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Law, Morality and Judicial Reasoning

Essays on W. J. Waluchow's Jurisprudence and Constitutional Theory

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Editors
Thomas Bustamante
Federal University of Minas Gerais
Belo Horizonte, Brazil

Saulo de Matos
Federal University of Para
Belém, Brazil

André L. S. Coelho
Federal University of Rio de Janeiro
Rio de Janeiro, Brazil

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Contents

About the Editors

Thomas Bustamante is Professor of Legal Theory and Philosophy of Law at the Federal University of Minas Gerais, Brazil, and Senior Research Productivity Fellow of the National Council for Scientific and Technological Development (CNPq), Brazil. He was a Global Research Fellow with a Fulbright Visiting Research Grant at the New York University, from 2020 to 2022, and a Research Fellow at King's College London. He holds a PhD from the Pontifical Catholic University, Rio de Janeiro. Some of his works in English appear in the *Canadian Journal of Law and Jurisprudence*, *Modern Law Review*, *Jurisprudence*, *Australian Journal of Legal Philosophy, American Journal of Comparative Law,* and *German Law Journal.* He has edited the books *New Essays on the Fish-Dworkin Debate* (with Margaret Martin, 2023), *Philosophy of Law as an Integral Part of Philosophy: Essays in the Jurisprudence of Gerald J. Postema* (with Thiago L Decat, 2020), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (with Bernardo Fernandes, 2016), *Argument Types and Fallacies in Legal Argumentation* (with Christian Dahlman, 2015) and *On the Philosophy of Precedent* (with Carlos Bernal Pulido, 2012).

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André L. S. Coelho is Professor of Legal Theory and Philosophy of Law at the Law School of the Federal University of Rio de Janeiro, in Brazil. He holds an M.Phil. and a Ph.D. in Philosophy from the Federal University of Santa Catarina, Brazil, with a Research Visit at the Goethe Universität of Frankfurt, Germany. He has previously taught at CESUPA and The University of Amazon, both in Brazil.

Contributors

Brian H. Bix University of Minnesota, School of Law, Minneapolis, MN, USA

Thomas Bustamante Federal University of Minas Gerais, Faculdade de Direito, Belo Horizonte, MG, Brazil
National Council for Scientific and Technological Development (CNPq), Brasília, DF, Brazil

André L. S. Coelho Federal University of Rio de Janeiro, Faculdade Nacional de Direito, Rio de Janeiro, RJ, Brazil

Kenneth M. Ehrenberg University of Surrey, School of Law, Guildford, UK

Imer B. Flores National Autonomous University of Mexico (UNAM), Instituto de Investigaciones Jurídicas, Circuito Mario de La Cueva s/n, C.U., Coyoacán, Ciudad de México, CDMX, Mexico

Michael Giudice York University, Department of Philosophy, Faculty of Liberal Arts and Professional Studies, Toronto, ON, Canada

Ronaldo Porto Macedo Junior University of Sao Paulo Law School, Sao Paulo, Brazil

Francisco Tarcísio Rocha Gomes Júnior University Center Christus (Unichristus), Fortaleza, Brazil

Matthew H. Kramer University of Cambridge, Churchill College, Storey's Way, Cambridge, UK

Breno Baía Magalhães Federal University of Pará, Belém, Brazil

Saulo de Matos Federal University of Pará, Faculdade de Direito, Campus Universitário, Belém, PA, Brazil

João Vitor Penna University of São Paulo, São Paulo, SP, Brazil

Jorge Sanchez Perez University of Alberta, Edmonton, AB, Canada

Xavier Scott York University, Department of Philosophy, Faculty of Liberal Arts and Professional Studies, Toronto, ON, Canada

Fábio Perin Shecaira Federal University of Rio de Janeiro, Faculdade Nacional de Direito, Rio de Janeiro, Brazil

Katharina Stevens University of Lethbridge, Department of Philosophy, University Hall, Lethbridge, AB, Canada

Ricardo Dib Taxi Federal University of Pará, Faculdade de Direito, Campus Universitário, Belém, Brazil

Introduction

Thomas Bustamante, Saulo de Matos, and André L. S. Coelho

Wilfrid Joseph Waluchow (or W.J. Waluchow) is one of the most important legal philosophers of our time. His insightful and original scholarship, expressed especially in his books *Inclusive Legal Positivism* (1994) and *A Common Law Theory of Judicial Review: The Living Tree* (2007), developed a powerful approach to legal and constitutional practice, shedding light on the theoretical commitments of legal positivism and the tension between fundamental rights and democracy in contemporary societies. Under the influence of H.L.A. Hart's jurisprudence, Professor Waluchow understands philosophy of law as an inquiry on how to understand, based on conceptual analysis, the implicit commitments that we undertake as participants of legal practice in constitutional communities.

Professor Waluchow got his Undergraduate and Master's degrees from University of Western Ontario, and his PhD from Oxford University, where he was the last PhD student supervised by Hart. He taught at McMaster University in Canada until his retirement. Besides the works in legal philosophy and philosophy of constitutional law, he published books in the field of bioethics (*Well and Good,* 2014; *Readings in Health Care Ethics*, 2012), and metaethics (*The Dimensions of Ethics*, 2003). His book *Inclusive Legal Positivism* is one of the most influential books of the twentieth century in analytical jurisprudence, since it successfully developed a new

T. Bustamante (✉)
Federal University of Minas Gerais, School of Law, Belo Horizonte, MG, Brazil

National Council for Scientific and Technological Development (CNPq), Brasília, DF, Brazil
e-mail: tbustamante@ufmg.br

S. de Matos
Federal University of Pará, Faculdade de Direito, Campus Universitário, Belém, PA, Brazil
e-mail: saulodematos@ufpa.br

A. L. S. Coelho
Federal University of Rio de Janeiro, Faculdade Nacional de Direito, Rio de Janeiro, RJ, Brazil
e-mail: andrecoelho@direito.ufrj.br

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model for identifying valid legal propositions, namely the inclusive legal positivistic approach to law. According to this model, although the content of the law is necessarily determined by descriptive social facts (as postulated by the *social source thesis*), there is nothing in the structure of these descriptive social facts that prevents a legal system from incorporating principles or values amongst its criteria for legal validity.

In the interview published at the end of this book, Professor Waluchow considers his book *A Common Law Theory of Judicial Review: The Living Tree* as his decisive contribution to philosophy of law and constitutional law. Professor Waluchow's *Living Tree* is a philosophical response to the tension between fundamental rights and democracy, based on Hart's conceptual methodology and an egalitarian approach to the role of fundamental rights in democratic societies. His conception of a community's constitutional morality, which provides the basis for constitutional adjudication, has made an important impact on the contemporary debates on fundamental rights around the world.

The idea of this *Festschrift* in honour of Professor Waluchow emerged in result of a conference on some of the main topics of his legal and political works, held in Belém (Brazil) in February 2019, at the Federal University of Pará. Professor Waluchow was present at the conference to respond to all papers delivered at that time, and the authors were honoured with his careful comments and replies. After this meeting, the editors of this volume selected some of the papers of the participants in the conference and invited other contributors who historically helped to interpret, apply, and criticize Professor Waluchow's works. The book unites scholars from multiple countries, stages of their careers, and research interests. It encompasses the different and central issues of Professor Waluchow's thoughts in legal and constitutional theories, divided in three parts: the first part, *Waluchow's Jurisprudence Restated*, comprises six essays on Professor Waluchow's inclusive legal positivism; the second part, *Constitutional Reasoning, Political Morality and Judicial Review*, is dedicated to Professor Waluchow's philosophy of constitutional law, namely the debate on his work *A Common Law Theory of Judicial Review: The Living Tree*; and, finally, the third part, *Constitutional Morality Applied*, discusses the application of his theory on concrete issues of political and constitutional morality.

The book begins with a chapter from Matthew Kramer, one of the most prominent scholars in contemporary jurisprudence, who alongside Professor Waluchow is a forerunner of inclusive legal positivism. The chapter considers a distinction between two versions of inclusive legal positivism or, as Kramer prefers to call it, incorporationism: a moderate and an extreme version of incorporationism. According to extreme incorporationism, it is conceptually possible that a legal system "in which the sole criterion for the status of any norm as a law is the correctness of that norm as a moral principle" exists. Nonetheless, Kramer thinks that although this thesis is logically true, it is "extremely misleading and gratuitously obfuscatory". Notwithstanding the fact that this thesis is conceptually possible, "it is unsustainable as a matter of credible possibility" and should not be the focus of an interesting version of inclusive legal positivism.

In the following chapter, Kenneth Ehrenberg offers a more critical stance on Professor Waluchow's view. He develops a metaphysical argument against inclusive legal positivism based on some conceptual features of legal norms. He claims that Professor Waluchow's assertion that legal systems can incorporate a robust moral norm among the set of criteria of legal validity should not be accepted because it is conceptually inconsistent with the social fact thesis and the institutional character of law.

In a similar direction, André Coelho presents a Razian response to Professor Waluchow's critics regarding the classical debate between exclusive and inclusive legal positivism. His main thesis is that Professor Waluchow's objections against Raz's conception of authority and its connections with exclusive legal positivism responds to Raz's statements as if they were intended to be factually true, and not conceptually true.

A different direction is taken in the chapter by João Vitor Penna, which considers the implications of Professor Waluchow's distinction between "institutional" and "moral" forces of law. Penna believes, in agreement with Professor Waluchow, that a successful positivistic legal theory needs to address the problem of the institutional force of law, but at the same time this concern should not be restricted to theories of adjudication. Professor Waluchow's insightful construction of the institutional force of law does not support, therefore, the conclusion that its determination is not a proper task of analytical jurisprudence.

Another interesting reconstruction of the debate between Professor Waluchow and his main critics is offered in the chapter by Ronaldo Porto Macedo Junior, where the author examines Dworkin's responses to the objections that Professor Waluchow presented in *Inclusive Legal Positivism*. According to Macedo Junior, the final version of Dworkin's philosophy of law can be in part understood as a reaction to Professor Waluchow's inclusive legal positivistic model.

Another prominent scholar in the tradition of legal positivism is Brian Bix, who offers in his chapter a very thoughtful and considerate analysis of Professor Waluchow's inclusive legal positivism. The chapter considers the question whether inclusive legal positivism succeeds in its attempt to offer a distinctive vision of the nature of law, given the habitual accusation that it is swallowed by other positions like Dworkin's non-positivism. By carefully considering Professor Waluchow's version of legal positivism, Bix highlights the distinctive elements of this position. The conclusion is that it offers a view of law, legal reasoning, and legal validity which has been meticulously argued and defended, leaving it, for many, as the most attractive analytical theory of law.

The second part of the book, dedicated to the debate on Professor Waluchow's philosophy of constitutional law, starts with a chapter by Thomas Bustamante, who argues that regardless of their methodological disagreements law as integrity and inclusive legal positivism are on the same camp, and that the former can also provide a sound theory of precedent and adjudication. The appendix of the text, written three years after the main text, is probably the most important part of the chapter, since it offers the author's own analysis of Professor Waluchow's contribution to constitutional reasoning. There, Bustamante comments on a response that Professor

Waluchow offered to him in person and offers a pragmatic-inferentialist interpretation of Professor Waluchow's account of a community's constitutional morality. He claims that this account is not only plausible but also fully compatible with Dworkin's theory of legal interpretation, and that it leads to the conclusion that there is no harm in dropping the distinction between first-order and second-order judgments about law because legal reasoning must be 'detached', in Walhuchow's sense of the term, regardless of who undertakes the challenge of interpreting the law or the community's constitutional morality.

The following chapter by Imer Flores, provides a comprehensive review of some of Professor Waluchow's outstanding contributions to the field of legal philosophy and theory, mainly his account not only of the nature of law and of judicial discretion, i.e. inclusive legal positivism, but also of the justification of charter review, i.e. living tree constitutionalism. It offers an intriguing analysis of how Professor Waluchow's legal theory and philosophy of law hang together and complement one-another.

The next chapter, in turn, written by Saulo de Matos and Ricardo Dib Taxi, provides an analysis of the capacity of Professor Waluchow's theory to resist the so-called Alice's Paradox, which is a difficulty that emerges once one rejects the claim that the law has a fixed and stable semantic content. The chapter focuses on some aspects of Professor Waluchow's account of legal interpretation in constitutional law. The text seeks to reconstruct the background of the debate between theories of fixed meaning and theories of non-fixed meaning, in order to identify the main problems that each of these theories needs to deal for building a reasonable theory of constitutional interpretation.

In the same direction of the debate on the indeterminacy of Professor Waluchow's theory of constitutional interpretation, Katharina Stevens's chapter claims that Professor Waluchow's suggestion that judges can use the community's constitutional morality as a tool for constructing constitutional interpretations is closely related to the role that idealized audiences play in rhetorical argumentation theory. She holds that Professor Waluchow's judges are not sufficiently concerned with democratic legitimacy when they merely strive for answers about constitutional problems in harmony with the citizenry's existing moral commitments. Rather, they should conceive of themselves as public servants, submitting arguments to an audience of sovereign citizens who are, at the same time, the measuring stick by which the validity of these arguments is determined.

The final chapter of the second part of book, by Fábio Shecaira, defends Professor Waluchow's position against to the so-called "objection from diversity". According to this objection, the community's constitutional morality does not offer much in the way of guidance for judges in industrialized and culturally complex societies like Canada, the US, Brazil, etc. The purpose of the chapter is to analyse Professor Waluchow's recent attempt to refute the objection from diversity in a recent paper titled "Normative Reasoning from a Point of View".

The third part of this book discusses the application of Professor Waluchow's theory on constitutional morality, and it comprises four chapters considering four different dimensions of the debate.

Michael Giudice and Xavier Scott's chapter, without dismissing the claim that Professor Waluchow's living tree constitutionalism may constitute a reasonable method of interpretation in certain contexts, presents an objection to the application of the method to the Canadian context of *reconciliation* with indigenous peoples. The metaphor of the living tree, they argue, commits to 'bind Canadian constitutional law to certain fixed structures and practices in particular, and a European and colonial past in general'. It may constitute, on their view, an obstacle to reconciliation.

The next chapter, by Jorge Sanchez Perez, adopts a more optimistic interpretation of the capabilities of the living tree method to interpret indigenous practices, arguing that Professor Waluchow's idea of a community's constitutional morality is able to promote a global political morality that includes indigenous knowledge as a social fact. In this sense, Sanchez Perez stresses how Professor Waluchow's work gives us an important method to promote and engage with forward-looking agendas that can make the discipline more inclusive and open for future generations of scholars.

The penultimate chapter, by Breno Baía Magalhães, argues that although Professor Waluchow's central thesis on the nature of charters rights is primarily moral, its effectiveness and explanatory power seem to depend on elements relating to the institutional design of a constitutional tradition. Given this dependence on an institutional framework, he claims that the common law methodology will not find fertile ground to grow in constitutional experiences whose precedents are regarded as immutable rules imposed from top to bottom and where most constitutional rights cases are settled by an abstract form of judicial review.

Finally, in the last chapter of the book, Francisco Tarcísio Rocha Gomes Júnior discusses the possibility of using Professor Waluchow's theory of legal adjudication to understand the Latin American constitutional experience. The text presents three main concerns regarding the extension of Professor Waluchow's theory to Latin America: (i) a reflection on social and multicultural rights in the context of controversies around the legitimacy of a constitutional court; (ii) the idea that social and multicultural rights are not opposed to individual rights ; and, (iii) an argument that the protection of authentic intentions is relevant when there is political will which aims to render the constitutional empty and disregard the social commitments it undertakes.

This book ends with a spontaneous and rich interview with Professor Waluchow, where he tells us about his academic life, his relationship with H. L. A. Hart and other important legal philosophers during his PhD study in Oxford, and he responds to some of the critics presented in the chapters of this book. We know that this book cannot do justice to the importance of Professor Waluchow's contribution to legal philosophy, but we hope that it can at least contribute to spread the already remarkable influence of Professor Waluchow's scholarship and keep its spirit alive.

Thomas Bustamante is Professor of Legal Theory and Philosophy of Law at the Federal University of Minas Gerais, Brazil, and Senior Research Productivity Fellow of the National Council for Scientific and Technological Development (CNPq), Brazil. He was a Global Research Fellow with a Fulbright Visiting Research Grant at the New York University, from 2020 to 2021, and a Research Fellow at King's College London, from 2022 to 2023, with a grant from CAPES Foundation. He holds a PhD from the Pontifical Catholic University, Rio de Janeiro. Some of his works in English appear in the *Canadian Journal of Law and Jurisprudence*, *Modern Law Review*, *Jurisprudence*, *Australian Journal of Legal Philosophy, American Journal of Compartive Law,* and *German Law Journal.* He has edited the books *New Essays on the Fish-Dworkin Debate* (with Margaret Martin, 2023), *Philosophy of Law as an Integral Part of Philosophy: Essays in the Jurisprudence of Gerald J Postema* (with Thiago L Decat, 2020), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (with Bernardo Fernandes, 2016), *Argument Types and Fallacies in Legal Argumentation* (with Christian Dahlman, 2015) and *On the Philosophy of Precedent* (with Carlos Bernal Pulido, 2012).

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Part I
Waluchow's Jurisprudence Restated

Incorporationism, Inclusivism, and Indeterminacy

Matthew H. Kramer

Abstract For three decades, Wil Waluchow has been one of the world's premier legal philosophers and in particular has been one of the world's premier legal positivists. In this essay, I explore the complexities of hard cases—cases in which there is substantial disagreement among judges or other legal experts over the correct answers to any questions at issue—in order to reflect upon the implications of those complexities for the legal-positivist theses which Waluchow has defended. The upshot is a more nuanced presentation of those theses.

1 Introduction

I am delighted to participate in a festschrift for Wil Waluchow, who is one of the world's foremost legal philosophers and also a major moral philosopher. He has incisively covered a lot of territory in moral philosophy—ranging from business ethics to medical ethics to meta-ethics—but, remarkably, his contributions to the philosophy of law have been even more profound and influential. He has established himself as one of the leading constitutional theorists in the English-speaking world, and his achievements in the field of general jurisprudence are even more redoubtable. Having been the final doctoral supervisee of H.L.A. Hart, he has played a huge role in defending and extending the tradition of legal positivism which Hart did so much to rejuvenate in the mid-twentieth century. Above all else, Professor Waluchow's magisterial 1994 book *Inclusive Legal Positivism* is the provenance of an entire subfield in general jurisprudence. It is a classic text that has served as a landmark for everyone who has written subsequently on the issues which it addresses. When I was producing my own books *In Defense of Legal Positivism* and *Where Law and Morality Meet*, I regarded *Inclusive Legal Positivism* as the most captivating and perceptive and elegantly written contribution to positivist jurisprudence since Hart's *The Concept of Law*. It will undoubtedly continue to be regarded

M. H. Kramer (✉)
University of Cambridge, Churchill College, Storey's Way, Cambridge, UK
e-mail: mhk11@cam.ac.uk

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with great admiration as a point of reference by generations of jurisprudential scholars.

Alongside the formidable achievements of Waluchow as a philosopher is his endearingness as a human being. I first met him in the late 1990s, and I have found him to be a model of warm geniality and joviality ever since then. He seldom becomes angry, and he never raises his voice. He unremittingly exhibits solicitude for his students, many of whom recently paid tribute to him with a conference in his honor where they extended gratitude to him for his supportiveness as a mentor and a friend. (Like the writing of this paper, the convening of that conference took place during the worldwide COVID-19 catastrophe. Hence, it had to be conducted electronically.) His prowess as a scholar has been matched by his adeptness as an organizer of intellectual events, as he has hosted an array of major conferences and lectures that have led to high-profile publications. He has made McMaster University a global center of excellence in legal and political philosophy—an especially impressive achievement, given that McMaster does not have a law school.

I was initially inclined to write my paper for this festschrift with a focus on some areas of practical ethics which Waluchow has addressed illuminatingly. However, I have subsequently decided to concentrate instead on the area of legal philosophy in which his finest accomplishments have occurred: namely, the area of general jurisprudence. Indeed, I will concentrate more specifically on Inclusive Legal Positivism and especially on Incorporationism. Ever since the publication of Waluchow's 1994 volume, the phrase "Inclusive Legal Positivism" has come to be the dominant designation for both of the two doctrines just mentioned. Nevertheless, I shall continue here my practice of referring to them with the separate designations which I have employed. This paper will mull over some issues that arise from my previous work on Inclusive Legal Positivism and Incorporationism, in order to amplify and refine and modify that earlier work by pondering some complexities that are not fully explored therein. Though a recent essay by Waluchow (2022) was not aimed at prompting my present meditations, that essay is in fact what has inspired them. I shall say a bit more about that inspiration at the end of this paper.

2 Inclusivism and Incorporationism

Let us begin with the chief tenets of Inclusive Legal Positivism and Incorporationism, in formulations that slightly amplify those which I have presented in my earlier work on these matters. The vast majority of Inclusivists subscribe to the following thesis:

> *Inclusive Legal Positivism*. It can be the case, though it need not be the case, that the consistency of a norm with some or all of the principles of morality is a precondition for the status of the norm as a law in this or that credibly possible jurisdiction.

As is indicated in this thesis, the actuality of the state of affairs envisaged in it as a possibility is a matter that varies across jurisdictions. Also variable across

jurisdictions are some salient aspects of that state of affairs. For example, the range of any moral principles involved—the range of any moral principles with which a norm must be consistent if it is to possess the status of a law—is likewise a jurisdiction-specific matter. Similarly variable is whether all laws or only some laws (if any) in a jurisdiction are subject to such a requirement of consistency.

While that requirement for legal validity is not inherent in the concept of law, it can be imposed as a threshold test under the Rule of Recognition in any particular legal system. Such a test is one of the criteria which the officials there use for ascertaining the law. Insofar as a threshold criterion of that sort is operative in any particular legal system, then, some degree of moral worthiness is a necessary condition for the legally authoritative force of each norm that is validated as a law within the system. Inclusive Legal Positivism, which readily accepts the possibility of such a state of affairs, is inclusive because it allows that moral precepts can figure among the criteria that guide officials' ascertainment of the law. Inclusivist theorists reject the view that all the criteria for law-ascertainment in every credibly possible legal system are focused on empirical sources. At the same time, the Inclusivists are positivists because they also reject the view that every credibly possible legal system does operate with some moral tests among its law-ascertaining criteria. An Inclusive Legal Positivist insists that such tests are contingent features, rather than essential features, of the systems of law in which they are applied.

Incorporationism is about a certain sufficient condition, rather than a necessary condition, for the status of norms as laws in particular jurisdictions:

> *Incorporationism*. It can be the case, though it need not be the case, that the correctness of a norm as a moral principle is a sufficient condition for the status of that norm as a law in this or that credibly possible jurisdiction.

Albeit the role of moral correctness as a sufficient condition for legal validity is not inherent in the concept of law, it can obtain under the Rule of Recognition in any particular legal system. An Incorporationist theorist maintains that moral principles regularly regarded by officials as legally determinative are indeed legal norms, notwithstanding that they have perhaps never been laid down in any explicit sources such as legislative enactments or judicial rulings. When officials do regularly engage in a practice of treating the moral soundness of norms as a sufficient condition for the legal authoritativeness of those norms, they have thereby incorporated moral principles into the law of their system of governance—even before most of the applicable principles have received any explicit and discrete recognition. Incorporationists, who unhesitatingly accept the possibility of such a state of affairs, are nonetheless legal positivists because they insist that the incorporation of moral principles into a legal system's array of norms is contingent rather than inevitable. This doctrine of Incorporationism is of course fully consistent with Inclusive Legal Positivism, and indeed the two are almost always embraced together by any theorist who embraces either of them.

3 Moderate Incorporationism Versus Extreme Incorporationism

In my previous writings on these matters, I have commended a moderate version of Incorporationism in preference to an extreme version (Kramer 2004, chs 1–4). That distinction between the two versions has heretofore been connected to a more familiar dichotomy, between easy cases and hard cases. However, one of the chief concerns of this paper is to investigate the complexities of that familiar dichotomy. Before we probe those complexities, this section will delineate the contrast between the two varieties of Incorporationism.

An extreme version of Incorporationism highlights the possibility of a system of governance in which the sole criterion for the status of any norm as a law is the correctness of that norm as a moral principle. Though such a thesis is true, it is extremely misleading and gratuitously obfuscatory. It is true because the envisaged system of law is indeed a possibility even in a sizeable society over a substantial period of time. Such a system is a logical possibility; its realization would not involve any logical contradiction. Yet the principal tenet of Incorporationism, as I have presented it above, does not refer to bare logical possibilities. It refers to credible possibilities (realizable in the actual world or in nearby counterfactual worlds). Logically possible though the system of law envisaged by extreme Incorporationists is even in a sizeable society over an extended period of time, it is not a credible possibility in any such society over such a period of time. Any credibly possible system of governance in a society larger than a handful of families will include criteria for the status of norms as laws in addition to any criterion focused on the correctness of norms as moral principles. Were that latter criterion the sole criterion, the ostensible system of governance containing it would not be able to function as a system of governance. Over vast areas of human life, that ostensible system would not provide sufficiently uniform guidance to people on how they are legally required or permitted to conduct themselves. Nor would it provide sufficiently uniform guidance to people on how they are able to exercise legal powers and on what the effects of exercising those powers would be. Though the correct principles of morality do furnish determinate answers to a myriad of questions, the understandings of those principles among the members of a credibly possible large-scale society will be profusely heterogeneous. Moreover, on countless points of detail, the correct principles of morality do not in themselves yield determinate answers. Such points of detail have to be resolved by recourse to conventional standards that have been laid down as authoritative. Precisely for these reasons, an array of laws beyond the correct principles of morality will be needed in any functional system of governance that presides over a credibly possible society.

Hence, notwithstanding that the thesis propounded by extreme Incorporationists is true as a matter of logical possibilities, it is unsustainable as a matter of credible possibilities. Consequently, that thesis is grossly misleading and obfuscatory. It trains attention on a bare logical possibility, and it thus tends to obscure the import of Incorporationism as a doctrine of general jurisprudence. The opponents of

Incorporationism could concede the bare logical possibility while rightly thinking that they had not conceded anything that detracts perceptibly from their general opposition to the doctrine. Given that a system of law like that outlined by extreme Incorporationists never has arisen and never will arise, an acknowledgment of the logical possibility of such a system is wholly undamaging for anyone who rejects the tenet of *Incorporationism* which I have formulated in §2 above.

Anyone favorably disposed toward that tenet is well advised, then, to adopt a moderate version of Incorporationism—as I have done in my previous writings on this topic. Instead of being concerned with the outlandish system of law on which the extreme Incorporationists bestow their attention, a proponent of the moderate version of Incorporationism maintains that there can credibly be a legal system in which the correctness of norms as moral principles is sufficient for the status of those norms as laws in the system's handling of certain cases. Unlike the thesis propounded by the extreme Incorporationists, this thesis of the moderate Incorporationists is an elaboration of the *Incorporationism* tenet in §2. It adverts to something that is credibly possible rather than to something that is just logically possible.

However, a proponent of moderate Incorporationism obviously has to precisify the phrase "certain cases" that has been used just above. In what sorts of cases, in a moderate-Incorporationist legal system, would the correct principles of morality be operative as laws which supplement the system's laws that have emanated from empirically ascertainable sources? To address this question adequately, a proponent of moderate Incorporationism has to mull over the complexities of hard cases—a task to which we now turn.

4 Hard Cases

In contemporary legal philosophy, the prominence of the distinction between hard cases and easy cases has been due partly to Hart's division between the core and the penumbra in Chapter 7 of *The Concept of Law*, and partly to Ronald Dworkin's emphasis on the disagreements in hard cases in *Taking Rights Seriously* and *Law's Empire*. In the present essay, I construe the contrast between hard cases and easy cases quite straightforwardly as follows. A case is hard if there is intractable disagreement or very widespread uncertainty among judges or other legal experts over the chief point(s) at issue within it. A case is easy if there is no such intractable disagreement or widespread uncertainty. Now, in connection with this very simple way of explicating the hard/easy dichotomy, several observations are germane.

First, the properties of hardness and easiness are clearly scalar properties. Either of them can be realized to varying degrees in any given situations. The scalar character of each property extends across several dimensions: the range or proportion of the legal experts among whom there is intractable disagreement or widespread uncertainty; the number and importance of the points to which the disagreement or uncertainty pertains; the persistence of the disagreement or uncertainty, whether over months or years or decades or centuries. Useful though a blunt

distinction between hard cases and easy cases often is, it tends to obscure the dimensions along which each side of that distinction is scalar.

Second, and even more important, the hard/easy division is not tantamount to a distinction between cases in which the questions at issue are not determinately answerable and cases in which the questions at issue are determinately answerable. A case is easy if (1) all or nearly all experts concur on the answer(s) to any question(s) at issue therein and (2) no significant uncertainty about the answer(s) is harbored by most of the experts. That state of affairs can obtain even if there is no determinately correct answer to any question at issue in the case, provided that a misapprehension about the determinate answerability of the question(s) is widely shared among the experts. Although the sharing of such a misapprehension is undoubtedly not very common, it is neither impossible nor risibly fanciful. Conversely, a case is hard if there is widespread disagreement or uncertainty among experts over the answer to any question at issue therein. There can be such disagreement or uncertainty even if the question is determinately answerable. Indeed, as I have argued elsewhere (2007, pp. 17–21; 2008, pp. 49–50; 2018, pp. 112–120, 128–130)—partly in agreement with Dworkin—situations in which legal experts disagree intractably over determinately answerable questions are not very rare. We can aptly recognize as much when we distinguish carefully between indeterminacy on the one hand and indemonstrability or uncertainty on the other hand, as I have done in the writings to which I have just cited. Indeterminacy obtains when there is no uniquely correct answer (or no confined set of determinately correct answers) to some question Q under consideration, whereas indemonstrability prevails when there is widespread and intractable disagreement among experts about the correct answer to Q. Uncertainty prevails when experts are widely unable to reach any confident conclusions about the answer to Q. Indeterminacy is often coupled with indemonstrability or with uncertainty, but they are far from indisseverable. In some of my previous work on this topic (2018, pp. 112–120, 128–130), I have reproached Hart for neglecting these distinctions.

Third, although some hard cases do not involve any genuine indeterminacy, quite a few do. Not only are there different types of indeterminacy, but there are also different levels at which it can arise. In particular, indeterminacy can arise at the level of the empirically ascertainable laws of a jurisdiction that are applicable to some point of contention *C* in a case, or it can arise at the level of any moral principles that would be applicable to that point of contention. If there is indeterminacy at the former level but not at the latter, and if the correct principles of morality have been incorporated into the law of the relevant jurisdiction to supplement the empirically ascertainable legal norms, then there is a determinately correct legal answer to *C* notwithstanding the indeterminacy that obtains at the level of the black-letter law. If the determinately correct answer is generally recognized among legal experts, then the case is easy. By contrast, if the determinately correct legal answer is something over which the experts persistently disagree or about which they widely feel uncertain, then the case is hard despite the availability of a determinately correct legal answer to the question on which it turns. Even so, given that the correct principles of morality have been incorporated into the law of the jurisdiction through

past activities of law-ascertainment, a court will be acting appropriately if it has recourse to those principles and if it identifies the answer to *C* correctly. In so doing, it will have furnished the correct legal answer to the legal point in dispute—because the moral principle which yields that uniquely correct answer is endowed with the status of a law in the relevant jurisdiction, *ex hypothesi*.

Contrariwise, if there is no indeterminacy at the level of the empirically ascertainable laws, then the presence or absence of indeterminacy at the level of the correct principles of morality does not affect the availability of a uniquely correct legal answer to *C*. After all, a moderately Incorporationist system of governance absorbs those principles into its law not to supersede the empirically ascertainable legal norms but instead to supplement them. There is no occasion for the activation of that supplementary role if the black-letter laws themselves are sufficient to generate a determinately correct answer to *C*. Of course, the officials in that system of governance might fail to identify the uniquely correct answer to *C*. If they inaccurately believe that the black-letter laws do not supply any such answer, then they will presumably seek such an answer in the correct principles of morality. If they believe (whether accurately or not) that those principles likewise do not supply any determinately correct answer to *C*, then they will conclude that the case which hinges on *C* does not lend itself to being resolved by reference to the existing law. They incorrectly think that the case cannot be resolved by reference to the legal norms that emanate from empirically ascertainable sources, and they likewise think that it cannot be resolved by reference to any correct principles of morality that possess the status of legal norms in the jurisdiction. If the officials instead believe (whether accurately or not) that the correct principles of morality do furnish a determinately correct answer to *C*, then they will conclude that the case which hinges on *C* is resolvable by reference to the existing law. That conclusion as stated here is correct, even though it emerges in the context of a misapprehension about the black-letter law. Furthermore, the conclusion about the existence of a determinately correct answer is itself true even if the officials have not accurately identified that answer.

Complexities proliferate still further when we notice that the preceding paragraph has treated the judges and other legal-governmental officials in the relevant jurisdiction as if they are a monolith. Disagreements among the judges and other officials are clearly possible in a case that hinges on *C*, as in other cases. Perhaps some judges will recognize that the empirically ascertainable laws deliver a uniquely correct answer to *C*, while other judges reach an opposite conclusion. Among the latter judges, there might be further divergences over the question whether the correct principles of morality as supplementary legal norms deliver a uniquely correct answer to *C*.

5 Some Lessons to Be Drawn

When we take account of this blizzard of complications and the many cognate complications that have not been specifically broached here, we find that the distinction between hard cases and easy cases—understood in the quite

straightforward manner in which it has been construed in this paper—is not really the germane distinction for a moderate version of Incorporationism. To be sure, it is to some extent a reasonable proxy for the germane distinction. That is, we can reasonably assume that intractable disagreement or widespread uncertainty is especially likely in circumstances where the black-letter law in application to some matter is indeterminate. Nevertheless, strictly speaking, the distinction between hard cases and easy cases is beside the point. That distinction is fundamentally epistemic, as it pertains to how judges or other officials perceive and handle various sets of circumstances that have to be gauged by them. If in relation to some set of circumstances the judges converge in their perceptions, a case involving those circumstances will be easy. Conversely, if the judges diverge significantly in their perceptions or if many of them harbor significant uncertainty concerning how the set of circumstances should be perceived, the case involving those circumstances will be hard. Hugely important though these epistemic factors are in the operations of legal systems, they are orthogonal to the factors that are decisive for moderate Incorporationism. (Let us also recall, in line with what has been said in the second paragraph of §4 above, that a blunt distinction between hard cases and easy cases simplistically glosses over the intricacies that arise from the scalar character of hardness and easiness.)

Instead of being focused on those epistemic concerns, a moderate Incorporationist element of a Rule of Recognition is focused on the presence or absence of indeterminacy in the black-letter law. As has already been emphasized, indeterminacy is not equivalent to—or coextensive with—indemonstrability or uncertainty. Indeterminacy in the law of a jurisdiction is an ontological phenomenon. It is a property of the contents and implications of the prevailing legal norms. If the contents of those norms are such that they do not supply any determinately correct answer to some legal question, then either every intelligible answer to the question is correct or else no answer thereto is correct. Such a state of affairs can obtain whether or not the legal experts in the jurisdiction are aware of its obtaining.

By contrast, indemonstrability and uncertainty—like the distinction between easy cases and hard cases—are epistemic phenomena. They are properties of the ways in which the contents and implications of the prevailing laws in a jurisdiction are construed by judges or other officials who give effect to those laws. When the judges or other officials construe the laws, they are arriving at higher-order interpretive beliefs about legal norms that are the products of their lower-order beliefs and attitudes and behavior. Because of the abiding potential for incongruities between the lower-order beliefs and the higher-order beliefs about those lower-order beliefs, and because the incongruities can differ significantly among judges, there is an abiding potential for the epistemic properties of indemonstrability and uncertainty to be out of line with the ontological property of indeterminacy.

How, then, does the presence or absence of indeterminacy matter in a moderately Incorporationist Rule of Recognition? The correct principles of morality, in the supplementary role envisaged for them by moderate Incorporationists, do not become activated in their status as legal norms unless there is indeterminacy within the black-letter law in application to some case that has come up for decision by

adjudicators or administrators. If the empirically ascertainable laws fail to yield any determinately correct answer(s) to the question(s) at issue in such a case, there is an occasion for the active supplementation of those laws by the correct principles of morality. If the principles of morality also fail to yield any determinately correct answer(s) to the question(s) at issue, then obviously they cannot perform their supplementary role in the case at hand. Contrariwise, if those principles answer the question(s) determinately, the supplementary function of the principles in their status as legal norms can be performed—and it will be performed if a majority of the adjudicators or administrators identify the principles and their implications correctly. A case of this kind will probably be a hard case, but it might not be. In any event, its hardness or easiness is incidental to the pivotal combination of factors: namely, the presence of indeterminacy in the black-letter law and the presence of determinacy in the correct principles of morality with regard to any question(s) at issue in the case. Only through the combination of those two factors is the moderately Incorporationist standard in a Rule of Recognition properly invocable by the adjudicators or administrators whose system of law is underpinned by that Rule of Recognition. And only through the correct identification of each of those factors by the adjudicators or administrators will that moderately Incorporationist standard be given effect. (Obviously, the Rule of Recognition in any particular system of governance might not include a moderately Incorporationist standard. My remarks here are applicable only when the regnant Rule of Recognition in a jurisdiction does comprise such a standard.)

The reason why the indeterminacy/determinacy combination is the pivotal factor—and why the hard/easy distinction is beside the point—is that a moderately Incorporationist criterion in a Rule of Recognition addresses any cases in which there are no empirically ascertainable laws that can correctly be invoked as bases for decisions in those cases. A moderately Incorporationist standard in a Rule of Recognition provides that, in such cases, the legal-governmental officials in the jurisdiction are both authorized and obligated to have recourse to the correct principles of morality as bases for their decisions. Unless those principles are themselves indeterminate on the points of contention in the cases under consideration, they can fill the lacunae left by the indeterminacy in the black-letter law. Now, this lacuna-filling function of the correct principles of morality under a moderately Incorporationist Rule of Recognition is focused entirely on what the law is rather than on how the law is construed. Occasions for the fulfillment of that function arise when and only when the points of contention in legal disputes are not covered determinately by the black-letter law, irrespective of whether the indeterminacy is recognized by the adjudicators and administrators who have to rule on those disputes, and irrespective of whether the adjudicators and administrators agree with one another on how the disputes should be resolved. Thus, because the distinction between hard cases and easy cases is centered not on what the law is but instead on the presence or absence of disagreement (or uncertainty) among experts about what the law is, it has no bearing on the applicability of a moderately Incorporationist standard in a Rule of Recognition. Decisive instead is the presence or absence of indeterminacy in the black-letter law.

6 Some Further Lessons

In light of what has just been argued, we can discern that some of the pronouncements in my earlier work on Incorporationism have been misleading at best. For example, in the Introduction to my book *Where Law and Morality Meet*, I announce that I will endeavor to "highlight the credible possibility of legal systems in which the laws for dealing with hard cases are incorporated moral principles" (2004, p. 6). To be sure, I thereafter evince a firmer understanding of the proper focus for an exposition of moderate Incorporationism, as I advert to a moderate "Incorporationist Rule of Recognition which establishes that moral worthiness is a sufficient condition for the status of norms as legal norms in hard cases that cannot be resolved by reference to legal norms from other sources" (2004, p. 28). Even then, however, my inclusion of the adjective "hard" before "cases" is inapposite—notwithstanding that most cases which cannot be determinately resolved by reference to empirically ascertainable legal norms will indeed be hard cases. Moreover, I subsequently declare that "the lone plausibly stable [version of an Incorporationist Rule of Recognition] is that in which the Incorporationist criteria apply peculiarly to hard cases. If there are gaps in the source-based law that need to be filled, or if there are clashes or serious ambiguities in the source-based law that need to be resolved, then judges and other officials may well invoke moral principles in order to deal with such circumstances" (2004, p. 34). Although the second sentence in this quotation is fine, the first sentence therein is guilty of the chief misstep against which I have warned in this paper. As becomes apparent on the next page of *Where Law and Morality Meet*, my concern with fending off Dworkin's onslaughts against positivism is what led me into the aforementioned misstep (2004, p. 35):

> This [moderate version] of Incorporationism is particularly pertinent in the context of my overall discussion, where we are pondering ways of replying to Dworkin. As has been mentioned in the Introduction to this book, Dworkin focused entirely on hard cases in his early attacks on legal positivists for their alleged failure to acknowledge the salience of moral principles in the law. Even in his more recent work, where he expresses some doubts about the distinction between hard cases and easy cases, his whole dissection of positivism's ostensible shortcomings is informed crucially by his accounts of several difficult cases. Hence, a version of Incorporationism attuned to the occurrence of such cases is apt indeed for fending off Dworkin's challenges. After all, the paramount merit of those challenges is to highlight the knotty legal cruxes which judges handle by recourse to moral principles. If legal positivism is to be worthy of commendation as a jurisprudential theory, it must be able to supply an adequate account of the judges' reliance on outright moral principles for adjudicative purposes. Incorporationism in its moderate form is an endeavor to furnish just such an account.

This latest quotation leads into two further lessons to be drawn from this paper. First, my erstwhile invocations of the distinction between hard cases and easy cases have not been necessary for the pursuit of my main concern in my elaboration of moderate Incorporationism. When I have distanced myself from extreme Incorporationism, I have done so chiefly for the reasons indicated in §3 of this paper. That is, I have argued that any Rule of Recognition of the sort envisaged by the extreme

Incorporationists would fail to provide the degree of regularized guidance that is essential for the very existence and functionality of a legal system of governance. My general aim here has been sustainable without any conflation of the hard/easy distinction and the indeterminacy/determinacy distinction, for—as has been noted more than once already—there is a very considerable overlap between the former distinction and the latter. Most cases marked by indeterminacy in the black-letter law will be hard cases, and a substantial proportion of hard cases arise in circumstances where such indeterminacy obtains. Conversely, most cases marked by determinacy in the black-letter law will be easy cases, and most easy cases pertain to circumstances in which there is such determinacy. (Worth keeping in mind here is that the properties of hardness and easiness are scalar, as has been observed in §4 above.) Without making the mistake of treating the hard/easy distinction and the indeterminacy/determinacy distinction as if they were equivalent, we can aptly take account of the large area of extensional intersection between them. Because of the sizeableness of that extensional intersection, the basis for differentiating between the untenability of an extreme Incorporationist Rule of Recognition and the tenability of a moderate Incorporationist Rule of Recognition can be expounded perfectly well with reference to the indeterminacy/determinacy divide. Hence, the gravamen of my complaint against extreme Incorporationism is salvageable, and so is my championing of moderate Incorporationism as a superior alternative that defuses the problem which undermines the extreme position. Both my complaint about the extreme approach and my commendation of the moderate approach are severable from the misleading terms in which I have sometimes articulated them.

Second, among the many faults that can accurately be imputed to Dworkin in his capacity as a legal philosopher is that he greatly overemphasized the distinction between hard cases and easy cases in his critiques of legal positivism. Admittedly, in *Law's Empire* he remarked that "easy cases are. . .only special cases of hard ones" (1986, p. 266). Nonetheless, even in that text he set up his whole critique of Hart by railing against legal positivists for their putative inability to capture accurately the nature of the disagreements in hard cases. Furthermore, in *Taking Rights Seriously*, where his fourth chapter is entitled "Hard Cases," he equivocated on the nature of hard cases in somewhat the same manner in which I have occasionally equivocated in my *Where Law and Morality Meet*. On the opening page of that fourth chapter, Dworkin declared that a hard case arises "[w]hen a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance" (1978, p. 81). If we overlook the fact that clarity is an epistemic property rather than an ontological property, Dworkin's wording is largely focused on indeterminacy in the black-letter law rather than on disagreement. Had Dworkin persistently adopted that focus in his discussions of hard cases, he might have spared future jurisprudential theorists from conflating indeterminacy and indemonstrability. However, elsewhere in *Taking Rights Seriously* he adverted to intractable disagreement as the defining feature of hard cases, and he thus understood the hard/easy distinction in the same way in which I have understood it throughout this paper. In the Introduction to that book, for example, he informed his readers that "there are hard cases, both in politics and at law, in which reasonable lawyers will disagree about rights, and neither will

have available any argument that must necessarily convince the other" (1978, p. xiv). He was here clearly concentrating on indemonstrability rather than on indeterminacy. Thus, in addition to inducing future jurisprudential theorists to overemphasize the import of the distinction between hard cases and easy cases, Dworkin paved the way for those theorists to conflate indemonstrability and indeterminacy in their ruminations on that distinction.

7 Back to the Beginning

Some readers may have noticed that I have made no mention of Waluchow since the opening paragraphs of this paper. However, as I have indicated at the end of those opening paragraphs, this whole paper is prompted by a recent essay of his. In a footnote in that essay, Waluchow recalls an early article in which he propounded a version of extreme Incorporationism. He writes: "Professor Kramer's arguments against extreme Incorporationism have led me to think that my conclusion. . .may have been too broad – and that perhaps I should have restricted its reach to hard cases in all but fanciful, imaginary societies where moral agreement is far more prevalent than we find in modern, pluralistic societies" (Waluchow 2022, p. 126 fn 6). I applaud this retreat from extreme Incorporationism, but during the retreat Professor Waluchow should not focus on hard cases as such. Instead, he should limit the reach of Incorporationism to cases in which the black-letter law is indeterminate. In so doing, of course, he will be limiting its reach to cases that are mostly hard.

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