is clear that the concept of internality applies just as much to non-legal sorts of normative systems as it does to legal ones. Hart's claim is a claim about human experience, though he does not explicitly frame it as such. Hart, concerned with laying out the philosophical framework for a legal system, is unconcerned with the applications of his theory of experience to other areas.

Since law is normative, commands of a sort described as relating to law by Austin and Bentham are not quite what comprises law. Instead, Hart proposes, law is a system of rules, not of commands. Rules designate some courses of action proper according to set standards. This interpretation is consistent with both the normativity provided by the law and with the general way law seems to regulate human affairs. Laws seem to designate a specific range of permissible and impermissible acts. Determining whether an act is law abiding or not, for Hart is a matter of determining the set of rules the laws specify that apply in this case and acting in their accord.

Imagine a Frenchman finds himself stranded in an Ohio town. Fearful of imprisonment, my Frenchman resolves himself to be law abiding. But without knowledge of what law dictates he do conformity is accidental; too risky, he decides. He travels to the town hall and asks to see the local ordinances for his region, which he discovers is named Botkins. In inspecting the documents in Botkins, the Frenchman learns of many specific acts he must not do, and others that he must. The list of dictates set up in the Botkins statute book, however, seem woefully incomplete. It is revealed to him by an aide that the capital of Ohio, Columbus, has certain statutes that recommend

[33] Ibid., 86-88.

[34] Ibid., 15.

courses of action. Travelling to Columbus, my Frenchman learns of many more specific acts he may or may not do. Insatiable, he learns of even more dictates in the capital of the United States, which, it is said, apply to all the states. Using the computer in the Botkins public library, my Frenchman uncovers countless additional federal documents. These documents, in particular, seemed to hint at something called "the Constitution." A newfound connoisseur of American legal documents, the Frenchman consumes the articles and amendments in no time at all. All in all, it seemed, there were a large number of acts that governments, citizens, and persons like he should do or forebear.

The few friends the Frenchman had retained in this time were relieved that his frankly unhealthy obsession with American law was drawing to a close. Their hopes were dashed when the Frenchman developed a newfound interest in something he saw referenced in the Constitution: the courts. The Frenchman saw it fit to read the expansive Supreme Court case law surrounding federal laws and constitutional questions. After much time, he succeeds, and moves on to a lower level of the courts. Exhausting the federal courts, my Frenchman learns that Ohio, too, has its own court system. Working his way up to the state courts from local courts, my Frenchman learns all there is to know about how the local and state laws he learned about could be used to apply to specific acts that he does or forebears. My Frenchman seems, at this point, confident that he knows all he must do to legally survive in Botkins.

This extended example is designed to illustrate the rule-like nature of law, Hart's most ingenious insight. Laws are rules that specify certain acts one may or may not do, or what one must do in order that a certain recognized result be achieved. The system of law is an interlocking set of rules, each with varying precedence and jurisdiction. Figuring out the law means figuring out what rules apply when and in what way. To determine the legal status of an act, I must find

out what rule applies and seeing what the rule prescribes; this is what judges must determine in specific cases, and how a person should figure out how they must act. Furthermore, unlike the command theory of law, the theory of law as a system of rules can account for dictates that deal with statuses and conditions. For example, that a contract, to be so, must involve three or more parties is not truly a command, in any real sense. But describing law as simply a rule about how things are to be done easily accommodates this area of the law.

Hart distinguishes between two types of rules. A primary rule dictates that persons, in their interaction with each other or by themselves, behave in a certain way. A secondary rule specifies how law itself is governed. Secondary rules are rules of procedure. They specify how the rule governed way in which the system is to apply primary rules.[35] To justify something as a law is to find where the rule it represents fits in the overall system of rules. This determination, as it is for other positivists, is mostly a matter of pedigree. For Hart, rules are justified in two ways: acceptance and validity. The vast majority of laws are justified by validity. A rule is valid as a matter of pedigree. A law is valid if it justified as having been given some authority by some higher law.[36] For example, consider a hypothetical Botkins land-use ordinance. That ordinance, very roughly, is granted authority by the actions of the Botkins city council, which is granted authority by the Ohio constitution, which is granted authority by the United States Constitution.

Of course not all rules can be justified this way; a legal system comprised with a finite number of rules must have one ultimate rule that gives authority to all other rules. That secondary rule cannot have authority because it is related to a higher rule. After all, if there were a higher rule, that rule would be the ultimate rule. The ultimate rule must be the rule that identifies what

[35] Ibid., 91.

[36] Ibid., 100.

sorts of things, broadly, are recognized as law. When and only when that rule is established will the resulting chain of pedigree rightfully fall into place. It is possible to imagine, after all, a set system of primary and secondary rules that might be organized into different hierarchies depending on what sorts of rules count primarily as law. Hart calls this rule the "rule of recognition."[37] The rule is of a special sort because it cannot be justified by validity. It is what is appealed to by every valid law. The machination by which authority is transferred is also determined by this rule; it cannot be also subject to those requirements without begging the question. Rather, the rule of recognition (hereafter ROR) is the only rule whose justification is its acceptance by the community the legal system is said to cover.[38] If a rule is recognized to designate the proper source of law by a significant minority of the population, it is just the case that this rule is not the ROR. The accepted standard of what counts as law in a legal system at the time just is the rule of recognition.

The duty of a judge, or of a general legal decision-maker whose job it is to decide a case, is to discover the relevant rules that govern his or her decision. There is some non-zero number of rules, situated in legislation, case law, or otherwise, that apply to a case. If a rule applies, it determines that case; a certain legal result must obtain. For Hart, most cases can be resolved by a straightforward application of existing rules to the particular circumstances that arise. In other cases, however, it is unclear what rule correctly applies to a case, or how that rule applies. Legal rules are general and cannot have procedures built into them that perfectly defines how they are to map onto specific cases. This is a function both of both epistemological limits and general features of language.[39] So, legal rules have built into them the possibility of ambiguous application.

[37] Ibid., 93.

[38] Ibid., 103-104.

[39] Ibid., 121-123.

Because those cases involve an undetermined rule system, the decision that a legal adjudicator must make cannot be justified by legal standards. If he or she could have done so, they would have already. Instead, the decision is justified based on any criteria explicitly not ruled out by other existing laws.[40] Hart calls this "discretion."[41] Certain reasons are restricted usages in all cases and may not be invoked, even in cases of discretion. For instance, a United States judge may not decide a hard case in estate law by explicit categories that privilege some races over others. Excepting existing restrictions, the decision-maker gets their pick of what reason or reasons to use, and which reasons should count more than others. The decision so set out, complete with grounds, becomes law and may mechanically be applied in future cases.

Hart does not posit a necessary conceptual connection between morality and the law. A law, to be so, need not be moral.[42] Importantly, Hart does not rule out the possibility that concepts of morality might be wedded into specific laws and legal practices. Some illegal acts may also be immoral acts, and furthermore might have been declared illegal acts precisely because those acts are considered immoral acts. This is precisely the reason for a vocabulary partially shared between the two. But although it could be that law in a given society is linked to law, it need not be.[43] Legal decisions frequently require the exercise of judgment about what values, such as impartiality and reasonability, should guide the decision. But as a rule they do not, since many judges also do make decisions on purely mechanical grounds.[44] Thus, Hart's apparent formalism is more accurately

[40] Ibid., 132.

[41] Ibid.

[42] Ibid., 151.

[43] Ibid., 180.

[44] Ibid., 200-201.

described as description rather than prescription; he does not maintain that legal decisions must be made formulaically, or that the correct application of rules is by necessity formulaic. He only reports what he considers a feature of many legal systems, which is that judges do seem to, in fact, make decisions mechanically. Legal systems, past and present, have indisputably dispensed with moral principles while nevertheless remaining fully rules, integrated into a cohesive social scheme. As such, a suitably descriptive theory cannot require the moral correctness of legal doctrine.

In terms of the generality of Hart's theory, Hart's theory is applicable to an extremely wide range of legal systems. Any legal community via the ROR can agree to a wide range of possible conditions for legality. The system need not be written and need not be liberal. Democracies, oligarchies, monarchies are all possible under Hart's system as long as there are clear lines of authority and responsibility demarcation. While the accommodating of regimes, past and present, that have dispensed with moral principles makes it more applicable to a wider of regime types, this is hardly an advantage in generality over other positivist legal theories.

Hart's theory is practical most of the time but is impractical in the cases when it is most needed. A legal decision-maker looking to use Hart's theory to decide a case must try and bring the case in question under the rule to which it is subject. If this is possible, and doing so yields a clear conclusion, then that is a success. In those cases, Hart's theory is successful. Some cases, on the other hand, resist determination by a rule. In these hard cases, Hart's theory gives little to no guidance on its resolution. In this respect, Hart's theory is more practical than Kelsen's. Kelsen maintains, as I have shown, that discretion can never be ruled out in a particular case. That is, he is aggressively impractical all the time. Hart's theory reduces the number of cases where discretion need by applied. But it would be perverse to conclude that a theory that succeeds most of the time

but which offers no guidance when the going gets tough is practical. Hart's discretion, in Dworkin's words, "leads nowhere and tells nothing."[45]

In the wake of the publishing of *the Concept of Law*, two critics in particular, Lon Fuller and Ronald Dworkin, published important pieces which respond to Hart's descriptive claims. These two critics provide some interesting push-back on some of the descriptive elements of Hart's system. I will turn to them next. Their works will constitute a good deal of the descriptive evaluation of Hart's theory.

Fuller

Though Fuller's overall legal philosophy will not be considered here, his famous reply to Hart's legal philosophy has wide-reaching implications for the specific versions of positivism one could reply on. Specifically, Fuller makes arguments about Hart's legal structure that might influence the direction that this form of legal positivism can be taken; that is, it clarifies its scope and limits.

Fuller's most important arguments for my purposes are concern Hart's arguments about legal internality. He takes Hart's argument to be this: there is a certain distinction between the normative commitments given by law and the normative commitments one has outside of law. Some normative forces are internal to law, are given by the law, or specific laws; insofar as one is involved in the law, certain obligations, prohibitions, and permissions follow, as a member of that system. Law gives certain reasons for action according to the situation one has relative to the law. Persons have other roles, and those roles carry with them certain reasons in accordance with those roles; one's status as a president, a doctor, or simply as a person dictates certain duties. To say that

[45] Ibid., 45.

the law has a certain internality is to say that the reasons that law gives are unaffected by the reasons one has in other roles. Law gives a certain of reasons, and the reasons it gives are the stuff that, on the positivist account, comprises the law. A judge who feels that, as a person, he or she has a certain set of utilitarian commitments cannot claim that those commitments are in some way an application of the law, or a reason given by the law, or something that should otherwise affect the decision the judge comes to. Therefore, for Hart, questions of what is the best moral theory are important questions, but are questions for the domain of ethics and not for law. On Hart's view there is no morality internal to law.

At stake in this debate is a morality-free positive law, or non-positive law. If deciding whether and how to apply a particular law is a question not just of what action is the most consistent with legal practice, but also of other normative commitments shot through human practices generally, then Hart has not succeeded in dividing morality from law. Although this would not necessitate the falsity of Hart's theory writ-large, it would certainly make its application seem like a natural law theory, or would perhaps force his theory to become one.

Fuller thinks both that Hart's conception of internality is not descriptive of how obligations work in human practices, of which law is one, and also that conceptions of internality pave the way for harmful legal practices. To summarize the latter: on Fuller's view, if there is no morality internal to law, and if external normative commitments do not affect the moral judgments particular legal persons have when making legal decisions, then all sorts of immoral legal outcomes are possible. There will be external criticism of immoral legal practices, but those criticisms will not hold much weight for actual legal practitioners. Those who are going about the business of delving through legal matters will have no sort of moral reason to guide their

judgments. In this way, external criticism has less force than internal criticism to criticize unjust legal regimes. For Fuller, this outcome produces morally unacceptable results.[46]

That argument, while interesting, is unpersuasive for the purposes of this piece. The point of this thesis is to determine which theory of positivism is the most descriptive, general, and practical. It is not to determine what theory of positivism would produce the most morally optimal results. Those sorts of questions cannot be addressed here for the many reasons outlined in the last chapter. The goal of this piece is to determine the most coherent picture of positivism, not the one with the best consequences.

Fuller's descriptive arguments will occupy the bulk of this section. This section will separate three arguments Fuller makes. I will lay out all three and then evaluate them in the order that I find they genuinely threaten Hart. First, whenever someone takes it upon himself or herself to engage in a practice, that engagement carries with it an implicit valuation of the worth of the system itself. Engaging in the activity of law at all requires presupposing certain normative ideals. Those ideals condition the permissible means of applying the law. On Fuller's account, engaging in a practice is an implicit commitment to that practice's worth. Engaging with the practice of law forces commitment to the value of what Fuller calls fidelity to law. That entails certain commitments to order, which has a meaning determined by moral precepts.[47] Thus, there are, internal to law, certain commitments that persons applying the law cannot escape, and which have inescapable force in binding their decisions.

Second, the sorts of reasons that one has within practices do not change across practices. Although it might be that the activity of law carries with it certain reasons and the activity of

[46] Fuller, "Fidelity to Law", pp. 657-660.

[47] Ibid., 644-645.

doctoring others, it does not follow that those reasons should be held to different standards, or are of fundamentally different types. All of these are reasons to act in certain ways. Thus, there is no real internality, since it is possible, indeed logically necessary, to compare moral commitments across practices. If I have a commitment that is more important than my commitment to apply the law in a certain way, then the more important reason should win out, even within the framework of law. Ultimately, there are no decisions that are only legal decisions; decisions are always and already infused with moral commitments persons have as a function of their other roles, including their role as a person. All decisions are external.[48]

Third, the legislation that the judges are said to be applying were created with certain normative reasons in mind. Laws are made because of external moral commitments. Thus, the application of law can never be merely internal, because bound up in applying the supposedly internal laws are external commitments that sustain those laws. Internal moral commitments to follow or apply laws cannot, therefore, be divided from external moral reasons, at least some of which are bound up in those laws.[49]

Fuller's third argument is not very threatening to Hartian internality. The reasons for the creation of certain laws and practices need not implicate their application. Laws can be made for all sorts of reasons. The beauty of legal adjudication is that determining what cases count under that law and what cases do not count under that law does not rely on knowing what those reasons are. A judge may apply the law in a case for wholly different reasons than what a law was intended to be used for. For instance the commerce clause was not intended to be used to crack down on

[48] Ibid., 656.

[49] Ibid., 642-643.

racist restaurant and hotel policies, but it has been.[50] In short, there is no reason that the one must affirm the reasons someone gave in support of a law at the founding of a law in order to determine the law's scope and limits. So, it is false that moral reasons for legal findings inescapably determine legal application.

A defender of Fuller here might note that many courts often used intention to invalidate statutes, or to otherwise judge laws. The United States Supreme Court, for example, frequently finds the intent in the creation of certain statutes relevant to their constitutionality. Statutes motivated by animus against certain minorities, for example, are termed unconstitutional according to equal protection clause standards.[51] Intention of legislators helps determine the intended effect of the statute. Supreme Court rulings demonstrate that a statute was not, in fact, consistent with United States law. Therefore, it is possible for the motivation of a dictate to affect whether a law is properly so termed.

I have three responses. First, even though it might be the case that intentions are relevant, they need not be relevant. Fuller's claim is a logical one, not an empirical one. But this argument does not show that intentions need logically be relevant, just that, in fact, they are. There are many sorts of statutes where intent is not relevant to their execution. Second, intentions can be used to invalidate certain things as law. That does not mean, however, that the meaning, logically, of the laws requires knowledge of legislative intent. A law motivated by malice might be unconstitutional because it was so oriented. But the ultimate meaning of what the law is does not require recourse to intentions in every case. Third, intention counts for Supreme Court rulings that some laws are unconstitutional. In that case, rules are deemed impermissible because of a bad intention. But

[50] Heart of Atlanta Model, Imc. V. United States, 379 U.S. 241 (1964).

[51] Washington v. Davis, 426 U.S. 229 (1976).

statutes with good intentions are not treated differently from ones with unknown intentions. If Fuller is right that legislative intent trickles down to legal application, then it should be so. It is not. So this argument is incorrect.

Fuller's first argument seems ultimately to rely on his second. The only reason, after all, why it matters if persons are said to have conceded to certain normative suppositions when they apply the law is that those reasons are of the same sort as those generated by the law. Perhaps a person, as a person, decides that he is going to be a judge. In doing so, he or she must value certain normative principles, such as order. But there is no reason that valuing those affects a decision in applying the law; perhaps those reasons are of different types. In order for there to be an essential link between those two sorts of reasons, the reasons to take on a certain role must be fully binding on determinations of that role. This is unlikely. This is so because persons have all sorts of reasons for adopting certain practices that could go along with their endorsement of their role. It is unlikely that those need condition specific applications. A new doctor may take the Hippocratic Oath for all sorts of reasons. The dictates of the oath bind him or her, not why they took it.

Furthermore, even if specific actions within practices require valuations, those valuations need not be general valuations about the system. They need only be valuations about the specific practice that was engaged upon. The overall logic of Fuller's argument is just that engaging in certain practices forces persons to admit the goodness of what they engage in. As someone undertaking some act, part of committing to doing the act requires the stance that the things that person does is good for them. But there is no reason that those commitments are general commitments about the moral worth of the whole practice itself. It cannot be that when someone does something they must concede that every aspect of what they did was good, or even that the system that supported that practice is good. A person may concede to the most limited of

commitments, that the thing that they did at that time and place was good, without conceding that others should do so, or even the general worth of what they act within.

Fuller advances a more specific version of this argument when he says that the concept of order has an "internal morality."[52] He explains that in order for a monarch to truly secure order there are some things he or she must do, such as issue commands in an intelligible manner, or apply the law consistently with statute. Without these things, Fuller thinks, the scheme that has been created is not truly orderly, a commitment of law. Even accepting that a legal adjudicator accepts certain duties as a result of his or her station, however, it is unclear why those duties are moral duties. That a monarch who wants to secure order must say his or her commands loudly enough to be heard does not require any moral commitments; that commitment at the level of legal analysis, too, can be applied mechanically in an internal fashion. Fuller's example is also probably not sufficient to demonstrate his argument; a story does not a general empirical analysis make. Therefore, this argument is only plausible if it is also true that normative reasons are similar at all layers of the chain of roles and responsibilities. This is exactly what the second argument asserts.

The soundness of the second argument depends on a more sophisticated account of how reasons work in the structure of human experience than this work is fully prepared to give. Fuller's support for it, in any case, seems merely a matter of rhetoric; his claim that this account would situate these reasons "shouting their contradictions across a vacuum" is visually interesting, but logically question begging.[53] There certainly need be no contradiction; just as a person considers themselves occupying a certain role, with certain commitments, persons have certain duties under those commitments. The structure of those reasons, and the structure of the systems in which those

[52] Fuller, "Fidelity to Law", pp. 644-645.

[53] Ibid., 657.

reasons reside, have different satisfaction conditions. So, the default assumption is that comparing between those reasons is to compare between the successes of things whose evaluation of success is different. Which of the two ultimately "succeeds" over the other is not something one can appeal to either reason to resolve.

But, a defender of Fuller on this point might point out, the argument types do, ultimately, have the same logical satisfaction conditions. That is, all claims, even within specific practices are subject to the same logical standards. If this is the case, comparing across practices does not seem difficult. Each reason within each practice comes to a logical conclusion about a certain truth. If different practices produce different conclusions about the same issue, it cannot be that both are true. The reasoning structure is the same across practices. Therefore, if there are different conclusions, there must be an error in one of the two practices. That error is not according to only one practice; it is according to principles of simple logic, such as the principle of non-contradiction. The idea that something and its opposite cannot simultaneously be true is only practice-specific. If one thinks of logical reasoning as its own practice. But that is absurd, because claims of reasoning within practices require logic for their resolution. Thus, claims do apply across practices.

It is certainly true that the principles of logical argument apply across multiple, if not all, practices. However, the requirements set forth in the principle of non-contradiction do not themselves justify any conclusions. It is a check on the sorts of moves allowed within practices. Those moves do not derive any meaning directly from principles of logic. Rather, the meaning of those moves, and what moves count as moves, is specific to specific practices. In this way, logic is not really a standard that allows for inter-practice comparison. Practices use logic, but what counts as a move subject to logic in each of the systems is determined by

Even if there is a way to justify some practice-specific reasons over others, that justification is itself only valid in terms of a specific practice. A unification of this chain of reasons seems unwarranted.

There may well be more thrust to Fuller's arguments considered outside the criteria I employ. But within the scope of my thesis and the criteria that accompany it, his arguments do not hold much weight. Morality can be in law, perhaps, but can only be so internally. It is no use to claim that individual, general moral commitments trickle down into law. The overall conclusion of Fuller's argument, that law carries with it some degree of moral force, might well be right. Fuller's conclusion will have to be realized the hard way, however: in some way explicable from extant legal practices, not fiated across from the domain of ethics. For a more internal criticism, it is time to turn to Dworkin.

Dworkin

In "Model of Rules I," Dworkin presents his main line of argument against Hart. Dworkin thinks that the idea of a legal system as a system of rules seriously misrepresents how legal decisions are actually made. Dworkin cites two cases, and hints that there might be many more, where judges do not seem to make decisions on the basis of rules. Instead they seem to be applying and using what Dworkin terms "principles."[54]

Principles, like rules, are normative. They motivate judges with specific reasons. There are two main logical differences between principles and rules. First, principles have weight. A coherent system of rules does not have rules that can conceivably conflict. Either a rule applies or, because of another rule that governs its use, it does not apply. Rules exist in relations to the other

[54] Dworkin, *Taking Rights Seriously*, pp. 22.

rules that exist, and get their life from their placement in the overall system of rules. So, it cannot be that two rules conflict with one another in any real sense, because a correct determination of the character of the system in which the rules reside should reveal that the supposed conflicting rule either supersedes it or is superseded by it. Put another way, a system of rules in which two rules of the same level conflict simply is not a system of rules.

Principles, on the other hand, commonly conflict with each other. That is, it is not a contradiction that two principles which make claims that recommend different outcomes could both apply to a case. Principles, unlike rules, have weight. A principle could well apply but be less important than another equally applicable principle. Choosing between principles is a matter of balancing the commitments to which legal adjudicators are subject. Thus, if a judge makes a decision that requires the ranking of principles, their action cannot be coherently explained as executing the dictates of a rule.[55]

Second, principles are not enumerable. The elegance of a system of rules is that, at least in theory, every legal state of affairs is accounted for by a finite number of rules. While there might be cases where it is difficult to determine which rule applies to a case, or where a rule implies imperfectly to a case, there is not a describable state where the legal system applies but has absolutely no tools for explaining or deciding cases involving that state.

Principles, though, are innumerable because the only limit is the commitments that bind specific judges. The manifold possible coherent commitments of judges makes exhaustive descriptions of principles in a rule like system impossible, especially because commitments can

[55] Ibid., 26-27.

change over time. Thus, the idea of the stable application of principles to subject cases, much like one would bring particular cases under general claims, cannot account for principles.[56]

Dworkin gives two sets of descriptive reasons for supposing that law contains principles. First, the rulings in *Riggs v. Palmer* and *Henningsen v. Bloomfield Motors Inc.* demonstrate the judges frequently use principles to decide cases where the strict application of precedent would seem the obvious choice. In *Riggs*¸ a late 19th century case out of New York, the court ruled that enforcing a will in favor of the deceased's murderer was a case of profiting from one's own wrong, which estate law should not recognize as proper. The opinion held that the principle that one should not profit from their own wrong was in fact a constraint on the enforcement of written contracts. In *Henningsen,* a mid-20th century New Jersey bench found that car manufacturers were liable for medical expenses in crashes despite a contracted exemption. The plaintiff had no specific law that established such a liability, but the court ruled for the plaintiff in any case. The court found this on the basis of general principles of freedom of contract, the special obligation of car manufacturers, and the need for the court to defend against injustice.[57] These two cases establish that principles are in law. Dworkin assures his readers that there are many more;[58] I shall take him mostly at his word but eagerly await any corroborating evidence.

Second, judges frequently over-rule precedent. In many of these cases, judges decide that the previous set of reasons used by judges are incorrect and in need of revision. These judges then offer their own set of reasons. Their decisions, furthermore, must be based in principle. This is because the choice of whether to adhere to doctrines such as legislative deference, respect for

[56] Ibid., 25-26.

[57] Ibid., 23-24.

[58] Ibid., 23.

preference, or others is itself a decision that requires a judge to determine the appropriate balance between legal commitments external to specific rules. Those sorts of reasons are not grounded in rules. But if a judge is free to choose whatever reason compels them to change precedent, the beautiful patchwork of rules Hart supposes comes crashing down. No rule would be safe from a judge's eccentric commitments. No rule would be normative, in Dworkin's words "binding," for judge use because whenever they are unsure of a rule they could dispense with it for themselves and all future judges. For Dworkin, the exclusion of principle based decision therefore threatens to make all law non-normative for legal decision-makers, eviscerating law's prescriptivity and its practicality.[59]

The legal system involving the use of principles and not rules has a number of implications for Hart's overall theory. Beyond the obvious conclusion that Hart's claim that rules are exhaustive of the law is false, there are at least two other main impacts to the existence of these principles. First, it shreds Hart's account of discretion. When deciding cases where rules unclearly apply, a judge may not simply use whatever reasons they want. Rather, he or she has certain responsibilities and obligations that dictate he or she resolve the case in accord with their principles. The choice of what to do in difficult cases is a choice between what the balance of commitments that the judge is subject to. The judge must then make the best decision, not simply a decision.[60]

Dworkin thinks Hart's account of discretion is very important and makes pains to illuminate what he imagines Hart means by it. To do so, he outlines three ways in which discretion could be said to exist. First, a person must make a decision according to a certain reason but is free to make up his or her own mind about the circumstances that are consistent with that reason. To

[59] Ibid., 37-38.

[60] Ibid., 24-25.

use Dworkin's example, a sergeant told to choose his or her five most experienced soldiers is not given the choice of what reason he or she must use in selecting soldiers, that is, experience, but is left up to decide what will count as experience in that case and so what soldiers to choose. Second, a person's decision is un-appealable in the sense that it cannot be overturned by a higher authority. An easy example of this is the authority given the United States Supreme Court to decided issues of constitutional law. Third, a person may choose any reason they want in constructing a decision. A sergeant told to choose any five soldiers is unconstrained by any particular reason.[61]

Dworkin claims it is unclear from the text which of the three types of discretion Hart means, but affirms that Hart must mean the third type in order for his claims to make sense. On Hart's account of discretion, says Dworkin, a court may use any non-prohibited reason they want for their decision. Though there might indeed be discretion of the first type in Hart, Dworkin thinks that Hart must mean that when it is unclear whether a rule covers a case, they can use any reason they want in selecting one of the equally legitimate interpretations available.

It is this type of discretion, "hard discretion,"[62] that Dworkin's arguments about principles being in law disputes. Judges are not free to choose any reason they want when making difficult decisions; they must weigh principles, determine what considerations are most important, and make a supported decision. Ultimately, the principles fill in the gap that Dworkin thinks that Hart posits. For Hart, in cases where there is no rule to influence the choice between two options, judges may choose any reason unrestricted by other rules.[63] For Dworkin, the judge must instead choose

[61] Ibid., 31-32.

[62] Ibid., 34.

[63] Ibid., 33.

the reason that most closely aligns with the appropriate principles. That is, principles are binding upon them

Second, it problematizes Hart's distinction between the acceptance and validity of a legal feature. Decisions made on the basis of principle are not made precedentially. The decisions must be made on the fly, new for each case. There is scarcely a determinate precedence-based test that would work for each case one would have to weigh principles.[64] So, the pedigree-based test for validity Hart uses can hardly be said to help a judge determine a principle's legal veracity by itself. Additionally, for Dworkin whether a legal principle truly controls the actions of legal decision-makers depends in part on whether the principle is accepted by the wider community to which law applies. It would seem, therefore, that the validity of a legal principle is subject to a test that is not quite either acceptance or pedigree, but a little of both, which undermines Hart's neat adjudicative dualistic formula.[65] For Dworkin, the power of the ROR is as an institution that directs judges to particular conclusions. If legal facts may also be supported by acceptance, the specification purposes of the ROR as establishing validity are not as needed.[66]

We come now to the evaluative section. Dworkin's descriptive arguments about the law containing principles are difficult to refute. There will later be some corroborating evidence. His claims are descriptive and cite specific Supreme Court cases. I do not believe an alternate interpretation of what happened in *Riggs v. Palmer* is possible, for example. The court in that case explicitly said that literally interpreting the rule specified by contract law would cut against their conclusion. The court wrote: "[i]t is quite true that statutes regulating the making, proof and effect

[64] Ibid., 40.

[65] Ibid., 40-41.

[66] Ibid., 39.

of wills, 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." [67] The conclusion in that case, that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime," is clearly a principle and not a rule.[68]

What the evidence he presents proves, however, should not be overstated. The impact it has on positivism need not be a deathblow. I will now distinguish what results from the truth of Dworkin's conclusion, addressing what it means for Hart before addressing the two impacts Dworkin expressly outlines.

First, the law containing principles and not just rules proves that Hart was wrong that law contains just rules. This is obvious. It leaves open the question of whether the rest of Hart's system still holds, and it leaves open the question of whether there is a coherent positivist system of law that contains both rules and principles. Dworkin, on my reading, does not contest that the law contains rules. He argues that the law contains principles as well as rules. If he thinks that law does not contain both, he is wrong. Hart's account that legal commands exist in the form of rules is persuasive and unmolested.

Second, it purports to show there cannot be discretion of Dworkin's third type. It is mostly successful. The principles that judges must use to decide cases constrain the reasons they may adopt in constructing a decision. Sometimes, however, the specific way that the principles and rules break in a case is unclear and a judge must use their judgment to determine what the correct balance of commitments demands. This would be a case of discretion in the first type, it seems.

[67] Riggs v. Palmer, 115 N.Y. 506, 510 (1889).

[68] Ibid., 511.

That judges must exercise discretion of the first type is "a tautology" with them being judges at all, for Dworkin.[69]

A defender of Hart might be tempted to say that the need for discretion extends to the application of both rules and principles. Which principles one would employ, the argument goes, is an open question. After all, principles are, like rules, indeterminate with respect to their scope and how they apply to particular cases. If a judge is supposed to restrict the decision he or she is will by appropriate principles, then it appears I am in the same spot as before. Discretion here cannot be internal to principles because they contest the application of those principles.

This argument is wrong because a principle one is generally committed to logically could constrain judgment at whatever level of analysis he or she selects. It is not in question under the parameters of this argument whether the principle is in fact a commitment one should have. Therefore, discretion in the first sense with respect to either principles or rules still sensibly involves principled commitments as reason-givers. As long as a judge knows what they are committed to, they can resolve questions of what principles should win out in specific cases according to those commitments. If principles generate conclusions all the way down, as it were, then any conflict is potentially soluble with reference to those commitments. There is no regress, as the argument intends to assert, because it is never in doubt the sum of principles that guide individual cases. There is no threat to internality. The principles that uniquely apply to law simply apply at levels a judge could decide a case on.

What about a judge unsure of his or her commitments, or whether his or her commitments are legal commitments? This is a more interesting question. If a judge is unsure of what principles generally apply to him or her, how can he or she decide a case which requires balancing between

[69] Dworkin, *Taking Rights Seriously*, pp. 34.

two closely contested commitments, one of which must be made to win out? Certainly he or she could not rely on reasons given by principles in this case. Is hard discretion required here?

The posing of this question is flawed because a judge not sure of his or her commitments cannot even try to balance two commitments. They are unsure of what they are committed to, or, at least, whether those commitments impact the law. This is obviously a dilemma a judge should resolve. But it is a dilemma to which there is a right answer.

This digression is crucial because it reveals that whether adjudication requires hard discretion is affected by the way that principles come to be known or operative for judges. Dworkin seems fairly confident that judges are able to determine the content of their principles. For him, the strength of those principles is an objective phenomenon. That certain moral principles apply in a community is a public fact because the salience of those principles is a matter of acceptance. On the other hand, if only some principles are legal ones, and if there must be some test to determine which principles are legal and which are not, the problem of discretion resurfaces. The debate about whether principles have to have a special feature to exist in law will be addressed later.

The third implication of Dworkin's work is that the existence of principles in law is evidence against the existence of a social ROR. His argument here suffers from a number of fundamental flaws. First, it is no threat to the concept of an ROR that legal validity could depend also on social acceptance. Dworkin's distinction is not a logical one. His claim is not that validity cannot involve tests of social acceptance. Dworkin paints a picture about validity requiring both a determination of the origin of a law as well as a determination of the appropriate legal principles, which relies on acceptance. This does not mean the ROR is useless, at least for the pedigree part. Second, it might be true that acceptance is not required for a principle to be legally permissible.

There is no immediate reason to assume there should be so. If acceptance is not required, the ROR is a bit safer.

These arguments are contingent on the existence of a descriptive problem Dworkin isolates with the ROR. His argument is that there is no universal standard for validity determinations, such as would be specified by the ROR in the case of principles. As it so happens, there is not a commonly accepted test judges use to distinguish legal principles from non-principles. The principles differ vastly across cases and judges do not cite or otherwise use a single standard for deciding them. The ROR is a plainly a social rule. It requires a set of shared social meanings and standards for use for distinguishing legal principles. If principles are part of the law and principles are not distinguished in this way, a ROR cannot be descriptive of law. This argument is presented in "Model of Rules II."[70]

It is important to whether an ROR exists that principles are utilized in a legally consistent, socially recognized way. Waluchow will discuss this at length, so I will table this discussion for now. I brought it up here to set the stakes. Since I agree with Dworkin that the ROR must be a social rule, then the absence of a social rule for a definitive feature of law renders the ROR thoroughly undescriptive. The ROR is a centerpiece of Hart's theory of law. The system of rules all related back to a common genesis likely cannot survive if this is in doubt.

We thus have two outstanding questions from my analysis of Dworkin.

I. What test exists for the validity of uniquely legal principles, if there is one?

II. What is a socially consistent way of assessing the validity of legal principles, if there is one?

I and II are really the same question. The reformulated combination reads:

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[70] Ibid., 57-60.

III. What is the socially consistent way of determining the unique validity of legal principles, if there is one?

This will be my main focus going into Waluchow. Before I move on, I will now address some arguments presented in "Model of Rules II" and how they relate to this question.

First, Dworkin responds to a critic, Rolf Sartorius, who affirmatively argued that Dworkin's test must itself be an ROR because it was a standard test that applied across diverse cases. Dworkin shrugged him off by saying what I have already noted his position was: the lack of social rules and one determinate test means principles don't run by a ROR based test.[71]

Second, Dworkin cites an attempt by another critic to incorporate principles into Hart's model. The argument is rather brief. The critic, Joseph Raz, notes the possibility of principles existing in law and proposes at least one test: if a principle is cited by judges in a large number of cases, or if a principle is embedded in constitutional documents, then that principle is a legal principle. That test can be applied socially. Therefore, a social ROR can take principles into account.[72] Dworkin has two responses. First, principles cited by judges are typically controversial, as proven by the judicial dissent in the Riggs case. Second, principles cited by judges are typically not found in previous precedents. The principles are new as far as legal documents are concerned.[73]

Dworkin's first argument here seems inadequate. It might well be true that these principles are controversial, but a one-judge dissent in *Riggs v. Palmer* is not enough to establish that. A ROR assumes a common standard, not a unanimous standard. The validity of this claim cannot be determined from Dworkin's meagre evidence. Dworkin's second argument has more bite. If

[71] Ibid., 59-60.

[72] Ibid., 64-65.

[73] Ibid., 65.

indeed the legal rules cited by judges in their decision have no previous legal import, then descriptivity demands that those principles that are law not be subject to a test of legal entrenchment. Here is what I will say about this argument: first, I would be careful before jumping to conclusions to find out whether the one example brought up is indeed supported by evidence from other cases. I could imagine, for instance, a number of important principle-based legal decisions that did have some support. Second, remember that existing in previous case-law is only one example of how legal systems could incorporate principles. Dworkin's argument counts as evidence against the example from Raz he cites and that example alone. If there was another way of having entrenched legal principles that made sense, Dworkin could not rely on this argument.

Third, Dworkin claims Raz confuses his account of discretion and tries in an unwarranted fashion to fuse the third and first forms of discretion into one.[74] Dworkin asserts that the two possible reasons for doing this are a) legal systems explicitly acknowledge the need for dissent or b) there is social collusion for principles in the ROR. Dworkin indicates that b) seems to be a descriptive falsehood because no legal systems he knows explicitly identify this. I will go with Dworkin, and would also add that it seems absurd to claim to prove that deviation from established rules in discretionary cases could possibly be warranted by an existing established rule. The b) point has been previous addressed some number of times now.[75]

The other two criticisms from "Model of Rules II" that I cite here are attempts to combine legal rules and legal principles. Dworkin cites Raz on both occasions, and I side with Dworkin each time.

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[74] Ibid., 69-70.

[75] Ibid., 70-71.

Raz argues that rules are not so different from principles, after all, because they do have weight. He has two pieces of evidence for this. He says, first, that moral rules work in this way; people speak of moral rules which exist in a system and which people can use. Those rules conflict with each other and require deliberation. So, Raz's argument goes, rules, like principles, can have weight and Dworkin's distinction is incorrect.[76] Dworkin rightly and smoothly points out that the things that Raz describes are, in fact, principles, and that real human beings do not think about the moral rules they staunchly commit to quite in the same way that rules are constituted in a system. Individuals are, as it were, more loose in their situation of moral beliefs.[77] For my part, this is enough.

Raz's second piece of evidence is that rules often directly conflict, as Dworkin supposes they do not. This should count as evidence that they can weight in order to be resolved. The example Raz gives is self-defense: some laws says aggression is wrong, and others say aggression is right in self-defense. This, Raz supposes, indicates a conflict in the law that must be resolved via weight.[78] He bases his claim on the argument that those two laws must be distinct laws that cannot be considered part of the same law or rule.[79] Dworkin argues that whether they are part of the same law is irrelevant, because the point of a law is to convey information about the sorts of acts that are prohibited and the ones that are allowed. What counts is that in the case of aggression in self-defense the act is allowed. It does not matter whether it was one law or two laws because the fundamental legal information that specific laws are designed to bring out permits aggression

[76] Ibid., 72.

[77] Ibid., 72-73.

[78] Ibid., 73-74.

[79] Ibid., 74-75.

in self-defense. Thus, the correct theory of law individuation is irrelevant, and Dworkin does not commit himself to any particular ones.[80] One legal act, aggression in self-defense is legal. Acts of aggression in other sorts of cases is prohibited. I do think Dworkin is right in this, but think that specifying a more fundamental set of data that laws and rules are supposed to convey raises more questions than it answers. It is enough for my purposes, at least, to confine this answer to a criticism of a criticism and leave it at that. This rabbit hole looks very deep.

Dworkin cites one last argument of Raz's. A possible conflict between an extant principle and an established rule means that both principles and rules must have weight and any hard and fast distinction must be wrong. If a rule could be found to outweigh a principle, then it must have had a weight to begin with.[81] Dworkin denies both the relevance and facticity of this claim. In the former case, he says that it is not helpful to think of a rule and a principle conflicting because rules can reflect other principles.[82] This argument is only an effective rebuttal if it proves that the things in conflict are not a rule and a principle, but in fact a principle and a principle the rule reflects or represents. Perhaps this is so. Dworkin, however, advances no arguments in support of such a conclusion. If it mattered, this would be worth delving into. I do conclude, though, that Dworkin is right about his claim about relevance. In this argument he says that when a judge decides between an existing rule and a principle, they are not choosing between a rule and a principle but between many principles. After all, the decision is not whether the rule is coherent but whether it should be applied in this case. There might be reasons for using it and reasons for not using it that conflict or support a specific cited principle. But those former reasons are themselves principles,

[80] Ibid., 75-76.

[81] Ibid., 77.

[82] Ibid.

with weights and justifications. Precedent following is not a sacred cow; it is one of ultimately many reasons that might weigh against over-ruling a change.[83]

The impact of Dworkin's arguments is not overstated. It does not claim that the law does not contain rules. It claims instead that the law also contains principles. In some of the mostly mechanical cases that involves the application of existing rules, judges do not seem to consider whether they should be consistent with precedent and, finding that they should do so, conform to precedent. As per the discretion discussion, a judge deciding whether to apply a rule or, for reasons of principle, break from it cannot rely on a rule to do so. A judge may also determine which of several equally valid interpretations of a rule should be selected on the basis of principles. The interpretation that most conforms with the appropriate balance of principles is chosen, for instance. Neither of these two ways of using principles limits out rules.

Waluchow

Waluchow's work is representative of where the positivism debate has gone post-Dworkin. Positivists who wished to remain as such had two options. They could try to exclude Dworkin's insights or otherwise undermine them. They could also try to defend a version of positivism that incorporated those insights. Waluchow calls the first strategy Exclusive Positivism, hereafter EP, and the second Inclusive Positivism, hereafter IP.[84] In terms of what the arguments actually represent, EP is the claim that the law, understood properly, cannot as such contain legally decisive determinations that hinge on the truth of some principle of political morality. IP is the claim that a

[83] Ibid., 77-78.

[84] Waluchow, *Inclusive Legal Positivism*, pp. 2-3.

legal system could coherently contain legally decisive determinations that hinge on the truth of some principle of political morality.[85]

I have two clarifications here. First, IP does not require that principle-based determinations exist in each legal system. It requires only that the existence of such determinations cannot be ruled out by criteria for law. Second, EP does not claim that judges do not make moral deliberations; it would then be strictly non-descriptive. Rather, it acknowledges that judges go beyond the law to make decisions. They do so in a legally recognized way, but the decisions themselves is beyond the law. Those actual deliberations which require the use of political-moral determinations are not law-governed, though the other legal factors that influence the decision are.

The aim of *Inclusive Legal Positivism* is to defend IP against EP. Though Waluchow's version of IP shares some of the features of Hart's system, Waluchow does not associate IP with Hart. Waluchow's version of IP's answer to question III in the previous section is that there is not, in fact, a socially cohesive test for questions of morality external to facts of political morality.

Waluchow first analyzes Canada's "charter system" and finds that many legal decisions made by judges are moral principle based grounds such as fairness and equality. Those determinations seem to be attempted to be realized on the basis of the objective truth of whether something, in fact, violates a principle as present in the Canadian Charter.[86] Waluchow cites the case of *Andrews v. Law Society of BC*[87] in which a court ruled that denying the right to practice law to those without Canadian citizenship was a form of discrimination and therefore violated

[85] Ibid., 82.

[86] Ibid., 144-145.

[87] Ibid., 149.

section 15 of the Charter.[88] This case, among others, is interpreted by Waluchow as constituting evidence for IP, that is, for the claim that those decisions were made on the basis of actual political-moral principles. For a defender of EP, on the other hand, although a legal system might have moral language in it evaluations thereof must be considered to either be beyond the law or merely code for a set of empirical circumstances that, obtaining, trigger certain actions on the part of a judge. Waluchow is fairly confident that this interpretation is wrong for a few reasons.

First, judges believe that they are appealing to the objective truth of principles. The judges that made those determinations believed they were appealing to public principles of morality in making their decision.[89] Now, for Waluchow, judges could always be wrong about whether they were appealing, in fact, to principles inside the law, or whether they were merely applying some other standard. Most judges are not well versed in the ins and outs of the legal positivism debate. However, unless there is a sufficient reason not to trust a judge's answer, there should be a default respect for their input. After all, they did make the decision. They are in the best position to ascertain the character of the action that they did, and of what similarly situated judges-in-arms did.[90] Taken together, this constitutes an argument for IP because without an argument against judge relevance, which it is not assumed, their authority is evidence for IP. This argument is clearly flimsy, however, because as soon as there is a reason to doubt the authority of judges here the burden shifts entirely to Waluchow. Perhaps for this reason, Waluchow does not put too much stock in the argument's ability to justify IP all on its own.[91]

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[88] Ibid., 154.

[89] Ibid., 144-145.

[90] Ibid., 147.

[91] Ibid.

Second, and more decisively, the cases themselves asked questions that required an external, objective moral deliberative element. In the *Andrews* case the court determined that it had to develop an objective test for discrimination. The resolution of their standard, and of their charge, was taken to involve the objective use of principles.[92] That is a pretty clear cut instance of the truth of a moral deliberation external to law's force, on the account of EP theories, being relevant to the resolution of a legal dilemma.

EP would posit that these conflicts between law and morality are just cases where law loses out to something else. Waluchow isolates two flaws with this interpretation. First, it conflicts with the intuitive sense of the meaning of those decisions. The evidence for that claim of Waluchow's is implicit in all of the analysis above. Second, the legal rights in question were treated as never having existed prior to the ruling. Rulings in charter systems such as these, Waluchow claims, are treated as determining what rights people have as well as what rights they had. The rulings are a-temporal in the sense that the claim that they make about what rights people have is taken to also mean that a person had a right in the past too.[93] For Waluchow, this is evidence that the claims were made to reference claims of objective morality. If judge rulings are taken to have a moral basis it is natural that they would be retroactive because moral rules are themselves often conceived as a-temporal. An EP defender evaluating the same scenario, in contrast, would be stumped.

I believe an EP defender has no good answer to Waluchow's first and second arguments. About the second point, a defender of EP could claim that there is no reason that retroactivity does, in fact, prove that there have been rights all along. After all, ruling in a way that breaks with how a law was applied in the past does not mean that justice was not rendered in cases where a past

[92] Ibid., 153-154.

[93] Ibid., 161-162.

ruling was on the books. This claim misses the point. First, it just might be the case that things considered legal and later legalized have legitimate rights claims. There is nothing revolting about such a conclusion. Second, Waluchow is not claiming that judges who make claims about what rights people have are claiming that their law was always on the books. There were instead claiming that, because the right they discover is timeless, related to principles, it applies to events that occurred before the case that was being decided. Though it is not relevant to this work, I do think that there is a danger that Waluchow's second response here warrants natural law more than it does IP. But that is too deep a rabbit hole for my purposes.

Waluchow very quickly advances some additional empirical evidence for his claim that principles are in law. He claims that to warrant IP he really only needs one decisive example of where IP clearly wins out. Canada's charter system fulfills that role.[94] In a stroke of generosity, however, Waluchow does posit the generality of his principles on the basis that:

> it seems a widespread feature of law that arguments which appeal to the authority of constitutions, statutes, precedents, or customs can often be challenged by counter arguments which assert that the constitution, statute judicial decision does not apply in the case because if it were to apply in the case at hand because if it were to apply this would result in a manifest injustice, absurdity, or moral repugnance.[95]

That sometimes results in cases where "standards of morality and rationality serve to determine the very content of valid legal norms, something again which the exclusive positivist must deny."[96]

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[94] Ibid., 165.

[95] Ibid.

[96] Ibid.

If Waluchow were right about this, I would assuredly take it as additional evidence for his claim. As it is, it would be to give Waluchow too much credit to give any credence to such a low-level attempt to give empirical support. It makes more sense to treat this as a slight additional level of credence for Waluchow's earlier empirical claims rather than as one that could fly on its own.

All of this is consistent with the earlier conclusions I made about Dworkin's empirical claims. Principles do, in fact, figure into law as a part of the law. My descriptivity criteria is sated. While this does not immediately settle the debate outright, it is a positive reason to believe in these sorts of claims until I am convinced otherwise.

I will now discuss several arguments against IP that Waluchow answers.

As Waluchow notes them, Hart has two types of arguments that cut against IP. The first set are what Waluchow calls "causal arguments."[97] They are so called because they posit a connection between IP and some consequence which is not logically entailed by IP but is instead presumably led to by IP in some contingent set of circumstances. One of these problematic circumstances is the case of the moral anarchist, someone whose moral skepticisms cut into not just whether what he or she did was right but whether it was even law.[98] Waluchow rejects this argument type wholesale, for two reasons. First, this is irrelevant to the question of whether IP is descriptively correct, which should be the primary consideration.[99] Second, Fuller's ascription of just the same causal consequences to positivism gives reason to think that these causal claims are not clear cut and should not be used to throw out IP too quickly.[100]

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[97] Ibid., 88.

[98] Ibid., 86-87.

[99] Ibid., 88-89.

[100] Ibid., 95.

Waluchow's first argument is consistent with my descriptivity criterion. I will reject Hart's argument as well, on the grounds that the potential moral fallout of the adoption of IP is irrelevant to the criteria I have set up. This is especially true when the consequences are not even logically entailed, but merely might happen given a specific set of circumstances.

Hart's second type of argument is that IP prevents inquiry into the nature of law.[101] Those investigations are highly empirical and data driven, and the inclusion of non-empirical moral data distorts the search. Waluchow argues that this argument begs the question because those things that investigations help discover should, perhaps, simply be elements of political morality. Those elements cannot be excluded on the grounds that exclusively empirical methods are needed to decrypt the meaning of law because it could be that the meaning of law under decryption is not only empirical[102]. Moreover, Waluchow argues, IP does not undermine inquiry in another area because things that are not law are frequently discussed in works on law. In fact, data determined to be not law tend to occupy much space in works in philosophy of law as foils.[103] Investigation into those data is therefore not foreclosed by accepting IP.

Both of these responses seem on point, particularly the second. Even if the argument is not question-begging, it does not actually prove that IP is bad.

Waluchow identifies six additional arguments that attempt to show EP's superiority to IP. I will consider each in turn.

The first critic in this section is Raz, and he will also be the last. Raz's first argument claims that the word "law" carries with it connotations of objectivity and non-morality in common usage

[101] Ibid., 99.

[102] Ibid.

[103] Ibid., 101-102.

that demand EP's superiority. Apparently, however, even Raz admits that the common usage of the word law cannot really hold much force in swaying a legal theorist towards a specific interpretation of positivism. Waluchow agrees with Raz's assessment of the relevance of his claim and resolves not to take this argument very seriously.[104] Neither will I.

The second argument comes from Sir Rupert Cross. The argument claims that allowing moral arguments to hold sway in legal determinations gives the "moral bias" of legislators sway in otherwise pure, non-moral legal deliberations.[105] Waluchow rightly notes that assuming the impurity or irrelevance of moral beliefs begs the question of whether IP or EP is superior.[106]

To go further that Waluchow does, if I take the argument to be somewhat sensible, "moral bias" would have to mean a certain sense of intuition. Deliberations about moral principles that IP endorses are more prone to intuition and are therefore less pure in the sense that they are more likely to be distorted by antecedent intuitions and would be less prone to objective evaluation.

I would make two follow-up arguments. First, there is no reason that the intuitions that govern moral concerns are different from the intuitions I have about other areas. Intuitions that rely on principles to determine the necessary elements of umbrella are equally "impure." Second, there is no reason that moral argument even requires much use of intuition at all. Claims involving right and wrong could, after all, could just be deductively good moral arguments.

This next argument and the three following it belong to Raz. The third argument says that law is a human institution with socially defined standards that constitute law and limit its application. So, elements of law must be based in human institutions. Moral arguments are not.

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[104] Ibid., 104.

[105] Ibid., 105.

[106] Ibid., 105-106.

This, however, is clearly an argument against natural law and not IP. IP recognizes that moral argument might be decisive in settling some question of legal interpretation, but requires that those arguments be recognizes as having some institutional connection to law.[107] Thus, Waluchow is right to claim that imposing the condition that legal arguments must relate to social institutions does not invalidate IP in the slightest.

A defender of Raz's argument might respond that moral claims, though they are related to institutions, do not depend on institutions for their veracity. It may be true that moral claims, as a benchmark, must relate to institutions. But whether or not that principle holds is also a function of something not related to a principle's station in an institution, namely its soundness as a philosophical argument. Therefore, this is an argument against IP, which outsources claims of the validity of laws to philosophy from law.

The institutional connection requirement, however, was never meant to say that the evaluation of specific laws must be tied to legal institutions. That interpretation would prevent judges from deciding even minor cases. Principles of logic and regular intuition relied on in many judge decisions would no longer make sense because those general analytic tools are not directly related to a human institution. While modes of evaluation need to be rooted institutionally, the truth of the evaluations themselves need not.

The fourth argument says that existing concepts that govern legal evaluation require a separation between law and moral truths. The common idea that there is a difference between settled and unsettled law and between legal and moral evaluations, for example, supports EP. That's because, for Raz, these concepts are "pre-theoretical data" that any descriptive account of

[107] Ibid., 112.

law must accommodate.[108] Waluchow has two responses here. He says first that these data are not pre-theoretical at all, but in facts functions of the adoption of an EP lens. Those facts would not be relevant if EP was false, so they should not be considered.[109]

I must break serve here and side against Waluchow. The claim that some concepts thought to be descriptive features true of law are only valid under certain legal schemes is a tautology. It would apply to any piece of descriptive evidence. Since I start from the premise that I must be able to consider at least some evidence for a descriptive account of law, I cannot accept this argument.

Waluchow's second argument is that the distinctions discussed can exist under IP too. In the case of the difference between legal and moral evaluation, for instance, IP can recognize its relevance. An IP legal system can note that a law was validly passed and then declared morally insoluble as a basis for its dismissal. [110]

I agree with Waluchow that I do not think that those claims truly rule out IP. I also think that those claims being commonly used in law and referred to by different authorities does not make them analytic truths of the legal system. That is, if it is the case that there is no difference between "settled law" and "unsettled law" under IP, that is hardly evidence that IP is incorrect. Those distinctions are heuristics. They are not written into legal code. If IP is true and contradicts them, then this distinction sometimes used by lawyers and judges does not really describe law. This argument is distinct from Waluchow's first argument because that argument claimed those data were not pre-theoretical. My claim was simply that there is no reason to assume that they were even important data in the first place.

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[108] Ibid., 113.

[109] Ibid., 113-114.

[110] Ibid., 114-115.

The fifth argument is that the law should primarily have the purpose of creating a publicly ascertainable standard that is not open to dispute on the level of its importance. Since IP claims can be countered by their actual moral falsehood, they cannot meet the purpose of law and should be excluded from it. The predictability of the resolution of legal claims is its primary virtue and cannot be achieved if moral claims have their resolution in claims of actual moral philosophy.

This argument is pretty good but suffers from two shortcomings. First, it is not clear why, granting the relevance of institutional predictability as a function of law, that it is law's primary function.[111] Waluchow points out that law can and does have other purposes. The maintenance of social order, ensuring justice, whatever that is taken to mean, and other purposes complicate Raz's picture. Those other standards are competing concerns which must be weighed against institutional predictability. Thus, Raz's argument cannot be considered a decisive win for EP in the abstract because considerations in specific cases, or even in general, might cause other functions of law to win out over the one Raz champions.[112]

Waluchow also argues that even granting institutional predictability as the primary function of the law does not grant EP an edge over IP. Some non-moral interpretive questions are extremely difficult to resolve and hinge on difficult questions, the answer to which could not necessarily have been predicted by the parties in a legal dispute in advance. Some moral questions are extremely easy. Thus, the descriptive claim this argument advances need not count for EP against IP.[113]

I think that Waluchow is right about his first argument. Laws plainly have multiple functions, and the sort of dispute settlement-based, predictability one pushed for by Raz is notthe

[111] Ibid., 118-119.

[112] Ibid., 121.

[113] Ibid., 122.

only game in town. I do think, however, the moral claims and empirical ones are of different types. Thus, I cannot fully agree with Waluchow that institutional predictably is equally served by each type of claim.

The final argument is a bit more sophisticated. Raz argues that law must be a thing capable of having authority. This claim is made by all attempts to establish a legal system and is pregnant in its execution. It therefore has to make sense that law could have the property of being authoritative. That authority guarantees that legal dictates are binding external to other reasons that bear on the issues at stake, simply insofar as they are claimed to issues of law. Thus, external moral evaluation cannot be a part of the law because a judicial decision that is the product of the truth of an external moral principle makes the authority relied upon by the law non-exclusive of competing considerations. Those considerations, which Raz calls "dependent reasons," cannot be relied upon in adjudication. So, IP cannot account for the descriptive truth of legal authority. EP, on the other hand, recognizes legislation, judicial systems, and custom as the sole sources of authority. Considerations for what is allowable there are wholly empirical and do not create any reasons that appeal to something else such as morality.[114]

Waluchow's main counter-argument is that authority given reasons need not be exclusionary; there could be, and often are, multiple context independent reasons to believe something on different authorities. Reasons to believe authorities do not work by eliminating from considerations in which the authority's influence is to play a part every possible other reason they could have to believe the same thing. Rather, authority counts as a certain weight in favor of or against a belief. Some entity's authority is some reason to accept a belief, but it could and must share that space with other reasons, which could very well win out. People treat law as one of

[114] Ibid., 124-126.

many determining elements in their considerations. Perhaps it is very important in many cases. But it need not be. Even when it is, it does not warrant wholesale elimination of other sources of authority from consideration.[115]

I wholly agree with Waluchow on this point. I think that viewing authority as inherently exclusive incorrectly pictures how authority conceptualized by concrete actors. Authority considerations do not necessarily exclude their opposites. Just because I take a chemistry textbook as an authority on chemistry, that does not preclude me from listening to a lecture on physics from a Stephen Hawking. If I learn conflicting things in either, I would have to weigh between which authority I have greater reason to believe. But such a conflict does not mean I do not take both of them as having authority.

We have considered a large number of arguments in support of EP and found them all to be wanting. Broadly, these claims were relevant to the descriptivity criterion. It is unclear, in addition, whether the truth of any of those arguments, if successful, would be enough to overcome what was earlier established as a strong descriptive case for IP.

Discretion and Waluchow

We have established some basic descriptive facts about my final theory of law. These facts allow me to answer the outstanding question III from Dworkin. That question concerned a social test for determining how principles figured into legal systems. At stake in that discussion was the survival of the ROR as a unique test for legal validity. As I have seen, the test to determine the validity of the legal principles was consistent across judges, but was not a social test. That is, it was possible for everyone to come to the same conclusion, but the test that was used was the

[115] Ibid., 130-131.

objective principled accuracy of moral principles as moral elements. The test must be made on a case-by-case basis for Waluchow. The weight of principles winning out turns out to be a determination that can only be made with respect to the principles present in each case in their respective weights.[116]

The conclusions established here are, I believe, consistent with the claims I made in the Fuller section. There I claimed that if morality was in law it would have to be internal to law. External reasons, it was concluded, were not the same as legal reasons. In my terms, not all principles are operative at all times. What I have concluded in this section proves that the evaluation of principles that exist in the legal system requires the evaluation of the objective truth of principles of political morality. But it does not claim that those moral claims are all in the legal system at all times. What principles are taken to be decisive in the legal system is not the set of all true moral principles. A judge makes an internal decision when they execute their role as a judge by ruling about the objective moral truth of a particular issue. They are making a decision on the basis of the law, however. They are not equating an external moral commitment with their claim as a judge. They view themselves as having a charge that they must execute as a judge. Executing that charge requires making moral judgments. Nevertheless, all of their acts can be explained by internal commitments.

We have established that cases of political morality do arise and are dealt with by judges in a way that investigates the philosophical merit of those claims. I have not yet come to the conclusion about whether discretion was required. Waluchow deals with this issue separately. I will turn to this issue now. I ultimately determine that discretion cannot be dispensed with, even under the mostly Dworkinian system I have constructed.

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[116] Ibid., 230.

Waluchow's interpretation of Dworkin's account of discretion is different from mine only in emphasis. His account hinges on Dworkin's use of "control" in the original text. What he takes Dworkin to mean is that an action being controlled is a logical operation whereby there is a certain degree of fit between the order someone is given and the decisions they may make in its charge. Waluchow speaks of Swedish persons a great deal here and I will not break serve.[117] That I am told to find "the tallest Swede" logically presumes that there is exactly one Swede who fits the bill who I am to locate. I am limited in the choice of acceptable reasons for Swede selection. This is discretion in Dworkin's first sense. Being told to find "a tall swede" is only somewhat controlling. Tallness is relative. This command gives me an expansive range of Swedes from which to select. Being told to find "a Swede" is the third sense of discretion because the dictate does not control my decision at all. Any Swede will do.

This is mostly right. Waluchow's analysis centers on the logical features of a given charge or duty and what sorts of responses it can logically permit. It misses what I believe is the pressure point of discretion for Dworkin, which is the reasons one can invoke in making a decision. If I am told that I may select any Swede whatsoever, I am given no specific reason to choose to select a Swede. I am given full choice of what Swede-selection reasons I find appropriate. If I am told to select the tallest Swede, I am allowed to select a Swede that is somewhat tall, but have full reign over any reason I might take to be decisive in my search among reasonably tall Swedes. If I am told to select the tallest Swede, I have only the criterion of maximum tallness to inform my decision. No other reason presented could be decisive. Waluchow is right to note that his interpretation of what Dworkin means by "controls" is not Dworkin's in the sense that discretion

[117] Ibid., 195.

only singles out the possible number of correct ways of answering the order.[118] But this is a quick fix.

Every order controls a decision somewhat. If it did not, it simply would not be an order because it could be fulfilled in an infinite number of ways. Furthermore, the relevant question, of course, is whether an order is in fact controlling, not whether it merely intends to control. An order is in fact controlling if there is a uniquely right answer to the question of law that the relevant authority, in this case a judge, could eventually divine given sufficient time and coffee. Waluchow distinguishes then between someone having discretion and someone exercising discretion. Having discretion is a philosophical question.[119] Whether a judge's decision was in fact controlled, that is whether the order generated unique standards that defied or allowed for deviation and a full range of reasons, has a determinate answer regardless of what a judge believes when deciding the case. Using discretion is a case of judge belief. Whether a judge felt they had discretion or resorted to deciding the case according to a looser set of reasons than what the law commanded were they to know it is independent of that final answer.[120]

This is intended to answer an argument of Dworkin's that the actual testimony and experience of judges indicates that they did not reason in discretionary terms when making decisions. This was thought to deny discretion as a descriptive feature of law. In addition to disputing the factual accuracy of this statement,[121] Waluchow claims that there is simply no reason the beliefs of judges matter for this sort of claim. The judges are claiming not that they did not

[118] Ibid., 204-205.

[119] Ibid., 204.

[120] Ibid., 212-213.

[121] Ibid., 213-214.

have discretion but only that they did not use discretion. Whether they have discretion is a philosophical question the empirical experiences of judges cannot themselves resolve.[122]

This is somewhat difficult for me. On the one hand, it is clear that judges continually exercising strong discretion, in the sense that Waluchow means it, has some bearing on whether strong discretion should be ascribed to them. If the debate is about whether discretion is a feature of the legal system, surely judges continually making decisions under conditions that they claimed gave them no specific guidance on what reasons to adopts is relevant to that debate. On the other hand, the point of discretion is to make a theory of law that maps onto the conceivable cases within law. Hart adopted discretion because rules could not explain decisions in some number of penumbral cases. Dworkin rejected it because it was inconsistent with his theory of principles existing in the law writ large. Those issues judge belief does not resolve.

Unfortunately, I have insufficient evidence here to conclude the way that judicial testimony actually swings on this matter. Waluchow merely mentions that Dworkin asserts that judges do not regularly use it. He then lists the names of a bunch of judges and claimed they support his interpretation. Without a decisive reason that this is either a) relevant or b) actually determined in one direction or other, the question of the relevance of judicial testimony to these descriptive questions I cannot resolve.

Dworkin thinks decisions are controlled by things such as principles and rules if there is a uniquely right answer to those questions that a judge should try hard and discover. This gets right to the heart of Dworkin's critique of discretion and uncovers a source of the last section's uneasiness. Dworkin's answers about whether discretion could happen in a case involving principles hinged closely on the sort that those principles were. Dworkin proposed features, such

[122] Ibid., 214-215.

as public accessible and acceptance, which, he thought guaranteed a determined right answer to a legal question in every case, would preempt strong discretion. Even "hard cases" are not impossible, at least.[123]

Waluchow contests this assumption. There is no reason that cases of political morality always face a right answer that is determinable at the level of judge adjudication.[124] And, importantly, there is no reason that such an answer, even if it did exist, would be discoverable by judges.[125] A Dworkin defender might be tempted to respond that the judge in this case simply has not looked hard enough. There is an answer, somewhere, and this is proof the judge does not have discretion, even if they cave in and use discretion, making light of Waluchow's distinction. But the truth of the matter is that, conceptually, there is some level at which the choice between two moral options is indistinguishable. That is, no real judge that exists, a mythical Dworkinian judge besides, that could make such a determination. It will certainly not be this bad in every case. But nothing about the nature of principles rules this out. Therefore it does not make sense to claim that discretion could not be a feature of legal systems. And surely a theory of law that says that discretion is not possible to be held but in which judges routinely use it cannot be descriptive.

But there is perhaps an even more interesting reply available that Waluchow is just short of making. I think that there is no reason that moral principles need have different weights from each other. For a judge doing a balancing test, they must weigh considerations of principles, different in each case, and come to a determination of which principles outweigh the others. But if principles can be of equal weight then it could just be the case that the principles weigh an equal

[123] Ibid., 222-226.

[124] Ibid., 223-224.

[125] Ibid., 225-226.

amount. Even an omnipotent judge in this case would have to use discretion. There is no uniquely right question to a matter of law. Discretion is required. Even if principles could have the same weight, and there is no reason they could not, it could be that two more significant principles are weighed and against three less and found to be the same. Therefore, there is no reason to rule out the possibility of an actually equal outcome when it comes to moral values. In those cases, a judge would have to resort to discretion in the third sense because their decision about how to rule in a case is not constrained by rules or principles that they have recourse to in their decision. In this case they must analyze the available options and act accordingly.

I conclude therefore that law cannot rule out principle-based discretion, though there is no reason to think it would be triggered often.

Conclusion and Synthesis

There were, it seems, three hallmarks of Hart's positivism: the model of rules, discretion, and the ROR. I have modified the model of rules, kept discretion in a limited sense, and ditched the ROR. As Chapter One indicated, I am not truly concerned with whether this theory is in fact positivist at the end. But I do believe that discretion and the maintenance of internality should count in the favor of this theory being a form of positivism. I set out to determine what positivist criteria and positivist authors could produce if I squeezed the right answers from them. If it turns out that the definition debate over positivism is such that this theory is a version of natural law, that would count as a strike in favor of natural law theory.

My theory of positivism is a form of IP. I will call it "Omega Positivism" (OP) to distinguish it from other theories and to give it a formal name. It is the endpoint of my analysis, so it is the Omega, or last, of Positivism for me. OP posits that law is a system that contains both rules and principles. Principles determine the correct interpretation of a rule to adopt when it does not

provide such an answer. Principles also may justify breaking from precedent if following precedent egregiously violates principles. Discretion is not required for rules, but may be required for principles if the weight of principles is either even sufficiently or unclear. There is not a legally enshrined test for determining which principles are institutionally valid; judges must make decisions from case to case. I will now judge OP according to my criteria.

OP is suitably general. Claims have been made pursuant to a large number of disparate legal systems. The theory I generated applies to all of them. Political morality is different in each society. Furthermore, I have adopted a combination of theories that were individually suitably general.

OP is descriptive. A full description of why this is the case would, I imagine, be simply nauseating at this point.

OP is practical, on balance. Judges should use rules and principles to decide cases. There are principles that are discoverable in legal systems. Given the use of principles, a judge should, following OP, have to use discretion must less than they would under Hart. Principles still inform how a judge should come down in those cases. And those principles dictate, the vast majority of the time how things will go. However, if a judge is unable to appreciate a difference of weights among principles, or if a judge determines that two principles are of equal weight, then he or she will have to make the best decision that they are able to given the reasons presented. Sometimes OP will not reach one conclusion, it is true. However, this reflects that human institutions, principles, and complicated persons interact in such varied ways that divining one single answer is an unrealistic goal from the start. Hartian discretion applied to far too many tangible scenarios to allow. OP allows few enough to earn a thumbs-up.

I now have a theory of positivism that will guide me in the Chapter Three, which is the exciting bit. There has yet to be a significant work analyzing positivism and philosophy of law in the context of *Florida v. Jardines*. OP will be useful in that regard.

Chapter Three: Cases

Introduction

In Chapter Two I laid out a theory of positivism that most comported with the criteria I laid out in Chapter One. In this chapter, I will use Omega Positivism (OP) to explain and evaluate the United States Supreme Court case of *Florida v. Jardines*. I will first provide the background for Fourth Amendment law, as well as some recent case law. I will then lay out the arguments presented in the opinions of *Florida v. Jardines*. After noting the issues in the case that I think require principle-based evaluation using OP, I will advance and defend the ruling I think is correct in light of those evaluations and the case itself.

Fourth Amendment Background

Florida v. Jardines is a case about Fourth Amendment search and seizure provisions. The Fourth Amendment to the United States Constitution reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[126]

This amendment does two things to restrict state action. First, it prohibits unreasonable searches and seizures not accompanied by a search warrant. Second, it limits the conditions under which search warrants can be issued. A member of the law enforcement cannot conduct a search without a warrant if that search is not reasonable. If a warrant is to be procured from a judge, there

[126] U.S. Const. amend. IV.

must be probable cause, that is, a reasonable suspicion based on objective evidence, as well as indication of the specific time and place police action will take place within.

The United States uses something called the "exclusionary rule" to enforce Fourth Amendment violations. In the early 20th century case of *Weeks v. United States*, the court ruled that violations of the Fourth Amendment would be dealt with by making illegally obtained evidence inadmissible in court.[127] *Mapp v. Ohio* eventually extended the rule to state as well as federal law.[128] Any evidence obtained illegally may not be brought up at trial. And, of course, if a prosecutor has no admissible evidence, then a charged defendant will almost assuredly be acquitted.

An extension of the exclusionary rule is the "Fruit of the Poisonous Tree" doctrine, first described in *Silverthorne Lumber Co. v. United States*.[129] This doctrine, used by courts to describe how the exclusionary rule works, indicates that additional evidence obtained as a result of illegally obtained information is also inadmissible. If a chain of dependent events from a constitutional violation results in a cascade of additional evidence, all of what is cascaded into is discarded. What a powerless doctrine the exclusionary rule would be, after all, if a confession would be excluded but the evidence it yielded fair game.

One can violate the Fourth Amendment in two ways. First, one can conduct an unreasonable warrantless search or seizure. Second, one can act on a warrant insufficiently specified or without probable cause. But, as the Fruit of the Poisonous Tree doctrine highlights, the two are intimately connected. If the probable cause for a search warrant resulted from an

[127] Weeks v. United States, 232 U.S. 383 (1914).

[128] Mapp v. Ohio, 367 U.S. 643 (1961).

[129] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

unconstitutional search, then that search warrant is invalid according to Fourth Amendment standards. Any evidence that is the result of an invalid warrant is excluded as well. Since searches are, without evidence, presumptively unconstitutional, it is the burden of law enforcement authorities to generate probable cause without conducting what is formally considered a search.

Until the middle of the 20th century, what constituted a Fourth Amendment search was linked entirely to common law notions of trespass. Enshrined in United States legal doctrine in the case of *Olmstead v. United States*, the court ruled that police tapping of a phone line physically outside Olmstead's home did not constitute a search. Specific to the wording of the amendment, the court ruled that tapping an outside phone line encroached on no "person," "house," "paper," or "effect" of Olmstead's.[130] This benchmark for a search for Fourth Amendment purposes was known as "the physical penetration rule." Finding out whether a search had occurred was a matter of determining the place that the action occurred within and whether a person, house, paper, or effect was encroached upon in that space.

The court changed its mind about this interpretation in the 1960s. The critical case of *Katz v. United States* repudiated the physical penetration rule. In that case, government agents attached a recording device to the outside of a public phone booth used by Charles Katz to conduct illegal activities. The government argued in court that the outside of a phone booth was not a constitutionally protected space ala *Olmstead.* The court agreed, but argued that the government's action was a search all the same.[131] The majority criticized *Olmstead*'s focus on protected spaces,

[130] Olmstead v. United States, 277 U.S. (1928).

[131] Katz v. United States, 389 U.S. 347 (1967).

arguing that "the Fourth Amendment protects people, not places."[132] The government's recording device was external to the phone booth but still constituted a search.

Katz created the "legitimate expectation of privacy" rule.[133] In order for certain information to be constitutionally protected, two things must obtain. First, a person must have manifested an expectation of privacy with respect to some information. Second, that expectation of privacy must be one that society is willing to accept as reasonable. It is this second part that subsequent *Katz* cases generally hinged on.

In *Katz*, the court seemed to have moved on from the physical penetration rule. The opinion, after all, argued that the justification for the *Olmstead* decision rested on a false interpretation of the Fourth Amendment. The next fifty years or so of case law therefore hinged on questions of reasonable expectations of privacy rather than on questions of physical trespass.

Just a few years ago, however, the court ruled that *Katz* did not repudiate *Olmstead*, but rather supplemented it. In the case of *United States v. Jones*, the court ruled unanimously that cases which involved no violations of the *Katz* doctrine could still constitute Fourth Amendment violations if they involved a trespass. Government agents affixed a Global-Positioning-System tracking device to Antoine Jones' car to determine if he was part of a drug trafficking operation. The government argued in court that Jones could not have a reasonable expectation of privacy with respect to his location on public roads, so the information being gathered was not protected and no search occurred. But in the majority opinion Justice Scalia noted that, while this was true, the placing of a GPS system on Jones' car physically interfered with Jones' property and was therefore

[132] Katz v. United States, 389 U.S. 347, 351 (1967).

[133] Ibid., 360.

a search. *Katz*, Scalia emphasized, was not a rejection of the relevance of trespass writ large. It instead provided a way one could violate the Fourth Amendment in addition to trespassing.[134]

Therefore, in the post-*Jones* era, an unconstitutional government search can occur either if a) a physical trespass occurs or b) a legitimate expectation of privacy with respect to some information is violated. It is in theory possible for courts to rule that both senses of a search occurred. In *Florida v. Jardines*, both were considered.

Recent Case Law Part One: Trespass

Trespass violations of the Fourth Amendment depend greatly on what sort of space it is that is being trespassed upon. Trespass, generally, occurs against property. But not all property is equally protected for trespass purposes. Some property, the home, merits great protection. "Open fields," in contrast merit little. Property protection exists on a spectrum with the home on one end and open fields on the other.

An open field that is part of someone's property, even one that is used regularly, does not enjoy Fourth Amendment protection. In an early 20th century case, *Hester v. United States*, Oliver Wendell Holmes claimed that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[135] Open fields carry with them some implied risk of unwanted contact and unknown or unwanted entities traipsing around. Additionally, the innards of open fields can be seen from publicly navigable airspace.

[134] United States v. Jones, 132 S. Ct. 945 (2012).

[135] Hester v. United States, 265 U.S. 57 (1924).

The home is the quintessential example of a protected space for the Fourth Amendment. It is clear that the house in which one resides is the home. But there are other areas close to the house that are, for Fourth Amendment purposes, considered the home. That area is called the curtilage.

The curtilage is a legal designation imported from the common law. It was used in American courts before it was explicitly brought in, with several court decisions making note of the curtilage of a home but never explaining what it was.[136] The first specific account of the curtilage comes from *Boyd v. United States* in 1886, where curtilage was claimed to be part of the home for Fourth Amendment purposes. An oft-cited passage from that opinion is the curtilage contains intimate activity concerning the "sanctity of a man's home and the privacies of life." [137]

Early courts had fuzzy conceptions of curtilage. Because curtilage was imported directly from English common law there was little United States precedent to evaluations on its behalf. Determining the precise limits of the curtilage was messy in a great many cases. The 1956 case *Care v. United States*, a case out of the tenth circuit, made one of the noblest efforts to define curtilage. After emphasizing the protected status of the curtilage, the court said that it "may include a garage, a barn, a smokehouse, a chicken house or similar property.[138] The court then attempted to give a sort of test for curtilage, claiming that "[w]hether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an

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[136] Amelia L. Diedrich, "Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment," *Hastings Constitutional Law Quarterly* 39 no. 1 (Fall 2011): pp. 301, http://hastingsconlawquarterly.org/archives/V39/I1/Diedrich.pdf.

[137] Boyd v. United States, 116 U.S. 616 (1886).

[138] Care v. United States, 231 F.2d 22 (10th Cir. 1956).

adjunct to the domestic economy of the family." [139] That court used this to dismiss a cave across the street and across a field which containing alcohol as not of the curtilage.[140]

In *United States v. LaBerge,* another district court case, a judge defined curtilage as "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling."[141] When confronted with the suggestion that they should apply a "75-foot" rule to determine curtilage, a district court judge in *United States v. Van Dyke* refused, citing the multiplicity of factors that determine curtilage, specifically *Care v. United States*.[142] In the 80s, the Supreme Court settled the issue, in a sense, by coming up with a four-pronged test for the curtilage in the case of *United States v Dunn*. [143] The court, faced with a case where police found evidence in a barn close to Ronald Dale Dunn and Robert Lyle Carpenter, said that the factors relevant to curtilage were "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."[144] They concluded that Dunn and Carpenter's barn, despite being a mere 50 yards from the house, was not curtilage because it was outside a fenced enclosure that contained the house, was not used for intimate home activities, and was not attempted to be made obscure from a distance.[145]

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[139] Ibid.

[140] Ibid.

[141] United States v. LaBerge, 267 F. Supp. 686 (D. Md. 1967).

[142] United States v. Van Dyke, 267 F. Supp. 686 (D. Md. 1967).

[143] United States v. Dunn, 480 U.S. 294 (1987).

[144] Ibid., 301.

[145] Ibid., 302-303.

It is not difficult for police action to be a trespass within the curtilage. Police activity there is presumptively unreasonable. What specific actions persons may or may not do within the curtilage is precisely the question raised in *Florida v. Jardines*.

Case Law Part Two: Katz

The lack of protection afforded to open fields was extended to *Katz* provisions in *Oliver v. United States*. In that case, troopers in Kentucky went around a suspected drug manufacturing property and found an enclosed field of drugs. The growers argued in court that their multiple "no trespassing" signs indicated an expectation of privacy, and that the open fields doctrine applied to just trespass rulings. Justice Powell affirmed that, in fact, the open fields doctrine applied just as much under *Katz* because an expectation of privacy in an open field is not a reasonable one society can accept.[146] And in *California v. Ciraolo* it was established that, even if an area is the curtilage, viewing it from publicly navigable airspace is not a search because such an expectation of privacy in such a space would also be unreasonable.[147]

But what about the home itself? The recent case under *Katz* that answers this question is *Kyllo v. United States*.

Danny Kyllo was suspected by police of growing marijuana in his home with the aid of heat lamps. Police, lacking sufficient evidence for probable cause, decided to use a new piece of technology: a heat scanner. Moving a police car across from Kyllo's residence, police officers turned the device on Kyllo's home. They found excessive heat emanating from the house, and specifically from the garage. Officers reasoned that there must be heat lamps growing marijuana

[146] Oliver v. United States, 466 U.S. 170 (1984).

[147] California v. Ciraolo, 476 U.S. 207 (1986).

in Kyllo's garage. This information was used as probable cause for a warrant. Kyllo was indeed growing marijuana in his house, and was arrested.

Clearly the question in this case is whether the police use of the heat scanner was a search under *Katz* standards. That question cannot be answered by way of trespass, however, because the police officers never set foot near Kyllo's house. The police officers were engaged in a variation of visual observation. Visual observation was pre-*Katz* considered presumptively reasonable because it was no trespass. But *Katz* meant that now what constituted a search was tied to expectations of privacy and whether those expectations were reasonable. *Kyllo* was the Supreme Court's opportunity to mark of types of *Katz*-permissible and Katz-impermissible surveillance activity.

The question of whether a thermal imaging device constitutes a search is a difficult one. The thermal imaging device enhanced vision in the sense that it disclosed what previously could not be seen by the officers. There is not much that distinguishes thermal imaging, viewed in this way, from binoculars. Furthermore, the "information" gathered by the scan was the heat particles emitted from the house, external to it, so, in a sense, no data internal to the home was parsed. [148]

Justice Scalia delivered the majority opinion in *Kyllo*. He ruled on *Katz* grounds, of course, and the rule he established is contained here: "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' Silverman, 365 U.S., at 512, constitutes a search–at least where (as here) the technology in question is not in general public use."[149] Noting that details about the home are uniquely important, Scalia warns that absent a blanket prohibition

[148] Kyllo v. United States, 533 U.S. 27 (2001).

[149] Kyllo v. United States, 533 U.S. 27, 34 (2001).

on sense-enhancing devices not in the general public use it becomes easy for some future piece of technology to arise and erode privacy in the home. Scalia's argument against the government's argument that the data parsed was outside the home and therefore not important for Fourth Amendment purposes is that this claim would be true of every surveillance method:

> But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. [150]

Post-*Kyllo Katz* law indicates that whether police usage of an instrument is a search of the home depends on several factors. First, the instrument is "technology" that is "sense-enhancing." Second, the instrument gives information about the interior of a home. Third, the instrument is not in general public use.

Florida v. Jardines Background

Florida v. Jardines starts as *Kyllo* did: with the suspicion of illegal drug production in a home. Police suspected that Joelis Jardines was growing marijuana in his house. That suspicion came by way of an anonymous tip to Miami Police Department Detective Pedraja. *Illinois v. Gates* established that a single anonymous tip does not constitute probable cause for a warrant.[151] So, Pedraja needed some other means of getting probable cause. The solution, he decided, was to enlist the use of a drug-sniffing dog.

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[150] Kyllo v. United States, 533 U.S. 27, 35 (2001).

[151] Illinois v. Gates, 462 U.S. 213 (1983).

Around one month after the tip, Pedraja, canine handler Detective Bartelt, and Franky, the dog in question, approached right up to Jardines' house via the walkway. The dog engaged in its drug detection process, known as bracketing, and within a minute or two gave a positive indication for drugs. The two detectives and their canine companion then left the scene. [152] The entire process, from walking from the car to the door to when the officers returned, took from ten to fifteen minutes.[153] The detectives used the drug dog investigation as probable cause to obtain a search warrant. The warrant was executed, marijuana was found at the residence, and Jardines was charged with trafficking in cannabis. Jardines motioned for a suppression of the marijuana plants as evidence because the canine investigation was a search. [154]

The question in this case is whether the actions of Pedraja and Bartelt constituted a search. If it was, then the warrant they used to obtain the evidence against Jardines had no probable cause and was therefore invalid. In such a case, the marijuana plants would be excluded as evidence from legal action against Jardines.

Whether the action was a search clearly depends greatly on whether the *Katz* privacy formulation, the physical trespass formulation, or both are at play. In order for the action taken by Pedraja and Bartelt to not be a search, it would have to be that they neither violated a legitimate expectation of privacy nor trespassed on Jardines' property. The court in this case has the option to decide this case by a) using just the trespass rule to render a search, b) using just the *Katz* rule to render a search, c) using both the trespass rule and the *Katz* rule to render a search, or b) determining that using neither the trespass rule nor the *Katz* rule renders a search.

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[152] Florida v. Jardines, 569 ____ (2013), https://supreme.justia.com/cases/federal/us/569/11-564/case.pdf.

[153] Ibid., Dissent 3.

[154] Florida v. Jardines, 569 ____ (2013), https://supreme.justia.com/cases/federal/us/569/11-564/case.pdf.

Justice Scalia's majority opinion does a). Justice Kagan's concurring opinion recommends doing c). Justice Alito's dissenting opinion endorses d). I will sequentially lay out the arguments in each in the next section. In my ruling, I opt for b).

Florida v. Jardines Opinions

Scalia's majority opinion focuses on, and only rules on, the physical trespass rule. He determines that the front porch is the curtilage of the home. Scalia cites no specific test he used to determine this, but does mention that the front porch is the quintessential example of an the curtilage.[155] Scalia seems confident that, at least in this case, what counts as curtilage "is at any rate familiar enough that it is 'easily understood from my daily experience.'" [156]

Once on the curtilage, for Scalia, there must be consent, implicit or explicit, that authorizes officer presence and action. Scalia notes that implicit homeowner consent is customary. The very idea of a publicly accessible door implies a willingness for the door to be approached and interfaced with by other members of the community. This is so whether the person is there to do well or to do ill. This invitation has certain restrictions, which form the heart of Scalia's argument for Pedraja and Bartelt committing a search. Scalia notes three restrictions. First is place. Approaching the entrance to the home is limited to the front door, and that may only be approached via the common walkway leading to that door. Second is time spent. Persons, whatever their intent, may not linger on the doorstep for 30 minutes, knocking on the door or otherwise.[157] Third is purpose. The visit may not be undertaken to gather evidence or to otherwise snoop around.

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[155] Ibid., Majority 4-5.

[156] Ibid., Majority 5.

[157] Ibid., Majority 6-7.

The third restriction is decisive for Scalia. Policemen and policewomen may, on his account, approach a door and engage in the same sort of conversations a normal, non-police citizen would do. But they cannot be there with the real purpose of gathering data to ensure the arrest of the home occupant. That, for Scalia, is not customarily agreed to upon erecting a house. As for Franky, "[i]t is not the dog that is the problem, but the behavior that here involved use of the dog."[158] For Scalia, certain acts manifest certain intentions. Approaching a house with a drug dog, allowing the dog to sniff, and then leaving manifests a desire to gather evidence. This intention is primary; they intended to conduct a search and nothing but. It is not customary that putting up a doorbell signals acceptance to the police coming to the door to do "nothing but conduct a search."[159] Scalia does not describe any impermissible intentions other than evidence gathering.

The primary arguments of the opinion complete, Scalia then dismisses two arguments which I will get to shortly. First, the government made the argument that there is no reasonable expectation of privacy with respect to contraband. Second, the government made the argument that drug dogs have been used for centuries and do not constitute technology. Scalia dismisses both of these arguments by correctly noting that they have everything to do with whether a reasonable expectation of privacy obtained and nothing to do with trespass law.[160]

We turn now to Justice Kagan's piece. Kagan's opinion is mostly the notation that much of what Scalia says justifies or does not rule out a ruling on *Katz* grounds. She does not deny that trespass rights are operative. Rather, she merely says that a ruling on *Katz* grounds would use the

[158] Ibid., Majority 7 at footnote 3.

[159] Ibid., Majority 8 at footnote 4.

[160] Ibid., Majority 8-10.

same evidence that Scalia puts forth in his majority opinion. A ruling, therefore, could have been made on both grounds.[161] Kagan makes three specific arguments to that end.

First, Kagan says that drug dogs are sense-enhancing technology for the point of view of *Kyllo*. Drug dogs are a relatively recent development in law enforcement activity, even though the general employ of dogs is not. Law enforcement dogs are categorically different from dogs that a neighbor brings up to up with them to a doorstep to frantically dart around while the humans converse. They have been trained for a specific purpose, and are used almost exclusively for that purpose. They also detect information which humans are not capable of detecting themselves. That is, they disclose information that would not otherwise have been available.[162]

Second, according to Kagan's interpretation of *Kyllo,* the relative sophistication of a sense-enhancing technological device is immaterial, as well as whether it is newly in use or has been in use for some time. What is relevant is the disclosure of private information in a way that it is not assumed the public can also utilize normally in its interactions with the holder of that information.[163]

Third, Kagan notes a connection between norms and expectations of privacy and notions of trespass. For Kagan, the two are obviously linked: "[t]he law of property 'naturally enough influence[s]' our 'shared social expectations' of what places should be free from governmental incursions."[164] Furthermore, "the sentiment 'my home is my own,' while originating in property law, now also denotes a common understanding—extending even beyond that law's formal

[161] Ibid., Concurring 1-2.

[162] Ibid., Concurring 4.

[163] Ibid., Concurring 4-5.

[164] Ibid., Concurring 3.

protections—about an especially private sphere."[165] This means that a strong reason to think that a trespass occurred is also a strong reason to think that a *Katz* violation occurred.[166]

Justice Alito's opinion is almost as long as the majority and concurring opinion combined.

Key to Alito's opinion is the argument that there is no limitation on customary invitations that exclude the intention of evidence gathering. The wide range of activities that individuals can legitimately do on a person's doorstep necessitates this. Although a person journeying to and from his or her neighbor's house may not skulk around the back garden and must not linger, once the person is at the right place at the right time, a wide range of acceptable purposes are admitted. Homeowners acknowledge that a person may only be at the door to drop off a flier, to encourage political patronage, to distribute a menu, or to acquire an address. Thus, homeowners implicitly acknowledge a very wide range of purposes, many unrelated to conversing with the homeowner.[167]

One of those purposes is evidence gathering by policemen and policewomen. Key to this argument is the example of "knock-and-talk" visits that the police conduct. For Alito, the purpose of these visits is not just talking, as Scalia supposes they are. It is evidence gathering. This is proven by the fact that it is permissible to gather information during those visits by means other than talking. Policemen and policewomen may, for example, perceive an object in plain view and take note of it. "Knock-and-talk" visits do not constitute a Fourth Amendment violation. Alito gets this from a majority he authored in the 2011 evidence destruction case *Kentucky v. King*, the relevant part of which, for my purposes is:

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[165] Ibid.

[166] Ibid.

[167] Ibid., Dissenting 6.

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak … and may refuse to answer any questions at any time.[168]

Alito notes that dogs have been used for their sense of smell by law enforcement for hundreds of years. Dogs have been used to track criminals in common law countries for centuries without legal incident, and certainly without an affirmative violation of trespass law.[169] Alito is persistent that the majority's inability to produce any decision in Anglo-American law that supports a contrary interpretation is proof of the baselessness of its case.[170]

Although it is clear that Alito's previous arguments apply to *Katz* decisions, Alito devotes some time to specifically *Katz* questions. There are three distinct arguments Alito makes.

First, Alito quickly notes that *Illinois v. Caballes* established that there is not a legitimate expectation of privacy compromised by the actions of a drug dog, chiefly because there is no legitimate expectation of privacy with respect to contraband possession, which a drug dog is exclusively designed to detect.[171] The case involved the use of a drug dog during a car stop for a minor traffic infraction.[172]

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[168] Kentucky v. King, 131 S. Ct. 1948 (2001).

[169] Florida v. Jardines, 569 ____, Dissenting 8-9 (2013), https://supreme.justia.com/cases/federal/us/569/11-564/case.pdf.

[170] Ibid., Dissenting 8.

[171] Ibid., Dissenting 9.

[172] Illinois v. Caballes, 543 U.S. 405 (2005).

Second, Alito argues that there is no relevant difference between the odors a dog can detect and the odors a human can detect. Adding to this is the fact that one of the detectives noticed the smell of marijuana. This lack of difference extends to the manifest expectation of privacy homeowners must have. A homeowner, Alito claims, does not reason that they will emit some odors from their homes powerful enough for humans but not powerful enough for dogs. [173]

Third, Alito argues that *Kyllo* was really about new technologies. The potential for technological change that enhances senses is not at play with dog noses, however, because dog noses are not subject to technological advances in the way that wiretaps are. Further, using the canine olfactory sense in law enforcement is not a new development. [174]

Before I evaluate the claims of these opinions and render a specific ruling, I will lay out what issues in this case I think turn on principles. More specifically, I will address the elements of this case that reveal the necessity of a decision based in principles in the way OP describes.

Principle-Based Issues in *Florida v. Jardines*

Determinations for what count as part of the curtilage, sites of implied homeowner consent, and reasonable expectations of privacy hinge on principles. The case law that describes how they are to be carried out ends up requiring the use of principles to adjudicate tangible cases.

Starting with trespass law, the issues of curtilage and implied homeowner consent hinge on principles.

The test for what counts as part of the curtilage is principle-based, in the sense that any of the weight afforded to each of the four prongs of the *Dunn* test is not to found in any established

[173] Florida v. Jardines, 569 ____, Dissenting 10-11 (2013), https://supreme.justia.com/cases/federal/us/569/11-564/case.pdf.

[174] Ibid., Dissenting 12.

rule of law. In this particular case it seems straightforward that the doorstep is part of the curtilage of a home, so it is not critical to the substance of the decision what test is used; in this case, where the officers went would surely be part of the curtilage, whatever test is offered. But, like with many concepts ported over from common law standards and then hastily adapted to American jurisprudence, there is not much on legal record to indicate which factors count more than others.

In those sorts of cases, principles give reasons to assign relative weights to different parts of the test. Those weights would have to be based in concepts of public morality. Imagine a part of property that was a medium distance from the house and enclosed in a fence with the house but was not shielded from prying eyes and was not used for normal home activities. In that hypothetical, the property meets two of the four part *Dunn* test and flaunts the other two. How is a judge to decide if the location is in the curtilage? As the law stands, principles of various sorts, such as moral revulsion against government intrusion, might stand out.

A critic of this view could argue that current law requiring principles is fact, but not a necessary fact. That is, it might be that the law as it stands requires principles to adjudicate. But that does not imply that a test that sidestepped principle-based adjudication is impossible. Therefore, the argument would go, what this section isolates as a link from principles to *Florida v. Jardines* is easily solved and does not itself count as evidence for the value of principle-based adjudication.

It is obviously the case that a principle-free test for curtilage could exist. But it does not exist. Theories of law which take principles into account are not threatened by either the claim that a) there are legal tests that are rules and not principles, or the claim that b) adjudication that requires principles could be spelled out in rule form. The first claim is obviously true. The second could be said of almost any principle-based adjudication element. The important point is this: although it

could be that principles do not factor into some elements of the law, they do factor in other elements of law. This fact requires theories of law capable of taking that into account. Thus, this argument does not prove what it purports to.

The other element of trespass law that hinges on principles is the test for whether something is consented to implicitly by homeowners. On the surface it does not seem that this determination would require the application of principles. But, in fact, I believe that it does. If it does not, it is at least functionally indistinguishable from a principle determination.

For the court, determinations about implied consent hinge on customary norms of reasonableness. Customary norms are not static. Implied consent for the appropriate level of benefits and burdens when it comes to public access to the home obviously depends greatly on the time that someone becomes a homeowner. Those obligations are specific to community expectations and custom, which change over time. One rule could not encapsulate them.

This much is clear, and does not seem, by itself, to indicate that a principle is required. After all, a critic could claim, it could be possible that a court must simply engage in sociological observation at the undertaking of each case and come to a conclusion about what the norms of the time happen to be. However, what society takes to be reasonable as a result of owning a home is not merely influenced by principles. Rather, it turns on principles.

The consent is implicit. It never happens in real time. The conditions of who may come to a door and do what is not contained in a mortgage or housing permit. Rather, notions of what a reasonable person not just does expect will happen to him or her, but ought to expect will happen to him or her, become operative. That is, principles are operative.

The dependence on principles is perhaps better illustrated than demonstrated. The arguments about what homeowners implicitly consent to in the context of this case were almost

exclusively based on hypothetical examples. The arguments in the decisions seemed to turn on whether a homeowner would find it reasonable were some set of facts to obtain. Given this, decisions about what must have been agreed to by a homeowner are never purely factual investigations.

Additionally, consider what a sociological investigation would involve in a case such as *Florida v. Jardines*. It would involve determining the beliefs that homeowners would have collectively when asked about what is reasonably expected of them to interface with each other from the home. This is the same as to say it would involve determining the principles of political morality relevant to the situation. This means that the only real interpretation of what it would mean to resolve such a question mechanically collapses, as well, to a decision based on principles.

In addition to trespass law, *Katz* jurisprudence illustrates the need for principle evaluations.

Katz evaluations are clearly steeped in principles. To win a *Katz* argument in court, I would have to win that the person in question manifested an expectation of privacy with respect to some datum. Determining whether the person did so is an empirical matter. The actions specific persons took serve as court-admissible indicators of what sort of expectations of privacy persons have with some piece of information. As a lawyer before the Supreme Court, to win that a client of mine had an expectation of privacy I need show only the presence of certain physical facts.

But in addition to winning that a person had an expectation of privacy, I would also have to win that that expectation of privacy was socially legitimate and reasonable. Winning that an expectation of privacy is reasonable is very different from winning that it exists. It is possible, I suppose, that a test could exist for whether an expectation of privacy was "reasonable" that hinged mechanically on the absence or presence of some empirical facts. It is possible for the test for reasonable expectation of privacies to be formulated that way only in the sense that it is possible

for any test, via stipulation, to merely turn on empirical facts. In United States law, what it means for there to be a reasonable expectation of privacy does turn on just those.

What it means for an expectation of privacy to be reasonable is that it is accepted as reasonable by society. Or, more precisely, that society would accept it as reasonable that something like that be private. Expectations for social acceptance are always according to principles of some sort. Whether they are about ensuring a well-ordered society, communal happiness, some sense of justice, or anything else, there seems to be no plausible answer that is not a principle of some kind. Scalia notes in *Kyllo* that there are some in circles of legal theory who think that the test is "circular, and hence subjective and unpredictable."[175] But it is only circular if one thinks of principles as outside of the law, and it is only subjective if one thinks of principles as subjective.

Scalia in *Kyllo* gives the following as his justification for his rule: "[t]o withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment."[176] Scalia notes the "deep rotes" of this standard in common law,[177] but justifies it with respect to the concept of privacy. I read Scalia not as making the clearly circular argument that his standard should be the standard for privacy rights because it protects privacy rights. Instead, I read him as making the claim that the purpose of the Fourth Amendment is to protect the concept of privacy, which is important. The very process of looking at conceptual goods society finds important and judging specific allowances or prohibitions on those grounds is exactly the sort of principle-based application of rules that makes OP so appealing.

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[175] Kyllo v. United States, 533 U.S. 27, 34 (2001).

[176] Kyllo v. United States, 533 U.S. 27, 28 (2001).

[177] Ibid.

Another example of principle-based *Katz* jurisprudence is the *Caballes* case, which Alito cites in his dissent. That case cites *United States* v. *Jacobsen* and concludes that a legitimate expectation of privacy with respect to contraband cannot exist because society recognizes no legitimate interest in the concealment of contraband. The court argued in *Jacobsen* that society writ large is not willing to accept contraband concealment as reasonable. They cited as evidence an avowed disapproval of the reasonability of such a thing by Congress.[178]

I think Kagan's point about the interconnected nature of *Katz* and trespass is also very telling here. Her claim is that trespass is based on the same sorts of norms that property is based around. That is, it is based on, principles. The quotations I pulled from her opinion are all about "'shared social expectations' of what places should be free from governmental incursions" and about "a common understanding … about an especially private sphere." [179] The reason that *Katz* decisions are so influenced by decisions in other areas of law is that those areas developed because of certain swings in political morality and changing understandings of what it is reasonable for the state to do. Those understandings, the genesis for many common law rules, especially in the area of property, have direct relevance to *Katz* evaluations.

Determining what society would accept as reasonable is a matter of determining the acceptance of moral principles in society. So, applying the *Katz* rule requires determining the validity, partially as a function of acceptance, of certain principles. This is exactly what OP claims is required in some cases. Theories that deny a moral-evaluative aspect to legal adjudication, like

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[178] United States v. Jacobsen, 466 U.S. 109 (1984).

[179] Florida v. Jardines, 569 ____, Concurring 3 (2013), https://supreme.justia.com/cases/federal/us/569/11-564/case.pdf.

Raz's Exclusive Positivism, cannot account for those situations. This case illustrates well, therefore, what I have talked about for some time now.

Florida v. Jardines Ruling: Trespass

We now turn to the actual ruling I will make in the case. Using the division I used at the end of the case background section, I will defend the b) method of ruling on this case. That is, I will conclude that the actions of detectives Pedraja and Bartelt constitute a search because they violate a reasonable expectation of privacy à la *Katz* and do not count as a trespass. I determine that Scalia and Kagan are wrong that a search occurred in *Florida v. Jardines* based upon trespass. I also determine that Alito is wrong that a *Katz*-type search did not occur. I will first demonstrate below why Pedraja and Bartelt did not trespass. Then, I will demonstrate why they violated a reasonable expectation of privacy.

The actions of detectives Pedraja and Bartelt occurred within the curtilage. The doorway should be considered part of the curtilage. This is the most commonly used area of the normal property outside of the house, close enough to the house as to be one with it, and enclosed with the house. I give priority to these factors because, I believe, the public most expects these of an area that is to be made identical with the house. For the purpose of the principle of judicial predictability, a widely accepted and utilized judicial principle, if an area is to be made identical with the house, it should be most intuitively part of it.

In a slightly separate rationale, the doorway should be considered part of the curtilage because, if it were not, then very little could justifiably be said to be part of the curtilage. Nothing being identified as the curtilage would make foreign incursions and unwanted government interference trivial, both of which are evils of political morality judges are constituted to resolve.

Given police officer presence on the curtilage, the presumption is that the presence of the officers is a search. The presence is not a search if it is the subject of implicit consent. I determine that implicit consent was present.

There seems agreement among the opinions in this case, majority and dissenting alike, that both place and duration restrictions apply to the officers. Detectives Pedraja and Bartelt must stick to the normal walkway for approaching the residence. Moreover, they may not linger for longer than a few minutes. Pedraja and Bartelt succeeded in both of these pursuits. At least according to these factors, then, no trespass occurred.

The presence of a drug dog does not seem to have any impact here. That is, whether or not a police officer has a drug dog at the time of arrival at the entry to the house will not change whether the police officer was trespassing. For Scalia, the fact that the device used was a dog was irrelevant. It is relevant only that the purpose in using the dog was to conduct a search. Any instrument, or no instrument, would do.

A purpose restriction of this sort, Scalia's third and final criterion, does not make sense. There is no reason, generally, that the intention that someone has in doing something on my doorstep is at all relevant to whether I have accepted previously their right to do it. Scalia presents no formal argument in favor of the right to have certain purposes excluded from formulation, but relies on examples. These examples, however, might not be consented to for other reasons, such as the character of the act itself. Officer intent is only relevant if intent is relevant. There is no reason to think that it is.

There are two reasons to think that purpose should not be a relevant way of excluding someone from engaging with the curtilage. First, there is a huge diversity of purposes people could approach a home with. A purpose might be commercial. It might be religious. It might be

promotional. It might be political. It might be a good many things. The door is the interface through which a homeowner interacts with those who want to communicate something, broadly construed, to the occupant of the home. A homeowner cannot reasonably claim to know all the purposes people might desire to communicate. With that in mind he or she therefore must accept a wide range of purposes, perhaps ones not anticipated in advance, and certainly not necessarily ones that are good. Thus, I do not believe that a homeowner can reasonably expect that the actions of those who will interface with the curtilage will be confined to a specific purpose.

Although that might be true, Scalia could argue back, police intentions are different. Activities like menu distribution and mid-election canvassing occur between private citizens and other private citizens. But interactions between law enforcement personnel and normal citizens are different. This is so because the police is the government's unique internal coercive force. The purpose of protecting the home at all is to minimize government interference. So, law enforcement personnel should be held to a higher standard when it comes to trespass. As such, law enforcement purposes should be restricted more than regular purposes, which certainly have some diversity. Action that might typically be considered normal might be better if it were restricted of law enforcement. Evidence gathering, as one of the police functions that is uniquely combative against the citizenry, the entity police are designed to control, should be one of those restricted purposes.

There is not much to this argument. First of all, I do not think that Scalia can avoid the discussion about whether homeowners consider intention relevant by saying that they consider police intention relevant. If homeowners concede that they may not think about intention at all when determining who may approach their doors and how, then they, logically, must not think that it matters for police purposes either. But even if the entirety of the argument is correct, there is no reason to suppose a) that purposes are the sorts of things that should be restricted of police or b)

that evidence gathering should be a uniquely restricted purpose. Saying that purposes normally unrestricted for regular citizen use should be restricted for the police cannot apply to evidence gathering. Evidence gathering is a purpose unique to law enforcement. Much of what happens in law enforcement is an extension of evidence gathering. It is a function expected of police. Just as it is reasonable to expect doctors to manifest certain intentions complicit with their role, it is eminently reasonable to expect that police officer will come to a door for the purposes of evidence gathering.

Second, it is impossible for a homeowner to know what intention a person truly manifests. A person claiming to want an address may merely be using that an excuse for conversation. Another person claiming they just want to have a casual conversation may, in fact, merely be looking for an excuse to encourage conversion to Christianity. Intentionality is non-falsifiable. It is only reasonable for a homeowner to expect that they will be deceived. Given this, a homeowner cannot expect that there are certain purposes that people will not come to the door to carry out.

The act of having a home therefore does not customarily exclude interactions on the basis of purpose. I believe that Scalia is lulled into a false general argument by the presence of what he feels is a clear specific argument. He felt that there was something odd about someone coming to a doorstep, doing something to gather evidence, without knocking the door, and leaving. He concluded that the intention to conduct a search was a relevant consideration to whether a search actually occurred. But this was not truly good enough.

It might be, a Scalia counter-argument might go, that intention in the abstract is non-falsifiable. But there are all sorts of legal tests that take philosophical and make them operational in empirical terms. Intent is one of those things. If intention was non-falsifiable, then there truly could be no successful criminal prosecutions. The solubility of intention in the law, the argument

goes, means that this problem with having intentions as custom does not extend to law, and so to whether there is a trespass.

This objection too easily makes the slide into formal legal proceedings from what homeowners believe. What is relevant is that a homeowner cannot reasonably believe that they can ever know the real intention of a person coming to their door. Whether the law has a mechanism used in court cases to determine intention is immaterial. What matters is that individuals cannot expect themselves capable of that. As such, custom does not imply that they be able to expect a certain permissible and impermissible range of purposes. Thus, this objection misses the link between the claim I made about intent and why purpose was not prohibited.

An additional reason why a purpose requirement is inadvisable and purpose-violating is that persons can manifest multiple purposes simultaneously. The concept of a pure purpose uncorrupted by any other purpose is an illusion. Persons always intend multiple things when they act. For example, say I decide to buy my mother a box of chocolates for her birthday. It is not the case that I intended only to make her happy, to make me feel good about my generosity, or to curry favor with her in hopes of obtaining a favorable allowance. It is probable I intended all those things at once.

Thus, prohibiting certain purposes from existing somewhere in the locus of a prospective curtilage-interacting person is unreasonable. This is so for two reasons. First, Scalia's account seems to assume that persons manifest one purpose at a time when they interface with the curtilage. Determining whether their action was lawful means testing what their intention is. Multiple intentionality makes this model inapplicable to tangible practice. Second, it would imply that police cannot interface with the curtilage at all. It is a feature of any police officer in an investigation that, they manifest at some level the intention of gathering evidence. Police talking

at doorsteps is almost exclusively done for the purpose of what Scalia would consider searching. Therefore, if Scalia is right that coming to the curtilage for the purpose of searching is customarily prohibited, there must be a custom against police coming to the curtilage at all. I think it obvious that this is not the case. Police are customarily presumed, at least in the United States, to be able to approach a home for evidence gathering purposes, and, indeed, generally. This gives good reason to think that the intention to gather evidence for police is not customarily excluded.

It is also true that "knock-and-talks" are constitutional according to *King*. This is relevant because Scalia's interpretation would seem to declare knock-and-talks unconstitutional altogether. On the other hand, perhaps Scalia is right that knock-and-talks do violate the Fourth Amendment. Unlike the Hartian positivist, I am not restricted to either slavish obedience to, or procreation of future, precedent. Perhaps respect for precedent does not trump the possible harm that enforcing the relevance of knock-and-talks.

Police evidence gathering on doorstep encourages voluntary exchange between potential criminals and law enforcement. It is democratic, perhaps, that communication may be done in a place where a potential suspect has authority and feels safe, that is, in their own home. Limiting interactions to arrest-style-scenarios seems more authoritarian than the United States seeks to be. Moreover, it encourages a more amicable relationship between law enforcement and non-law enforcement personnel. A police force that is perceived as being more connected to the citizenry is likely more effectively intermeshed with the community and therefore both more likely to catch criminals and to help the community in ways that do not hinge on criminal activities. Finally, it is very likely that ending police-curtilage interfacing would result in both less and slower convictions of obviously guilty perpetrators. Since law and order is a relevant United States social principle, knock-and-talks are beneficial.

There is another principle-based reason to bar the type of purpose-based criteria for trespass Scalia suggests. Scalia does not give any general set of dictates that govern which purposes are legitimate and which are illegitimate. He only mentions one of presumably multiple prohibited reasons. The diversity of reasons that persons in society manifest makes trying to determine what reasons are allowed, and which are not, quite difficult. Not providing a standard for what intentions count as wrong makes his arguments erroneous.

Scalia could easily respond that it is possible to provide a standard even though he did not. But trying to nail down in advance what intentions are prohibited and what are allowed is itself prone to failure. Such a standard could not possibly be exhaustive. This creates a nightmare scenario for an agent subject to the Fourth Amendment looking to normally approach a home. They would not know what purposes are allowed and which are not. More specifically, they would not know if an intention they specifically held that was not covered by the rule would make their action prohibited. This lack of institutional predictably is a loss for the criminal justice system and ought to be challenged on principle-based grounds.

Thus, Scalia's proposed prohibition is both uncustomary and undesirable. There is principle-based value to holding consistent with current precedent, based in institutional predictability. That value is not outweighed by the moral desirability of precedence deviation. In fact, sticking to current practice is morally desirable.

As such, there is no reason to rule that the actions of Pedraja and Bartelt constituted a trespass. So, my ruling in this case would be that it was not.

Where do Scalia and I really disagree? In at least two place, I think. First, Scalia thinks that arguing about whether implied homeowner consent exists is a solely empirical matter. I argued in the last section that this is not so. Second, Scalia thinks that, as an empirical matter, homeowners

do not implicitly consent to the purpose of gathering evidence. I argued in this section that, in as much of an empirical manner as Scalia thinks it happens, they do. Disagreements of this second sort I think I have dealt with above. Disagreements of the first sort demand more of my time.

This first disagreement could stem from multiple sources. The first possible source is that Scalia could not think that applying the law requires the use of principles at all. That could have caused Scalia to not consider interpreting trespass law in a principle-based way. In that case, the real difference of opinion Scalia and I have would be that we do not share the same philosophy of law. His theory of law would likely be a version of positivism. The difference of opinion could be the result of either a) a difference in criteria for the evaluation of philosophical arguments or b) a difference in the facts that matter in the evaluations themselves. As for a), it could be, for example, that Scalia thinks that it is less important to have generality in a theory of positivism for the United States Supreme Court. After all, Scalia's decisions only affect the United States, so it makes sense for him to assess descriptivity in the United States alone. As for b), it could be that he feels that principles are not, in fact, found in the law as a descriptive matter. I cannot know whether the difference of opinion results from a) or from b). If it is from a), then Scalia and I simply have different goals. Learning what reasons he might have to have those goals would be relevant to the material in Chapter One. If the difference of opinion results from b), however, Scalia is incorrect. The data I presented in Chapter Two that would support such a conclusion are compelling.

The second possible source of the first disagreement is that Scalia could think that trespass law evaluation does not require the use of principles. This would be direct disagreement with the arguments I make in the last section. If this is truly the source of the disagreement, I am confident that the arguments in that section are powerful enough to withstand criticism.

The third possible source of the first disagreement is that Scalia could think that principles cut the other way on trespass law. Scalia might think that the principle-based reasons I offered for thinking trespass law should not include purposes restrictions are incorrect. I have discussed some of those above. He might also think that there are positive reasons for having purpose based-restrictions on police action. I will now consider an argument of this kind.

Scalia could think that removing the intention for evidence gathering from customary invitation is good because it reduces government interference in home affairs. Scalia is clear that the home should be afforded greater protection than usual because it is important to have a zone of non-interference from the government's prying eyes. If that is so, efforts to reduce government power have a special significance near the home. In that case, principles of non-interference from state affairs trumps crime control efforts, or other principles that cut the other way.

This argument is fine, if not very flashy. It makes a compelling case for prioritizing certain sorts of principles in trespass cases. I do not think the case it makes is any more compelling than the arguments I made earlier about how purpose based restrictions are unreasonable. Those arguments, importantly, are also specific to the purposes of police officers. Scalia's proposed argument only show that it is a general goal to restrict police action around the home. It does not show that purpose is what should be restricted. There are many other properties of police action that could warrant restriction without being negative in terms of other principles.

Thus, Scalia's argument only truly warrants purpose-based restrictions if it purports to show that any restriction of police action near the curtilage is permissible. If that is so, it would have to be because the principle against government intrusion is so amplified when applied to the home that it would effectively overwhelm any potential counteracting principle. I believe that to say this would be a massive overstatement. The home is a way of counter-acting government

intrusion. But it is also an area that law enforcement has a significant interest in. Many heinous crimes occur in the home that the society writ large has an interest in stopping. Domestic violence comes to mind as an example of such a crime. Further, domestic violence is often allowed to continue because of the norm of police non-interference in the private sphere of the home. Now, this is not to say that government interests always, or even often, outweigh efforts to protect the privacy of the home. But it does prove that claims about governmental non-interference are not bullet-proof in that sphere. If they are not, Scalia's argument cannot succeed.

A counter-argument that could show a principle-based reason to reject a purpose requirement would have to show that there is some feature of police intention that judges would have a principle-based reason to reject. But the principles that confront judges tend to be associated with principles based around consequences. Crime control and government interference function like this. The ones that do not at least focus on traits of an action with a certain empirical payout. This is not so with purpose. Two otherwise identical acts executed for different purposes would be empirically indistinguishable.

Therefore, it is infeasible to have a purpose-based restriction on police action. Scalia's objective is far more likely to be accomplished by different sorts of restrictions.

This decision I made in this section emphasized the benefits of OP. OP allows me to make decisions based on the case law involved and to also acknowledge the role that principles play in mediating adherence to or deviation from the case law in new circumstances.

Florida v. Jardines Ruling: Katz

I will now discuss any potential reason out of *Katz* that Pedraja and Bartelt's actions might constitute a search. I primarily use the precedent of *Kyllo v. United States* to inform my decision. I look at other principle-based claims as I find them in my way.

Before I get to the issues involving in directly applying *Kyllo*, I must first address the more recent case of *Illinois v. Caballes* that Alito cites in his dissent. Notwithstanding what I said previously about *Caballes* relying on principles to justify the exclusion of the presence of contraband as a constitutionally protected privacy interest, *Caballes*'s application to this case can, at least, be resolved relatively mechanically. The case is similar to *Florida v. Jardines* in that it involved a drug dog and Fourth Amendment search considerations. But, crucially, it did not involve the home. The dog in *Caballes* detected at a car. Franky detected at a home. *Caballes* distinguished itself from the decision in *Kyllo* by claiming that the drug dog in that case was not capable of disclosing intimate details, which the thermal vision device in *Kyllo* was capable of doing. The court in *Caballes* argued that drug dogs are incapable of providing any intimate details because they only indicate the presence or absence of contraband. There is no socially legitimate expectation of privacy with respect to contraband qua contraband.

Within *Kyllo* case law, however, it is clear that the home is very important. Regardless of whether it is true that evidence was obtained from within the curtilage, the investigation was designed to disclose details about goings-on inside the home. Those goings-on are intimate details, since, as Scalia notes in his opinion in *Kyllo*, "[i]n the home … all details are intimate details, because the entire area is held safe from prying government eyes."[180] Franky only detects the existence of contraband, the presence of which society cannot accept as worthy of privacy protection. But there is an expectation of privacy at the threshold of the home. If all home details are intimate details, then a dog detecting for contraband is a search when it comes to the home. The difference between a home and anywhere else is colossal.

[180] Kyllo v. United States, 533 U.S. 27, 37 (2001).

It would be tempting for Alito to respond that the difference between *Kyllo* and *Caballes* in the *Caballes* opinion need not matter much. He could say that *Caballes* proves that contraband is an illegitimate category of object to hold private. The argument about intimate details in *Kyllo* was not that important to the *Kyllo* opinion. Details being intimate or non-intimate is irrelevant because contraband is a detail one does not have a right to have at all. In fact, legitimate expectation of privacy rulings constrain what factors in the home could have privacy protection.

This argument is unsupported. First, the relationship between *Kyllo* and *Caballes* is that they are both simultaneously case law. Neither tried to over-rule the other. *Kyllo* indicates that all home details are intimate details and carry *Katz* protection. *Caballes* indicates that this is untrue when dogs are used on automobiles. The combination of those two rulings means that the argument about legitimate expectations of privacy in *Caballes* does not apply as far as a home is concerned. Thus, the current legal status of *Kyllo* undermines this counter-argument. For the home, expectations of privacy are not object dependent.

Though it is not necessary to do so, this interpretation can be rejected on principle grounds too. It would make a mockery of the home as a place that resists government intrusion. After all, if there are some objects that the government can locate within a home without searching it, then the government has essentially unlimited surveillance power. Government agents could use whatever method they want to open up a home for public viewing. People do have a reasonable expectation that police officers will not take an X-ray scan of their houses looking for a list of prohibited items. This interpretation would therefore destroy any meaning that "privacy" would have for *Katz* purposes.

Now, the inapplicability of *Caballes* does not immediately end my inquiry. It does not itself justify the conclusion that Pedraja and Bartelt did not commit a search. It merely means that the

lack of contraband holding with it a legitimate privacy interest does not exclude a legitimate expectation of privacy from existing in other areas.

The two ways that Alito argues that dogs are not technology are both incorrect. The mistake of the first is to rely on common features of technology but which need not obtain. The mistake of the second is that it focuses on the object of a dog rather than on the law enforcement use of a dog.

First, Alito's point that drug sniffing dogs have been used for centuries does not prove that drug sniffing dogs are not technology. Technology, after all, can be old. Despite the use of dogs by law enforcement for many years, targeted drug detection dog use has not trickled down to the general public. As such, this factor cannot be used to exclude Franky's technological status. The same argument can be said to rule out Franky's lack of sophistication as grounds for removing him from the field of technology. Technology can be sophisticated as well as unsophisticated.

Second, Alito says that part of the danger of technology according to *Kyllo* is that technology has the potential to rapidly evolve. Since the relevant dog faculties do not evolve over time as a result of human ingenuity, Alito seems to be saying, there is no reason to ascribe Franky the label of technology. This argument is not very good because it focuses on the wrong level of analysis. It argues that the constant canine form means that there is no natural evolution with respect to the law enforcement-relevant part. But the same could be said of the metals and plastics that make up the thermal detection device employed in *Kyllo*. Humans over time molded those unchanging metals into new variations and functionalities which came to disclose certain protected information. The same could be said of a dog nose; increasingly sophisticated training could result in enhanced uses for dog smelling ability that reveals more and more sensitive, socially protected information. It is the use of the dog that is important, not the traits of dogs themselves.

Indeed, the inability of individual elements to evolve on their own does nothing to stop humans from discovering new ways of uncovering hidden information. Suppose, for example, that a certain type of bird, a toucan for the sake of strong imagery, was discovered with the ability to hear very soft and specific sounds and then repeat them. Discovering this fact and using toucans as an arm of law enforcement would be both highly effective and highly disrespectful of privacy. Declaring the use of toucans here as not technology because toucans have had untapped aural potential all along seems grossly inaccurate.

I think that there is no reason to think that Franky does not comport with the concept of technology. Franky shares some important seeming traits of technology, such as that he is used for a specific purpose in a targeted, procedural way. Given this, it is reasonable, absent a compelling reason against it, to afford him technological status.

There is no question that drug dogs a) can detect information in a home and b) are not in general public use. The heart of the legitimate expectation of privacy concerns, à la *Kyllo*, must therefore be the issue of whether Franky is sense-enhancing. That is, does the presence of a drug dog change the legitimate expectation of privacy one has about home details with respect to odors? If the presence of a drug dog adds not enough of a relevant increase in sense awareness, then it would not be a search to employ it. This is obvious. A police officer who approaches a home to ask for direction to the nearest donut shop and who smells the strong odor of a decomposing body upon reaching the doorstep has not conducted a search. Neither has a police officer who came to the same door to ask a suspect questions during a murder investigation and smelled the same thing.

There are three questions I must answer here. First, is there a difference, generally, between what human beings can smell and what dogs can smell? Second, what level of difference makes a

difference, as it were? That is, what difference is distinct enough to warrant separate treatment of the technology as sense-enhancing? Third, does the relevant difference manifest in this case?

I think it would be simply odd to suggest that dogs and humans have the same range of smell. It is true that dogs and humans, as species, smell overlapping things. It is also undoubtedly true that within the human and dog species that there is wide variation with respect to olfactory ability. But the range of odors that dogs can smell is much wider than the range that humans can smell. This is uncontroversial, scientifically.[181] If drug dogs could not, categorically, or at least on balance, smell more effectively than human beings they would not be used by police.

What would it take for that difference, generally, to merit the label of "sense-enhancing?" Alito seems to think that the relevant question here is there is a reasonable expectation of privacy with respect to it. I think that confuses the layers of the case. The entire point of the extended foray into whether dogs are sense-enhancing is to determine whether a dog is a piece of technology to which *Kyllo* applies. The ruling in *Kyllo* demonstrates the reasonable expectation of privacy that attaches to devices that detect home details. There being a reasonable expectation of privacy with respect to a possible difference in dog sensing ability is not the only thing that should matter. In fact, a wide range of principles are relevant to that question.

Any principle that is selected should try hard to make sure that fringe cases do not determine the appropriate level of difference. The extraordinary range of humans that exist means that making such a rule artificially normalizes a technology that would otherwise be considered

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[181] Alexandra Horowitz, Julie Hecht, and Alexandra Dedrick, "Smelling More or Less: Investigating the Olfactory Experience of the Domestic Dog", *Learning and Motivation* 44 (2013): pp.207-208, http://ac.els-cdn.com/S0023969013000234/1-s2.0-S0023969013000234-main.pdf?_tid=2c22e026-e269-11e4-96e1-00000aab0f27&acdnat=1428990386_7e9537ba930556cbd777b643962b9fe3.

sense-enhancing. Avoiding fringe cases escapes the problem of making the worst cases govern the best ones. Rules should govern instances to which they are most applicable. Otherwise the purpose of having that rule at all is undermined because the genesis of a rule is inspired by the need to govern cases under a unified standard. Making the case about majorities not fringe cases is key to resolve that concern.

This standard means that I should not think a human being so extraordinary that they can detect what it normally takes a machine to do is enough to make some piece of technology not sense-enhancing. I also do not think that glasses, even if they were not in general public use, would constitute sense-enhancing technology among policemen and policewomen, because at most it just catches the vision of some policemen and policewomen up to the level of the ordinary, or slightly extraordinary, human being. Therefore, I conclude that a technology is relevantly sense enhancing if it gives its wielder an ability to exaggerate sensory information that, on balance, human beings lack. There is no method of detection which is not in some capacity a method of sense detection. I have avoided the use of the term "on average" because average weights fringe cases.

Drug dogs are sense-enhancing according to this standard. They can detect what human beings on balance cannot. The frequent use of drug dogs testifies to their power here. It is obvious that in the vast majority of cases in which drug dogs are successfully used to identify the presence of illegal drugs, a regular police officer sitting there sniffing would not have been enough, at least not without getting extremely close to the odor source. I think it would be unusual for a human with an extremely, extremely good sense of small to have one that outstrips the average dog, let alone the average dog selected for use in drug detection. I do believe, therefore, that the difference in smell makes a difference.

Our third question seems at first glance to render the answer to the second question uninteresting. Alito cites in his dissent that one of the detectives, Pedraja, testified that he could smell marijuana. Detective Bartelt testified he could not. It seems true in this case that there was not a difference in the sense of smell Franky provided in terms of the ability to actually detect the marijuana in this case. The dog and the police officer detected the same odor.

What would a decision based around precedent make of this conclusion? On the one hand, it would initially seem silly to say that detective Pedraja and Bartelt performed a search when their dog smelled marijuana but not when one of them smelled marijuana. It is the same action, after all. On the other hand, there is a sense in which the actions are quite different, even if they resulted in the same thing.

For example, imagine a variation of the *Kyllo* case. I approach Danny Kyllo's house with my thermal imaging device. The model of the device I am using is spectacular at detecting heat. However, the specific device I was issued is not very good because of an unknown factory defect. I train the device on the house and my device does not detect abnormal temperature readings for the house. Luckily, however, my vision sense is far above average. Known around the precinct as "20-20," my vision is so good I can even figure out how hot houses are at their edges by staring at them for a few seconds. I look at Danny Kyllo's house and it appears that the house is much hotter on average than other houses, and that the garage is much hotter than the rest of the house. I conclude that marijuana is being grown and leave to procure a warrant.

Even though in this case the thermal vision failed when regular vision succeeded, I believe it still makes sense to say that the device is a sense-enhancing device. Its purpose was to enhance my vision. Although in this case the scanning yielded no results and my normal senses were

enough to uncover a marijuana grow-house, the thermal vision device should still be treated as a search.

Additionally, I think that any reasonable application of principles yields the conclusion that whether drug dog action constitutes a search should not differ in each case. That would mean that a police officer performs a search only when the particular dog they happen to use has a much superior sense of smell to their own sense of smell. This is intuitively bizarre, and also undesirable, because it decreases institutional predictability. People should be able to predict the status of their actions in the courts in order to make compliance with the law socially efficient. This is compromised if the standard used changes from case to case.

There are two other principle based reasons to reject a case-specific approach here. First, the principles of efficient law and order are not served when police departments have an incentive to select their dog handlers on the basis of poor olfactory sense. It, in essence, creates incentives to select officers that are otherwise impotent at solving the crime they use a tool to solve. It selects for the trait that their entire profession tries to escape, one which is vital to law enforcement. It could also very well result in more unchecked criminals. If police departments select dog handlers and the detectives that accompany them on the basis of their poor smelling ability, then a single sick dog with a poor sense of smell prevents that set of officers from catching even the most obvious of illegal drug violators.

Moreover, law enforcement purposes are undermined if police have no idea going into an investigation with a dog whether what they are doing would be considered a search. It would discourage them from using drug dogs altogether. But since drug dogs do, on balance, have a much increased sense of smell to that of almost all humans, this interpretation would almost certainly

result in worse ways of ferretting out illegal drugs. That results in more drugs in communities, which political morality recommends against.

Alito might be surprised at the direction that this argument has turned. If it is true that it is important that drug dogs are highly effective at removing drugs from communities, then it seems bizarre to rule that using drug dogs is a search. Such a ruling decreases the amount that drug dogs will be used. Therefore, the principles used to cut in favor restricting drug dogs creates an even stronger case against it, he might say. If it is important to reduce crime, then a different ruling from that one cited here is far more useful.

This argument functions at an entirely different level than the one my argument is on. My argument was that an interpretation of what it would mean for something to be sense-enhancing should be rejected because it results in the increased impotence of drug dogs. His argument is that the principle I used to support that justifies switching my ruling on the case. His argument does not actually prove that having a standard about what would be sense-enhancing that changes from case to case would better serve law enforcement. Clearly it would not. Therefore, his argument should just count as a reason why, if my interpretation is correct and precedent swings my way, precedent should be dispensed with in favor of crime control. Perhaps Alito would not go that far with his argument. But if he does not go at least that far, he goes nowhere.

Franky is a sense-enhancing technology that reveals details of the home and is not in general public use. Therefore, as precedent demonstrates, his use constitutes a search. And, on that issue, this is where I shall stop. I believe that principle-based reasons to be consistent with precedent swamp principle-based reasons to deviate from it in this case.

Precedent yields a specific answer to the questions out of *Florida v. Jardines*. Institutional predictability, which I have stressed time and time again as an important principle, demands that

respect for precedent be followed absent a strong reason to deviate from it. Deciding to make permissible conduct explicitly condemned in *Kyllo* amounts to the claim that a mere decade ago the court got it wrong. It is terrible for predictability to embrace so sudden a switch. Given the volume of relevant legal rulings that would go in and out of date if it were the norm to regularly overturn such recent precedent, it would end up a mere guessing game to determine what would end up legal or illegal by the end of trial. Since at least some of the purpose of law is to provide predictability in dispute resolution, issues where precedent is clear should be decided according to precedent absent a strong counter-reason.

I do not think there is a very compelling reason to shift the standards of what society should accept as legitimate after such a short period of time. I think this for two reasons. First, I do not think, as a factual matter, that the moral standards of society have shifted very much. Since principle-based argument in part a function of the acceptance of moral principles, there should be a presumption against changing a standard after only a few years. Second, I think that the difficulty of this case indicates a need to stick with precedent. A case so controversial that it is difficult to develop an argument of principle for or against its application indicates, as a preliminary, that the arguments on each side are relatively balanced. This should give me a strong presumption against flippantly making moral arguments and throwing away precedent. The degree of credence I would have that the principle based argument I construct is true likely would not, even factoring in the probable weight of the moral harm my argument diagnoses, outweigh the certain and not insignificant harm to predictability over-ruling precedent would give in this case.

To be clear, I do think the principle-based argument for law and order, the one I attributed as a counter-argument Alito might make, is not obviously better than any counter argument about reducing unwanted governmental interference. More generally, the argument would simply be

that, on balance, interpreting these actions as searches results in more criminals getting away with drug production and trafficking. I do think these interests are legitimate. But in the case of police action involving the home, I do agree with Scalia and Kagan that there should be a, to use Kagan's words, "'firm' and a 'bright' line at 'the entrance to the house'" for government intrusion. [182]

Much of the principle-balancing in Fourth Amendment cases involves decisions about the goals of crime reduction and protection from government intrusion squaring off against one another. There are some cases where it is obvious what balancing demands of me in deciding between these two goals. I do not believe this is one of those cases. That makes it prudent to decide in favor of precedent. If I had to pick a goal to win out in this case, I would say that the presence of the home as the bastion against government intrusion, as Scalia likes to frame the issue, would incline me toward resisting government intrusion. However, I do not think that the conclusion here is strong enough to warrant over-ruling precedent if precedent were in the other direction.

All in all, my decision constitutes a decision for Jardines. Detectives Pedraja and Bartelt unreasonably searched Jardines' home. As such, the plants they obtained as a result of Pedraja and Bartelt's search should be declared inadmissible evidence.

I will, among other things, reflect on the effectiveness of the process of case evaluation and criteria-based positivist theory selection in the conclusion.

[182] Florida v. Jardines, 569 ____, Concurring 3 (2013), https://supreme.justia.com/cases/federal/us/569/11-564/case.pdf.

Conclusion

Loose Ends

Here I will address two outstanding questions. First, how useful were my criteria? Should they have been otherwise? Second, how useful was my project? Did my work show what I claimed it would in the introduction; did it illuminate the importance of the philosophy of law? I will then give some parting remarks.

Criteria in Review

It seems that my criteria were useful enough. Most of the arguments I evaluated did not require me to use my criteria to disregard them outright. However, this does not mean too much for the praiseworthiness of my criteria. This is because the effect of introducing my criteria is to narrow the considered data to be relevant to those criteria. I excluded some sections of the books I read on the basis that they were not relevant to my criteria. So, to confirm that the convergence between my data and my criteria meant I did a good job in criteria selection does not say much.

In Chapter Two I did answer the theories of two thinkers, Kelsen and Fuller, partially through the use of my criteria. I do not think this is enough to discount the worthiness of my criteria. Fuller is a natural law theorist and Kelsen is somewhat of a methodological oddity among positivist thinkers. I am not too concerned.

Overall, I am satisfied with the work my criteria did in the execution of this thesis. They gave me a place to argue from and a benchmark to assess my progress. Without them, my work would have been much less systematic.

Project in Review

In the introduction I claimed that philosophy of law works are relevant partly because actual legal determinations hinge on them. It is clear by now, I hope, that failure to appreciate the principle-based nature of law caused an incorrect decision in *Florida v. Jardines*. Philosophy of law considerations are therefore directly relevant to court decisions. Even if it were true that the original decision was correct, moreover, it would still be that a change in philosophy of law resulted in a different conclusion. That affirms the importance of philosophy of law considerations because it proves it matters what philosophy of law one chooses to adopt.

I am also impressed with the ability of Chapter Three to illuminate the issues in Chapter Two. It added a sense of specificity to the whole enterprise. I think that discussing the specific issues in Fourth Amendment law with respect to principles gave a much better sense of how principles could be required for adjudication then simply reporting what another positivist has said. The value of my theory of positivism and the case that surrounded it theory was cached out tangibly in that discussion.

Ends Meet

If the philosophy of law is an ocean, then I still wallow in the shallows. By now I hope the reader has a good sense of the positivist local fish species, and how they coalesce around the coral embankment of *Florida v. Jardines*. I hope that this is true whether or not the reader's theory of marine-biological natural selection has my species of positivism outcompeting the others. If I did not breach the mesopelagic zone, I hope I at least rested on a sandbar with a good vantage point.

Like marine biology, legal philosophy attracts a narrow following. But law matters in a way that marine biology cannot begin to approach. This work is my first attempt to contribute to such an important institution, and it will not be my last.