

UC Santa Cruz

UC Santa Cruz Electronic Theses and Dissertations

Title

Justice and Legitimacy: Legal Faith in a Time of Political Exception

Permalink

<https://escholarship.org/uc/item/22d075hw>

Author

Olney, Charles

Publication Date

2014

Peer reviewed|Thesis/dissertation

UNIVERSITY OF CALIFORNIA

SANTA CRUZ

**JUSTICE AND LEGITIMACY: LEGAL FAITH IN A TIME OF POLITICAL
EXCEPTION**

A dissertation submitted in partial satisfaction
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

POLITICS

by

Charles Olney

December 2014

The Dissertation of Charles Olney
is approved:

Professor Robert Meister, Chair

Professor Mark Fathi Massoud

Professor Gopal Balakrishnan

Tyrus Miller
Vice Provost and Dean of Graduate Studies

Copyright © by
Charles E. Olney
2014

Table of Contents

Abstract.....	iv
Acknowledgements.....	vi
Introduction.....	1
Chapter 1 – Rawls and the Reasonable.....	33
Chapter 2 – The Hart/Dworkin Debate and the Indeterminacy of Law.....	98
Chapter 3 – Law’s Exceptions: Positivism and Political Theology.....	152
Chapter 4 – The Differend of Justice.....	220
Chapter 5 – A Political Concept of Justice.....	282
Conclusion – Justice and Legitimacy	344
Bibliography	361

Justice and Legitimacy: Legal Faith in a Time of Political Exception

By: Charles Olney

Abstract

This dissertation seeks to develop a viable concept of justice—one limited enough to sustain the conditions of modern pluralism but strong enough to survive the encounter with political emergency. Such justice is necessarily mediated through law, which promises to reconcile the competing obligations of its subject while still producing authoritative decisions. This unifying task founders on political exceptions: expressions of difference that resist incorporation into the conceptual schema of rational order. My point of entry is John Rawls’ theory of political liberalism, particularly his concept of ‘reasonableness.’ This term in Rawls is primarily a device for depoliticizing exclusions; by demarcating reasonable and unreasonable doctrines, he permits the deployment of political violence in the name of neutrality. However, a radical possibility of recursive development is embedded in this idea, one unexplored by Rawls or any of his critics.

To situate this argument I turn to the Hart/Dworkin debate in legal philosophy over the nature of law, informed by Carl Schmitt’s treatment of exceptionality. My goal is to demonstrate the terminal limits of legal restraint on political order. Law in this sense is nothing but bare formalism, a servant of decisions made in the exceptional space where indeterminacy and emergency meet. But a different concept of law is possible, one that begins from the premise of exceptionality. The rule of law cannot resolve the inherently undecidable problems of justification. But this is

unimportant if law is reconceptualized as a technique of legitimacy, a mechanism for binding difference on explicitly political terms. In this account, justice provides the terms through which a political community of reasonableness constitutes itself. In affirming the mutuality of justice and legitimacy, therefore, we affirm a political concept of law—one founded on exceptions rather than norms.

Acknowledgments

This project has been the work of almost six years. It began in a seminar with Robert Meister, who has traveled with me every step along the way, first as instructor, later as adviser, always as a collaborator. Every important component of this dissertation owes something to his influence. I am also deeply indebted to the other members of my committee. I owe the thematic clarity of the argument to Mark Fathi Massoud, who has read countless drafts and helped me extract and clarify the key terms of my argument. Gopal Balakrishnan has lent a skeptical and incisive edge to the work, pressing me to venture out from the world of abstract theory where my inclinations naturally lead. I would also like to thank Vanita Seth, who served on my qualifying committee. In particular, her comments forced me to radically reconsider my faith in persuasion as a technique for political engagement.

I presented an early formulation of this argument at the Princeton Graduate Conference in Political Theory, where I received excellent feedback, and which convinced me that this argument was worth pursuing. A revised version of that paper was eventually submitted to the journal *Law, Culture and the Humanities* where I received helpful comments from the editors and anonymous reviewers. Portions of that article appear in this dissertation. While my ideas have moved forward, that early work provided the backbone for the eventual structure of the argument. There are too many other people who have provided feedback to list everyone individually, but I would like to extend specific thanks to Jessica Clarke, Dan Wirls, Douglas Dow, Christopher Kutz, Rob Hunter, and Andrew Dilts for their contributions. I should also

note that my interest in Rawls goes extends back to my time as an undergraduate at Whitman College. In particular, to a class I took with Jeanne Morefield on liberalism and its discontents. As a ‘discontent’ herself, I do not imagine that she will be enthusiastic about having set another Rawlsian loose on the world, but I hope that my arguments are iconoclastic enough to offer some hope of redemption in her eyes.

On a more personal note, I want say thank you to my family. My father: the best parent a child could ask for, endlessly supportive and caring. My mother: an inspiration—from her I have learned that fulfillment is there to be found if you care to search for it. My grandfather: the kindest and gentlest and most quietly brilliant man I have ever known. I miss him greatly, but never more than now. I wish I could have shared this moment with him. And my grandmother: who raised me, who guided me through life, who has loved me completely. There are not words to express how deeply you have influenced my life. I just know that I could not be here today if not for you.

Finally, I want to thank Caroline Brandt, who has been here for every step along the way. Nothing in the world has ever inspired me more than the simple desire to make you proud of me. I hope that I have succeeded.

Introduction – Justice and Difference

We live in an age of discontinuity, of fractured identities, financial crisis, and economic dislocation. And yet, at the same time, we are also in an era of unification and conservation. Despite the proliferation of political conflict, the institutions of liberal democracy have held remarkably stable. Why? What binds them together, and does this connection come at an unacceptable cost? To answer these questions requires attending to the political structure of justice. This is a theoretical undertaking, but one grounded in the concrete practices of political life. We experience justice through encounters with discontinuity, as a lingering but irresolvable burden, manifested through the necessity of producing authoritative decisions within a world of indelible difference.

While this is a particularly acute issue for modern liberal democracy, where collective existence remains obligatory even as shared modes of valuation and justification are increasingly splintered, the underlying problem exceeds the historical convergence of liberalism and democracy. The search for a framework through which dueling obligations may become joined is a recurring theme in political philosophy, perhaps *the* recurring theme. It is a meta-political repetition in the structure of modernity, one that has been characterized by the slow but inexorable growth of doubt about the possibility for metaphysical truths. The Hobbesian sovereign is replaced by Rousseau's general will, which is further abstracted in Kant's appeal to practical reason and Hegel's historical dialectic, and threatened with extinction via

the Marxist critique of ideology.¹ At each step, complexity grows and the goal of unifying a fractured world becomes less plausible.

Justice today is enframed by these historical patterns. It enunciates the possibility of durable order, even in a world that has been denuded of its theological enchantments.² To affirm the value of justice is to accept that toleration is the limit condition of political existence. Everyone is permitted a safe internal life world, in which he or she may build whatever communities are desired, based on values of one's own choosing. Such radical freedom, however, is only possible if everyone agrees to share a limited set of regulative techniques and acknowledges the collective authority of the results that they produce.³ In an important sense, justice is the *measurement* of this necessity. It is the mediating term through which mutually incompatible obligations may be translated—on one hand, the inalienable freedom of self-creation; on the other, the compulsory force of collective obligation. Justice is not located *within* either of these worlds; it exists interstitially, as the connective tissue that binds them together.

However, to describe justice as the conceptual binding force of political life immediately provokes the question of recursion. If justice is the means by which norm and fact are balanced, from where does *it* arise? Is justice a lingering

¹ See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1998), pp. 1-3

² See Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (London: Routledge, 1996).

³ See John Locke, *Second Treatise of Government*, in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 2008), "Chapter 6 – Of Paternal Power." Locke's treatment of freedom and law is notable for its emphasis on mutual support. Law is not seen as a restraint, but is instead a device that permits freedom to become actualized. In ceding certain liberties to a higher authority, each individual obtains a fuller experience of freedom.

metaphysical premise, a durable external framework that somehow escapes the pluralization of truth? Or is it an internal regulative technique, a relational concept that emerges out of deliberative engagement? Or perhaps it is some synthesis of the two? Alternatively, perhaps justice simply a useful fiction, a term that allows those in power to characterize the underlying structure of a given political order as *necessary* rather than *contingent*.

If we hope to progress further in this inquiry, we must escape from the realm of abstraction and evaluate justice within the context of the institutionalized practices of social organization. That is: to the ways in which actual disaggregated communities unify around shared principles of justification. In the present age, that means attending to the concept of ‘law,’ since law is a particularly powerful device for constituting political life on normative terms. It binds together disparate subjects authoritatively and therefore makes possible “highly artificial communities, associations of free and equal legal persons whose integration is based simultaneously on the threat of external sanctions and the supposition of a rationally motivated agreement.”⁴ This account adds depth to our working concept of justice. We might now say that justice is the *potential* for this simultaneity of sanction and agreement. It is the conceptual framework through which obligation may come to be understood as both normative and factual.⁵

⁴ Habermas, *Between Facts and Norms*, p. 8.

⁵ This treatment of justice is focused on its *social* component. For Hobbes justice presumes the existence of social relationships and cannot be defined in the moral solitude of the state of nature. Thomas Hobbes, *Leviathan* (Baltimore: Penguin Books, 1968), p. 78. Similarly, for Rousseau, the residents of the state of nature do not yet possess political reason, nor do they experience the value of ownership. Justice only comes into existence in a world of collective organization in the context of

But rather than resolving the recursive problem this formulation merely restates it. We still lack a means of defining foundations. If justice situates the possibility of law, is not the reverse also true? Does law bind because it is just, or is it just because it binds? In theory, these ideas should be mutually reinforcing. But what happens when this relationship weakens and the two facets come into conflict? Consider some exemplary cases. Are Lincoln's dubious decisions during the civil war to be valorized because they saved the union or castigated because they violated the Constitution in doing so? Were the Bush administration's practices of 'enhanced interrogation' unfortunate necessities or illegal monstrosities? Are human rights absolute or may states justifiably refuse to intervene in their name? And what is to be made of the Fugitive Slave Act or the law of Nazi Germany? Do the rank injustices of these systems delegitimize the very idea of legal obligation? If so, who is authorized to make this determination?

Exceptionality and the concept of law

What we are discussing are *exceptions*, moments when seemingly clear structures lose their coherence and the necessity for action no longer appears to be tamed by clear legal obligation. The simplest form of the exception is a political emergency, when unforeseen events pose existential threats to the stability of public order. In such moments of crisis, when systems appear to be in danger, the certainty of values fades and new potentialities appear. Emergencies tear apart normative

scarcity. See Jean-Jacques Rousseau, "Discourse on the Original of Inequality," *The Basic Political Writings*, trans. Donald Cress (Indianapolis, Indiana: Hackett Publishing Company, 1987), p. 38, 66.

certainty and suggest the possibility of revolutionary eruption. In effect, they expose the unstable foundations of law's claim to mediate between principled unity and material force. They clarify a hidden caveat in law's claim to authority: *law binds political order only so long as normal conditions hold*. In the exception, the *justice* of law evaporates and the balance of competing aspects is collapsed. Therefore, if the unique relationship between justice and law is to be sustained, we must supplement it with theoretical techniques for managing exceptionality, for reincorporating the experience of the emergency into the framework of rational justification. This requires expanding our definition of justice. Its purpose is not simply to unify the binary functions of political existence, but to do so in a *systematic* way, to eradicate the sort of incongruities that erode law's capacity to establish authoritative results. Broadly speaking, this task may be achieved in two very different ways.

In the first case, the technicians of justice seek to aggressively re-iterate the expansive quality of law, its capacity to fill every gap. This approach draws on the long tradition of Kantian constructivism and natural law theory to establish the durability of normative reason.⁶ The rule of law is an *ideal*, which if properly understood is capable of negating the supposition of exceptional danger. Law is not simply one practice of stability among many, which can be set aside for a moment and then restored to power after the crisis has been resolved. It is logically *prior* to all other considerations of practical risk. To displace its authority, even for very good reasons, casts us back into the disaggregated world of secular conflict, and reduces

⁶ This is, of course, a stylized and overbroad account and is not meant to represent the nuanced views of any particular theorist. In chapters 2 and 4, I will focus in depth on the work of Ronald Dworkin, who might be considered an exemplar of this approach.

law to nothing more than the temporary allegiance of its subjects. Of course, well-constructed legal orders can and should build in emergency procedures for temporary cessation of certain obligations, but such provisions should be tightly regulated and relatively rare.⁷ They remain *internal* to the rule of law.

By contrast, the second approach combats the exception by casting its danger entirely *outside* of law's purview.⁸ By this account, the rule of law is a material fact, whose authority is always particularized and constrained by its specific positive elaboration. A legal order is constituted in historical time, in response to the unique conditions of pluralism experienced in the political community of its formation. This limit is a firewall. While emergencies do exist and may well necessitate stepping beyond the terms of existing legal possibility, they do not threaten law as such because law is merely a framework through which pluralistic values are stabilized and rendered coherent. Emergencies merely shift the terrain, opening new doors and closing old ones. But as these values coalesce and seek to establish new authoritative structures, they remain subject to the modulating force of legal reason. Law, by this approach, is a rational device whose content is determined by the arrangement of moral and political value but whose *form* is fixed. Each legal order is highly particularized; it covers only those issues that have been positively articulated. But underneath the substantive differences of each positive legal order resides a durable concept of law.

⁷ See John Rawls, *The Law of Peoples: With The Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), pp. 96-99

⁸ Again, this description is cast broadly, and reflects a vulgar positivism unlikely to be endorsed by any significant thinker in the field. Chapters 2 and 3 will deepen this exploration significantly.

These represent contrasting directional attitudes for navigating the fact/value divide. In the idealist approach, law is seen as a value capable of generating factual content. In the positivist approach, law is a fact from which value may then be derived. They therefore share a faith that political and legal decisions are ultimately subject to coherent principles of adjudication. Regardless of what emphasis is given, how elements are weighted, and what eventual decision is reached, the entire process is contained within the structure of rational evaluation. This is achieved either by drawing the emergency inside of law (and thereby regulating it) or by casting the emergency entirely outside law to avoid its polluting effects. In either case, apparent exceptions are never truly exceptional; they are issues in need of resolution, dangerous but ultimately cognizable. And justice, by this logic, can be defined simply as the process through which the appropriate balance of political and legal necessity is determined. Its content may be unclear, but its goal is coherent.

The politics of exceptionality: emergency and pluralism

We have now described two important and inextricably linked functions of justice. First, it secures value pluralism against self-destruction by ensuring that disagreements may be regulated on terms acceptable to all. Second, it neutralizes emergencies. That is: it safeguards the world of value pluralism from incursions by forces that refuse to accept the necessity of mutual engagement.

While it would be easy to characterize these as distinct tasks, they would be far better understood as *variants* on the shared problem of how to engage with

difference. Emergency is the destructive form. It arises when contrary values place institutions under stress. Emergencies threaten destruction and chaos, and they are defined by the question: ‘how may difference be neutralized?’ Pluralism, by contrast, is the constructive form. It does not occur in discrete moments but is a constant background hum that arises from the desire for mutual respect for individuals and their reasons. The problem of pluralism is how to construct and sustain unity without eradicating the uniqueness of its subjects. It is defined by the question: ‘how may difference be valued?’

This binary is a crucial structuring device of liberal political theory (and therefore of liberal political *institutions* as well). It is expressed primarily through the sublimated desire to transform existential differences (those that provoke emergencies) into pluralistic ones. That is: to domesticate the exceptionality of emergency by revealing it to be simply a variation on pluralistic difference.⁹ As we have already seen, this may be conducted either by erecting an impassable barrier between emergency and legal pluralism or by *expanding* law, so as to wholly colonize and therefore tame the experience of emergency.

The critical question of liberal democracy in the 21st century is, quite simply: can this act of erasure be sustained? Is the concept of justice capable of neutralizing the ineffable externality of exceptional violence? My project is to assess this possibility, by picking apart the relationship between justice and exceptionality,

⁹ This is, for example, the essence of Madisonian democracy, which is premised on the inevitability of factions and the necessity of pitting them against one another in terms that will bolster rather than weaken the state. See Alexander Hamilton’s “Federalist 10” in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet, 2003).

paying particular attention to the way they manifest in the context of law. This is no simple task. By definition, law's exceptions are difficult to define. They exist at the limits of reason and are experienced only in the dissolution of the very conceptual tools meant to describe them.

My tentative hypothesis is that justice is *both* a device meant to stitch together the frayed edges of law or political society *as well as* a conceptual framework through which the impossibility of this task may be theorized. We should resist the impulse to collapse the tension between these two elements. We must begin to see justice as neither an alternative to, nor an aftereffect of, politics but instead as the theoretical structure through which political possibility obtains concrete form through the medium of law.

In this way, justice is *the reverse analog of the exception*—occupying the same location but turning in the opposite direction. Both mark the limits of conceptual order, and through their existence actually *define* that order. The difference is that the exception represents an impossible horizon—the space beyond which reason dies and theology reigns supreme—while justice is an *invitation*, the promise of mutual redemption. It is birthed and renewed in the constant interplay of legal order and political necessity. Justice is not the result of that relationship; justice *is the relationship itself*.

Rawls and the promise of justice

My entry point for this argument is the work of John Rawls, in particular his late-career ‘political turn.’ Rawls is the key figure of interest because he simultaneously *epitomizes* the limits of liberal justification while also *challenging* them. He is a deeply sensitive philosophical thinker, whose theoretical constructions are interpretive collaborations, full of respect for his interlocutors but never beholden to their horizons of understanding. This makes him a uniquely interesting object of inquiry. He stands at the end of a long road, and gathers together the many insights of his forbears, bringing them together in the hopes of constructing a new theoretical edifice. However, the resulting theory is not simply an amalgamation. Instead, it is a new entity, one pitched to the historical moment of its articulation while *also* asserting a trans-historical continuity of justice. This dualistic construction is a mimetic representation of the material practices of liberalism itself, whereby past and present are bundled together and expressed as a utopian possibility of disagreement without conflict.

For some of his critics, this utopianism expresses the fundamental limitations of ‘ideal theory.’ It asserts that justice can be described outside of time and place, but fails to see that any claim about justice presumes pre-existing communal association through which its content can be made cognizable and therefore generate obligations.¹⁰ This, then, is the distilled form of liberalism’s paradox. Justice requires

¹⁰ See Alasdair Macintyre, *After Virtue: A Study in Moral Theory* (Notre Dame IN: University of Notre Dame Press, 1981), p. 247; Michael Sandel, *Liberalism and its Critics* (Oxford: Basil Blackwell, 1985), p. 5; Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), pp. 21-23; Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

a community through which it may be articulated, but a community cannot be sustained without a concept of justice to bind it together.

Rawls' response to this dilemma is to re-characterize the nature of the social contract. He rejects the approach taken by some of its early thinkers, who presented their arguments as "historical process doctrines," and used this faux-historical reasoning to justify the results that emerged.¹¹ To escape this trap, Rawls adopts a Kantian approach, treating the contract as a hypothetical idea of reason, meant to illuminate the structure of justification necessarily at work in a shared society.¹² The problem is that this concession does more to obscure than it does to clarify. *Where* and *when* is justification enacted in the context of the original position? And, perhaps even more importantly, to *whom* is it presented? The principles of justice apply for a given society, but from where does that society emerge? Was its constitution just? This question cannot be answered because justification presumes the existence of a community to whom reasons may be offered. As a result, the fact of initial exclusion is written out of existence. Those whose voices were silenced so that *this* community could formulate itself *as* a community have no recourse to justice because they are *per se* excluded from the conversation. They are the specters of reason, unheard and unvalued.

And this is a crucial lacuna in the structure of political reason. Its mediation between the obligations of normativity and materiality—between facts and norms—is

¹¹ John Rawls, *Political Liberalism*, paperback edition (New York: Columbia University Press, 2005), p. 286.

¹² John Rawls, *Lectures on the History of Political Philosophy* (Cambridge: Belknap Press of Harvard University, 2007), p. 15.

necessarily tied to the historical community of its articulation, but every such community comes into being through the exercise of force, by eradicating all other claims to the legitimacy of violence. This *precedes* the structure of reason and therefore defies even the minimum content of justice—that exclusions will be enacted in terms that ought be accepted by all. And, since political order is a constant process of *becoming*, this cycle is constantly re-enacted. The original position stands outside of time, but those who *use* it to describe the obligations of justice are historically grounded. As they particularize the practice of reason, therefore, they also *weaponize* it. With each new articulation, new exclusions are also generated. Some may be justified through appeal to the shared terms of value pluralism, but some will necessarily disappear from comprehension entirely.¹³

This is the unassailable problem of politics in the secular age: that every decision comes at the expense of those who believe differently. If justice cannot speak to this bare fact, then it is simply a reiteration of moral reason, albeit a more complex variation. While Rawls admirably seeks to render those exclusions ‘political, not metaphysical,’ he cannot wholly eradicate the universalizing structure of reason itself.

We may frame this in terms of the emergency/pluralism dynamic. The essence of Rawlsian political liberalism is to impose a condition of *relevancy* on the promulgation of reasons. Those reasons matter which may be pluralized in the appropriate fashion—that is: which may be expressed in terms of public reason.

¹³ As we will see in chapter 4, they are the ‘differends of justice.’

Values that do not fit within this matrix of shared reason are permitted a private existence but carry no weight in *political* life.¹⁴ Through this treatment, all potential disruptions are pre-adjudicated by splintering the world into two distinct categories: reasonable disputants and outlaws.¹⁵ The former articulate the scope of political life, while the latter exclude themselves from that conversation. In this framing, the problem of the exception disappears from sight, and accordingly the promise that justice may *reverse* the experience of exceptionality also fades.

In making this argument, I draw significant insight from Carl Schmitt's treatment of exceptionality as an expression of the deep-rooted theology of supposedly secular institutions. Schmitt writes in *Political Theology*:

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development...but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology.¹⁶

Any attempt to theorize justice must take this claim seriously. Exceptions cannot be reduced to emergencies. They are conceptual breaks, truly unforeseen challenges that do not provoke argument or discussion but which demand *conversion*.¹⁷ In the face of such a call, one cannot respond procedurally because the exception *exceeds* the

¹⁴ Rawls, *Political Liberalism*, pp. 26-28.

¹⁵ See Rawls, *Political Liberalism*, pp. xvi-xvii, where he distinguishes between reasonable doctrines among whom democracy is possible, and unreasonable doctrines who must simply be contained.

¹⁶ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p. 36.

¹⁷ Schmitt, *Political Theology*, p. 6. For more on the nature of such conversion, see Alain Badiou's description of Paul's conversion on the road to Damascus as "a thunderbolt, a caesura...a conscription instituting a new subject." The subject that emerges from this event is radically distinct from what came before. To convert is not to accept the logic of new argument, but is to adopt an entirely new mode of being. Alain Badiou, *Saint Paul: The Foundation of Universalism*, trans. Ray Brassier (Stanford: Stanford University Press, 2003), p. 17.

structure of formal logic. The question of whether a particular danger justifies an exception to the law is itself outside the scope of law. It permits no legal resolution. All one may do is resort to the bedrock, universal assumptions that sustain order.¹⁸ This is a theological response, which presumes the existence of justifications that lie outside the realm of justification.

For this reason attempt to resolve the exception—re-asserting a fundamental unity that precedes and organizes the possibility of reasoning—is doomed to failure. Such an assertion performatively denies its own internal coherence. If justification itself is unjustifiable, then the entire edifice of justice is untethered. Persuasion is impossible; there is only conversion or non-conversion. Therefore, to economize the decision, to represent it via the logic of pluralistic deliberation, does not eliminate the exception but merely hides it from view. Sovereign authority is distributed throughout the numerous institutions of the state, but although it takes on multiple identities (“lawgiver, executive power, police, pardoner, welfare institution”) these remains merely “disguises” for “the same invisible person.”¹⁹ And the conceptual unity, the underlying physics which organize its refracted institutional structures, endures. This unity is the condition through which understanding itself is possible, and it still depends on the organizing fact of a decision. At a certain point justification necessarily fails, and the question ‘what is right?’ must be re-characterized as the question ‘*who decides* what is right?’ The former question is found on the belief that

¹⁸ See Wittgenstein: “If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: ‘This is simply what I do.’” Ludwig Wittgenstein, *Philosophical Investigations*, Third Edition, trans. G.E.M. Anscombe (New York: MacMillan, 1968), §217.

¹⁹ Schmitt, *Political Theology*, 38.

justice may be universalized, while the latter presumes a persistent gap at the core of every judgment.

If justice is to mean anything, it must speak to this fundamental discontinuity. If it cannot, justice will merely be the technique through which law and politics become mutual negative externalities—each offering the illusion of determinacy to the other, while behind both the bare force of political power operates unchecked.

Post-war liberalism and the limits of rule by law

In making this argument, I am particularly interested in the shifts in Rawls' argument from *A Theory of Justice* to *Political Liberalism*. This transition is of great interest to those who study Rawls, and is subject to a wide variety of interpretations. The core question is whether to read the move to political liberalism as a fundamental break in his theory or merely as a recalibration.²⁰ My argument approaches this debate obliquely, by noting that these two sides merely represent two different strands of liberalism's depoliticizing structure. The story of continuity emphasizes strength, the capacity for liberal values to establish unity even in the face of pluralism. The

²⁰ Commentary on this subject is extraordinarily widespread. See Brian Barry, who argues that *PL* constitutes a significant and unfortunate shift, a "capitulation" to "philosophical anarchism." Brian Barry, "John Rawls and the Search for Stability," *Ethics* 105, no. 4 (July 1995), p. 914. Glen Newey identifies seeds of *PL* in the earlier work, but sees the treatment of 'toleration' as a crucial and significant disjuncture. Glen Newey, "John Rawls: Liberalism at the Limits of Intolerance," in *Reflections on Rawls: An Assessment of his Legacy*, ed. Shaun Young (Farnham, England: Ashgate, 2009), pp. 131-152. On the other side, Paul Weithman grounds *PL* firmly within the moral universe of *Theory*, marshaling impressive analytic and textual resources to fill in the background behind Rawls' claim that the late work is a refinement. Paul Weithman, *Why Political Liberalism? On John Rawls's Political Turn* (Oxford: Oxford University Press, 2010). Less positively, Perry Anderson also treats *PL* as effectively continuous with *Theory*, noting that its superficial changes merely reflect the shifting political circumstances in which Rawls was writing. *Political Liberalism*, Anderson thinks, is merely an attempt to repackage the same bundle of Americanist imperialism. Perry Anderson, "Arms and Rights: Rawls, Habermas and Bobbio in an Age of War," *New Left Review* 31 (Jan-Feb 2005).

story of a break emphasizes weakness, the limited imaginative potential of liberal justification, the tentativeness of its principles. In a sense, both are right. There is a deep continuity throughout Rawls' work, but it is located more in his attitude toward justification than the content of his theory.

To situate this argument, it is important to recognize the broader political and historical context of his work. Rawls must be read *within* historical time. For all that he works in the field of 'ideal theory,' the theoretical goals of his work cannot be disentangled from the material conditions in which those ideas come to life. It is not enough to discuss a concept's stated meaning; we must also explore its function, its placement within the concrete social order of its articulation.

However, in making this argument, I do not mean to press a purely materialist take on the role of theoretical work. Inquiry is mobilized by and through concrete social and political relations while also providing an instrument for surpassing them. We must therefore seek out the places where concepts double back on themselves and infuse the historical basis for their own promulgation, where they *create something new*.²¹ These two aspects may be combined to say: the political theory of an era tends to suit its historical-political context. 'Suit' here suggests a significant relationship, but not a clear causal connection. Theory emerges to fill voids, to filter and explain new necessities, to clarify the range of the possible. But it is not purely an auxiliary to social order. By describing what is appropriate for political order, it shapes the deep-lying structure of the society in which it is articulated.

²¹ Schmitt, *Political Theology*, 35.

To study Rawls, therefore, we must be attentive to the political world of post-war liberalism, its socio-economic conditions as well as the trends and tendencies within the field of political theory. At the broadest level, we might divide this period into two rough sections. The first (the liberal consensus of the 1950s and 1960s) is one of rising optimism characterized by faith in constant improvement and the possibility of social progress. The second (from the late 1960s through the end of the Cold War) is a period of retrenchment, but only of a limited sort. Commitment to large-scale social engineering fades as does the hope for substantive principles of justice. But such hope is simply transferred back to procedural approaches, as expressed through the power of the market. These eras *share* an underlying faith in the secular religion of liberal justice; they worship two sides of the same Janus-faced god. A basic certainty remains: that every problem is capable of expression *within* the scope of liberalism. This unifying belief helps explain the apparent contradictions of a New World Order that simultaneously affirms pluralism while also disseminating a universalized Human Rights Discourse. This is only a contradiction if one expects liberal political thought to hold consistent substantive content. If one instead looks to formal structure, these dueling elements may be united. The discourse of human rights, one might say, is in fact thoroughly pluralistic, insofar as it insists on *respect for the essential sameness of our difference*.²²

This context helps to explain why Rawls has so thoroughly captured the interest of liberal political theorists over the past half-century. *Theory* is perhaps *the*

²² Robert Meister, *After Evil: A Politics of Human Rights* (New York: Columbia University Press, 2011), p. 160-161.

representative text of the first period, full of optimism that difference is ephemeral and that shared principles of justice are discoverable.²³ In it Rawls asserts a categorical gap between politics and justice, with the latter being a prerequisite to the former: “the rights secured by justice are not subject to political bargaining... Being first virtues of human activities, truth and justice are uncompromising.”²⁴ Further, while justice “is marked by a conflict as well as by an identity of interests” that conflict is limited to how “the greater benefits produced by their collaboration are distributed.”²⁵ These claims appear plausible in context. Immersed in a shared world of liberal consensus and booming economic growth, it might well have seemed that the only significant matter left was determining the *fair distribution of endless growth*.²⁶

However, these dreams quickly came to appear fanciful at best, absurd at worst. A new reality imposed itself, defined by the quagmire of Vietnam, intense domestic backlash against the supposed excesses of the 1960s, retrenchment on race, oil shocks, an apparent ebb in the growth of democratization, and stagflation. The dreams of the Great Society came into disrepute, now seen as arrogant assertions of state power in the name of highly-specific (rather than universal) values, while the narrative of distributive justice was replaced by trickle-down economics. Thus, as

²³ Of course, the owl of Minerva flies at dusk and this period was coming to an end even as *Theory* was being published.

²⁴ John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University, 1971), 4.

²⁵ Rawls, *Theory of Justice*, p. 4.

²⁶ See, for example, *Theory of Justice*, p. 158 which seems to assume the possibility that growth will increasingly ease the burdens of inequality, and chapter 82, which argues that the marginal benefit of individual wealth will decline as society itself grows more wealthy. More broadly, the argument for the difference principle stems from the basic premise that relative gains are insignificant in a wealthy society. The assumptions built into this argument are among the most criticized in all of Rawls work.

Theory was overtaken by history, Rawls sought in *Political Liberalism* to build bridges that would keep its utopian potential within reach, accommodating the discontinuities and dislocations of the 70s and 80s without truly accepting the fact of difference.

But given the continued pull of political tides in the 21st century, this recuperative faith appears even more fanciful. The current era (bubbling below the surface in the 1990s and brought vividly to life on September 11th 2001) is marked by doubt in the potential for coherent, lawful social order, and by fear that ideology is essentially insuppressible. Victory over the Soviet Union has been little comfort on this front. It represented an existential threat, certainly, but communism never posed a meaningful *internal* challenge to liberalism. Its implacable opposition simply defined the terms of liberal unity. The new world order, however, is characterized by serious concerns about the capacity for liberal systems to resolve their own inner tensions.

All of this would come as little surprise to Schmitt, who observed many of the same factors at play in Weimar Germany. And the resurgence in scholarship around Schmitt's work can certainly be associated with these new conditions. While the risk of a coup in the name of defending law (the sharp edge of legality's weakness) no longer seems a particularly serious concern in the West, a more prosaic version of the same danger remains quite present. That is: actors within a legal system who seize upon the indeterminacy of law in order to disrupt the smooth functioning of its effects. Rather than launching a full frontal assault on law, they aim to subvert, disrupt, reorganize, inhibit.

The great problem, in the face of such challenges, is the lack of mechanisms to distinguish destructive anti-politics from the standard practices of intransigence meant to serve specific policy agendas. The radicalism of many contemporary political movements is not antagonistic to law *per se*, but is merely antagonistic to the particular content with which law is presently filled. For them, the political form of law, grounded in the necessity for compromise and pluralistic tolerance, lacks sufficient strength to overwhelm other closely held political commitments. Law is meant to serve those goals, not vice versa. As a result, the Madisonian premises of stable democracy are called into doubt. The idea that factional selfishness may be neutralized through empowerment of other factions depends on an underlying commitment to the survival of its existent institutions. But such a commitment cannot be secured through any legal mechanism. If a sufficiently large group of participants hold the legal functions of the system ransom, there is little that can be done.

This is the inherent limit of rule by law. It remains sustainable if its formal offices are inhabited (and its formal procedures are implemented) by those who respect its principles, but can offer no recourse against those seeking to use legal channels for the destruction of legality. That this no longer occurs in precisely the same way as it did in Weimar Germany does not alter the underlying character of the problem. Liberalism depends on the legitimacy of a political order, but provides no mechanism for locking it into place. It may describe its system of order as just but the concept of justice lacks the coercive force necessary to secure itself. It cannot generate unity, and it cannot create a community of justice.

Outline of the dissertation

The argument presented here seems to demonstrate the futility of theoretical inquiry within the Rawlsian framework. His approach is either anachronistic (presuming the values of a specific historical moment that has long passed) or too weak to restrain the force of political conflict. However, I believe that Rawls' work contains a hidden strength, a flicker of possibility that does not merely succumb to the problem of exceptionality but instead expresses it in a new and more productive way. In particular, his concept of reasonableness hints at a new concept of political identity, one capable of sustaining political legitimacy from *within* the logic of liberal justification. While this possibility is immanent in Rawls' conceptual structure, he does very little to engage it. Therefore, my project is to draw out this element, breathe life into it, and explore the implications of thinking through Rawls.

Chapter 1 develops the terms of this argument. I discuss his 'political turn' and the idea of reasonableness, noting the radical potential in these arguments as well as the ultimately constrained horizon of their articulation. Because Rawls strives above all to do justice he remains inattentive to the persistent *necessity* of injustice, and is therefore unable to articulate the value of exclusion. By asserting the fundamental commonality of reason, he breaks faith with the promise of reasonableness and transforms it into yet another (more perfectly realized) device for depoliticization. In doing so, he evacuates its meaning. Reasonableness is only powerful *because* it necessitates conversion to survive. This is what allows it to

contrast with bare pluralism (which tolerates and ignores) and colonization (which imposes its own truth upon difference). While Rawls' work provides the infrastructure for embracing this aspect of reasonableness, he lacks the conceptual tools needed to sustain this idea.

In search of support, therefore, I turn backward to explore the underlying mechanisms of legal analysis, focusing in particular on the mid-20th century debate between H.L.A. Hart and Ronald Dworkin. Each of these powerful thinkers describes important aspects of law's exceptionality. Although neither can individually escape the exceptional traps of liberal legalism, working carefully through the structure of their debate allows us to track several emergent possibilities. In **chapter 2**, I establish the terms of their debate and introduce the argument that the crucial missing referent in their conversation is the concept of a Schmittian exception. **Chapter 3** then applies this argument to Hart's positivism, focusing on the role of *emergency* as a disrupting force in legal continuity, while **chapter 4** turns to Dworkin and discusses the *pluralist* side of the exception in the transition between moral value and legal justification.

What the Hart/Dworkin debate illustrates is that the Western tradition of political jurisprudence cannot help but assert the value of following the law (for the sake of law), while simultaneously denying that any pure reason could ever exist for affirming the law *qua* law. Further, legal theory guided by these dueling impulses will constantly find itself on the horns of a dilemma: it must assert constitutional order as a bulwark against the mere happenstance of power while being unable to ever fully clarify precisely what distinguishes law from power. This expresses the core feature

of liberal order—that politics must never be allowed to present itself explicitly but must always be mediated through procedural techniques. As a result, political debates are constantly in flux. On one side are concepts of the good built on principles, norms, values. On the other side are concepts of order built on legitimacy, facts, structure. Between these two poles, debates are persistent and emphatically engaged but the only effect of such debates is to continually re-calibrate the nature of the exception: to paint that which exists outside of law as still contained within the imagination. These debates, therefore, are mechanisms for hiding the violent necessity of the exception from view. And the emblems of liberal moral order—values such as justice, fairness, equality, and liberty—are simply the vehicles for this process. Any one of these many concepts of the good may be fitted into the framework with equal success. Indeed, liberalism requires nothing other than the continual development and re-articulation of such values in endlessly diverse forms.

Thus, Hart and Dworkin's debate is simply one manifestation of a far more durable feature of liberal politics. However, if it is only a manifestation, it is nevertheless a uniquely rich and fruitful one. Digging deep into this argument helps to show the constitutive relationship of politics and law, and exposes the seam which unites them, the liberal concept of the political. By stripping away the political context of this idea and reducing it to the seemingly simple question: 'what is law?' Hart and Dworkin expose the fault lines of identity and representation that organize the liberal political order in every manifestation. Their debate pries open the unspoken heart of liberalism, the deep structure which organizes its more superficial

manifestations. While neither successfully resolves this problem, their failures are tremendously illuminative. In their work we may observe the absolute limits of both moral and legal reasoning. This then provides a system for *integrating* the legal/moral structure of liberalism with a political concept of justice.

Informed by this foray into the world of jurisprudential reasoning, **chapter 5** seeks to reconstruct the idea of justice by integrating the ideas of legal justification and political legitimacy. This begins by framing the failures of political liberalism, in order to better express its lingering strengths. We have noted that the modern era is defined by persistent shuffling back and forth between incommensurable obligations—between the dueling necessities of preserving stability and honoring pluralistic value. Rawls’ response is to accept this necessity, but to express this movement in positive terms by embracing its life-generating energy. However, he remains unwilling to truly commit to this premise. The flux of political life remains contained within a larger structure of stability defined by the shared terms of reasonableness. His hope is to construct a political identity capable of preventing the descent from flux into pure will to power.²⁷ But paradoxically, this task produces its own failure. The radicalness of reasonableness is its constitutive potential, the manner in which it builds new identity out of nothing. Rawls’ unifying logic pacifies his version of reasonableness. The result: a ship drifting at sea without sail or rudder, continually moving but never under its own power.

²⁷ See Friedrich Nietzsche, *The Will to Power*, trans. Walter Kaufmann and R.J. Hollingdale (New York: Vintage Books, 1968), pp. 330-331.

This missing ingredient in this argument is the *temporality* of justice. While Rawls' later work begins to crack open the door on the movement of justice across time, he remains unwilling to untether himself from the de-historicizing structure laid out in *Theory of Justice*. As we shall see, this is the great lost opportunity in Rawls' work. Hidden within his argument is a deep historical awareness, one that *materializes* the nomadic quality of liberal values by situating them within and throughout history.

The task is to extract this element, to breathe life into it. And in doing so, to alter the concept of justice itself. Rather than fleeing from the fact of injustice, attempting to write it out of existence by imposing the stultifying logic of pluralism, the political form of justice generates durable structures of legitimacy through active engagement with the limits of its inclusionary gestures.

Classic liberalism is *restless*, caught perpetually on the horns of a dilemma it cannot acknowledge much less resolve. The indeterminacy of its moral and political system stems from the persistent disruptive force of exceptions, gaps in its mediating structure. Its commitment to *resolving* exceptions through the imposition of rational order is doomed to failure. By contrast, the political concept of justice is *dynamic* and active. Its coherence is grounded in the necessity of concrete exclusions, and its flexibility is grounded in the *movement* of those exclusions over the course of real historical time. Political liberalism, properly understood, is characterized by the perpetual experience of risk. Its concept of justice is grounded in the capacity for incommensurable communities of value to *price* that risk over time, to develop

mutual obligations through shared experiences of indeterminacy. Justice, in this approach, is the mutual debt we all owe to one another for our collective inability to erase the burdens of history. It is the unpayable obligation owed to those whose exclusion permitted the construction of a community capable of articulating itself.

To call on justice, therefore, is to enunciate a doctrine of salvation. It speaks to the faith of a community that its exclusions may retroactively be justified, that they may be *redeemed*. The crucial movement made here is the recognition that redemption, the re-imposition of moral order, is possible only from within a unified political order.

This redemptive goal is not a unique feature of Rawls' work. Indeed, *every* modern treatment of justice includes a redemptive impulse—this is what situates justice as the mirror image of exceptionality. What is distinct about the Rawlsian approach is the promise that the redemptive character of justice may be unified with the structure of political reason. This situates justice as *both* a theological and material practice of political order. Rawls' fear of metaphysics left him unable to follow through on this promise. But we are not so constrained. My proposal is that we take the underlying logic of secularization seriously and accept that the task of redeeming injustice has passed from a mystical Other into the hands of an active, material community. Such redemption occurs within the particularity of a historical moment, but in the name of a unifying spirit.

These, then, are the terms of the argument. Liberalism is caught amidst two worlds—legality and legitimacy, fact and norm. It is materialized through the

traversal of the gap between these aspects, a journey that is plagued by inconsistencies and doubt. These doubts manifest via law's *indeterminacy*, but this is merely a shadow on the wall. The true limit of unification is the deep *exceptionality* at the heart of both law and politics. Therefore, *justice* must be re-conceptualized. If it is deployed as a recuperative, gap-filling device it will be trapped within the terms of its articulation. It must instead be affirmed in the context of *redemption*, grounded in both the irreconcilable nature of difference as well as the utopian promise of restorative belonging. And the driving force of this new approach to justice is the concept of *reasonableness*. Once extracted from the terms of Rawls' initial description, reasonableness permits a new architecture of liberal legal order, one capable of extracting the political force of the sovereign decision without descending into the chaos of arbitrary rule that this has traditionally implied.

Schmitt and a political theory of justice

My reliance on the work of Schmitt to develop these arguments will surely provoke consternation among many readers. He is a difficult and troubling figure, for obvious reasons. Despite a small boom in recent years, he remains a relatively marginal presence in mainstream liberal legal debates (particularly in the United States). To the extent that his work is discussed, it is often treated as a canonical text for those seeking to expand executive power, especially in the wake of the 'war on

terror.²⁸ This approach does have value. Schmitt certainly provides a useful framework for assessing the relationship between legislative and executive power and the place of extra-legal violence within a legal structure. However, to reduce his work to an apologia for executive power denies all of its depth and vitality. His arguments become strategic deployments, meant to serve the particular interests of existing political organizations. This formalistic treatment is easily coopted into the basic structure of liberal democracy: it produces an executive more willing to wield the tools of mass violence and coercion but no more free from the basic impulses of liberal universalism.²⁹ By removing content and context, such uses of Schmitt create an empty vessel of political capacity, ready to be captured by the very political interests that Schmitt was so concerned about holding at bay.

To those skeptical of Schmitt, this account is conclusive.³⁰ They see his work as nothing more than a stalking horse for fascism, dressed in fancier clothes by his

²⁸ An excellent recent example of this argument may be found in Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010). They use Schmitt to diagnose the weakness of legislative constraint on executive power in order to describe the growing strength of the American executive within the system of Madisonian checks and balances. For a more practical application, John Yoo drew significantly on Schmitt's work to justify the Bush Administration's torture policy. See Scott Horton, "Deconstructing John Yoo," *Harper's Magazine*, January 2008 (<http://harpers.org/blog/2008/01/fisking-john-yoo/>)

²⁹ Posner and Vermeule, for example, use Schmitt to conclude that political constraints on the executive are sufficient to tie it to the basic structure of liberal values (Posner and Vermeule, *The Executive Unbound*, pp. 5-6, 11-13). They also explicitly "reject his political extremism, which is not justified by his critique of liberal democracy but requires additional assumptions about political psychology that are implausible," and seek only to deploy his argument in "suitably institutional and pragmatic terms," (pp. 32-33). The anodyne version of Schmitt found here bears little resemblance to his actual work. His arguments about liberalism, democracy, the friend/enemy distinction, and theology are all intertwined. To detach them might therefore be read as little more than an attempt to neutralize and depoliticize Schmitt himself.

³⁰ See, for example, Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006), particularly p. 56 and p. 89. Ackerman argues that Schmitt's take on emergency provides an important intervention on the subject, but trends into melodrama and therefore risks undermining the positive aspects of liberal democracy.

contemporary acolytes. But this is far too dismissive. The increasing tendency for legal structures to push the business of politics out of sight is a genuine problem. The dangers of exceptionality expose a disjuncture *within* the practices of liberal theoretical inquiry, one that cannot be seen through the standard techniques of justification. To discuss exceptionality in the context of Schmitt is to regard him as a provocateur, or perhaps a “diagnostician” of the illnesses in liberalism.³¹ He forces our attention back onto the discrepancies and blank spaces in between justice and legitimacy, fact and norm, right and good, morality and law. These gaps are immanent within every treatment of liberal political philosophy, but are virtually impossible to pin down. They hide in plain sight, buried in assumptions that resist articulation.

The power of Schmitt’s critique, then, is its dualistic treatment of liberal principles. Unlike many other critics, whose objections are pitched at a register of shared understanding, Schmitt begins from the premise that politics is *essentially* chaotic and incomprehensible. His emphasis on the necessity of exclusion shifts the register of analysis by challenging the basic precept of secularized democracy that its values are accessible to everyone. Unlike, for example, communitarian or feminist critics, there is no obvious route for *including* Schmitt within the sphere of acceptable justification. He is purely alien, an antagonist whose frame of reference admits no possibility of collaborative engagement. However, in an important sense, his work also closely parallels the structures of liberal legalism in that he also prioritize the role

³¹ Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale University Press, 2005), p. 232.

of law in establishing a connection between politics and social life. For both Rawls and Schmitt, politics is organized around the question: *who* is capable of adjudicating the necessity for coercive force in conditions of reasonable disagreement.³²

These two aspects of Schmitt make him a uniquely fruitful interlocutor for political liberalism. His arguments call attention to the existence of irreconcilable differences *within* the structure of legal order. The Schmittian critic cannot be incorporated into the community of law through the force of persuasion but neither can she be driven to accept the legitimacy of her exclusion. She provokes a crisis in liberal justification by exposing the limits of deliberative engagement. In the end, exclusion must be undertaken on terms that exceed the scope of justification; the only question is whether they may be satisfactorily redeemed.

It is worth noting that Rawls himself saw Schmitt primarily as a threat, rather than a serious interlocutor. The only explicit reference to Schmitt in his published work references the danger of intellectuals who abandon hope in a sustainable political order.³³ Schmitt, in this account, is simply a cipher for the danger of unremitting pessimism about political utopias.

Elsewhere, in a lecture detailing his work that would eventually lead to *The Law of Peoples*, Rawls argues that every society is assumed to work off of a political conception of justice. However, he points out in a footnote:

Of course this conception may be a null conception, as it were, which rejects all conceptions of right and justice as without force and adopts a purely predatory attitude toward other societies as friends or foes who are treated accordingly. A

³² Miguel Vatter, "The Idea of Public Reason and the Reason of State: Schmitt and Rawls on the Political," *Political Theory* 36, no. 2 (April 2008), p. 244.

³³ Rawls, *Political Liberalism*, p. lx.

paradigm case of this is Carl Schmitt who in his *Der Begriff des Politischen* [sic] (Munich, 1932) took the opposition of friend and foe as the origin of politics. These peoples we shall call ‘outlaw states’ and discuss how democratic peoples are to act toward them in III:13-14.³⁴

By this account, Schmitt represents an anti-liberal strain of political thought, one which cannot (and should not) be incorporated into political liberalism. Further support for this reading can be found in “The Idea of Public Reason Revisited,” where Rawls obliquely references the Schmittian concept of the political:

Those who reject constitutional democracy with its criterion of reciprocity will of course reject the very idea of public reason. For them the political relation may be that of friend or foe, to those of a particular religious or secular community or those who are not; or it may be a relentless struggle to win the world for the whole truth. Political liberalism does not engage those who think this way. The zeal to embody the whole truth in politics is incompatible with an idea of public reason that belongs with democratic citizenship.³⁵

In each of these cases, Rawls appears to entirely dismiss Schmitt: the friend/enemy distinction is treated as antithetical to the fact of reasonable pluralism, and the only concept of justice available to Schmitt is a null one.

Given this clear sense of distaste, Rawls may not seem an ideal candidate for engaging with the issues raised by Schmitt. However, this is precisely why this

³⁴ John Rawls, “Philosophical Problems of the Law of Peoples,” in Law of Peoples, P.U. seminar, 1995 April 1, The Papers of John Rawls, Harvard University Archives, HUM 48 Box 15, Folder 10, p. 25.

³⁵ John Rawls, “The Idea of Public Reason Revisited,” In *The Law of Peoples: With The Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), p. 132. It is difficult to read this as anything other than a commentary on Schmitt. Rawls made this argument even more explicitly, and in terms that make his reference to Schmitt even clearer, in an earlier formulation prepared for a 1994 seminar at NYU. There he writes: “Those who reject democracy will of course reject public reason. For them the political relation may be that of friend and foe and may call for a life and death confrontation with the enemy; or an unceasing struggle to win the world for the whole truth.” John Rawls, “Political Liberalism, Public Reason, Ten Questions,” December 8, 1994, The Papers of John Rawls, Harvard University Archives, HUM 48 box 50, folder 13, p. 60. For background on Rawls’ position here, see *Theory*, p. 136, where he argues that egoism is not itself a concept of justice, but rather the *alternative* to justice. This framing clarifies the foundation of Rawls’ belief that arguments like Schmitt’s simply fall outside the scope of the normative project of justice.

project is crucial. Schmitt embodies an important blind spot in both Rawls and liberal theory writ large. That Rawls insists on reading him as a philosophical effort to ‘win the world for the whole truth’ clarifies this problem. In Schmitt’s work, the political distinction generates a legal order and the normative forms that come with it. This, by definition, means that political values are only ever devoted to producing a specific and contextual truth. The ‘whole truth’ Schmitt leaves to idealist theories such as liberalism.³⁶ Furthermore, Rawlsian political liberalism shares this basic mode of analysis, suggesting a closer alignment than Rawls was willing to credit.

Clarifying the significant overlap in their work provides the foundation for a more productive discussion of their remaining differences. And, as we shall see, the best reading of Rawls is one that emphasizes the politicization of justice. That Rawls himself was stridently opposed to this interpretation of his work only demonstrates the necessity of stepping outside the limited terms of his articulation.

Our task is to dig into these gaps, to accept the centrality of faith in liberal utopianism, and to acknowledge that reasonableness is a political concept in need of redemption rather than a pre-political and universal identity. That is: to accept the reality that liberal justice demands conversion, not simply persuasion.

³⁶ See Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press, 2008), p. 184.

Chapter One – Rawls and the Reasonable

A Theory of Justice is arguably the most significant work of political philosophy in the 20th century. It attempts nothing less than the unification of moral philosophy around the mutually acceptable rational terms of agreement. In staking out this objective, Rawls redefined the entire scope of inquiry into the concept of justice by insisting on a return to the comprehensive normative goals of the 19th century. But he does not simply reiterate those arguments. Instead, *Theory* promises to advance the old objectives of comprehensive and universalizable justice by utilizing new approaches in economics and game theory—precisely the same work that had seemingly dismantled the dream of universal moral reasoning over the preceding several decades. Arrow’s impossibility theorem, for example, shows that rational disagreement cannot be forced into equilibrium, since the procedures needed to accommodate differences of opinion cannot themselves be validated.¹ Based on this premise, it seems impossible to unify the two strains of liberalism—its commitment to individual agency and its endorsement of democratic decision making. Even under the most reasonable conditions, democracy cannot produce rationally determinate results.²

In *Theory* Rawls attempts to show that game theoretical techniques can be massaged to produce objectively valid procedures for ranking options. His concepts—the original position, the veil of ignorance, the difference principle—are

¹ Kenneth Arrow, “A Difficulty in the Concept of Social Welfare,” *Journal of Political Economy* 58, no. 4 (August 1950).

² Amartya Sen, *The Idea of Justice* (Cambridge: Belknap Press of Harvard University, 2009), pp. 91-92

all designed to recalibrate the principles of his philosophical forbearers engage the analytic limits of a newly economized standard of moral reason. The goal of these techniques is to isolate the expression of rational judgment by removing its association with the biases and subjective opinions of one's social location.³

Given these tactics, Rawls has been an easy target for those inspired by Schmitt's work. His efforts to rationalize the concept of justice seem to exemplify the depoliticized core of liberal political thought.⁴ This chapter will argue, however, that Rawls' work contains a far more nuanced understanding of the political than is usually credited. While, the critics *are* right to characterize Rawls as seeking to neutralize and limit the damage from wholesale political engagement, they err in treating this effort as simply another variant on liberal depoliticization. The Rawlsian argument is more complex. Imposing limits on certain forms of political activity does not constrain politics as such; indeed, genuine political order cannot exist *without* such limits. What Rawls offers is the possibility that, by drawing the lines in the right fashion, liberalism may unite the goals of both justice and legitimacy without pushing either into a subordinate role.

To make this case, I focus primarily on Rawls' post-*Theory* writing, in particular on *Political Liberalism* and the work that surrounds it. My argument is that his late work shifts the emphasis from the imposition of normative unity to the more

³ Rawls, *Theory of Justice*, pp. 251-252.

⁴ See, for example: Chantal Mouffe, "Carl Schmitt and the Paradox of Liberal Democracy," in *The Challenge of Carl Schmitt* ed. Chantal Mouffe (New York: Verso, 1999); William Rasch, *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political* (London: Birkbeck Law Press, 2004); Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004), pp. 3-4.

nuanced task of justifying and expressing the coercive force of political violence. As noted in the introduction, his shift in emphasis has provoked much debate among both supporters and critics. Therefore, one crucial task of this chapter will be to isolate the differences and evaluate their meaning. I argue that this analysis must escape the conceptual binary through which the development in his work is treated as either *break* or *refinement*. It is both of these things and neither. The disruptive potential of political liberalism was not entirely absent in *Theory*, nor does the commitment to rationalized unity disappear in the later work. As we shall see, it is better to treat the radical components of Rawls' work as emergent possibilities embedded throughout his oeuvre—possibilities which received greater attention over time, but which are never brought wholly into the light.

With this in mind, I conclude the chapter by discussing the limits of Rawls' work and the lines he was unable or unwilling to cross. Despite the enormous potential in his methods of theoretical engagement, his sustained commitment to certain principles of rational deliberation mark a powerful barrier to the successful development of political liberalism. Tracing the limits of his work, the unspoken exceptions that he cannot engage, provides the staging ground for the turn to legal philosophy in the following chapters.

I. Rationality and reasonableness

The key to unlocking political liberalism is the idea of reasonableness. The notion of reasonable justification is, I believe, a durable feature across all of Rawls' work, albeit one that remains hidden in many cases. It exists as an attitude, a form of expansive interpretive generosity embedded in his approach to theoretical reasoning.⁵ However, the spirit of reasonableness is often obscured behind a different strain of Rawls' work: his commitment to the idea of rationality. He attempts to unravel these connected-but-distinct concepts in *Political Liberalism*, but in order to successfully unpack those arguments, we should first turn to the way rationality functions in his earlier formulation.

Theory and rational judgment

Rationality is crucial to *Theory*. In the first place, it sets a limit on the viability of moral theories that seem to require individuals to pursue irrational goals. Utilitarianism, for example, creates a paradox in which the good is *defined* by individual desires but can only be *achieved* by the sublimation of those same desires.⁶ Second, rationality structures our sense of justice. Indeed, the principles of justice are defined quite literally as those “that free and rational persons concerned to further their own interests would accept in an initial position of equality.”⁷ Rawls' goal is to

⁵ One need only read his lectures on the history of moral and political philosophy to see this spirit at work. For all that Rawls' *theoretical* work is often ascetic and intensely rationalized, his interpretive work is entirely different. His approach to his predecessors is charitable, engaged, honest, and intensely humble.

⁶ Rawls, *Theory of Justice*, p. 14.

⁷ Rawls, *Theory of Justice*, p. 11.

free the capacity for rational judgment from the polluting influence of purely subjective will.

Thus: the original position, which is designed to distinguish the true form of rational deliberation from its false association with pure self-interest.⁸ The veil of ignorance falls, blocking out the sight of individual circumstance or desire.

Presumably, this allows one to articulate a purified concept of the good: to seek “the satisfaction of rational desire.”⁹ This ‘thin’ concept is crucial to the entire operation of justice as fairness, because it is the standard against which all other evaluation is possible. In a sense, the original position is nothing but a metaphorical representation of the potential for rational judgment, the one feature of moral personality unrelated to individual interests. It is universal in that its conclusions will be identical regardless of “when one takes up this viewpoint, or who does so: the restrictions must be such that the same principles are always chosen.”¹⁰ Interpersonal deliberation is not even necessary—because all individuating characteristics are removed, one person would reach the same conclusion as any other. ‘Goodness as rationality’ is therefore the foundation stone upon which the larger edifice of justice is constructed.¹¹

Of course, many critics immediately noted that this ‘thin’ theory of the good is not nearly so limited as Rawls wishes. It contains a variety of assumptions (the centrality of the individual, the efficacy of reason, the universality of judgment, etc.)

⁸ Rawls, *Theory of Justice*, p. 18.

⁹ Rawls, *Theory of Justice*, p. 93.

¹⁰ Rawls, *Theory of Justice*, p. 139.

¹¹ Rawls, *Theory of Justice*, pp. 396-397.

that are neither neutral nor universal but instead emerge from a particular time and cultural location.¹² For these critics, Rawls writes specifically liberal values into his argument at the zero point and thereby corrupts any further conclusions that might be drawn.

It is curious, therefore, how little justification Rawls provides for the presumptions that go into this ‘thin’ concept of the good. It will be legitimated, he hopes, in the process of cyclical reasoning that eventually reaches reflective equilibrium. This requires working from “provisional fixed points which we presume any conception of justice must fit” because even the original position cannot extinguish the necessity of differentiation. But once the act of evaluation begins those default assumptions may be called into question: “even the judgments we take provisionally as fixed points are liable to revision.”¹³ The test is not whether ‘goodness as rationality’ is objectively true but only whether it produces a system of reasons capable of reflexive, universalizable moral justification.

However, this argument is inherently limited. Rawls’ reference to ‘provisional fixed points’ only covers specific moral judgments, not epistemological structures. This is clear in the examples he provides, including the sense that “religious intolerance and racial discrimination are unjust”¹⁴ and that “no one deserves his place in the distribution of native endowments.”¹⁵ Elsewhere he also suggests that equality

¹² See Adina Schwartz, “Moral Neutrality and Primary Goods,” *Ethics* 83 (1973) and Thomas Nagel, “Rawls on Justice,” *Philosophical Review* 82 (1973).

¹³ Rawls, *Theory of Justice*, p. 20.

¹⁴ Rawls, *Theory of Justice*, p. 19.

¹⁵ Rawls, *Theory of Justice*, p. 104.

of liberty is a fixed point as well.¹⁶ These seem to be relatively stable moral valuations from which further arguments may be deduced, allowing the construction of a system of moral reasoning that may eventually circle back around to verify their truth. But this reflective approach provides no entry point into the question of how *justification itself* may be justified. One value necessarily stands outside the system of verification: the intrinsic goodness of rationality. And while this may appear quite thin, such is the nature of the problem of exceptionality. Even the smallest gap is corrosive and potentially world-shattering.

One possible response, hinted at in several places by Rawls, is to argue that rationality itself *is* tested within reflective equilibrium.¹⁷ However, this intimation is vague at best and difficult to support. After all, rationality is different from the other ‘thin’ assumptions insofar as it constitutes a framework for reasoning, rather than the content of any particular deliberate judgment. If rationality remains the frame of reference for *all* judgments, then it structures the entire process. Thus, even if the principles of justice can be made to hang together with the notion of ‘goodness as rationality’ this would only demonstrate that the reasoning is circular—it presumes certain facts and then works backwards to prove them. Such circular reasoning, when framed in terms of rationality, asserts a universality which cannot be justified by its own process. One might therefore say that, of all the concepts smuggled into the original position, the most important one is also the most obvious: rationality itself.

¹⁶ Rawls, *Theory of Justice*, p. 206.

¹⁷ See Rawls, *Theory of Justice*, Chapter 9: “Some Remarks About Moral Theory,” in particular p. 51.

Rawls does acknowledge this danger in *Theory*, in a limited but interesting way. In his discussion of toleration, he admits that the original position is unsuited to metaphysical truth-claims. Therefore, rational judgment cannot philosophically rule out the potential validity of intolerant positions. Just as they cannot be proven, so they cannot be disproven via general skepticism. As such, those who refuse to accept the principles of justice are not necessarily wrong; all that can be definitively said is that they cannot be reasoned with.¹⁸ This is a surprisingly radical admission, insofar as it sharply constrains the remit of reason.

However, he does not pursue this idea to its apparent conclusion and instead returns to the fold. Within his theoretical approach, the claim that someone ‘cannot be reasoned with’ is tantamount to declaring their irrationality. Thus, while Rawls encourages toleration for wide-ranging beliefs, such toleration must end for those that prove themselves “incapable of justice.”¹⁹ In these cases, rationality may be legitimately imposed upon them via state coercion. It does not matter if they accept the decision; all that matters is that they cannot *rationally* object.²⁰ This invocation of coercion in the name of rationality pushes Rawls perilously close to the circumstance described by Schmitt wherein: “The adversary is thus no longer called an enemy but a disturber of peace and is thereby designated to be an outlaw of humanity.”²¹

This distinction between enemy and outlaw is crucial. Unlike an enemy, the outlaw does not represent an alternative ideology or defensible metaphysics, because

¹⁸ See Rawls, *Theory of Justice*, Chapter 35: Toleration of the Intolerant,” in particular p. 217.

¹⁹ Rawls, *Theory of Justice*, p. 219.

²⁰ Rawls, *Theory of Justice*, pp. 575-576.

²¹ Carl Schmitt, *The Concept of the Political*, expanded edition, trans. George Schwab (Chicago: University of Chicago Press, 2007), p. 79.

the model of rationality cannot acknowledge the existence of external danger. The outlaw is therefore understood as a disruption to be resolved rather than a threat to be excluded. Outlaws must be policed, and through this regulation “a new and essentially pacifist vocabulary has been created. War is condemned but executions, sanctions, punitive expeditions, pacifications, protections of treaties, international police, and measures to assure peace remains.”²²

Accordingly, the fight to secure humanity against such threats is conceptualized as a ‘war against war itself,’ a war to restore peace. And the sweeping character of this goal pushes its scope far beyond the limited form of war to generate political unity. Once the enemy is reconfigured as a moral or economic problem, it demands absolute destruction. It is not enough to defeat one’s challengers; they, and the violence for which they stand, must be cleansed.²³ Such a moral war, waged to defend the shared ideal of a universal and secular truth, cannot be checked by external necessity because it denies the very notion of externality. It is a “crusade” and “the last war of humanity.”²⁴ In this way, ‘humanity’ is utilized as a conceptual lever—which permits the infiltration of political necessity under the guise of post-political enforcement. As Schmitt says: “To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.”²⁵ The result: a

²² Schmitt, *The Concept of the Political*, 79

²³ Schmitt, *The Concept of the Political*, 36.

²⁴ Schmitt, *The Concept of the Political*, 79

²⁵ Schmitt, *The Concept of the Political*, 54

battle over how to define humanity, which is *framed* as if it were a police action to defend the determinate and preexisting fact of universal human value.

In short, the built-in assumption of rationality exposes the entire apparatus of justice as fairness to an irresolvable problem of identity: its universal frame writes specific assumptions into a notion of humanity as such. The problem with outlaws is not that they hold different values but that they have natures fundamentally incompatible with justice. As such, the actions necessary to restrain and punish them become part of the broader process by which the human is distinguished from the subhuman, so as to expel the latter.²⁶

Wittgenstein and the limits of rationality

This argument suggests that too much is being asked of rationality in *Theory*, something that Rawls himself comes to acknowledge in his later work. Before developing those arguments, however, it will be helpful to approach the problem of rationality from a different angle: that of Wittgenstein's work on ordinary language. This turn to Wittgenstein will be useful in its own right to better illuminate the nature of *Theory*'s limitations, but also speaks to the long arc of Rawls' work. Though his published writings contain relatively few direct references, Rawls read Wittgenstein extensively,²⁷ and one of his key early influences was Norman Malcolm who was

²⁶ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G.L. Ulmen (New York : Telos Press, 2003), p. 104.

²⁷ In his archives, one may find an extensive set of personal notes by Rawls on *Philosophical Investigations*, written at an unspecified date though seemingly from the late 1940s. John Rawls, "Wittgenstein investigations" [undated], The Papers of John Rawls, Harvard University Archives, HUM 48 box 9, folder 2.

himself a rigorous student of Wittgenstein.²⁸ Furthermore, a number of his key concepts are clearly influenced by ordinary language philosophy.²⁹ Indeed, the shadow of Wittgenstein stretches across his whole career, as can be seen in his personal notes and correspondence toward the end of his life.³⁰

As we shall see, the Wittgensteinian approach is uniquely appropriate for diagnosing the wrong turns made in *Theory*—particularly its goal of deducing a concept of justice from the premise of ‘goodness as rationality.’ This sort of elaborate philosophical architecture is precisely the sort that Wittgenstein routinely criticizes. Rather than conceiving of justice as a property inherent in rationality, divorced from its form of life, he instructs us to consider only the ordinary way in which justice is spoken. Thinking about justice in this way requires asking *who* it is that conceives of justice at all and *how* do they do so? In *Theory*, Rawls uses the original position as a device to eliminate the problem of bargaining.³¹ What this misses, however, is that bargaining is not simply a function of individual interests. It is also a basic feature of

²⁸ Thomas Pogge, *John Rawls: His Life and Theory of Justice*, trans. Michelle Kosch (Oxford: Oxford University Press, 2007), pp. 10-14.

²⁹ For example, the notion of reflective equilibrium in *Theory* is clearly influenced by, if not directly traceable to, Wittgenstein’s discussion of linguistic order.

³⁰ See, for example, Rawls’ early work on political communities which draws heavily on Dworkin’s interpretation of Wittgenstein. John Rawls, “Political Liberalism, notes and bibliographies,” The Papers of John Rawls, Harvard University Archives, HUM 48 box 29, folder 2. Also see Rawls’ correspondence with H.L.A. Hart, which indicates a desire to focus on *practices* of justice, rather than *theories*. In one letter he articulates the desire to move away from a theory of justice and instead seeks merely a ‘conception’ of justice. John Rawls, letter to H.L.A. Hart, April 22, 1981, The Papers of John Rawls, Harvard University Archives, HUM 48 box 39, folder 34. In another note he argues that public reason relies on a “family of liberal political conceptions of justice” and derives its justification by reference to a criterion of reasonability. John Rawls, “Notes for Chicago,” in [Dewey Lecture in Jurisprudence at University of Chicago Law School] New Chicago PR [Public Reason, 1995-1996], The Papers of John Rawls, Harvard University Archives, HUM 48 box 50, folder 1, p. 4.

³¹ Rawls, *Theory of Justice*, p. 139.

the *grammar of deliberation* itself.³² Without a thinker to conceive the principle, the principle itself does not exist in any meaningful fashion—and such thinkers are only capable of thought from within a specific frame of linguistic experience.³³ If truth depends on the perspective from which it is seen, then the device of the original position does not just strip away individual desires; it strips away the very capacity for judgment. The problem here is well-captured by Wittgenstein:

The more narrowly we examine actual language, the sharper becomes the conflict between it and our requirement. (For the crystalline purity of logic was, of course, not a result of investigation: it was a requirement.) The conflict becomes intolerable; the requirement is now in danger of becoming empty. -- We have got on to slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also, just because of that, we are unable to walk. We want to walk: so we need friction. Back to the rough ground!³⁴

The original position is a rigorous and beautiful abstraction, which strives to eliminate all the frictions of living experience. This permits a very powerful sort of insight, because those frictions produce dislocations and render meaning ragged and untidy. However, the slippages and seeming gaps are also the underlying necessary *conditions* for meaning. The thin theory of the good that remains in the original position is effectively a sort of private grammar—issuing judgments without context or reference to existent meaning. As such, it can play no role in a real language game that must produce shared meaning.³⁵ If the aim of philosophy is to “shew the fly the

³² See Habermas, *Between Facts and Norms*, p. 10-11

³³ See Wittgenstein, *Philosophical Investigations*, §325: “What people accept as a justification—is shewn by how they think and live.”

³⁴ Wittgenstein, *Philosophical Investigations*, §107.

³⁵ Wittgenstein, *Philosophical Investigations*, §269.

way out of the fly-bottle,”³⁶ then argument from the original position is without purpose.

This Wittgensteinian assessment could be interpreted pessimistically, as shutting the door on any definitive statement about justice. In the end, the argument might go, all that one may say of any political value is: ‘this is simply what we do.’³⁷ However, while this is a limit on justification it is not the *end* of justification. One must still consider *who* constitutes the ‘we’ in the statement ‘this is simply what we do.’ The dangerous weakness of liberalism is its helplessness in the face of this task. It seeks to promulgate justice but cannot acknowledge that this requires first answering the question: ‘whose justice?’ Therefore, one of the key hopes for political liberalism is that it can clarify certain practices as the genuine markers of collective practices and purposes. That is: that it may successfully articulate a simple ‘this is what we do’ as the basis of all political unity. While Rawls does not use this precise terminology, his move from *Theory* to political liberalism suggests a keen awareness for the basic concern raised here.

The fact of reasonable pluralism

The shift in Rawls’ work is grounded in a frank admission that his previous approach had leaned too heavily on the force of rationality. While he does not want to abandon the notion that rationality (appropriately filtered through the veil of ignorance) provides a powerful tool for assessing shared political obligations, the

³⁶ Wittgenstein, *Philosophical Investigations*, §309.

³⁷ See Wittgenstein: “If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: ‘This is simply what I do.’” *Philosophical Investigations*, §217.

story in *Theory* leaped too quickly over the manner in which the stability of such agreement could be achieved. Rationality alone, he now says, may border on the “psychopathic” if it is directed purely inward.³⁸ Given this, while rational deliberation can deduce the principles of justice it cannot guarantee their collective adoption because it generates no public obligations.³⁹

Therefore, rationality must be supplemented with the idea of reasonableness: a separate, distinct, and necessary virtue of persons in a successful political society.

The core feature of reasonableness is the element of reciprocity:

Persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them; and they are ready to discuss the fair terms that others propose. The reasonable is an element of the idea of society as a system of fair cooperation and that its fair terms be reasonable for all to accept is part of its idea of reciprocity.⁴⁰

Reasonableness is defined here by the willingness to accept principles not simply because they are rational but also because they create shared mutual obligations. We might say that rational deliberation identifies the obligations of justice, while reasonableness explains why those obligations are adopted.

This distinction between reasonableness and rationality provides an answer to the dilemma posed above. The reasonable is not derived from rationality, but is an independent and complementary idea. Therefore, it can provide the external frame of

³⁸ Rawls, *Political Liberalism*, p. 51.

³⁹ Rawls, *Political Liberalism*, pp. 53-54.

⁴⁰ Rawls, *Political Liberalism*, pp. 49-50.

reference needed to justify inserting the ‘thin’ concept of the good into the original position.

However, this appreciation for the independent natures of the reasonable and the rational creates a new barrier to political stability. Reasonableness can only mutually verify the thinnest concept of the good; beyond that limit, a wide range of values will flourish. Therefore, universal agreement on the good cannot be derived through rational deliberation and cannot become the basic for a well-ordered society. This is the “fact of reasonable pluralism,”⁴¹ which is distinct from the mere fact of pluralism as such, in that citizens do not simply *happen* to disagree; they are *right* and *justified* in doing so. Reasonable pluralism is characterized by “irreconcilable latent conflict” and establishes a hard limit on the potential for truly collective identity.⁴² No concept of the good can generate coherence, because each concept forecloses alternative reasonable conceptions. This is true even of rationality itself; it may appear to transcend difference but in fact merely calcifies a particular mode of reason.

This lock may be picked by recursively analyzing the terms of its articulation. The fact of reasonable pluralism dooms any hope for collective identity found in a shared concept of the good. But since reasonableness is defined quite simply as the willingness to acknowledge *precisely this fact*, it generates the connective tissue for a different sort of unity. Any reasonable doctrine, by definition, will affirm reasonableness as a value and they will do so without demanding agreement that it is universally true. It is a metric for conducting public reason on terms that are

⁴¹ Rawls, *Political Liberalism*, p. xvii.

⁴² Rawls, *Political Liberalism*, p. xxvi.

acceptable to all, by avoiding the questions of truth that plague all other concepts of the good.⁴³ To say of liberalism ‘this is simply what we do’ is to emphasize the hope for shared communication embedded in that phrase. This is the basis for a mutually reasonable political order.

With this argument, Rawls retains the essential moral character of justice as fairness, but seeks to balance that impulse with an insistence on reciprocal respect.⁴⁴ Such respect is preserved by separating the public conception of justice from the comprehensive notions of the good affirmed by the members of a political society. Because unified agreement about the nature of the good is impossible, the more limited project is agreement among reasonable peoples about the terms of their mutual obligations.⁴⁵ The reasons for accepting those obligations may differ; all that is required is that all parties find reasons sufficient for themselves. This is called an “overlapping consensus.”⁴⁶

The division of labor involved in this concept is crucial. Rational deliberation of the sort found in *Theory* remains crucial; it establishes the political concept of justice by identifying the terms of social engagement that would be acknowledged as legitimate in the original position. But the *survival* of this political concept depends on the independent endorsements of reasonable doctrines, each undertaken for their

⁴³ Rawls, *Political Liberalism*, p. xx.

⁴⁴ This point is drawn out in an illuminating fashion by Charles Larmore in “The Moral Basis of Political Liberalism,” *The Journal of Philosophy*, 96, no. 12 (December 1999). Larmore notes that Rawls’ sense of the reasonable stems from “a principle of *respect for persons*.” See p. 607, italics in original.

⁴⁵ Rawls, *Political Liberalism*, p. 38.

⁴⁶ See John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Belknap Press of Harvard University, 2001), pp. 32-38. Also see Rawls, *Political Liberalism*, “Lecture IV – The Idea of an Overlapping Consensus.”

own reasons. The dynamic relationship of shared obligation and independent valuation is captured in his aphorism that “the just draws the limit, the good shows the point.”⁴⁷ The law provides mechanisms of validation, but must be affirmed independently. Furthermore, the ‘good’ referred to here no longer ‘thin’ but is now *multifaceted*. Any particular good may serve as a reason sufficient for each individual agent, but no single notion of the good is necessary. In this way, political liberalism establishes the normative terrain of politics, but leaves open the motivation for adherence. It is a concept of justice not *founded* on shared notions of the good but still broadly *consistent* with them.⁴⁸

⁴⁷ Rawls, *Justice as Fairness*, p. 141.

⁴⁸ Rawls, *Political Liberalism*, p. 147.

II. Political Liberalism: break or continuity?

In light of these arguments, we must now return to analyzing the nature of Rawls' shift. Do we agree with his own judgment that *Political Liberalism* is an amendment rather than a fundamentally new approach?⁴⁹ Is political liberalism merely the remnant of a once-vibrant idea, ground down by the passage of time and the weight of historical change? Is it an act of retrenchment, of surrender, or does it strike out in search of new frontiers?

In this section I cautiously engage this issue and attempt to demonstrate a genuine change in the late Rawls. The nature of this shift, though, is difficult to parse—partly due to Rawls' own limited articulation and partly due to the weight of interpretive tradition that has guided our reading of these matters. Still, buried beneath these layers of confusion is a significant move whereby Rawls effectively re-characterizes the *fundamental*, rather than merely the ephemeral, nature of liberalism. The values of *Theory* are not simply reiterated; they are transmuted at the level of the form as well as content.

The nature of this shift (as well as its ultimate limits) is best understood by returning to the Schmittian critique of liberalism. This is, undoubtedly, a somewhat counter-intuitive position. A more straightforward deployment of Schmitt would emphasize the deep continuity across Rawls' work, which manifests through the

⁴⁹ Rawls was adamant that *Political Liberalism* should not be construed as a repudiation, or even a significant revision, of the earlier doctrine except on the limited question of how stability is possible. He would certainly not embrace the idea that it proposed an entirely different mode of justification, with the attendant ontological and epistemological implications. See John Rawls, "Discussion of PR [Public Reason] Revisited at Center for Ethics and Prof?," 1997 October 30], The Papers of John Rawls, Harvard University Archives, HUM 48 box 42, folder 19.

appearance of substantive change. As noted in the introduction, liberalism may be expressed in two radically different ways: as a universalizing narrative of reason or as a fragmented narrative of pluralism. These two halves are not contradictory but instead reveal an essential restlessness. By this account, Rawls might be seen as simply changing sides without challenging the overall structure of thought. If so, there would be little point in attempting to theorize within the Rawlsian framework, which expresses the values of its era but lacks the heft necessary to instantiate itself beyond this horizon. It is anachronistic, an artifact in the history of philosophy, not a living object. While Rawls claims to acknowledge the importance of historical conditions, he continues to mistake the unique circumstances of the post-war period, particularly in the United States, for a universalizable framework, and therefore insists that *principles* of justice may be transhistorical, even if their *application* is contextual. With this claim, Rawls embodies the true continuity of liberalism: its deeply anti-historical structure.⁵⁰

However, my goal is to turn this argument on its head and reverse the direction of its application. Critics are *right* to treat these two phases of Rawls' work as contiguous. But it is wrong to treat see connection as the end of analysis. Implicit throughout Rawls work and brought closest to the surface at the end of his career is a *dynamic* practice of liberal theory, exemplified by his treatment of reasonableness. In it we can observe the faint outlines for a liberal concept of justice capable of operating *outside* the depoliticizing trap of the human/inhuman distinction. Instead of

⁵⁰ Sheldon Wolin, "The Liberal/Democratic Divide: On Rawls's Political Liberalism," *Political Theory* 24, no. 1 (Feb 1996), p. 113.

simply recapitulating the standard project of political theory (to recuperate necessity and redefine it as justice), Rawls cracks open a window on a different theoretical possibility. That is: **to redeem history without erasing it**.

This section will explore that possibility by looking at Rawls' fraught relationship with the idea of political community. Doing so will illuminate both the radical possibilities within the Rawlsian attitude toward justification as well as explore why Rawls himself failed to conceptualize his argument in these terms.

Rawls, political communities, and the communitarian objection

The argument for political liberalism is delicately poised in relation to the problem of communities and justification. On the one hand, Rawls is emphatic that political legitimacy cannot be grounded in shared normative reasons. That project, Rawls thinks, is doomed to failure given the fact of reasonable pluralism. His attempt to square this circle is located in the collaborative relationship between the rational and reasonable. Reasonableness is meant to guarantee *endorsement* of limited political agreement, the content of which will be *determined* through rational deliberation.

This contrasts with *Theory*, which argued that the long-term stability of a well-ordered society would arise naturally through the communal acceptance of a shared set of moral sentiments.⁵¹ Those sentiments do not derive in a metaphysical sense from the truth of justice, but grow naturally out of a community that

⁵¹ Rawls, *Theory of Justice*, p. 458. More broadly see chapters 69-75.

collectively comes to embrace justice through their use of practical reason. That is: as a society builds its legal order around a theory of justice, its social practices will organically evolve to incorporate the tenets of justice into its interpersonal relationships. Politics and society are therefore interconnected, insofar as moral principles provides the basis for justification in both locations. And this is the only viable model of political stability because only an approach premised on the moral valuation of the individual can inculcate the sense of personal worth necessary to prevent dissension.⁵² His thought was that any rational subject would affirm the principles of justice and that this affirmation itself would provide the binding resin with which a well-ordered society could be held together. In effect, the moral value of justice will catalyze a community of justice as well.

This element of *Theory* aroused furious critiques from communitarians, who argued that the attempt to locate justice in the disassociation of an individual subject from her social context pollutes the entire chain of reasoning.⁵³ It dogmatically *presumes* unity at the level of social identity, which writes a specifically liberal worldview into its entire process. In doing so it categorically denies the potential for meaning in a communal identity. It enforces, rather than describes, a universal character of reason.

Given this, one might logically conclude that Rawls' political concept of justice was meant in part to respond to these concerns. However, Rawls repeatedly

⁵² See Rawls, *Theory of Justice*, "Chapter 76 – The Problem of Relative Stability."

⁵³ For an overview of these arguments, see Michael Walzer, "The Communitarian Critique of Liberalism," *Political Theory* 18, no. 6 (Feb 1990); Amy Gutmann, "Communitarian Critics of Liberalism," *Philosophy & Public Affairs* 14, no. 3 (Summer 1985).

insists that this is not the case. For example, in the introduction to *Political Liberalism* he makes a point of noting that it is not meant as a reply to the communitarian critique.⁵⁴ For him this shift, to emphasize the lingering problem of legitimacy, does not owe anything to communitarianism, because its necessity can be determined solely from within the logical structure of *Theory*. The problem is wholly “internal to justice as fairness” and does not require any external theoretical support.⁵⁵ In his personal notes, he goes even further: stating that the communitarian critique is “not serious” and stems from a misreading of his argument.⁵⁶ The emphatic nature of this dismissal is peculiar, to say the least. Rawls was famously generous and effusive in praise of those whose criticism helped inspire developments in his work. Given this uncharacteristic vehemence, it is worth exploring *why* he believes such readings are misguided.

As a first step, we must note that although Rawls does pay obeisance to the enduring fact of pluralism, he does so unhappily. Given the fact of reasonable pluralism, society will contain a diversity of members who affirm distinct (and contradictory) notions of the good. These groups cannot be coerced and should not be driven to sublimate those particular conceptions of the good to a higher unity. The very principles that are affirmed in the initial developmental stages of justice as fairness demonstrate the injustice that would be required for such efforts. Thus, “the

⁵⁴ See Rawls, *Political Liberalism*, p. xvii.

⁵⁵ Rawls, *Political Liberalism*, p. xv.

⁵⁶ See his notes prepared for a seminar in 1997: “Nor does PL try to reply to communitarian critics, since it regards that view as not serious and as resting on misunderstanding.” Rawls, “Discussion of PR [Public Reason] Revisited at Center for Ethics and Prof?”

hope of political community...is excluded by the fact of reasonable pluralism together with the rejection of the oppressive use of the state power to overcome it.”⁵⁷

Theory does err, therefore, in its effort to force the construction of a political community of justice where one cannot be sustained. But this flaw does not illustrate the need for appeals to communal identity. It shows precisely the opposite. If even justice as fairness cannot become the collective moral good of a political community, this shows that the search for *any* sort of truly political community is fundamentally misguided. The remedy is to de-emphasize communal values as the basis for a specifically *political* sort of order. What *Political Liberalism* offers is a re-articulation of the relationship between justice and legitimacy, not between justice and community. This requires reabsorbing the problem of legitimacy into the procedural structure of justice, which is accomplished by acknowledging the importance political-historical context while refusing to abandon the conceptual logic of moral judgment that enframes that context.

The problem of legitimacy and community

Taken one way, this argument seems to deny *any* room for collective value—and thus represents the perfect realization of abstract order erasing the discontinuities of material life.⁵⁸ Though *Political Liberalism* promises to respect pluralism, this tends to be limited to associations rather than communities. Associations are cultural,

⁵⁷ See Rawls, *Political Liberalism*, p. 146. See also *Justice as Fairness*, p. 3 where he argues: “a democratic society is not and cannot be a community, where by community I mean a body of persons united in affirming the same comprehensive, or partially comprehensive, doctrine.” Similar claims are made at *Political Liberalism*, p. 42.

⁵⁸ See Mouffe, “Carl Schmitt and the Paradox of Liberal Democracy.”

economic, aesthetic. In structure they are free-floating, participatory, open-ended.⁵⁹ But they are not catalyzed, brought into sharp and concrete existence. They do not possess the *political form*. As a result, there is nothing in *Political Liberalism* to sustain strong state institutions, and political legitimacy becomes nothing more than the terms of compromise among pre-political values and interests. The order it produces is tentative and managerial because it does not speak to a fundamental metaphysical condition. This system *resembles* sovereignty but lacks its crucial organizing force. When faced with dissent, the coherence of the community cannot be enforced, because the very idea of a community as the primary subject of political identity is anathema. This means that crisis limits may be breached as revolutionary forces stir. And because the system is premised on the erasure of precisely those concepts, it offers no hope for managing them once they reappear.⁶⁰ In short, political liberalism lacks the ability to mobilize the pure force of political violence in the name of generating a political identity, because it presumes that such identity is prior and inviolable.

While this critique is not entirely misguided, it nevertheless misses an important feature of Rawls' argument. His attack is not on the idea of community itself but only on the particular way in which it obtains political manifestation. Although justice cannot stitch together a political community, it can form the basis for what he calls a 'democratic political society.' Such society contains a sort of

⁵⁹ See Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986), pp. 209-210.

⁶⁰ This problem is expressed rather succinctly by Douglas Adams: "The major difference between a thing that might go wrong and a thing that cannot possibly go wrong is that when a thing that cannot possibly go wrong goes wrong it usually turns out to be impossible to get at and repair." Douglas Adams, *Mostly Harmless* (New York: Ballantine Books, 1992), pp. 136-137.

legitimacy, one built out of general principles but embodied in specific and material form. While the constraints of reasonable pluralism prevent it from articulating shared final ends in the traditional sense, a weaker bond is still possible in a shared *political* good.⁶¹ Therefore, political society is not grounded in the singular pursuit of any specific final end, but neither does it simply affirm its own particularized notion of justice. It is something in between. Rawls wishes to distinguish this from ‘community’ in order to avoid the “serious error” of collapsing the distinction between political and final ends—an error that he himself had made in *Theory*.⁶²

The ‘misunderstanding’ of the communitarians now becomes clearer. They have focused on the idea that justice as fairness asserts a single correct mode of being, which Rawls believes to be a clear misreading. His approach is “political not metaphysical” in the sense that it only asserts a political unity, not a formal or normative one.⁶³ Despite the erroneous leap in *Theory*—which suggested that a moral community would be the logical endpoint of justice—Rawls’ consistent impulse is to challenge all efforts to grant legal backing to particular concepts of the good. To do so collapses the distinction between what is *good* and what is *right* and lends the tools of state coercion to anyone capable of taking control over them. Legitimacy ceases to be a means but becomes the end in itself. As such, it cannot be anything other than

⁶¹ Rawls, *Justice as Fairness*, pp. 20-21.

⁶² Rawls, *Justice as Fairness*, p. 21.

⁶³ John Rawls, “Justice as Fairness: Political not Metaphysical,” in *Collected Papers* (Cambridge: Harvard University Press, 2001).

the weapon of a specific community, wielded in the service of their arbitrary values against those who fall outside them. This is the “fact of oppression.”⁶⁴

This partially explains his distaste for the idea that *Political Liberalism* is in any way indebted to communitarianism. While he shares a concern for the enduring differences that mark liberal society, he is deeply distrustful of the attempt to portray those differences as the groundwork for *political* legitimacy. The communitarians are right to challenge the idea of a universalizing concept of the good as the basis of legal authority, but they are right for the wrong reasons. Authority does not arise out of a less universal, more particular concept of the good. It must come from somewhere entirely *outside* such values.

This is the task of political liberalism: to clarify the best possible base of political power. The argument depends on identifying a concordance between two aspects of legitimacy. On the one hand, legitimacy must be forceful, deeply felt in the fashion experienced within a communal order. That is: it must be theologically grounded, *political in the Schmittian sense*. On the other hand, legitimacy must be shared among diverse groups. It must possess formal structure that permits shared action within a collective system of state coercion. That is: it must be *political in the liberal sense*. The first aspect produces the substantive unity necessary for holding together a polity. The second aspect ensures the durability of that order, by establishing the framework for its exercise of force. In effect, this requires two linked notions of legitimacy: one grounded in a particular community and historical, the

⁶⁴ Rawls, *Justice as Fairness*, p. 34.

other grounded in human reason and existing outside of time and space. The linkage between these two is what *constitutes* the political for Rawls.

Reconstructing the value of community

Still, for all his protestations to the contrary, this picture does not seem dissimilar from those of a number of communitarian theorists. It almost seems that his disagreement has more to do with phrasing than with core ideas. After all, communities retain a significant place in this theory. First, because they supply the raw background of liberal political society. They are the materialized fact of reasonable pluralism, and their adherence to the principles of justice is necessary for them to obtain legitimacy.⁶⁵ But second, and more surprisingly, the Rawlsian alternative to ‘political communities’ does not actually look all that different from those supported by communitarians.

This convergence is apparent in his personal notes, where the idea that community could serve as the base for political power is treated with far less scathing terms. He makes specific reference to this possibility in a note to himself regarding Kurt Baier’s 1989 article: “Justice and the Aims of Political Philosophy.”⁶⁶ Baier, he thinks, misses the point of political liberalism by focusing too much on the minimum requirements for stable social unity. For Rawls, this is far too limited; the goal is the *ideal* of stable social unity. It is not enough to secure a viable political compromise. Political liberalism requires genuine affirmation of legitimacy by its subjects. Without

⁶⁵ See Rawls, *Justice as Fairness*, pp. 195-198.

⁶⁶ See Kurt Baier, “Justice and the Aims of Political Philosophy,” *Ethics* 99, no. 4 (1989).

that, justice will remain wholly abstract and detached from the actual practice of law.⁶⁷ Though he does not use these terms, we might say that he is concerned about liberalism becoming overly secularized and thereby losing its theological purchase. To affirm the idea of law is only the beginning; it must then be internalized, genuinely valued in a collective sense.

This sounds surprisingly similar to a ‘political community,’ something that stands astride the particular values of its subjects and unites them. Delving further back into his notes, we find even more direct references to this idea. One of his earliest outlines of the argument for political liberalism, from late 1986, references the idea of a ‘political community’ that might stand in between the purely arbitrary fact of an existing historical community and the unachievable, abstract community of normative order located in *Theory*. Such a political community, he writes, may arise: from “a public recognition & acceptance of the plurality of associations” which each affirm distinct comprehensive doctrines; from collective agreement to affirm the same political values; from a shared public culture of political ideas; or from a “public recognition of a shared history” that includes shared political values and cultural history. This last possibility, he argues, constitutes a shared “civil religion, so to speak.”⁶⁸ At least in these notes, he is not simply drawing an analogy between

⁶⁷ See John Rawls, note to self dated December 1991/January 1992, In “Notes and letters regarding the Overlapping Consensus, 1988-1992,” The Papers of John Rawls, Harvard University Archives, HUM 48 box 42, folder 1.

⁶⁸ John Rawls, note to self dated November 1986, The Papers of John Rawls, Harvard University Archives, HUM 48 box 29, folder 2. In addition, his “Remarks on Political Liberalism,” prepared for a class in Fall 1986, offer a similar framing: “[W]hile they affirm no comprehensive good in common, we can say that when citizens share a sense of political justice and endorse the principles of justice realized by the just constitution of their society (we assume them to be so fortunate), they also share the fundamental political end of supporting that constitution and of giving one another justice as it

political society and a community. He instead seems to argue that the associational ties of a political order are a *variant* of community, not an alternative. While this distinction might seem small, it suggests that at least in this early stage of the process Rawls did see his project as integrated into a broader set of questions about the capacity for justice to serve as the unifying basis of community without *universalizing* that form of unity.

Moreover, even in his final works, he does not categorically reject the notion that political liberalism could be interpreted as a type of political community. In *Justice as Fairness*, for example, Rawls notes that the choice about how to define these terms is open, and that “nothing turns on these definitions of community alone.”⁶⁹ This seems to suggest that the distinction is merely linguistic, not fundamental.

Given all these similarities, we must return to the question of why Rawls was so uncharacteristically brusque in his dismissal. There is no way to know for sure, but I believe that he feared using the frame of ‘political communities’—even in this unique way—would invite criticism that political liberalism smuggles in a sort of comprehensive doctrine through the back door. Given this concern, it is understandable that he might choose the language most suited to avoiding this critique.

requires. So although a just liberal state is not a community – if by community we mean an association united in affirming a comprehensive conception of the good, religious, philosophical or moral – it [sic] members do affirm in common a publicly recognized final end.” John Rawls, “Remarks on Political Liberalism Phil 272,” Fall 1986, The Papers of John Rawls, Harvard University Archives, HUM 48 box 29, folder 2, p. 5.

⁶⁹ Rawls, *Justice as Fairness*, p. 200.

However, such an accusation does not concern me. As we will see, the particular way that political liberalism smuggles in its metaphysics is in fact its greatest *strength*. In a limited but important sense, the political conception of justice is capable of holding a political community together *because* it employs a comprehensive form. While the full contours of this argument will not be discussed until Chapter 5, for now we may now at least posit that focusing on *types* of communities will better illustrate the nature of contemporary liberal political society and the hidden strength of theoretical inquiry grounded in Rawlsian political liberalism.

The arguments in favor of this linguistic choice come in two forms. First, ‘political society’ is too cerebral. The overlapping consensus that forms such a society seems to stem from intellectual endorsement, rather than affective connections. A political community, in contrast, is more robust. It must unite together around a shared feeling, not simply around the bare and anodyne fact of agreement. The political value of justice, that is, must be incorporated into its citizens’ identity in order to generate the durable ‘civil religion’ of political liberalism. Without that constructive work, political unity can only rest on the unstable terrain of a *modus vivendi*. The community of political liberalism, like other communities, relies on a single unified value that imposes itself onto diverse forms of life in order to generate a single frame of reference.⁷⁰ The only difference is the *content* of that value. That

⁷⁰ This is one place where Rawls’ original treatment of stability in justice as fairness in *Theory* was quite powerful and too quickly set aside in his reformulation. See Chapters 70-72 on the morality of authority, association, and principles, in particular his claim that a “common allegiance to justice

critics often miss this connection may be attributed primarily to Rawls' efforts to hide it behind the language of 'political society.'

Second, political communities are more explicitly linked to historical and material development. Here again, Rawls' antipathy toward describing his work as informed by communitarianism seems to have driven him away from the strongest form of his argument. This point deserves special attention, because Rawls could easily be interpreted as exhibiting a lack of concern for such historical specificity. In *Justice as Fairness*, for example, he stresses that his approach is not 'political in the wrong way'—which he defines as a conception “framed as a workable compromise between known and existing political interests, or when it looks to particular comprehensive doctrines presently existing in society and then tailors itself to win their allegiance.”⁷¹ This phrasing deserves close attention. Rawls does indeed resist the impulse to valorize existing values, but only in the context of articulating the political conception of justice *as such*. That political conception should not be established via 'compromise' among existing comprehensive doctrines, but should be capable of affirmation by any imaginable reasonable comprehensive doctrine. Indeed, the willingness to affirm such a conception is the defining feature of reasonableness.⁷² This is the moral component of Rawls' political conception: to the extent that

provides a unified perspective from which [citizens] can adjudicate their differences.” Rawls, *Theory of Justice*, p. 474.

⁷¹ Rawls, *Justice as Fairness*, p. 188.

⁷² It is worth noting on this point that Rawls does not appear to believe that reasonableness is (even potentially) a universal feature of politics. His eschewal of 'metaphysics' is deep and genuine on this point. He sees *Political Liberalism* as philosophy minded toward “a political ideal, and not an ideal for all of life” and it is only suited for the particular constraints of the “modern social world.” Rawls, “Political Liberalism, Public Reason, Ten Questions, NYU, 1994,” p. 65.

political liberalism is stable, it depends entirely on the willingness of its citizens to affirm the legitimacy of the law as a normative principle, to voluntarily accept its force upon themselves.⁷³

However, the unification of such reasonable doctrines does not take place in a vacuum. It must build out of a simple *modus vivendi*, and only over generations will shared political culture develop connective ties capable of being sustained purely on the grounds of the political conception.⁷⁴ Openness to this possibility is a defining feature of a reasonable conception, but this does not negate the slow and painful work required to give it material form. What begins as mere alliance, as compromise between comprehensive doctrines, may eventually transform into a new normative value (the political conception of justice), which can replace previous communal ties.⁷⁵ Once it does so, a shared commitment to the political concept of justice will be sustainable because it will possess historical and cultural linkages. This cannot be wished into existence—it arrives only via, to borrow Weber’s phrase, a “strong and slow boring of hard boards.”⁷⁶

Once again, his sensitivity to the accusation of smuggling in a new comprehensive doctrine seems to have led Rawls away from clearly articulating this point. For instance, regarding the ‘fact of oppression’ he suggests that a political community “united in affirming one and the same comprehensive doctrine” will necessarily employ “the oppressive use of state power with the attendant evils” to

⁷³ Rawls, *Justice as Fairness*, p. 195.

⁷⁴ Rawls, *Justice as Fairness*, p. 198.

⁷⁵ Rawls, *Justice as Fairness*, p. 182.

⁷⁶ Max Weber, “Politics as a Vocation,” *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills (London: Routledge, 1991), p. 128.

sustain that unity.⁷⁷ Because he defines communities by their connection to unitary moral doctrines, he is led to equate state coercion to ‘maintain a political community’ with the imposition of a comprehensive doctrine. However, this does not account for the possibility that the state’s coercive power might be necessary to maintain a political community in a *positive* sense: as the force needed to hold together a union, for example.⁷⁸

Here, it is helpful to consider the influence of Dworkin on his developing ideas. In the same early note where he defines the potential positive features of political communities, Rawls comments to himself: “See Dworkin on Community,” pointing toward specific passages in *Law’s Empire*.⁷⁹ In the chapter cited, Dworkin develops a concept of interpretive community that appears to draw heavily on Wittgenstein. Community, for Dworkin, is always dependent on a unique associative relationship. It is a “form or mode of life constituted by communal practice.”⁸⁰ A community is therefore constituted by what its practices *do* rather than any supposed universal meaning they might carry. This process entails the production of “associative obligations” that bind people together by incorporating themselves into their interpretive/normative universes.⁸¹ Importantly, Dworkin notes that political obligations function in the same way that familial or friendship relationships do.⁸²

⁷⁷ Rawls, *Justice as Fairness*, p. 34.

⁷⁸ Abraham Lincoln’s willingness to violate a wide range of constitutional principles in the service of preserving the union is one particularly famous example of this idea. See Posner and Vermeule, *The Executive Unbound*, p. 11.

⁷⁹ Rawls, note to self, November 1986.

⁸⁰ Dworkin, *Law’s Empire*, p. 200.

⁸¹ Dworkin, *Law’s Empire*, p. 196.

⁸² Dworkin, *Law’s Empire*, p. 207.

This suggests that political obligations must be understood within the context of communities in order to capture their full effect. Of course, Dworkin goes further than Rawls in suggesting a unified theory of communities. Nevertheless, Dworkin's demonstration of the basic similarities in forms of legitimacy helps to clarify the specific location for Rawls' divergence. That is: the ever-present possibility of state power that stands behind assertions of political legitimacy, and the burdens this generates given the fact of reasonable pluralism.⁸³ In effect, while all communities (grounded in some form of moral order) produce their own concepts of legitimacy, only political communities can manifest that sense of legitimacy in the form of coercive state power.⁸⁴

Lingering absence and hidden structure

The nature of justice, according to this argument, is to sustain political unity on terms that remain internally justifiable. That is: to *manage* the exception rather than being subservient to its emergence. In this way, a political community might ground the exercise of state power in a concept of right that does not rely on the absolute moral principles of comprehensive doctrines, but on shared principles of political association duly organized by a political conception of justice. The goal: to establish a way of thinking about how the formal structure of liberal justice links

⁸³ One might perhaps construct a crude spectrum on this subject. At one extreme lies Dworkin, who sees all legitimacy as interpretive and therefore imagines political communities to be merely one form among many. At the other extreme is Schmitt who sees political values as utterly distinct from all others. The unique force of the friend/enemy distinction (and the existential risk it implies) obliterates all other conceptions of legitimacy. We may situate Rawls somewhere in between these extremes.

⁸⁴ Rawls, *Justice as Fairness*, p. 20.

together with its historically-contingent manifestations. Schmitt's critique calls attention to the neutralizing effect of the apparent binary between substantive and procedural concepts of justice. The problem is that every attempt to grasp this element, or to lock it in place, is self-destructive. By stamping it with specificity, one draws it out of its spectral form and erases its unifying function. Therefore, Rawls' approach distinguishes itself from these other liberal modes by seeking to *express* rather than *resolve* this dilemma. He recognizes the great paradox of liberalism—that its basic unifying feature is the fundamental *absence* at its core—and resists the impulse to simply fill the void.

Justice, understood in these terms, is discovered when one refuses to descend into the simulacra of procedural and substantive concepts. Justice is not the result, nor it is the process; justice is the *relationship* between and around them. This is the hidden structure of Rawls argument and the hidden structure of liberalism writ large. Properly understood, he hopes, the *application* of just rule and its *justification* will join together and produce a truly legitimate order. Such order promises to sustain itself, on self-justifying terms, not by erasing the exception but by *using* it to engage the force of justice.

III. Reasonableness and political identity

The linchpin of Rawls' argument, as I have presented it, is the idea of reasonableness. Its power stems from the recognition that politics entails inevitable exclusion. He notes: "there is no social world without loss: that is, no social world that does not exclude some ways of life that realize in special ways certain fundamental values."⁸⁵ The key issue is how those inevitable exclusions are justified. If the classic problem with the liberal form of such justification is its faux-neutrality, Rawls offers a slightly different perspective. He is not concerned with *equality* among doctrines, but rather with *fairness*. Similar to Schmitt, he notes that genuine neutrality would eviscerate the meaning of social relations in the first place.⁸⁶ That is: without distinction there is no politics. Of course, he hastens to add, such exclusion is lamentable, and from the perspective of morality may be unacceptable. But political liberalism is not a moral doctrine.⁸⁷ It does not seek to erase loss, but only to ensure that it happens within the confines of justice.

It does so by laying out a principle of exclusion that is self-referential and constructive: "the reasonable generates itself and answers itself in kind."⁸⁸ This stands in contrast to modes of justification that look outward to external sources. What makes a doctrine reasonable is that it appears reasonable to other reasonable doctrines.⁸⁹ It is therefore explicitly dependent on its family resemblance and can

⁸⁵ Rawls, *Justice as Fairness*, p. 154.

⁸⁶ Rawls, *Justice as Fairness*, p. 154.

⁸⁷ Rawls, *Justice as Fairness*, p. 155.

⁸⁸ Rawls, *Justice as Fairness*, p. 196.

⁸⁹ For example, he argues that: "PL offers no way of proving that these specifications are reasonable. None is needed. It is *simply* politically reasonable to offer fair terms of cooperation between persons

only be enabled via the collective social process of communal articulation. Its consensus is defined not so much by content but rather by an attitude of reasonableness—a willingness to subsume one’s sense of good underneath a notion of politics. Reasonableness, by this account, is a principle of *identity*. It does not (indeed, it *cannot*) articulate a universal case against unreasonable orders. It merely states, as the basis for its own form of political legitimacy, that such worlds are incompatible with the political community of liberalism. To the extent that existing distinctions challenge the political distinction of the reasonable, they must be cast aside.⁹⁰ In effect, only those values capable of articulating themselves within the context of reasonableness become incorporated into the identity of the polity. This process is analogous to—though clearly still distinct from—Schmitt’s friend/enemy distinction.

Rawls and Schmitt both warn that an undifferentiated pluralism will produce conflict that cannot be contained. Unlike Schmitt, though, Rawls argues that liberalism can harness such conflict by searching for a hermeneutic starting point that actively *encourages* competing versions of the good within one polity rather than pretending to have transcended conflict. Indeed, he insists, the perpetual bubbling of conflict is essential to sustaining public reason: “the ideal of public reason does not often lead to general agreement of views, nor should it. Citizens learn and profit from conflict and argument, and when their arguments follow public reason, they instruct

free and equal, and it is simply politically *unreasonable* to refuse to do so.” Rawls, “Discussion of PR [Public Reason] Revisited at Center for Ethics and Prof?,” p. 5.

⁹⁰ Rawls, *Political Liberalism*, p. 9

and deepen society's public culture.'⁹¹ This deeply embedded element of conflict in political liberalism demonstrates a crucial difference (often misunderstood) between Rawls and his more purely deliberative contemporaries. Rawls recognizes that concurrences must always be tentative—and seeks only to stamp an element of normativity onto the loose allegiances that are inherently built on a foundation of perpetual discord.⁹²

Like Schmitt, he identifies conflicts as 'political' if they become so powerful that they organize state power and the possibility of mass violence.⁹³ He also directly acknowledges that toleration is not an alternative to exclusion but is a *basis* for exclusion. Grounding legitimacy in the openness of public reason is fruitless if it does not entail the exclusion of those who resist its injunction to generate valid political reasons for publicly acceptable law.⁹⁴ The difference is that the 'political realm' for Rawls is the sphere of public reason, in which a position's adherence to any particular comprehensive doctrine is no longer accepted as an argument for or against it.

⁹¹ Rawls, *Political Liberalism*, p. lv.

⁹² For a particularly stark example of misreading Rawls on this point, see Chantal Mouffe's essay: "Democracy, Power, and the 'Political,'" *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton, N.J.: Princeton University Press, 1996). Mouffe sees Rawls as fundamentally interested in consensus, and uses this supposition to criticize the exclusion that Rawls enables: the remainder who are written out of 'the reasonable.' This argument misses precisely the Schmittian concurrence alluded to here: that the basic antagonism built into his concept of reasonable pluralism seeks not to erase the remainder who falls outside the law but instead to provide an ethical justification for drawing the line of exclusion *here* rather than *there*. This issue will be explored in much greater detail in Chapter 5.

⁹³ On this point, I draw significant inspiration from Miguel Vatter's essay "The Idea of Public Reason and the Reason of State: Schmitt and Rawls on the Political." Vatter identifies an essential overlap between Rawls and Schmitt vis-à-vis their similar attitudes toward public reason as the vehicle for legitimation of state practice.

⁹⁴ Rawls, *Political Liberalism*, pp. 152-154.

By drawing his argument in this manner Rawls offers a counter-theory to Schmitt's formulation that "sovereign is he who decides on the exception."⁹⁵ The decision, Rawls suggests, need not be taken by a sovereign. Instead it can be found in the mutually constitutive belief of reasonable actors who, in combination, are capable of developing a principle of justice. That very process of self-formulation articulates a concept of political order and excludes those who remain unwilling to set aside absolutes. But these exclusions take place within the context of legitimacy rather than being enacted through material reality. The effect: all things are *tolerated* in Rawls' overlapping consensus, even the unreasonable. Those who refuse to accept this principle are not driven out; they simply will not be able to articulate public reasons for their positions that will be accepted as legitimate. The result is a self-contained legal apparatus capable of delineating what obligations it must fulfill in order to establish its legitimacy *and* capable of marking certain arguments as illegitimate.⁹⁶

According to this framework, the value added by Rawls' treatment of politics is its capacity to exceed the divide between 'what is' and 'what is right.' This is, of course, a classic problem. Whether the is/ought gap can be bridged—and if so, how it is to be accomplished—is one of *the* primary problems in liberal philosophy over the

⁹⁵ Schmitt, *Political Theology*, p. 5.

⁹⁶ Rawls, *Political Liberalism*, p. 100. This concept of tolerance cannot escape the accusation that 'the only thing liberalism will not tolerate is intolerance,' but establishes the contours for a limited defense of that premise. By using public reason to stand for fairness, Rawls need not necessarily imply a universality of identity in the same fashion as standard liberal approaches. For critics of tolerance, see: Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006); Joan Scott, *The Politics of the Veil* (Princeton: Princeton University Press, 2007); Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999).

centuries.⁹⁷ Using the language of political theology, we might say that it represents the lingering desire for sacred order. No matter how completely one embraces the secularizing move, the ineffable horizon of ‘ought’ continues to torment the goal of descriptive order. One may seek to obscure this horizon behind the screen of justice, but it cannot be wholly excised.

My argument is that contemporary liberalism, as conceptualized in Rawlsian terms, offers a line of reasoning that steps outside the impossible structure of this binary. It permits a philosophy of right (in the Hegelian sense) that is actively normative, which is not forced to lock its moral character within the language of necessity. Its concept of justice is neither historically nor morally determinate, but it nevertheless remains durable and formally consistent over time and space. Overlapping consensus, understood in these terms, produces coercive limits on the operation of community. It excises all overarching moral principles from the realm of politics except one: that justice requires a linkage between the political and the reasonable. In practice this means that, although all comprehensive doctrines may theoretically be included, some will *exclude themselves* by virtue of their refusal to accept the tenets of political liberalism.⁹⁸

This is a normative basis for exclusion insofar as it relies on a conception of the good to mark its claim, but it differs from the attitude in *Theory* about those who

⁹⁷ The principle that an ‘ought’ cannot be derived from an ‘is’ is commonly traced back to David Hume, and is compellingly discussed in his *A Treatise of Human Nature* (Oxford: Oxford University Press, 1978), pp. 469-470.

⁹⁸ Rawls, *Justice as Fairness*, p. 154. Also see Rawls, *Political Liberalism*, p. 9, which clarifies that such exclusion is determined by their refusal to acknowledge the importance of a “publicly recognized point of view from which all citizens can examine before one another whether their political and social institutions are just.”

are “incapable of justice”⁹⁹ because *this* concept of justice is quarantined. The capacity for justice is not measured by willingness to accept any substantive result. Indeed, precisely the opposite is true. The one and only universal to which all must agree is that every agent must abandon all *other* efforts to establish comprehensive doctrine as law. Reasonableness therefore creates a kind of *sovereign* distinction, which cannot be measured by reference to any other content. While justice as fairness derives its legitimacy from a universalizing, normative mechanism of authorization, it is a universalism grounded in the *denial* of all other universalism. This idea helps to illuminate Rawls’ claim that “political liberalism applies the principle of toleration to philosophy itself.”¹⁰⁰

The priority of right: the rebirth or destruction of political identity?

However, it still remains to fill in this idea. Even if reasonableness creates a *sort* of sovereign distinction, it is still not political in the Schmittian sense. Its legitimacy is not derived from the chaotic imposition of order, or the demarcation of enmity. On what base, then, can reasonableness exercise authoritative coercion? On this point, Rawls is frustratingly vague. In exploring his answers, we will quickly discover a breakdown between theoretical potential and constitutive effect.

To begin, we must recall that the limitations imposed by the burdens of judgment mean that political liberalism is incapable of offering truly conclusive decisions. The best that can ever be said is that its values are affirmed *nearly*

⁹⁹ Rawls, *A Theory of Justice*, p. 219.

¹⁰⁰ Rawls, *Political Liberalism*, p. 10.

universally by a durable overlapping consensus, but such consensus cannot be philosophically grounded in absolute principles.¹⁰¹ In spite of this limitation, Rawls continues to assert that justice is grounded in the priority of right—the notion that reasonable terms of cooperation that are mutually available trump even deeply held conceptions of the good. On what basis can he assert such an obligation if political values cannot ‘outrank’ non-political ones? The answer is found in the linkage between good and right found *within* comprehensive doctrines. Reasonable comprehensive doctrines, he argues, will include a strong commitment to the priority of right. This is what makes them reasonable. Accordingly, the heavy lifting necessary to place political values first comes from inside the comprehensive doctrines that affirm them. This is the dynamic relationship discussed before, in which “the just draws the limit, the good shows the point.”¹⁰² Just institutions would have no purpose if they did not promote and sustain conceptions of the good, and conceptions of the good unconstrained by a concept of justice will succumb to the ‘fact of oppression.’

While this approach emphatically does not concede the terms of justice to the arbitrariness of decision, it also aggressively resists the simplistic impulse toward secularism. Rawlsian justice must infuse political practice—law must be *constructed*, not merely discovered—but it must also stand outside. The diverse normative

¹⁰¹ See Rawls, “Political Liberalism, Public Reason, Ten Questions,” p. 31, where he argues the best case is people coming to think that “political values normally (though not always) outweigh whatever nonpolitical values may conflict with them.”

¹⁰² Rawls, *Justice as Fairness*, p. 141. See also Rawls, “Political Liberalism, Public Reason, Ten Questions,” p. 17, which argues that justification in political liberalism *always* depends on reference to comprehensive doctrines because only those possess the broad scope necessary to even consider non-political values.

commitments that lend themselves to the manufacture and sustainment of law cannot become coterminous with that law itself because they do not (indeed they *cannot*) take the decisive and limited form that law must hold. In the face of an emergency, the *concept* of justice must hold firm even as its political formulation is placed under catastrophic stress. As an abstract practice, this cannot be guaranteed. Success is only ever a *practical* matter, made possible by its subjects' willingness to affirm political values with sufficient force to sustain their commitment even in times of crisis. Such a commitment depends utterly on the shared normative belief that "values of the political are very great values and hence not easily overridden."¹⁰³

However, this formulation remains quite vague and, in a sense, begs the question. What makes them 'great' values, and by what standard may their greatness be measured? The closest he comes to answering such questions is this:

The virtues of political cooperation... [when] these virtues are widespread in society and sustain its political conception of justice, they constitute a very great public good... Thus, the values that conflict with the political conception of justice and its sustaining virtues may be normally outweighed because they come into conflict with the very conditions that make fair social cooperation possible on a footing of mutual respect.¹⁰⁴

The notion that these values constitute a 'public good' depends on the presumption of prior agreement to value the principles of mutual respect and fairness. But what supports treating *these* as fundamental goals? Nothing, it seems, except for the fact that the idea of an overlapping consensus is impossible without them. This approach

¹⁰³ Rawls, *Political Liberalism*, p. 139.

¹⁰⁴ Rawls, *Political Liberalism*, p. 157.

is circular. It presumes pre-existing identification with a set of communal values as the condition for durable political order.

This suggests that Rawls is still stuck on the same dilemma that plagued classic liberalism. He may either affirm ‘political values’ that organize and restrain the expression of individual comprehensive doctrines, but which are ultimately arbitrary, or he must acknowledge the exceptional limits of any supposed order. That such values are normally shared and irregularly overridden does not imbue them with genuine legitimacy, because they remain dependent on an external source. This is especially acute given Rawls’ emphasis on the ‘priority of right.’ The dominance of the Right over the Good is, in its most simple formulation, a prohibition against rules based on arbitrary appeals to particular concepts of the good. Instead, decisions must derive from norms that transcend such limits. What it means for something to be ‘political in the right way’ is for it to be a justifiable exercise of coercion on these terms. This, as we have seen, is directly in line with broader liberal attitudes where the law is a device for constraining the application of subjective will. One crucial way in which it achieves this is by setting boundaries on what sorts of decision may become imbued with legitimacy.¹⁰⁵

However, informed by the discussion of political communities in the previous section, we may now proffer a slightly different perspective. There *is* a sense in which political justice may successfully *trump* the deeply-held moral convictions of its subjects without *obliterating* them. Recall the distinction between a *modus vivendi*

¹⁰⁵ See Rawls, *Lectures on the History of Political Philosophy*, p. 296.

and political community. The former is affirmed for self-interested reasons and therefore depends on its adherents making rational judgments about the value of shared terms. Political communities, in contrast, derive their solidity from shared forms of life. While rational judgment can provide post-facto justification for the specific terms of agreement, the actual basis of stability depends on the internalization of the political conception of justice. Thus, “the shared final end of giving one another justice” should become “part of citizens’ identity.”¹⁰⁶ Rawls’ reference to identity in this statement should not be overlooked. It suggests the possibility of unification that exceeds the simple force of an appeal to ‘public good.’

The problem is that his concept of identity reverses the order of operations. For Rawls, identity is slowly incorporated as citizens embrace the political form of justice. But, as per Schmitt’s argument, justice is a pure abstraction unless it is *initially* catalyzed by the force of political identification. Without the decision to mark the line between law and exception, a norm is pure ephemera. It only becomes articulated and applicable *via* the condensation of a sovereign act.¹⁰⁷ The rule of law, in its abstract form, is the rule of nothing. Only *out of* a concrete decision to enact a specific concept of the good does the possibility of a functioning legal norm emerge.¹⁰⁸ The political comes first, and rest on its own distinctions, never an external source:

The real friend-enemy grouping is existentially so strong and decisive that the nonpolitical antithesis, at precisely the moment at which it becomes political, pushes aside and subordinates its hitherto purely religious, purely economic,

¹⁰⁶ Rawls, *Justice as Fairness*, p. 199.

¹⁰⁷ Schmitt, *Political Theology*, pp. 11-13.

¹⁰⁸ Schmitt, *Political Theology*, p. 6.

purely cultural criteria and motives to the conditions and conclusions of the political situation at hand.¹⁰⁹

Political values are not judged by their content. They are measurements of intensity. In taking on the political form, doctrines lose the character of universality and collapse into a simple friend/enemy distinction. Political values, therefore, eradicate the defining features of their previous form. They do not simply trump nonpolitical values but *colonize* them so completely as to erase all other meaning. Thus, any viable political concept must impose itself on the chaos of competing values in order to stamp them with legitimacy. If it cannot represent the exceptional decision that *founds* its normative order, liberalism cannot account for its inevitable eruptions.

For Schmitt, identity is a principle of factual presence, of a unified and absolute form existing concretely.¹¹⁰ The pure concept of identity is embodied in the dream of direct democracy—an entire people acting in unison. But because that pure form is impossible, *representation* is necessary. It mediates and smoothens the rough edges of political identity and produces a unified political form out of disunity.¹¹¹ Representation is the means by which a fractured community is *perceived* as whole, and therefore acquires the capacity to act as such.¹¹² Similarly, pure representation cannot exist—it would be wholly untethered from the substance of political life.¹¹³ Only in conjunction may a state be formed and sustained.

¹⁰⁹ Schmitt, *The Concept of the Political*, p. 38.

¹¹⁰ Schmitt, *Constitutional Theory*, p. 239.

¹¹¹ Schmitt, *Constitutional Theory*, p. 241.

¹¹² Schmitt, *Constitutional Theory*, p. 248.

¹¹³ In this circumstance, “the state, which is never anything other than a people in the condition of political unity, loses its substance. That would then be a state without people.” Schmitt, *Constitutional Theory*, p. 248.

Liberal democracy, however, eviscerates this antimony. It corrupts the idea of representation, transmuting it from the representation of social unity into the representation of individual interests. The liberal state does not stand for a shared political identity capable of dominating particularized identities; it rather represents pockets of identity in the form of plural interest groups, classes, etc. It is a series of emanations without a core, whose paraphernalia is wielded by private interests for their own purposes.¹¹⁴ The more ‘representative’ democracy becomes (in the liberal sense of protecting the diverse array of distinct identities in society), the less representative (in Schmitt’s sense of calling into existence a unity of the polity) it actually is.¹¹⁵ Its justice is abstract, a pre-political truth, obtained through obedience to procedural or substantive norms and normative in the wrong way. It floats outside the concrete practices of politics and cannot be the basis for generating legitimacy:

That the government of an established community is something other than the power of a pirate cannot be understood from the perspective of the ideas of justice, social usefulness, and other normative elements, for all these normative concepts can apply even to thieves. The difference lies in the fact that every genuine government represents the political unity of a people, not the people in its natural presence.¹¹⁶

Representation is not targeted at serving pre-articulated interests of groups in a society, nor does it derive from pre-existing norms or values. This means that the ‘rule of law,’ perhaps the defining feature of liberalism, contains neither rule nor law. Its content is ragged, full of gaps and disjunctures, ready to be exploited by those who live within it but do not owe it fealty. Such gaps may only be filled via representation

¹¹⁴ See Habermas, *Between Facts and Norms*, pp. 33-41.

¹¹⁵ Schmitt, *Constitutional Theory*, p. 250.

¹¹⁶ Schmitt, *Constitutional Theory*, p. 245.

of the right sort, which can generate *new* interests that bind otherwise disparate groups. Unity is not real until it is represented; it is made real *via* its representation.¹¹⁷

The question is whether reasonableness constitutes ‘representation of the right sort.’ This is the subject to which we must now turn.

¹¹⁷ Schmitt, *Constitutional Theory*, p. 247.

IV. The politics of exclusion

I have identified reasonableness as a core principle—perhaps as *the* core principle—of Rawls’ work. It provides the conceptual support for the entire structure of his argument. Legitimacy is only possible because reasonable people employing techniques of reasonable deliberation achieve it, and justice is obtained only through the shared practices of reasonable people. But the idea remains tremendously fraught. Its foundational status—and the fluidity that this implies—calls the entire universe of liberal justice into doubt. It promises everything and nothing: it is a universal standard upon which political life may be organized but also an absent referent. It is political but also the terminal erasure of politics. It is a set of practices brought to life within and by a political community, which is transformed through this process to appear as a trans-political moral standard.

In making this argument, I have attempted to trace pathways laid out by Rawls himself. But as this work has developed, the trails have grown increasingly unkempt. We must therefore ask: is reasonableness a technique for engaging the problem of representation, or merely another conceptual device for evading this necessity? In answering this question, we must acknowledge the difference between reasonableness as it could be and reasonableness as it is explicitly treated by Rawls. We have already identified several ways in which Rawls seems to have actively resisted endorsing a *political* treatment of reasonableness. This section explores further examples of this hesitancy, delving down the thorny trails where Rawls fears to tread. The goal will be

to disentangle the emergent force of reasonableness within his work from the particular manner in which he deploys it.

The critical question: is the fault in our stars or in ourselves? Does reasonableness express the latent possibility of a conceptual framework through which liberalism may recursively engage its own exception? Or is reasonableness merely the peak of secularization, the permanent becalming of stormy seas? On one side is the hope of a truly political concept built on the foundation of a genuine distinction. On the other side is a sleeker, more perfectly articulated model of depoliticization. As wielded by Rawls, it trends toward the latter. But is this a *betrayal* or an *expression* of its meaning?

Posing the question in this way offers a new perspective on Rawls. Even his most sensitive interlocutors (both critics and supporters) tend to be limited by the weight of expectation and dismiss the idea of reasonableness as nothing but a new way of articulating the same old principles (perhaps better or worse, but not fundamentally different). While this constrained interpretation is certainly supportable, it misses both the potential and the true danger of Rawls' work. There is a kernel of exceptionality at the heart of his work, albeit one that he himself cannot admit. The surface may appear placid, but any successful critical analysis must dive down to discover the deep currents.

Rawls and the unreasonable

As we dig into the idea of reasonableness, to explore its presentation and hidden meanings, our best guides will be Rawls' critics. For them, reasonableness is a key weakness of his approach; it does all the heavy lifting but is itself untheorized and indeterminate.¹¹⁸ It is unclear, for example, whether political liberalism is a community of reasonable people, or a community of people who accept the requirement to justify their positions in reasonable terms. Is it both? Rawls is evasive on this point.¹¹⁹ And further questions abound: doctrines may be reasonable, and we are asked to assume that reasonable persons will only affirm such doctrines.¹²⁰ But why does this follow? Particularly since, as Rawls admits, reasonable doctrines may be affirmed in unreasonable ways.¹²¹

Moreover, the internal structure of reasonableness is also frustratingly difficult to describe. In the reading I have presented, reasonableness is extremely constrained—it is nothing more than an attitude toward the experience of difference. But it is not clear that Rawls wishes for it to be so limited. In introducing the idea, for example, he notes that reasonable people “are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept.”¹²² From where does this sense of

¹¹⁸ For examples of such critiques, see Onora O'Neill, “Political Liberalism and Public Reason: A Critical Notice of John Rawls, *Political Liberalism*,” *The Philosophical Review* 106, no. 3 (July 1997), pp. 411-428; Shaun P. Young, “Rawlsian Reasonableness: A Problematic Presumption?” *Canadian Journal of Political Science* 39, no. 1 (March 2006); Wolin, “The Liberal/Democratic Divide: On Rawls's Political Liberalism.”

¹¹⁹ James W. Boettcher, “What is reasonableness?” *Philosophy & Social Criticism* 30, no. 5-6 (2004).

¹²⁰ Rawls, *Political Liberalism*, p. 59.

¹²¹ Rawls, *Political Liberalism*, p. 60 fn 14.

¹²² Rawls, *Political Liberalism*, p. 50.

freedom and equality arise? And what is the value of cooperation? Are these not simply the same vulgar liberal principles we had hoped to escape?

Underneath all of these ill-defined elements lies one fundamental ambiguity: for Rawls, reasonableness appears to be both a *standard* for assessing reasons and an *identity* of political subjects. Its primary function, as we have seen, is to impose an obligation on the process of political reasoning, but this often drifts to include the demand for *philosophical* reasonableness. In effect, Rawls tends to conflate two distinct goals: achieving political order that is legitimate for reasonable people, and achieving political order grounded in reasons that are themselves reasonable.¹²³ Both aspects seem to be necessary—the former creates the content, which then permits the generation of the latter—but neither may be clearly defined without overriding the existence of the other. Indeed, the fluidity of the concept is crucial; this is what permits it to fill in the gaps of pluralism, to function as the cartilage in the joints of a community, permitting the full flexing of its strength without succumbing to the slow destructive force of political arthritis. But conversely, this fluidity is also a key weakness. As reasonableness fills in gaps, it neutralizes the experience of exceptionality. It imposes a logic of universality and strips away the experience of political danger.¹²⁴ The result: by holding these two aspects of reasonableness in limbo, Rawls permits exclusionary violence in the name of abstract universality to

¹²³ Roberta Sala, “The Place of Unreasonable People Beyond Rawls,” *European Journal of Political Theory* 12, no. 3 (2013), p. 261.

¹²⁴ Cheryl J. Misak, *Truth, Politics, Morality: Pragmatism and Deliberation* (London: Routledge, 2000), p. 11.

also act on the level of political particularity and forecloses theoretical engagement with either effect.

These questions crystalize as they are reversed, when ‘the reasonable’ is contrasted with its oppositional concept: the unreasonable. If reasonableness is the ur-concept of political liberalism, then the unreasonable are its antagonists. And if the norm is defined by its exception, as Schmitt argues, then reasonableness may only come to life through their exclusion.

The problem is that Rawls actively refuses to acknowledge this reality. He admits, as we have seen, that “there is no social world without loss,”¹²⁵ but his depiction of reasonableness still treats this loss as incidental rather than essential. The exclusion of the unreasonable is always a disappointment; it occurs as the unfortunate consequence of failed attempts at conversion. To constitute a political order in this way, however, is to build upon an illusion. Reasonableness of this sort purports to represent merely a judgment on *reasons*, which it regards as objects a person may pick up or discard. To be reasonable, this suggests, is simply to choose the right sort of reasons—i.e. those that may be shared with others. Since anyone can choose to accept this truth, those who do not thereby reveal themselves as untrustworthy. They *exclude themselves* through their unwilling to accept the salvation promised by reasonableness.

Sheldon Wolin characterizes this deification of reasonableness as a particularly insidious form of secularization: “The recipe is for a civil religion in

¹²⁵ Rawls, *Justice as Fairness*, p. 154.

which the dogmas boil down to ‘reasonableness.’ Just as Rousseau banished the atheist, so Rawls reads the unreasonable out of his political society.”¹²⁶ Political liberalism, by this account, is deeply conservative. The terms of public reason are set by the expectation of reasonableness and these terms exclude “risk taking” focused on “unexpected domains and topics” as well as the “unanticipated speakers of political judgments and claims, which in turn generate our sense of the common world.”¹²⁷ Although reasonableness claims to build outward from the conflictual engagement of pluralistic discontinuity, it prejudices a wide swath of voices as incapable of speaking in a fashion deserving to be heard.

For Wolin, this reflects an unfounded utopianism and loss of history. It refuses to acknowledge that “political society inevitably carries a historical burden as part of its identity, that it has committed past injustices, whose reminders still define many of its members. Rawls...gives a picture of an expiated community that has settled its injustices on terms that merely need to be recalled.”¹²⁸ This suggests that Rawls treats reasonableness as an intuitive good, not as the reciprocally grounded political concept I proposed in the previous section. His deep faith in the redemptive function of politics, his progressive liberalism, blinds him to the history of conquest upon which these ideas are grounded.¹²⁹

¹²⁶ Wolin, “The Liberal/Democratic Divide: On Rawls's Political Liberalism,” p. 116.

¹²⁷ Linda Zerilli, “Value Pluralism and the Problem of Judgment: Farewell to Public Reason,” *Political Theory* 40, no. 1 (Feb 2012), p. 9.

¹²⁸ Wolin, “The Liberal/Democratic Divide: On Rawls's Political Liberalism,” p. 116.

¹²⁹ Anderson, “Arms and Rights: Rawls, Habermas and Bobbio in an Age of War,” p. 32.

As such, he evangelizes for the idea that the political concept of justice is genuinely available to all. The problem is that this very goal *is itself* a concept of the good. As Cheryl Misak notes:

It is, granted, a conception of the good which happens to have the feature that it is neutral among all other conceptions of the good that are in favour of (or capable of) peaceful coexistence. But this will not impress the Schmittian, who scorns such conceptions. His point will be that Rawls does not provide us with an independent or neutral justification of the liberal or democratic virtues; he just assumes those virtues.¹³⁰

In one sense, this is no problem at all. Of course political liberalism cannot offer persuasive arguments to those who seek chaos. Its grounding premise is the value of collaborative order. And it organizes that possibility around the unifying principle of neutrality. Which means that it is no objection to note that it *does* include a ‘conception of the good’ nor does it merely ‘*happen*’ to have the feature of being neutral among other conceptions. That particular sort of neutrality is precisely what makes it radical. However, the radical potential in these ideas remains inert, since Rawls does not (or cannot) embrace it. He seems emphatically committed to the principle that justice as fairness is ‘political not metaphysical’ and takes this to mean that it must utterly reject all reasons founded in a concept of the good.

As such, reasonableness (at least as presented by Rawls) is just a new conceptual device for enforcing the standard trope of neutrality. Its purpose is to describe the disposition of the right sort of persons. Namely: those who are able to “distance themselves from their comprehensive doctrines.”¹³¹ What this argument

¹³⁰ Misak, *Truth, Politics, Morality*, p. 25.

¹³¹ Sala, “The Place of Unreasonable People Beyond Rawls,” p. 256.

ignores is the existence of deep and catastrophic wounds in the body politic. In fact, the sort of concrete political intervention needed to take on grave injustice is precisely what must be avoided. The essence of politics is the avoidance of conflict and the hope that shared frames of reference will whitewash any lingering differences.¹³² And the essential purpose of reasonableness is to re-brand genuine political violence as ‘disagreement’ and deny the legitimacy of existential conflict.

In this way, reasonableness reveals itself to be simply one more variation on the Janus-faced violence of liberalism: depoliticizing on one side, colonizing in the name of humanity on the other. Its truth is treated as a pre-political good, and its politics is organized around the enforcement of liberal peace upon a world not yet ready to accept it. The “upshot is never in doubt: a license for the American empire as placeholder for human progress.”¹³³ Its goal is conversion, pitched as persuasion. But the persuasive qualities of its arguments beg the question. They presume the existence of agreement on the good of reciprocal engagement, which is precisely the value over which the battle is to be fought.

Pluralism, emergency, and political identity

These critiques are powerful. Rawls *does* use reasonableness as a wedge to reinsert many of the classic liberal tropes under the guise of pluralism. However, this is only the start of a critical engagement with Rawls, not the conclusion. For these critics, the basic conservatism of *Political Liberalism* reveals the falsity of his claims

¹³² Chantal Mouffe, “Political Liberalism. Neutrality and the Political,” *Ratio Juris* 7, no. 3 (Dec 1994), p. 318.

¹³³ Anderson, “Arms and Rights: Rawls, Habermas and Bobbio in an Age of War,” p. 31.

to genuinely engage difference. Because Rawls is afraid of reinscribing a metaphysical logic, he is unable to dwell in the uncomfortable realm of pure justification that it creates. Instead, he collapses the indeterminacy and thereby re-establishes a framework of value. The result is an apologia for the status quo, a superficial reconfiguration of justice meant to leverage the force of historical reasons behind the logic of the present era.

However, we may still learn something important from the manner of his failure. Rawls' invocation of reasonableness strips away the layers of obfuscation—the pretense of procedural limits or substantive goals—to reveal the kernel within, the essential organizing principle capable of tying together the almost infinitely-variable superstructure of liberalism. He backs away from the terminal implication, and the result is a sterilized form of life. It *is* a sort of political identity, but only in the sense that a vaccine is a *sort* of virus. And, just as a vaccine is introduced to inoculate the body against the viral outbreak, so does this inert form of political identity ultimately buttress political order against its disruptive elements. Under normal conditions, the body is unprepared for exposure to the virus. Its arrival constitutes a crisis, against which the body must leverage its resources or die. The vaccinated body, however, is prepared for the onslaught and can neutralize it before it reaches the breaking point.

This is a critical point. That reasonableness can exert the forcefulness of political identity but strip away its concrete meaning both *describes* and helps to *shape* the nature of contemporary political order. Unfortunately, Rawls' lack of faith in its transformative potential leaves him trapped all the more fully within the grasp

of secularism. By evacuating the concrete meaning of political identity, he leaves only the shell of political stability behind. This bolsters the overall clarity of the conceptual order but at the cost of reducing its coherence. In effect, he doubles down on the lack of principled order to liberalism, accepting that a wide range of content may be incorporated as long as it conforms to a shared formal structure.

The effect: to neutralize emergencies by defining them out of existence. Emergency no longer stands for the possibility of exceptional disruption—an existential tear in the framework of shared meaning—but instead reflects the constant everydayness of conflict in an open-ended, pluralistic world. Once it is pitched as simply another variation on acceptable disagreement, the emergency dissipates and is drawn *inside* the order of political liberalism. It becomes an ongoing, enduring problem to be managed. We find evidence of this shift in the ‘global war on terrorism,’ which is hardly a war in the traditional sense. Its enemy is vague at best, its reach is global, and its endpoint is terminally vague. Similarly, the threat of financial ruin is persistent but ill-defined. And even political institutions themselves are increasingly subject to this particular form of indeterminacy. The most obvious example is the wave of self-sabotage that has characterized recent battles in the United States between the executive and legislative branches—a litany of escalating extortionist demands grounded in the threat of systemic collapse, shutdown, or disorder.

As this tendency toward governance via emergency has become more habitual, the very idea of emergency becomes normalized. Emergencies are now far

more persistent, but their edges have been sanded down. In effect, the *politics of exceptionality* have been replaced by the *normalization of emergency*. Sovereign is no longer ‘he that decides on the exception.’ Instead, the active choice which creates order through the destruction of difference is replaced by a passive logic, and what passes for value is expressed through ideas such as justice, liberty, the rule of law, and the logic of the market.¹³⁴ These devices formalize the organization of society and encase it within institutional structures that starve and isolate the political world. This transforms the problem of legitimacy into a management issue. It no longer stands for the existential question of order itself. It is a wisp of an idea, not a motor for political formation. The role of the state expands enormously—as a formal instrument through which order may be rationalized—but the genuinely conflictual elements of life are eradicated. They are transmuted into disinterested, shared concepts and thereby *legalized*.

In an important sense, Rawls is the key theorist of this transition. The great paradox of his work is that his desire to reduce the danger of reasonableness destroys precisely those elements of liberal order that he most desires to save. He attempts to re-secularize reasonableness, to restrain its indelible violence but cannot *eliminate* the exception. It is domesticated, corralled, and managed. But all of these restraints exist in a limbo state between politics and law. The exception, in a sense, is kneaded and spread across the entire range of political life. It is no longer encountered in discrete moments of eruptive violence but instead is a persistent threat requiring constant

¹³⁴ See Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, MIT Press, 1985), p. 4.

attention. The ideal of reasonableness provides a ghostly regulative mechanism for the exercise of political violence, but it does so in aggressive contradistinction to the ideas of both sovereignty *and* law.

Erasing the exceptionality of the emergency is meant to protect the law from being overrun by its enemies. By treating difference as compatible with order, political liberalism promises a political utopia, one where shared terms unify collective life while still preserving the value of difference. But reasonableness of the sort that Rawls actually endorses is *antithetical* to this dream. It is a filter, a holding chamber in between the experience of exceptional difference and the necessity of decision. It endorses the rule of law, but relies for every critical decision on the shared institutional legacy of reasonable political identity, which *must* remain external to law and which cannot materialize in the form of concrete decisions. The encounter with difference is therefore eternally conducted outside the realm of law. Nothing is ever permanently settled. Political life is a process of fluctuation around the ideal of unity, an ideal that disappears over the horizon every time it is approached. The possibility of shared justification is the absent god of Rawls' political liberalism—the mutual faith necessary to catalyze public order, which cannot ever be made real.

Political liberalism: legality without legitimacy

Political liberalism is intensely powerful. But its power is neither *for* nor *against* anything. It is simply the bare fact of power itself, stripped of direction or

meaning. It preserves the force of political activity, its organic structure, but evacuates the spirit and sucks out the vitality. It is, in a sense, an undead political form. Rules and procedures guide its application but nothing stable stands behind them. The formal logic of its commitment to rule by law *cannot* establish a decisive and seamless system—the exception will always return—but it *can* assert a continuous logic that perpetually fills in the spaces between its own gaps. Such continuity is necessarily false, but this is unimportant; the assertion itself is more important than its truth. Rather than establishing a final end through a sovereign act that marks the exception, the liberal state claims to enforce a normative order that is always already final.¹³⁵ Such finality is *defined* by its dismissal of the immanent. It exceeds the logic of presence and therefore obliterates the possibility that truth might be found in specificity. The elaboration of such unity provides the necessary conceptual framework for disguising political decisions. And the disjuncture between the *political* force of such decisions and the *universal* premises upon which they are justified is the essence of political liberalism.

In this way, the inclusive gesture—the claim to tolerance necessitated by an absolute commitment to the value of judgment—becomes the most complete form of exclusion. The sovereignty of individual choice is preserved, but only by predetermining what will count as ‘choice’ and what will be policed. And the deep contradiction is that such predetermination is itself political, and thus specific and arbitrary. The law establishes the framework of absolute authority but it leaves

¹³⁵ What it lacks in decisiveness, liberalism makes up for with certainty.

unresolved the question of *who decides* what such authority entails. Its formal structure, the lingering feature of neutralization which hides the exception without eliminating it, establishes the procedures for articulating truth but leave the content unresolved. This authority lies around like a loaded weapon, ready to be wielded by all participants in a political system, each of whom will speak from the position of universality against the unlawful, irrational, dangerous others.¹³⁶

The end result is a set of liberal mechanisms that function automatically, churning out policing-actions to secure a formal continuation that no longer bears any meaningful attachment to the principles for which it originally stood. The formal logic of the system overwhelms the substantive motivations that were imagined to have set it into place, and in doing so retroactively evacuate the meaning of the original concrete foundation. Founded in revolution, in the democratic spirit of a population capable of constituting itself as a political agent, the system is now independent: “the machine now runs by itself.”¹³⁷

¹³⁶ Schmitt, *Political Theology*, pp. 32-35.

¹³⁷ Schmitt, *Political Theology*, p. 48.

V. Conclusion: reasonableness for radicals?

The essence of reasonableness is the principle that justice must be understood through its *limits*. This is supposed to be achieved by categorically refusing to render abstract determinations. Justice is not a judgment on particularity but is only a **judgment on the form of judgment itself**. It is a device for holding principles firm over time, and thus for generating and sustaining a political community organized around genuinely held beliefs that collectively *represent* a deeper *unity*. The procedure of rule-making *is* important, but only as a descriptive tool through which orders may be organized and comprehended. This is not justice itself, but is merely its shadow. Similarly, the substantive content of rules *is* important, but never absolute. What is acceptable—and what is forbidden—defines the specific nature of *a* political legitimacy, but does not control the concept of legitimacy *as such*. The conceptual language of procedure and substance is useful, insofar as each *clarifies* a certain form of limit on the scope of political chaos, but if they are taken to *actually constitute the limits themselves* then one has drifted into error. And this is precisely the mistake that Rawls himself commits. Rather than endorsing the aporetic necessity of justification, he returns to the fold, and re-imposes the binary structure of fact and value.

In doing so, he destroys the very object he seeks to sustain: the rule of law. On the one hand, as the content of the reasonable is radically constricted in order to obtain generality, the law it produces immediately withers and dies. There is no ‘law’ behind the wall of reasonable pluralism because the terms of agreement are so tightly drawn that there is no meaningful sense in which they could be enforced. On the other

hand, as the concept of reasonableness spreads its exceptionality across the entire landscape of political life, it transforms questions from determinate ones capable of decisive resolution into open-ended matters of justification. By carrying the exception into every possible judgment, reasonableness destroys the very idea of legal restriction.

The key problem for Rawls is that his desire to make the law reasonable only results in the replacement of law by reasonableness. And, correspondingly, his desire to make politics reasonable only results in the replacement of politics by reasonableness. Rather than providing the mobilizing faith in these dual institutions, it eradicates the institutions themselves. It employs the logic of a world beyond conflict—modeled in the hypothetical original position—in order to draw the dominant modes of historical existence *into* the present and wipe away their exclusionary history. Behind the sordid past lies the utopian promise of a world of mutual respect against a background of reasonable pluralism.

Therefore, the task must be to re-politicize the concept of reasonableness. We have isolated the point of rupture in Rawls' work, where he fled the recursive experience of judgment. This is, in a key sense, the exceptional gap in political liberalism as currently articulated. To describe this gap, we must arm ourselves with a form of judgment capable of redeeming the utopian promise of mutually constitutive political identity.

This project necessarily requires turning away from Rawls. After all, we have already noted his inability to construct a durable conceptual framework for

reasonableness. Fortunately, a useful analogue to this problem exists in the parallel realm of legal philosophy, particularly in the debate between Hart and Dworkin. While neither conceptualizes their project in terms of reasonableness or political identity, their deep attentiveness to the deceptively simple question ‘what is law?’ provides the framework for building a more sustainable concept of reasonableness. This is true not because of Hart and Dworkin’s success, but because of the useful form taken by their failures.

Delving deeply into the structure of their argument will allow us to deconstruct the structural indeterminacy of law and discover the missing referent of legal justification. What I hope to show is that this missing referent is perfectly matched to the gap in Rawls’ work. Political justice is located in the indeterminacy of law, and legal judgment is possible only against the backdrop of reasonable political justification.

Chapter Two – The Hart/Dworkin Debate and the Indeterminacy of Law

Liberal democracy is defined by binary obligations that resist reconciliation. The task of justice, as we have described it, is to engage these antinomies. I have pointed to reasonableness as a uniquely productive device for characterizing this obligation, albeit one still unformed and incomplete. Its weakness is found on both sides of the divide it seeks to traverse. At times it threatens to utterly colonize the law, replacing its material authority with an a priori structure of reason. In other cases, the content of reasonableness shrinks to a singularity; it represents nothing more than the *idea* of collective order.

Therefore, we now turn to the Hart/Dworkin debate in the hopes of capturing both aspects of this problem. Their dialogue similarly engages with liberalism through its dualistic structure, focusing in particular on the nature of obligation. Stated in most basic form, the debate revolves around a relatively straightforward binary question: is it ever possible for an otherwise valid legal rule to be rendered invalid due to its moral content? Or, conversely, may a legal rule derive its validity purely from its moral content?¹ This is a deceptively simple question. Like a rock thrown into a still pond, it produces ripples that spread across virtually the entire field of legal reasoning. And, just as the ripples on a lake often rebound to create general chaos that eventually erases the clarity of their origin, the Hart/Dworkin debate has in some ways grown *more* obscure over the years. Indeed, it has become increasingly unclear what it is even *about*. Scott Shapiro, for example, wonders if it is “about

¹ Joseph Raz, “Authority, Law, and Morality,” *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994), p. 210.

whether the law contains principles as well as rules? Or does it concern whether judges have discretion in hard cases? Is it about the proper way to interpret legal texts in the American legal system? Or is it about the very possibility of conceptual jurisprudence?”² Perhaps it is all of these, and more besides. Over the years, many partisans (including Dworkin himself in his final works over the past decade)³ have attempted to clarify these matters, but it has been to little avail.⁴ Both sides remain at loggerheads not only about who has won but also about what is even being discussed. And if those who study the issue cannot even agree about the basic questions it raises, what hope is there for important conclusions to be drawn? Perhaps this lack of clarity simply shows that the debate has exhausted whatever utility it once offered.⁵

However, we need not grow so discouraged. I will argue over the following three chapters that the Hart/Dworkin debate is particularly intriguing precisely *because* it is so difficult to parse. The basic confusion at the heart of the argument, the way that every seeming distinction grows softer and less clear the more closely it is examined, is itself tremendously fascinating. Underneath all the seeming differences between these theories, they work from the same underlying presumptions that characterize legal argument in contemporary liberal political systems. These

² Scott Shapiro, “The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed,” U of Michigan Public Law Working Paper No. 77 (February 2, 2007), p. 2.

³ See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), and Ronald Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006).

⁴ As Frederick Schauer notes, the passing of the baton has often added to the confusion as the interests of Hart himself have steadily been pushed aside in order to explore new variations on matters peripheral to his initial concept of law. Frederick Schauer, “(Re)Taking Hart: Review of A Life of H.L.A. Hart: The Nightmare and the Noble Dream by Nicola Lacey,” *Harvard Law Review* 11, no. 3 (Jan 2006), pp. 874-875.

⁵ Brian Leiter, “Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,” *American Journal of Jurisprudence* 48 Am. J. Juris. 17 (2003).

assumptions, and the associated silences they provoke, remain important subjects of inquiry. I propose, therefore, to re-read the Hart/Dworkin debate in light of Schmitt's critique of liberal legalism. This context will permit a new characterization of the fundamental problematic in their debate: namely, the Schmittian exception. Its hidden but fundamental status will help to unlock some of the more troublesome puzzles. This will not bring us any closer to resolving their debate itself (if anything, it makes that project more difficult), but will help us to garner new understanding of their impasse.

I have characterized the debate as a stone cast into the lake—tremendously influential but potentially so confusing that its ripples disrupt the clarity of future study. Rather than battling such chaos, I instead adopt a different angle of assessment by diving down into the lake itself. My goal is not to choose sides nor propose an alternative solution to their argument. Instead, I seek to identify the (often unstated) terms of their argument, with an eye toward clarifying certain core features of contemporary liberalism and the sort of political order that its societies produce. This will show that the Hart/Dworkin debate provides a window into both the tremendous strength and concurrent weaknesses of political structures grounded in liberal concepts of the good and help situate the reconstruction of political liberalism I will eventually undertake.

Schmitt's concept of the political provides the backbone for this argument. By focusing on the exceptional status of political judgment, which lurks beneath the concrete terms of their argument, we will discover a crucial unity in their approaches.

The core of each is identical: a disavowal of the capacity for law to cross the border between what is and what ought to be. In the case of legal positivism, the demarcation is rigid and severe: while moral reasons infuse the creation and structure of law—and may even be integrated into the procedures of law—the actual adjudication of law depends exclusively on legal reasons. Dworkin's normative legalism places moral reasoning first: the very structure of law is based in moral principle, to the extent that any judgment about what *is* must simultaneously make a claim about what *ought to be*. What unites these two approaches is that each seeks to normalize the experience of the gap, to articulate a broader vision of human reason that is coherent and stable. In Dworkin's case, the gap is treated as a psychological limit rather than a genuine space of exception. Every apparent hole disappears once one views it from the correct perspective. While Hart seems to emphatically reject this approach—insisting that law and morality are separated by a void of reasons that can only be bridged in a limited fashion—the difference is more cosmetic than it first seems. He sees the separation as necessary and irresolvable, but it nevertheless exists entirely *within* a larger comprehensive structure of reason. In both cases, the exception is domesticated, treated as simply a problem of incomplete reason. It is left as an unexplored and untheorized gap between ought and is, subsumed under assumptions that refuse the necessity for any further justification

Thus, both Hart and Dworkin represent liberal legal theories which do not tread into the breach but instead seek to simply wish it away. Under either approach this space remains not just exceptional to the content of law (extra-judicial) but

almost entirely invisible. Although the gap does force itself into the realm of legal analysis occasionally in moments of extreme crisis, it is inevitably subsumed by the re-articulation of the rule of law (in the case of Dworkin) or pushed away so that it ceases to be a gap *in* law and instead becomes an open space *around* law (in the case of Hart). This is so troublesome because the gap between fact and value is precisely where politics takes place, but is precisely what Hart and Dworkin cannot explain or justify. For them, the essential *violence* (and the concurrent creative force that it unleashes) of political identity is treated as partial and manageable. As a result, the possibility of irreconcilable disorder forever lurks behind their theories but cannot ever be named; to acknowledge it would deny the entire premise of legal reason.

In this way, Hart and Dworkin are merely two halves of a single movement, which uses ‘the law’ as a device to evade direct engagement with the most troublesome features of politics. The question ‘what is the nature of law?’ becomes a model for channeling the limits of theory into a conceptual pattern—changing them from abstract problems into more practical ones. The question is quickly transformed into a more practical form: ‘what sort of law ought to be enforced?’ That this question about enforcement is always already a question about the nature of political violence (and therefore also a question about the content of political identity) is completely hidden from view. This deep structure to their debate explains its terminal limits: the very terms of their discussion foreclose the sort of definitive resolution that is required.

Put simply, the Hart/Dworkin debate is the necessary byproduct of a system of thought that cannot unite justice and legitimacy. Because it cannot acknowledge the eruptive and arbitrary force of genuine political identity—at odds with the universality of its moral commitments—it must articulate a weaker, neutralizing conception of politics, and an attendant conception of law that is forever trapped in limbo. The entire debate, one might therefore say, is an elaborate exercise designed to obscure their shared dependence on a form of reason that cannot itself be reasoned but may only be *asserted* or *enforced*. The full development of this argument will occupy the next two chapters. Before that can be undertaken, however, we must set up their debate in the terms with which they understood it, isolating the key notes and picking away the surrounding noise, in the hopes of slowly attuning our ears to their underlying resonances.

These claims are sweeping, and could easily be read as dismissing Hart and Dworkin entirely. I certainly do not mean to go so far. While this analysis *is* meant to approach them from a critical perspective—seeing them as illustrative examples of a broader tendency to substitute legal reasoning for political conflict—this should not be taken to diminish the significance or quality of their work. Quite the contrary. Both of these men were brilliant thinkers, so brilliant that their ideas reach to the very limits of what is possible within the terms of their assumptions. Tracing the development of these positions will be essential to unpacking what is so enduringly powerful about the legal theory of modern liberalism. The constructive potential in

each approach offers crucial hints about the necessary conditions for any eventual reconstruction of liberal political justice.

I. Hart's positivism and law's normativity

Hart opens *The Concept of Law* by reviewing a few of law's recurring peculiarities—issues which have plagued previous efforts to describe it. First, law is able to generate a special kind of obligation: grounded in force but not *based on* force. A legal order operates differently than the command of a gunman to hand over your wallet.⁶ This seems intuitively obvious, but it is difficult to define precisely *why* this is true. Second, such legal obligations are in some way distinct from moral rules. While some forms of natural law conflate the two and simply regard law as a subdivision of morality, even those approaches must explain the distinct sort of moral obligation that is legal in nature.⁷ Third, while the law is primarily made up of rules, the definition of a 'rule' remains elusive. Legal rules, Hart thinks, must surely be distinguished from the simple rules of habit, in that they seem to imply a normative justification for adherence, and thus create a corresponding normative justification for punishment of violations.⁸

In each of these matters, law appears similar to other forms of order, but not identical. A strong theory of law ought therefore be able to draw comparisons without collapsing the distinction between it and other sorts of obligations. However, none of the previous theories have successfully achieved this objective. The most interesting failure, he believes, is John Austin's framing of law as the issuance of commands, which garner obedience, by an actor who remains unaffected by the scope of those

⁶ H.L.A. Hart, *The Concept of Law*, 2nd edition (Oxford: Clarendon Press, 1994), pp. 6-7.

⁷ Hart, *The Concept of Law*, pp. 7-8.

⁸ Hart, *The Concept of Law*, pp. 9-11.

commands.⁹ This basic positivist take, while too simplistic, helps to clarify what will be necessary of a more successfully theory of law. Its errors “are a better pointer to the truth than those of its more complex rivals.”¹⁰

The strength of Austin’s argument is in his recognition that law’s special feature is its ability to override other sorts of reasons. A legal rule is obligatory *because* it is law, regardless of whether it is desirable or good. Law therefore imposes a prior condition on normal reasoning; its binding force stems from what it *is*. As a necessary corollary, Austin thinks, this ‘content-independent’ function creates a clear distinction between morality and law. A rule cannot be neutralized based on moral objections; a rule is valid if properly formulated, regardless of its content.¹¹ This means that the decision about whether to follow a law is purely a matter of instrumental reasoning—what harm will I suffer if I disobey—rather than moral reasoning. From the perspective of the subject, the only reason law *ought* be followed is that failure to do so risks sanction. The bare force of a threat changes the subjective normative reasoning of the subject without making a claim about the objective moral justification of the order.

This relatively simple account is surprisingly powerful and remains the foundation for Hart’s concept of law. Its cleanliness is extremely useful for the pursuit of a “purely analytical study of legal concepts, a study of the meaning of the

⁹ John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954).

¹⁰ Hart, *The Concept of Law*, p. 16.

¹¹ H.L.A. Hart, “Legal and Moral Obligation,” in *Essays in Moral Philosophy*, ed. A.I. Melden (Seattle: University of Washington Press, 1958), pp. 82–107.

distinctive vocabulary of the law.’¹² The introduction of moral argument is toxic to such a project because it introduces ephemeral and indeterminate conclusions, unattached to specific positive objects. It is inherently imprecise and therefore not amenable to scientific study. If law is to be accurately described, that description must be analytic and focused on the closed system of legal reasons.¹³

However, while Austin’s theory helpfully isolates this key aspect of law, Hart believes that he errs by unnecessarily entangling the ‘content-independent’ feature with the idea of ‘law as command.’ It is understandable why he would connect the two: if the only suitable focus for legal study is the bare positive content, one still must determine what constitutes that content. For Austin, the answer is simply the commands of a ruler over a subject, which are the only objects that produce obligation of the legal sort. But, Hart argues, this connection does not follow. Not only do commands fail to perfectly align with the peculiar function of legal orders, they are also far too circumscribed. The law contains a great deal more than can be found in a study of commands, and the too-narrow approach of Austin and the other classic utilitarians risks becoming claustrophobic and ill-suited to describing the actual operations of legal order.¹⁴ Two specific arguments from Hart deserve particular attention on this front.

¹² H.L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71, no. 4 (Feb 1958), p. 601.

¹³ As we will soon see, such a truly ‘closed’ system is utopian and impractical. Nevertheless, Hart is strongly committed to the general principle that any description of law must be extremely wary of morality’s confusing imprecision.

¹⁴ Hart, “Positivism and the Separation of Law and Morals,” p. 601-602.

First, contrary to what might be expected from a theory focused exclusively on the sovereign decider, laws remain valid through generations—long after both the issuer and subjects of the rules have departed.¹⁵ This suggests that law contains a formal element of authority that is detached from any specific subject. A simple habit of obedience is insufficient to explain this situation; the law depends instead on a persistent collective affirmation of the legal order itself.¹⁶ Second, the command theory is limited to explaining the coercive function of law. It cannot explain rules that establish the proper conditions under which contracts may be formed, or which permit the creation of new legislation, or which establish the procedures for appointment of officials. These *are* rules, insofar as they set limits on how such actions may be properly conducted, but they do not depend on obedience to any command.¹⁷ They command no action, nor do they offer any threat. Instead, they confer powers. Through them, the subjects of law are granted the specified power to create new legal obligations.¹⁸

¹⁵ Hart, *The Concept of Law*, pp. 61-64.

¹⁶ Hart, *The Concept of Law*, pp. 51-57.

¹⁷ Hart does acknowledge one possible response to this claim: the Kelsenian treatment of law as a system of norms which stipulate sanctions. This narrow concept sees laws as simply a set of instructions to officials about their obligations to impose a sanction or honor an obligation. For Hart, this is an incredibly cramped and ultimately unhelpful picture of law, because it fails to describe the ordinary operation of most legal systems. See Hart, *The Concept of Law*, pp. 35-38. One alternative theory, inspired by the natural law tradition, might argue that Hart has misunderstood these ‘power conferring’ rules. The power to create obligations, one might argue, is an intrinsic feature of individual subjectivity. The law does not confer these powers; they are naturally possessed. The purpose of law, then, is to regulate the scope and manner in which such rights may be executed. For example, the natural power to promise implies a right to create legal obligation in whatever fashion one wishes. Human law then restrains that natural right and limits its scope. Dworkin’s theory of right-based law arguably falls into this category. Cf. Ronald Dworkin, “Hard Cases,” *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), pp. 105-116.

¹⁸ Hart, *The Concept of Law*, pp. 29-31.

Such rules are not merely incidental and they are also not rare exceptions. They are key features of legal order, whose existence provides the background condition for social interaction. Indeed, this lubricating function is, for Hart, the essence of law. Of course, the threat of punishment is crucial in some places (criminal law in particular), and the capacity for successful enforcement in the case of disputes or violations is necessary for most forms of law. But the typical legal subject interacts with law primarily as a device for smoothing collective existence and only rarely experiences it as a coercive limit on action. One might therefore say that law is ‘exercised,’ in the vast majority of cases, within the minds of those who observe it. They follow the law not because of any threat, but because acting within the law improves coordination and enables a broader range of social experience. Those cases where law breaks down and requires enforcement are merely “ancillary” features of the system, not its essence.¹⁹ In making this point, Hart takes aim at the Holmesian claim that law is best understood from the perspective of the ‘bad man’ who merely wants to know what he can get away with.²⁰ This approach is wrong because the law is primarily a tool of social ordering, and it cannot be understood without recognizing that its subjects treat its obligations as *right*, rather than merely *existent*. The authority of law stems from the internalization of its structure in the minds of its subjects, not simply in their grudging acceptance.²¹

¹⁹ Hart, *The Concept of Law*, p. 38.

²⁰ Hart, *The Concept of Law*, p. 39.

²¹ As we will later see, this reflects two important and related motivations for Hart: his commitment to ordinary language philosophy and his commitment to liberal principles of individualism and liberty.

Here, Hart adds a layer of complexity to Austin's positivism. Genuine understanding of the law requires acknowledgment that its subjects relate to it in terms of normative obligation, not simply as a predictor of personal danger. Of course, acknowledging that the practice of law contains normative elements abandons the absolute barrier between law and morality erected by Austin. So, if Hart hopes to preserve the general prohibition, he must establish that the sort of normativity associated with the smooth functioning of a legal order—the way that it infuses the moral reasoning of its subjects—does not permit the infiltration of moral reasoning into the *content* of law.²² It must remain possible to describe legal obligations in purely analytic terms, without any reference to external moral reasons.²³

We now have a clear picture of what must be accomplished by a successfully concept of law. It must a) distinguish law from morality while b) clarifying the social function of law as a normative practice. And while meeting these tasks it must also c) demonstrate why law continues indefinitely; it must reveal law to be a social order rather than simply the hypostatized will of a sovereign law-giver. In short, a viable theory must allow for the content of a legal system to be determined without reference to morality, while still demonstrating how law is structurally capable of generating a normative order of reasons.²⁴

²² Cf. Hart, *Concept of Law*, “Chapter 9 - Laws and Morals.”

²³ Note that Hart does not think that law is necessarily defined by the *absence* of morality-dependent reasoning. He is simply trying to establish that there is no *necessary* connection. Cf. Hart, *The Concept of Law*, p. 181. We shall see in the next section why this distinction is particularly important for the opening salvos of his debate with Dworkin.

²⁴ The similarity between this goal and Rawls' objective in *Political Liberalism* should be obvious.

Law as the union of primary and secondary rules

To meet this challenge, Hart makes a crucial distinction between first and second order rules. First order rules regulate behavior and are social in nature; they exist because they are customarily treated as valid.²⁵ In small, homogenous communities, adherence to such rules is a basic social norm, enforced by daily interactions.²⁶ However, in the more complex societies with which we are concerned, such rules are insufficient. The collective communal will that they enforce quickly becomes too diffuse to provoke the necessary normative endorsement of its obligations. Without the de facto unity of a communal identity, disputes over the proper interpretation of primary rules are irresolvable.²⁷ Thus, Hart argues, the first type of rules must be supplemented by a second order dealing with the construction, modification, and removal of the first type of rules. Once these take form, the authority of rules is knit together into a larger system of order. This jump is necessary to re-establish the authoritative function of rules, and constitutes a useful dividing line between simple normative social order and a formal legal system.²⁸

A system of first order social rules is moral in nature. Because social rules are made valid only through their actual collective articulation, they are fundamentally reliant on the moral values of a community. A social rule exists only because the community under consideration believes that it is *justified* to enforce its content. This is what makes it a rule: that it does not merely reflect habit or correlation; it

²⁵ Hart, *The Concept of Law*, p. 89. Of course, these rules need not be *universally* treated as valid, but they must be so for a significant majority of its subjects

²⁶ Hart, *The Concept of Law*, pp. 80-81.

²⁷ Hart, *The Concept of Law*, p. 90

²⁸ Hart, *The Concept of Law*, pp. 91-92.

constitutes a reason.²⁹ The introduction of second order rules, however, creates new possibilities. These rules confer validity on other rules without any necessary reference to the moral justification of a social rule. In this way, legal reasons may be detached from moral ones. A rule may now be obligatory simply because it *is* a rule; it need not directly reflect any moral value of the community. Of course, these secondary rules must themselves be validated, which can only be accomplished by *other* secondary rules. This then creates a chain of justification. As one traces the links backward, eventually only a single rule will remain: the ‘rule of recognition’ in which all authority to validate the entire legal system rests.³⁰ This rule, like intermediate rules, provides standards of validation for other rules, but is unlike them in that it cannot be validated by a higher rule. The rule of recognition itself is an exception to the normal requirements of law.

The rule of recognition, therefore, is always only a social rule. We might say: it is legitimate, but never valid.³¹ Meanwhile, its children, the secondary rules of operation and primary rules of behavior are valid because they fall under its umbrella, but may or may not be legitimate individually. This is a tricky idea, and can only be fully understood by recognizing two distinct perspectives on law. From within the legal system, rules are judged by an “internal statement of validity,” but from outside, observers only look for “external statements of fact that the rule exists in the actual

²⁹ Hart, *The Concept of Law*, p. 82.

³⁰ Hart, *The Concept of Law*, p. 100.

³¹ This is, of course, a fraught framing. One of the key issues at stake in using the Hart/Dworkin debate to comment on Rawls is how these legal arguments redound to the question of political legitimacy.

practice of the system.”³² Crucially, both perspectives concur on law’s *content*. The difference is in their *attitudes* toward law’s positive content, not in a disagreement about what the law actually is. The internal perspective is concerned with the question of validity: “we only need the word ‘validity’, and commonly only use it, to answer questions which arise within a system of rules...No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use.”³³ Put simply: the rules of a legal system become binding insofar as they have been validly constructed, and this does not depend on a social endorsement nor any judgment about their particular content. They may or may not function as social rules, but this is purely a secondary matter. They impose legal obligations because they fit into a broader legal apparatus, and remain analytically determinate as long as the broader network of rules retains clarity. As such, they may be meaningfully studied and employed from an internal perspective regardless of their acclimation in general practice. We may still accurately describe the obligations they *ought to* impose, even if they are not heeded.³⁴

The internal and external perspectives are linked together via the rule of recognition—the key feature that cannot be easily captured by either approach alone. It is the unique rule that generates coherence for the internal viewpoint, which binds together other rules. But it is itself binding *only* due to the factual content of the world. It must be a social rule, and cannot obtain validity in any other way. It binds

³² Hart, *The Concept of Law*, p. 108.

³³ Hart, *The Concept of Law*, p. 105.

³⁴ Hart, *The Concept of Law*, p. 81.

tautologically, imposing (legal) obligations simply because it does, not because it ought to. This means that the internal perspective is always necessarily incomplete. While law's structure of validity makes a positivist analysis necessary, and disproves the efficacy of a Holmesian realism, that internal meaning is possible only because of a pure fact. The legitimacy of its rule of recognition generates the possibility for other obligations to grow, but nothing can be said to obligate the rule of recognition itself. It simply is. Of course, those who affirm a rule of recognition will often do so for a variety of reasons. But those reasons are wholly distinct from legal reasons; they create no legal obligation. For example, many people may support a legal order because they believe it embodies a principle such as 'justice for all.' These beliefs matter a great deal—without them, the law is unlikely to remain legitimate—but they impose no *legal* restriction on a duly appointed legislature promulgating flagrantly unjust laws.³⁵ This means that subjects may value the rule of recognition (and thus the entire system of law which depends on it) in radically different, even contradictory ways. This is acceptable because their individual justifications do not intrude into the shared content of the law, which prevents any contradiction from manifesting as a positive obligation.

The structure of this argument should be familiar, given its similarity to the Rawlsian overlapping consensus. In both cases, legitimacy stems from a common framework rather than from deep moral reasons. The rule of recognition obtains authoritative status because the reasons for supporting the rule remain wholly outside

³⁵ See Hart, *The Concept of Law*, p. 197.

of law. Their existence sustains the law but plays no role in its content. Similarly, political liberalism grows out of the need to generate authoritative principles of justice that do not depend on general moral acclamation. Given the fact of reasonable pluralism such collective normative affirmation is unobtainable, and yet political liberalism requires its citizens to treat their legal order as normatively valid. The important move made by both Rawls and Hart is to treat one particular fact as a moment of transformation, capable of taking moral inputs and producing legal output.

The next section will explore Dworkin's critique of this approach—focusing first on its treatment of rules and second on its presumption of basic agreement—but before engaging that debate it will be useful to reflect on how Hart's arguments relate to the Schmittian approach to law. I have already hinted that the rule of recognition constitutes a sort of exceptional space within the structure of law, but this idea must be expanded if we are to derive *political* implications—rather than purely legalistic ones—out of the Hart/Dworkin debate.

To engage this task, let us emphasize one of Schmitt's key motivations: to distinguish *rule* (as a broadly political phenomenon) from *law*. The practice of ruling involves the application of order, whereas law is simply one form by which such rule becomes manifest.³⁶ The law is always incomplete because it is founded on the exceptional eruption of political identity; it is *constituted* by an order that exceeds the scope of reasoned analysis.³⁷ In Schmitt's terminology, "the legal order rests on a

³⁶ Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham: Duke University Press, 2004), p. 4.

³⁷ Schmitt, *Constitutional Theory*, pp. 75-76.

decision and not on a norm.”³⁸ Theoretical treatments of law must account for this division or else founder on their own exceptional assumptions.

How, then, does Hart’s positivism fit into this scheme? At first glance, the rule of recognition has promise. It signifies the limit condition of legal reason, the necessity of an exterior point upon which legal reasons may hang their claims to legitimacy. Without the idea of a space beyond law, there could be no law at all. That means that law does not just *include* the exception; it is *founded upon it*. This is quite similar to Schmitt’s argument in *Political Theology* that a norm can never fully account for its own existence. Because norms organize otherwise disparate facts—they attempt to generate order out of chaos—they themselves must come into existence *within* disorder. A norm can impose obligations only against a background of disorder that the norm itself cannot speak to.³⁹

This is not to depict Hart as a secret Schmittian. Obviously, their approaches differ in significant and irreconcilable ways. However, the relatively close analogy between the rule of recognition and the foundational political act does help to clarify the key pressure points in Hart’s positivism. As we work through the Hart/Dworkin debate, it will be helpful to remember that the rule of recognition in a certain sense constitutes an attempt to *model* the nature of the exception.

³⁸ Schmitt, *Political Theology*, p. 10.

³⁹ Schmitt, *Political Theology*, p. 6.

II. The Hart/Dworkin debate: disagreement and indeterminacy

In order to think through the Hart/Dworkin debate, we should first ask one general question about Hart: what is his goal? Is it simply descriptive accuracy? If so, to what end? On this point, Hart himself is somewhat circumspect. One might suppose that he considers the answer so obvious as to not need elaboration. And yet: the answer is not obvious. To see this, one need only consult the proceedings of Hart's debate with Lon Fuller over morality and law, a peculiar discussion in which the two men at times seem to be talking past one another. Specifically, Fuller has a difficult time determining why Hart supports the position that he does. He titles his essay "Positivism and Fidelity to Law" and uses that concept of fidelity extensively. The superior theory of law, he says, is the one that "can best define and serve the ideal of fidelity to law."⁴⁰ For Fuller this seems to be a key nexus of their dispute, and yet Hart makes no mention of fidelity whatsoever in his "Positivism and the Separation of Law and Morals." More broadly, while he does seek to argue that positivism will not *degrade* the general respect for law, he does not seem particularly troubled to prove that it will benefit that goal.

But what Hart *does* say about his priorities is telling. Positivism has been a productive force, he argues, because the clarity of mind that it provides is crucial for resisting the descent into political quietism. A lucid science of the law will dispel the illusions toward which political actors may unthinkingly lurch. This is expressed in a concern about two linked risks: "the danger that law and its authority may be

⁴⁰ Lon Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71, no. 4, February 1958, p. 632.

dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.”⁴¹ Law must not be reduced to being either a servant or a replacement for morality but instead should be a supplement. Positivism is valuable, then, because it clears the mind of the dangerous pretense that law must necessarily conform to a moral good. In the case of law we are better served by candor than by utopian dreams.⁴² And this leads us to the conclusion that law is nothing more or less than a tool of statecraft, “nothing either good or bad, but thinking makes it so.”⁴³ Its value depends on how it is used.

This means, of course, that good law depends on good actors to develop and enforce it; otherwise despots may employ the law to serve malicious ends. More prosaically, just as a worker must know the proper use of a wrench in order to achieve its successful use, those who employ the law risk doing more harm than good if they fail to understand its contours. Their best intentions cannot force it to work against its nature. This goal—descriptive clarity to facilitate the best possible use of law by well intentioned agents—constitutes the durable core of Hart’s position in his debate with Dworkin. Conversely, as we will see, Dworkin’s consistent commitment is to affirm the ineluctably moral structure of law. If we treat these two elements as beachheads for their debate, the ensuing arguments may be kept in perspective. Furthermore, this distinction helps us to tether the Hart/Dworkin debate to the different aspects of justice as fairness. In this comparison, Hart’s theory stands in for the attempt in

⁴¹ Hart, “Positivism and the Separation of Law and Morals,” p. 598.

⁴² Hart, “Positivism and the Separation of Law and Morals,” p. 620.

⁴³ William Shakespeare, *Hamlet*, Act 2, Scene 2.

Political Liberalism to sharply limit the work done by a concept of the good, in an effort to evade the impossible universality that was implied by *Theory*.

Dworkin's opening salvo: the model of rules

Dworkin's initial attack focuses on a distinction between rules and principles. Hart's theory, he argues, is defined primarily through its attempt to describe law by reference to the rules that make up its content. The law is nothing but this system of rules, linked together underneath a single rule of recognition.⁴⁴ Such rules are defined by their binary nature: a rule is either valid or invalid with no gray area possible. If it is valid this means it fits into an entire coherent system. Thus, valid rules cannot contradict; validity is itself a principle of non-contradiction.⁴⁵ By contrast, principles function quite differently. They are open to questions of degree or emphasis, and they may countervail against one another to produce distinct results given unique individual circumstances.⁴⁶ Thus, when a principle is countermanded within the law, it does not become invalid, nor does such an effect constitute an *exception* to the principle. It simply means that the principle fails to take precedence in a particular instance—it is outweighed by another principle.⁴⁷ For example, a strong principle exists that one should not benefit from wrongdoing, but this does not mean all instances of profit from wrongdoing are illegal. In some cases the balance of reasons

⁴⁴ Dworkin, "The Model of Rules I," *Taking Rights Seriously*, pp. 17-22.

⁴⁵ Dworkin, "Model of Rules I," pp. 24-25.

⁴⁶ Ronald Dworkin, "The Model of Rules II," *Taking Rights Seriously*, p. 72.

⁴⁷ Dworkin, "Model of Rules I," p. 27. See also Dworkin, *Law's Empire*, pp. 269-270.

will permit exceptions to even the strongest of principles. Because Hart fails to account for principles, Dworkin argues, his 'model of rules' is woefully incomplete.

To support this position, one need only observe the behavior of judges. When faced with hard cases, where existing rules offer no clear guidance, judges do not act as though the law is simply indeterminate, as the model of rules would suggest. Instead, they seek to find the legally correct decision embedded within law's principles, even if those have never been fully articulated or clarified as rules. Moreover, such decisions in hard cases are not rare. Once we recognize principles as distinct phenomena, we suddenly become "aware of them all around us. Law teachers teach them, law books cite them, legal historians celebrate them."⁴⁸ Even in seemingly simple cases, where the 'model of rules' seems sufficient, the simplicity is a mask. Underneath the clear rules are underlying principles so widely shared and uncontroversial that they no longer must be explicitly articulated. This suggests that the basic building blocks of law are principles, while rules are secondary instantiations. The principle of equality, for example, informs all those particular positive rules that enforce it. As such, the task of the judge is not to weigh rules *against* principles, but rather to balance the various principles that support the system of rules.⁴⁹

In some respects, Dworkin's argument is quite strong. He demonstrates with great acuity that most modern legal systems do include a wide range of legal reasons that fail to clearly fit into the category of rules. Judges, when tasked with making

⁴⁸ Dworkin, "Model of Rules I," 28

⁴⁹ Dworkin, "Model of Rules II," p. 77.

decisions, appeal to these principles with significant regularity. It is less clear, however, whether this criticism poses any particular danger to Hart's theory. Although *The Concept of Law* does indeed focus primarily on the operation of rules, Hart makes no claim that the law is *nothing but* such rules. While a 'hard' or 'exclusive' positivism might insist on an absolute separation of law and morals—and thus also imply that principles are wholly excluded from legal reasoning—Hart's position is far less restrictive. His 'soft' or 'inclusive' positivism claims only that there is no *necessary* relationship between law and morality.⁵⁰ It does not deny that many legal systems will nevertheless include principles in several possible ways.

We have already seen one such example in the form of the rule of recognition. Because it is a social rule, rather than a legal one, it must obtain legitimacy through its appeal to the political reasoning of its subjects. Such legitimacy often does depend on moral judgment, even if it does not *necessarily* do so. This means that most legal systems depend on a deep-lying moral justification. The fact that a rule of recognition retains force over time may well indicate that the rules which it promulgates, on balance, are justified by the moral reason of its subjects. Such moral reasoning, however, does not interfere with Hart's positivist objectives because the law may still be described without reference to moral criteria. These moral bases improve our external picture of law—they help explain why and how it obtains social legitimacy—but they are unimportant to the internal perspective on law. There is also a second way that soft positivism incorporates principles; they may simply be

⁵⁰ Compare to, for example, Raz whose 'harder' version of positivism will be discussed in chapter 3.

validated in the same manner as rules. That is: principles may quite easily be included as validity-conferring elements of a legal system, as long as they themselves are validly connected back to the rule of recognition. In his posthumously published Postscript to *Concept*, Hart forcefully makes this point, noting that the First Amendment to the US Constitution is a clear example of principles being incorporated into law.⁵¹ Furthermore, principles may still apply even without such explicit pedigree. A wide range of principles have been baked into the common law, and as long as the rule of recognition honors that common law it will also incorporate those principles.⁵²

Both of these arguments are relatively straightforward and make a compelling case that Dworkin's critique in "Model of Rules I" fails accurately strike its mark. By making the distinction between rules and principles the core of his argument, Dworkin overstates the uniformity needed for law. Nevertheless, while this 'soft' positivist response weakens Dworkin's case, it fails to resolve a deeper matter of significant disagreement: whether or not there are 'right answers.' For Dworkin, the centrality of principles means that law is both expansive and complete; it contains no blank spaces or gaps. Because principles are flexible, they remain fully operative even in the face of wholly unanticipated circumstances. Regardless of whether a posited rule applies, the underlying principles will still hold. Thus, an objectively correct answer exists for all (or at least most) legal matters, if the judge is only

⁵¹ Hart, "Postscript," *The Concept of Law*, p. 264.

⁵² Hart, "Postscript," p. 265.

capable of discerning it.⁵³ Hart, of course, does not think that the law extends nearly so far. Though ‘soft,’ his approach is still positivist. While certain circumstances permit (or even instruct) reference to principles, this still requires a chain of pedigree, except for the unique case of the rule of recognition. For him, rules and principles may live in harmony within the law without troubling the basic distinction between legal and moral reasons, but this is unlikely to satisfy Dworkin, who sees principles as necessarily expansive; by their very nature, they produce obligations that *precede* and *exceed* the simple study of positive, articulated rules. Therefore, if Hart’s approach is to be vindicated, it must show how the use of principles (and their inherently non-binary mode of value-weighting) may be *restricted*. This, accordingly, marks the renewed terms of their disagreement.

The semantic sting

In recognition of the limitations of the argument from principles, Dworkin’s work following “Model of Rules I” focus more broadly on the subject of disagreement.⁵⁴ His goal is to show that Hart is incapable of establishing a basis for interpretation that remains limited in scope. To make this argument, he takes particular aim at what he believes to be the basic stabilizing feature of positivism: the agreement among most legal interpreters about the foundation of law. If law is simply

⁵³ The issue of precisely what it means to ‘discern’ the rule in such cases is tremendously important and will be discussed in more detail in chapter 3 in the discussion of discretion. Ultimately, this idea of discretion will prove more illuminating than the distinction between principles and rules

⁵⁴ The first stages of this shift may be seen in “The Model of Rules II” (1972) and “Hard Cases” (1975), but its full development, which will be my primary focus in this discussion, is found in *Law’s Empire*.

the factual aggregation of rules and principles, there is no room for deep interpretive disagreements about the nature of the thing. Gravity remains gravity regardless of how we understand it, and law remains law in the same fashion. Individuals may disagree about whether the proper procedures were followed or whether the terms were articulated with sufficient precision to create a rule, but they cannot meaningfully disagree about the general idea of what law in fact *is*.⁵⁵ This, Dworkin thinks, is the essence of the positivist position. It sees all disagreements about the grounds of law as disguised normative arguments about what the law *ought to be*.⁵⁶

Against this ‘plain facts’ view of law, Dworkin deploys an argument he calls the ‘semantic sting.’ It begins by challenging the premise of underlying agreement on the grounds of law. Such a supposition, Dworkin thinks, is both unnecessary and unfounded. Legal debate is full of disputes in which people argue not only over how to apply the law but also over what the law actually is. Indeed, many of the most significant and intense legal debates revolve precisely around the basic meaning of seemingly core concepts.⁵⁷ For example, when deciding how to apply the Bill of Rights, different parties may disagree not merely about the scope of those rights but about their very nature. Who is an appropriate bearer of these rights: men, citizens, corporations, animals? Should phrases like ‘cruel and unusual’ be judged without

⁵⁵ Dworkin, *Law's Empire*, p. 5.

⁵⁶ Dworkin, *Law's Empire*, p. 7. While positivists remain unsatisfied with Dworkin's characterization of their approach, the description here is certainly more precisely calibrated than the ‘model of rules’ account. In particular, it seems to align far more closely with Hart's idea that law contains a settled core about which none could reasonably disagree, and a “penumbral” set of rules that provoke dispute. See Dworkin, *Law's Empire*, p. 39, and Hart, *The Concept of Law*, pp. 131-132.

⁵⁷ Some extremely general examples might include: how to determine the content of law, how to value and assess legislative intent, the proper standard for interpreting words, how to understand the popular will, how to evaluate end-goals that appear to be incoherent in light of their means, etc.

reference to context, or according to their meaning at the time, or with reference to their present contextual meaning? And so forth. These arguments are not merely about the size and shape of the gray area between definite law and undefined decision; they are disagreements about “pivotal cases testing fundamental principles.”⁵⁸

Dworkin offers a number of illustrative examples of this phenomenon. One of the most interesting is the Snail Darter Case, which concerned the construction of a Tennessee dam. While the dam was under construction, Congress passed the Endangered Species Act, which instructed the secretary of interior to block projects that would threaten key species. Because this almost-completed dam would destroy the habitat of the snail darter, “a three-inch fish of no particular beauty or biological interest or general ecological importance,” the secretary decided to halt its construction.⁵⁹ The Tennessee Valley Authority argued that the secretary’s interpretation of Congress’s intent in passing the ESA was erroneous. Congress could not have meant for the ESA to produce such a drastic result, they argued, citing appropriations bills passed after the secretary’s decision which funded the dam and statements from various congressional committees strongly disagreeing with the secretary. To halt construction would require an irrationally literal reading of the statute’s text and blindness to the contextual understanding of its requirements.⁶⁰

⁵⁸ Dworkin, *Law’s Empire*, p. 43.

⁵⁹ Dworkin, *Law’s Empire*, p. 21.

⁶⁰ This bears a striking similarity to the case now making its way through federal courts about the provision of subsidies in the Affordable Care Act. Sloppy statutory construction has created the potential for a legal challenge that would eviscerate the law—a seemingly absurd result, but one that could arguably be required based on the straightforward and acontextual reading. See Abbe Gluck,

Justices Burger and Powell wrote opposite opinions in this case. Burger spoke for the Court's obligation to simply apply the plain content of the law without regard to context, even when it produces a bad result. Absent clear and dispositive evidence that Congress's intent was to give the words of the statute a contextual meaning, the Court is powerless to enforce an alternative position. Powell's dissent, by contrast, argued that a more complete reading of Congressional intent provided sufficient evidence to instruct the Court to avoid an absurd outcome.

One might be tempted to say that this is simply a case of Burger making the positivist case for applying law and Powell making a normative or political claim about what the law *ought* to be. However, this is not how *Powell* described his opinion. He believed himself, just as much as Burger, to be applying the law; they simply disagreed about *what the law actually was*.⁶¹ Accordingly, the choice in the snail darter case is not a political choice between applying the law or deciding to discard the law in this case in the service of reasonableness.⁶² Instead, the choice is about which interpretive model more accurately describes the actual content of the law. It is a deeply theoretical question of how to best interpret statutes, not a political disagreement about when it is acceptable to step beyond the clear meaning of law.⁶³ For Dworkin, this demonstrates that legal debates regularly and necessarily involve

"How Congress Works (And the ObamaCare Subsidies Lawsuit)," *Balkinization*, December 12, 2013, <http://balkin.blogspot.com/2013/12/how-congress-works-and-obamacare.html>

⁶¹ Dworkin, *Law's Empire*, 23.

⁶² This might have been Dworkin's view in "Model of Rules I," where it could have been pitched as a claim that the absurdity doctrine constitutes an implicit principle that must be weighed against the principle that supports straightforward reading of a rule.

⁶³ This distinction (between legal disagreement over the requirements of law and political disagreement about what to do in the face of clear law) will be returned to in chapter 3 in the discussion of emergencies.

fundamental disagreements about the meaning of 'law' itself, rather than marginal arguments about what precisely is covered by the law. Such cases are not rare or exceptional but instead are quite commonplace.

Theoretical disagreements

If Dworkin is correct that such disagreements are common, it seems to disrupt the entire apparatus of positivist judgment. The presumption of common criteria for discussion, from which argument obtains intelligibility, is unfounded. Once disagreement emerges, as it must do in virtually any contested case, the supposed semantic criteria of legal order fade into oblivion. Because there is no uncontroversial core of agreement, there is also no plain fact of the law, no objective criteria for the promulgation and validation of its emanations. There is no simple description of what the law *is*; there are only complex arguments about the nature of proper interpretation. As such, every assertion about law's content depends on a deeper justification of why that content should be fixed in that particular way, and disagreements about the grounds of law are the very essence of legal debate.

Again, this calls to mind the Rawlsian concern about the fact of reasonable pluralism. Both Rawls and Dworkin are attentive to the problems posed by durable disagreement about fundamental matters among well-intentioned participants in a social world. What makes Dworkin's approach unique is his deep attachment to the interpretive process. Faced with enduring theoretical disagreement, one cannot identify an objective set of facts (which exist 'out there' in the world) but instead

must actively participate in making law “the best that it can be.”⁶⁴ Only this attitude, which he terms ‘law as integrity,’ can fulfill the interpretive obligations made necessary by the persistence of theoretical disagreements. The rule of recognition cannot provide the master key for unlocking disputes, because there will inevitably be disagreement over it as well. The only potential for genuine legal analysis, then, depends on an external, normative key. This does not completely deny the value of Hart’s approach. Positivist analysis is crucial for establishing the rough contours of possibility, but Hart errs by presuming that analysis can end here.⁶⁵ Like with the *Snail Darter* case—where Burger’s choice to default to the ‘plain facts’ view was no more pure a form of legal analysis than Powell’s incorporation of external values—*both* sides must make judgments about why their interpretive approach is best. Conventional practices cannot fix the grounds of law simply by virtue of being conventions; they must be defended by an interpretive model.

In this respect, Dworkin’s argument hearkens back to Fuller’s—who also saw any theory of law as necessarily containing a moral judgment about the value of law. And, just as was the case in his debate with Fuller, Hart refuses to accept this idea that the best theory of law must also be able to justify its political *application*. For him, these are entirely distinct questions; perfectly valid laws may produce horrific results. Conversely, a particular legal order may actually forbid morally obligatory actions. Therefore, Dworkin’s attempt to impute an implicit normative objective to the plain facts view fails because it presumes a motive (the justification of coercion)

⁶⁴ Dworkin, *Law’s Empire*, p. 53.

⁶⁵ See Dworkin, *Law’s Empire*, pp. 62-67.

which simply does not exist. For Hart, a descriptive theory of law is only as good as those who employ it—it possesses no intrinsic moral worth.⁶⁶ Against this claim, Dworkin argues from theoretical disagreements that ‘the law’ is an illusion in the sense that Hart means. There is no objective fact of law available for accurate description, even in apparently simple cases. After all, the only requirement for turning a simple case into a hard one is the presence of a dueling convention. Faced with such circumstances, a judge will be lost when she attempts to apply the law unless she possesses an interpretive model that provides guidance about how to weigh and incorporate potential values. This means that the stability supposedly afforded by positivism is illusory. Ultimately, the content of law depends on the interpretive whims of judges.

In an attempt to charitably reconstruct Hart’s theory in the face of this objection, he describes the plain facts view as simply an implicit preference for stability and a distrust of state force. This manifests via the demand for formal clarity in the justification for its application.⁶⁷ Such clarity does not constitute the ‘bare’ fact of law; there *is* no such bare fact of law. Instead, the narrow content analyzed by Hartian positivism may be *treated* as the entire content of law only if one makes a prior moral judgment in favor of predictability. This means that Hart’s positivism is really a form of legal ‘conventionalism’: an interpretive argument about the value of defaulting to concrete conventions, rather than a semantic argument about the social fact of law.

⁶⁶ Hart, “Postscript,” p. 248.

⁶⁷ Dworkin, *Law’s Empire*, p. 114.

Conventionalism works from a relatively constrained concept of law, one which is only permitted to intrude into the realm of individual freedom where it has been explicitly authorized. The devil, however, is in the details. What exactly constitutes explicit authorization? Almost by definition, if a case is in dispute the authority cannot be explicit, or else it would not require adjudication. This means a ‘strict’ conventionalism cannot possibly provide a useful model for legal judgment.⁶⁸ However, once that concession is made, the whole ball of yarn begins to unravel. When faced with complex cases demanding resolution, judges seeking to employ a ‘soft’ conventionalism must interpret the legislative history and apply their best guess of what such statutes demand, assessing the competing conventions and determining which hold most strongly. The answer will not be obvious or universally acclaimed—this is a hard case after all—but this does not mean the case occupies a legal void. The existing conventions do provide guidance in discovering the best possible answer. But, Dworkin argues, this concedes the entire debate to him. The assertion that a case contains a “correct, if controversial, way to interpret the abstract conventions of legislation” is nothing more than a weak form of law as integrity.⁶⁹ The convention that supposedly controls the case is not located in any collective semantic agreement; it is simply the assessment of the individual judge. We may hope the judge’s assessment is a good one, but ‘good’ will be an entirely subjective question. The only way to establish *truly shared* terms for evaluating such cases is to accept the logic of law as integrity.

⁶⁸ Dworkin, *Law’s Empire*, p. 124.

⁶⁹ Dworkin, *Law’s Empire*, p. 126.

Moreover, even if this critique could be evaded, soft conventionalism still erodes the supposed foundations on which positivism rests. A system where individual adjudicators determine the weighting of conventions is no more predictable than Dworkin's.⁷⁰ The conventionalist model is therefore fundamentally unstable. Either legal conventions are clear, and there is no need for judges or any sort of complex study of law, or it is opaque, in which case it cannot produce the desired stability. The more that a legal system depends on the expert judgment of specialized practitioners of legal thought, the less it may secure the expectations of its subjects.

Is positivism a semantic theory of law?

While this new critique strikes closer to home, it has mostly failed to dissuade positivism's proponents. Hart is particularly flummoxed by Dworkin's attempt to re-brand his theory as 'conventionalism.' In his Postscript he states emphatically that his approach "is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law."⁷¹ Dworkin's insistence on reading a value-driven goal into positivism, Hart thinks, causes him to quickly descend into meaningless flights of fancy. While Hart is adamant on this point—and appears to consider it a knock-down argument of sufficient strength to obviate the need for much further discussion—it is unclear why he is so confident. Certainly, Hart's goal is different from Dworkin's; no one would dispute that. But Dworkin's

⁷⁰ Dworkin, *Law's Empire*, pp. 128-129.

⁷¹ Hart, "Postscript," p. 240.

argument seeks to show that such a goal of morally neutral description is simply impossible because every attempt to describe is simultaneously a justification of that description.

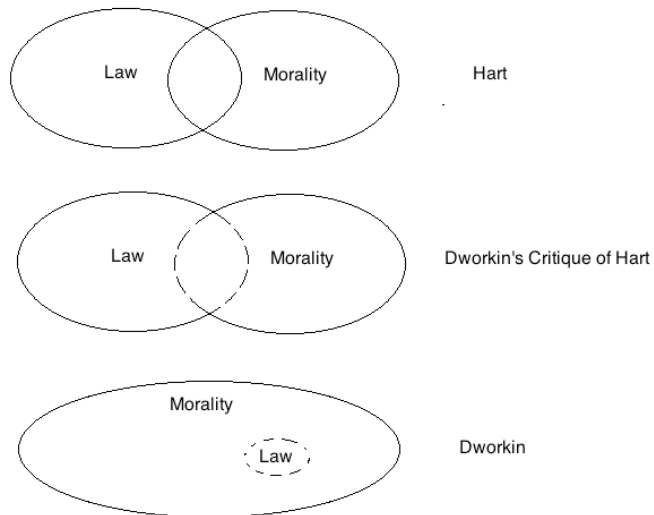


Fig. 1 provides a rough scheme for understanding the nature of this debate. In Hart's soft positivism, law and morality may overlap without degrading the entire descriptive model of legal analysis. This is because a (relatively) clear line still distinguishes the sort of law that is infused with morality from pure moral reasoning. There is some area of overlap, but outside that space the concepts preserve their unique character. Dworkin's argument, however, is that such lines are inevitably porous. They permit leakage of concepts and reasons, which means that a 'morally neutral' description of law is impossible. Therefore, it cannot be a sufficient response

for Hart to simply restate that he does not desire to mix moral judgments with legal ones. Such interaction is inevitable.⁷²

The important question, then, is whether Dworkin does in fact successfully prove such conceptual leakage. The semantic sting is meant to do so by showing that the supposed stability of law depends on an illusory premise of background agreement. If the semantic stability of law's grounds does not exist then neither may law's boundaries be kept secure.

However, once phrased this way, it becomes clear that Dworkin's argument is not nearly as strong as he seems to think. It is not at all obvious why semantic agreement on the grounds of law is necessary for preserving the firewall against leakage between law and morality. The 'core' of law need not be agreed upon by all practitioners; all that is required is that their attempts to define its contours can be conducted without reliance on moral reasoning. As we have already seen, judges may accept the role of morality in establishing the grounds of law (with all the concurrent messiness that this implies) without thinking that those moral reasons therefore *become* legal reasons. Debates about the application of law may be more complex than initially thought, but they nevertheless remain wholly within the scope of legal reason.⁷³ In the *Snail Darter* case, for example, we can observe competing ideas about the strict text of legislation and the force of legislative intent, each of which reflects a

⁷² Note that Fig. 1 also provides a model for Dworkin's notion of law as integrity, which abandons the goal of drawing any part of law outside of morality. It instead places the content of law inside the larger practice of morality. This variation is not crucial to the current argument, but will be returned to later.

⁷³ Cf. Jules Coleman, "Negative and Positive Positivism," *The Journal of Legal Studies* 11, no. 1 (January 1982), pp. 139-164.

different attitude toward convention. There is no need to follow Dworkin in seeing this as a ‘theoretical disagreement.’

In short: Hart’s positivism is not ‘semantic’ in any significant way. He does not presume that law must contain an uncontroversial core about which no disagreement is possible. He must show only that the grounds of law stem from convention, not that such convention is always crystal clear or universally accepted.⁷⁴

Based on this argument, we can diagnose a standard philosophical error—of the sort that drove Wittgenstein to endless frustration—in Dworkin’s argument. Namely, he assumes that the descriptive study of a concept is useless if it cannot “uncover the criteria that ordinary people actually use, perhaps all unaware, when they describe something.”⁷⁵ Positivism errs, he thinks, because it presumes that the semantic structure of language can stabilize understanding. While this might be possible with simple concepts like ‘book’ or ‘gold,’ where the object exists independent of its assessment, no such certainty is available for complex philosophical notions like justice or democracy or law. If accurate, this would be the death of positivism. But positivism does *not* rely on the existence of a single definitive meaning, and Hart certainly does not suggest that such meaning could be elaborated via criterial techniques. Rather, following Wittgenstein, he sees complex concepts as family categories, composed of linked practices that share relational meaning.⁷⁶ His goal is simply to assess law as it is used, while acknowledging that

⁷⁴ Hart, *The Concept of Law*, p. 245.

⁷⁵ Dworkin, *Justice in Robes*, p. 150.

⁷⁶ Hart, *The Concept of Law*, pp. 246-247.

such study can bring us no closer to understanding the ‘true’ nature of law as such.⁷⁷

We will never uncover definitive guides to judgment, but we may simply say that a “sign-post is in order—if, under normal circumstances, it fulfills its purpose.”⁷⁸

Therefore, Dworkin is correct to note the basic slippage at the heart of language but wrong to argue that this sounds the death knell for positivism. Hart is not concerned with establishing an unassailable semantic basis for meaning; he only seeks to trace meaning as it occurs through ordinary usage. This is a viable project because the indeterminacy of language makes law complex but not incoherent or impossible to describe.

To understand how this is possible, we must distinguish between forms of indeterminacy. The first form occurs when authoritative sources appear to justify multiple (and inconsistent) conclusions. Such limited indeterminacy often occurs in legal debates, as we have seen. The second more extreme case occurs when premises and conclusions cannot be connected by any logical relationship. Dworkin’s mistake is to assume that the first form of indeterminacy necessarily implies the other. Because he is invested in the notion that legal cases must be amenable to definitive answers, any degree of sustained disagreement would destroy the entire practice of legal reasoning.⁷⁹ But limited indeterminacy is amenable to a sort of shared reasoning that is not imperiled by lingering disagreement. As long as parties acknowledge the mutual obligation of justification, they need not agree on a stable, determinate ground

⁷⁷ Hart, “Postscript,” 247. Hart is uninterested in defining the nature of law *as such*. All that can be done, he argues, is to delineate the specific contents of propositions of a particular legal order.

⁷⁸ Wittgenstein, *Philosophical Investigations*, §87.

⁷⁹ I owe this distinction to Christopher Kutz, “Just Disagreement: Indeterminacy and Rationality in the Rule of Law,” *Yale Law Journal* 103 (1993), pp. 1001-1002.

from which all reasons stem (as a ‘semantic’ theory might). If they accept that their reasons must refer to shared practice and cannot be purely personal, stable communication is possible.⁸⁰ By this standard, the question is not whether a legal claim comports with the singular, true form of law (as Dworkin suggests it must), but only whether a legal claim can be reasonably justified based on existing legal conventions.⁸¹

Dworkin assumes that a reason is unsupported if it cannot be traced back indefinitely.⁸² But such recursion is unnecessary. The rule of recognition provides a stable concept for organizing the law, but its stability does not depend on the perfection of its structure. It harnesses the legitimacy-granting force of a social rule, insofar as it reflects a custom, and uses that energy to sustain a coherent system of rules.⁸³ The rule of recognition is thus a useful backstop beyond which reasons are unnecessary. The *fact* that a rule of recognition provides sufficient clarity to build a system of rules does not exist within that system and is therefore not subject to semantic drift.

What this suggests is that the rule of recognition is *not* final or absolute by any means. Instead, it simply represents an event horizon for a certain type of reasoning. It is not sustained by justification but instead by a ‘form of life’ within which reasons

⁸⁰ Hart, *The Concept of Law*, p. 113. The parallels with political liberalism should be obvious here. The baseline form of justification found in *Political Liberalism* is precisely of the sort described here.

⁸¹ Kutz, “Just Disagreement,” pp. 1004-1008.

⁸² See Wittgenstein, *Philosophical Investigations*, §87. “As though an explanation as it were hung in the air unless supported by another one”

⁸³ See Wittgenstein, *Philosophical Investigations*, §198: “a person goes by a sign-post only in so far as there exists a regular use of sign-posts, a custom.”

obtain coherence.⁸⁴ It is a form of life in which all parties agree that the emanations of law will continue to generate durable legal obligations, even if they occasionally disagree (sometimes in vehement terms) about precisely what the law demands.⁸⁵ In a strict sense, this is a moral commitment. But as we saw in the previous section, the moral nature of the rule of recognition is detached from the world of legal analysis. It may be *moral* but it is not *reasoned*. And the danger of the overlap between law and morality stems from the introduction of moral reasons.

This argument reframes Dworkin's concern about the necessity of semantic stability. If we understood the true structure of positivist law to stem from a form of life that *precedes* the rule of recognition, then the problem of stability occurs entirely outside of law's empire. Successful legal orders certainly will often possess the sort of shared semantic terminology that Dworkin discusses, because this is a feature of a relatively tight form of life. But such stability is not what *defines* a legal system; rather, it is simply what defines a *well-functioning* example. Put another way, law's capacity to survive moderate indeterminacy is a practical matter, not a theoretical one.

⁸⁴ See Wittgenstein, *Philosophical Investigations*, §241.

⁸⁵ One interesting implication of this argument is that the rule of recognition becomes more of a conceptual tool than a concrete idea. In a sense, we could say that the form of life that permits viable legal order is one characterized by a shared conceptual terminology, and the rule of recognition is simply a *model* of this idea.

III. Legality and legitimacy: legal order and legal reason

The response to the semantic sting is tremendously revealing. It demonstrates that the positivist approach is both stronger and weaker than Dworkin thinks. It is weak because it offers no surety against the breakdown of law. While a successful legal order can and must survive disagreement, such durability is always circumscribed and is never a structural feature of law itself. Given intense enough feelings and disparate objectives, disagreements may eventually drive the interpreting parties so far apart that they no longer understand themselves to be assessing the same practice. Over time, legal rules will weaken as perspectives radically diverge. Eventually, absent some form of resolution, whether peaceful or violent, the law itself will cease to successfully bind its subjects.⁸⁶

However, this weakness is also a kind of strength. By showing the limits of law, positivism clarifies what sort of extra-legal work is necessary to sustain a functional legal order. Meaningful legal judgment, it seems, depends primarily on a background condition of political association and only secondarily on the internal mechanisms of legal determinacy. After all, what distinguishes one long-lasting and vibrant legal system and one on the verge of implosion has everything to do with the forms of life in which those systems take root and very little to do with the structure

⁸⁶ Cf. Hart, *The Concept of Law*, pp. 116-120. This sort of drift is often found in post-colonial states, which are faced with the question of whether to enact a radical break or a more smooth separation. The former stems from a revolutionary disconnect, while the latter is possible only because of a resuscitated (if limited) recombination of law. This sort of drift is also found in so-called “constitutional moments,” where the scope of contestation grows enormously. In these cases, the legal order may be restored but doing so requires re-establishing the normative foundation of law. That is: it requires re-confirming a shared form of life capable of once again agreeing on a chain of pedigree to be traced back to a shared rule of recognition. Cf. Bruce Ackerman, “Constitutional Politics/Constitutional Law,” *Yale Law Journal* 99, no. 3 (Dec 1989).

of law itself. Many successful legal orders can withstand a great deal of disagreement over the content of law as long as the grounds of law remain firm. And conversely, a clear legal apparatus means little if the underlying form of life is breaking apart. Borrowing the language of Schmitt, we might crudely refer to the procedures of validation within a legal order in terms of ‘legality’ and a form of life as a type of ‘legitimacy.’

Hart’s argument is that legality *can* be defined without legitimacy, but will soon fade into irrelevancy. The two are distinct, though that distinction carries a hierarchical structure in which legality is relegated to a supplemental status. However, this relationship between legality and legitimacy is often obscured because the two elements have been thoroughly blended together in modern liberal democracy—which treats the Lockean package of rights and responsibilities (due process, the principle that no one should be the judge of their own case, like cases should be treated alike, etc.)⁸⁷ as both the logical structure of law as well as the groundwork for political legitimacy. However, this desire to collapse legality and legitimacy is not required for a conceptually valid system of law, as Hart emphatically argues against Fuller.⁸⁸ For example, divine law might well be arbitrary and could very easily instantiate permanent hierarchies, but would not cease to be ‘law’ because of this.

⁸⁷ Cf. Rawls, *Theory of Justice*, pp. 235-239; Lon Fuller, “The Morality That Makes Law Possible,” in *The Morality of Law* (New Haven, Yale University Press, 1964).

⁸⁸ See, in particular, the discussion of whether law existed in Nazi Germany. Hart’s position is that the law cannot be distinguished from the civil code. That the law was unconscionable simply means it ought to have been violated, not that it failed to count as law. Hart, “Positivism and the Separation of Law and Morals,” pp. 618-620.

Expanding on this premise, we might posit (again, with Schmitt) that legality is not simply distinct from legitimacy but is in fact *dependent* on it. A political unity must exist in order for the practices and procedures of legality to coalesce. The fact of political legitimacy provides the stability needed for legal order, both at the level of practice (law cannot be formed, much less sustained under conditions of civil war) and theory (it is the form of life that restrains discordant interpretive practices). As a general rule, law does not *create* forms of life; it is made possible *by and through* them.

Of course, this point should not be overstated. Social development is an incredibly complex process, dependent on a wide range of political, economic, and cultural factors. It does not occur in discrete moments but instead reflects the never-ending push and pull of growth and decay. While the law is shaped by, and organized around, political structures that precede it, those elements are also themselves influenced by law. After all, forms of life do not emerge from a vacuum. They coalesce over long periods of time, as connective tissues are formed, broken, and formed again. To imagine that such development proceeds without legal structures until a single moment in time, at which point the law emerges fully formed, is naïve at best.⁸⁹ Instead, the constructive process is slow, complex, and mutually reinforcing. This means that legal order may play an important role in shaping the *development* and *preservation* of collective unity, even if such unity is itself a necessary prerequisite to order.

⁸⁹ For a discussion of constitutional pre-history, see Edward Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 62, no. 2 (Dec 1928).

By focusing on this collaborative relationship, we will in effect be studying the ways in which well-structured legal orders succeed. This requires paying significant attention to the forms of law, not because they constitute the foundations of order but because they supplement and stabilize the continued operations of shared political identity. After all, law is a unique tool, which cannot be described simply in terms of a general concept of order—as Hart’s critique of Austin demonstrates. Law may take many forms, as necessitated by the particular organizational energy of the political legitimacy that animates it, but it is not infinitely malleable. It must still operate in specific ways to meaningfully count as ‘law.’ The appeal of Hart’s positivism is that it provides a framework for cataloguing some of those distinct elements. Again, we must emphasize that he is uninterested in defining the essence of law, the core feature that *makes* it law. That goal is a chimera. He is instead seeking to outline the general resemblances that link together practices of legal order which, in their repeated recurrence, suggest the existence of regularities that constrain the operation of law as a social practice.⁹⁰

The most important of these regularities is the authority of law. Faced with the danger of persistent disagreement, society must have recourse to decisive judgments capable of settling matters and preventing endless re-litigation. Compared to the arbitrary will of a sovereign or the rough texture of social morality the law is highly

⁹⁰ This marks a clear distinction from Schmitt, who sees those ‘regularities’ as simply the regularities of the particular mode of law employed by liberal democratic mass society. It is worth noting that Hart strongly rejects the premise that the rule of recognition is equivalent to sovereign authority. While it is convenient to connect the rule with the supreme criterion for judgment, they are not identical. Even a clearly-defined and singular supreme authority, such as in a parliamentary system, remains subject to the rule of recognition. Their authority is derived from it, meaning there is no ‘sovereign’ in Schmitt’s sense. See Hart, *The Concept of Law*, pp. 102-104. We will return to this distinction in Chapter 3.

bureaucratized, which in turn allows it to be far more expansively functional.⁹¹ By this account, law is primarily a device for the preservation of general collective unity. It succeeds to the extent that it channels disagreement into formal structures and away from irresolvable questions of the good or the right. Although conflicts over content cannot be eradicated, a well-functioning system of law will tend toward a rough equilibrium around (relatively) stable procedures of justification.⁹²

As we have seen, this equilibrium depends primarily on the feature of ‘legitimacy,’ the general credibility of the rule of law, which permits legal judgments of designated entities to take authoritative control over potentially contentious issues. The key feature of a system of primary and secondary rules is the coherence they generate, a coherence that endures beyond any particular instance of legitimation. The meaningfulness of law depends on a durable commitment to the relationships of legality themselves as sufficient to generate obligations. This, then, reiterates the importance of separating law and morality. As long as disagreement is political or moral, it does not threaten the potential for authoritative resolution in law. However intense the battles over these questions grow, they will not disrupt the function of law: to organize whatever rules the winners establish. Absent this distinction, society risks defaulting to either political quietism (where moral justification is slowly converted into deference to law) or political tyranny (where law becomes simply a tool of an external moral force).

⁹¹ See Habermas, *Between Facts and Norms*, pp. 144-146. Habermas sees the complexity of legal forms as inextricably related to the loss of divine authorization. The increasingly convoluted forms of legal justification are not coincidental with the rise of the modern state.

⁹² Again, the similarities between these argument and Rawls’ case in *Political Liberalism* should be obvious.

The descriptive goal of better defining the scope of law therefore supports a deeper-lying normative goal of preserving law's core function as a social stabilizer. When properly structured, law does not simply reflect a form of life; it also provides a shield that protects the core features of a political culture from constant warfare. Law's shield is completely compromised, however, if legal interpreters feel free to introduce moral arguments that cannot be authoritatively locked. Given this, the success of law depends heavily on clarity of thought in the practices of those who apply it. If they mistakenly expand the scope of their reasoning too far, they will invite confusion and potential chaos by drawing moral reasons into their remit. In this sense, the cleanliness of law's formal procedures redound back on the underlying legitimacy that helps build them. Accurately describing the law will leave little room for renegade interpretations, and therefore reduce the danger of morality infiltrating into legal reasoning. The more precise and clear the rules and relationships among rules, the less risk of frayed consensus.

This is why Hart worries about Dworkin. Legal interpreters guided by law as integrity will not be amenable to the sort of rough agreement that stabilizes a legal equilibrium. For them, the persistence of theoretical disagreement requires continual re-assessment of every case. Because they are searching for single correct answers, they will never accept legal resolution unless they believe it to be the correct one. The authority of law depends on its objective truth, rather than simply its factual existence. In effect, as Scott Shapiro notes:

accounts of legal interpretation such as Dworkin's defeat the purpose of having legal authorities – they allow subjects to reopen the questions that

authorities resolved by designing a legal system. After all, the judgments of designers are just more fodder for constructive interpretation. Their judgments will receive only the amount of deference that the Dworkinian interpreter deems to be morally appropriate in the light of current practice.⁹³

Even in relatively benign cases where the disputing parties may wish to set aside the argument for the sake of expediency, the assumption of law's basic integrity forces never-ending litigation of the underlying issues.

We might analogize such disagreements to wounds in the law. For Hart, they are merely nicks and cuts, which—if they are allowed to scab over—pose no significant danger. Scars may result but underneath the system continues to function. Dworkin, however, cannot resist scratching the itch, which provides relief in the moment but in the long run does nothing but inflame the wound and disrupt the healing process.

⁹³ Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," p. 48.

IV. Conclusion: Hart and the exception

Based on these arguments, it is easy to see why some read the Hart/Dworkin debate as decidedly tilted in Hart's direction.⁹⁴ At best, Dworkin has mischaracterized the motives of positivist legal philosophy; at worst, his attitude toward the law is actively destructive of its core purposes. And yet, this conclusion is far too pat. If the semantic sting does not pierce positivism in precisely the manner Dworkin believes, neither is his critique fully misplaced. Positivism is not semantic in the way he understands the term, but it *is* interpretive in an important sense. A legal decision-maker guided by positivism cannot truly claim to be uninfluenced by moral considerations—and not just in the trivial sense for which Hart allows. The underlying commitment to positivism as a method is itself entirely dependent on a set of normative assumptions about the value of law. Those assumptions are not supposed to influence the descriptive analysis, but without them such description could never be catalyzed in the first place. This means that Dworkin was right to assert that Hart's positivism is dependent on an implicit interpretive commitment to conventionalism, which supplies the necessary motivation for excluding further forms of moral reasoning. From Dworkin's perspective, this proves that positivism depends on a false narrative of self-enclosed legal rules that obtain validity purely through reference to other rules. At some point that belief itself must be justified and its justification cannot escape moral reasoning.

⁹⁴ See Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence."

We therefore must turn back to the problem of conceptual leakage. While the semantic sting does not seem to be the best way of articulating this danger, it remains the case that Hart's positivism is dependent on moral reasoning to fuel the fire of legal interpretation. That system of rules is limited and controlled by legal reasons, but it depends for general authorization on the moral reasoning of a community. In fact, this is the most interesting feature of Hart's argument, and the place where it is most helpful for approaching the broader issues of political liberalism raised by Rawls. Just as *Theory* attempted to propose a thin concept of the good which, under scrutiny, grew quite thick, Hart's concept of law depends on a commitment that far exceeds its supposed parameters. If the rule of recognition is exceptional in a certain sense, the underlying form of life that sustains that rule is exceptional as well. It is a moral commitment that is not *part* of law, but which makes law comprehensible. It is a moral wall erected around the law, which forbids the introduction of any further moral reasons. This, we might say, is the key feature of modern positivism: its identification of law via the exclusion of moral reasons. The 'hard' variety of positivism phrases this in absolute terms, while Hart's approach admits the limited spaces of overlap, but both agree that law comes into view only through this device of exclusion.

Hart's argument is supple. It seeks to neutralize dangerous eruptions of moral reasoning not via an absolute restriction but instead by neutralizing and restraining their effects. The idea of the rule of recognition is crucial to this project, because it marks the exceptional limit—the space where moral goods transform into legal

reasons. We might say, quite simply, that the rule of recognition *depends on* legitimacy but *produces* legality. It models a crucial feature of modern legal order in liberal systems: it shelters the order of *reason* from the chaotic world of *arbitrary interest*. We might summarize this process as follows: **the modern legal order is a peculiar device of shared meaning in which secondary rules shelter primary ones from the *influence* of social morality**. It provides a semi-porous membrane through which certain aspects of moral reasoning may be incorporated into law without permitting them to infect every judgment with persistent doubt. Both forms of validity remain in the same general orbit and depend on one another, but their mechanisms for authorization remain distinct. In this way, the power of legitimation—necessary to sustain and structure a legal order—is preserved, but laundered to strip away all defining ties and obligations. It therefore offers an untapped well of authority to law, while imposing no further obligations on the use of that power.

Moreover, if we have correctly interpreted Hart to be treating legal orders as effectively forms of life, then the rule of recognition is simply his attempt to illuminate the *nature* of such a form of life. Its existence does not ‘define’ law in the semantic sense, but it does clarify the recurrent mechanism that distinguishes legal order from other sorts of social organization. It is a moment of transformation, a device of justification, whereby a certain kind of reason transmutes into another form. As such, the rule of recognition cuts through Dworkin’s distinction between rock-solid foundationalism and pure interpretivism like a knife through butter. Both are

illusory. All that we may hope for is a peculiarly legal form of life whose contours are discovered through ordinary usage, and occasionally exceeded in exceptional cases. Those exceptions do not, however, tear apart the entire apparatus of law. As long as they remain at the margins, the success of normal procedures will be in no danger. This defense is not dependent on the structures of reason—which promise perfection that can never be achieved—but instead on the more rough-and-tumble security of practice and habit.

The rule of recognition, then, is not a factual object—a semantic certainty at the core of law—but might better be understood as a form of agreement. It may be *analogized* as a specific document or historical moment (a constitution, a moment of revolution, a declaration of independence) but this is always imprecise. Those are merely its first emanations, historically discrete events which can be analyzed and captured. But the rule of recognition is only truly be seen through its *usage*, which takes place in the present and occurs through constant small reiterations. Even the idea of ‘agreement’ is still insufficient, because the rule of recognition does not model or embody that agreement; it merely reflects the continued fact that a people exist together and acknowledge a mutually constructed system of obligation. This means that the rule of recognition is necessarily a *spectral* concept, always already present in law but impossible to locate. It is a persistent, ephemeral rule that instructs its subjects to abide by the terms they have established, but it identifies neither the nature

of those subjects nor the content of their agreement.⁹⁵ This distinction may appear trivial but it is of the highest importance. It means that even where a legal system contains a rough statement that approximates the rule of recognition, its borders are always liminal. In its rough application, the rule is obvious and uncontroversial. It is simply the agreement that the rule of law applies. In difficult cases, however, this clarity recedes. The rule of law applies, but what is that rule? Where there is doubt about the applicability of law, what is left to guide decisions? These are intensely political questions, and yet the structure of positivism is designed to neutralize such matters.

Admittedly, this somewhat mystical reading of the rule of recognition is likely to discomfort orthodox positivists. They will rightly identify in it a sort of creeping decisionism. However, as we have seen, positivism's ultimate coherence depends on this spectral element. And, it is only by reading positivism in this light that it offers any hope of resolving the exception. The Hartian approach, we can now see, shares an awareness with Schmitt that law is only as meaningful as the community which enacts it. Further, the 'decision' to collectively affirm a rule of recognition tracks reasonably well with the decision to mark a new friend/enemy distinction. While Hart certainly does not treat the political success of a rule of recognition in such stark or militaristic terms, neither does he exclude such concepts. This is one of the key differences uncovered in his debate with Dworkin: Hart's rejection of moral

⁹⁵ We might, for example, summarize the rule as 'all law stems from the constitution' but this is so vague as to be virtually meaningless. What (and who) defines the constitution? From where did the constituting power emerge? What controls the interpretation of its meaning? Does the constitution erase all common law? And so forth.

justification ‘all the way down’ allows positivism to retain explanatory capacity even if one accepts that the foundation of legal order must rest on bloody swords and violent exclusions.

Of course, this is only a small component of Schmitt’s argument. While the rule of recognition shares certain characteristics with the Schmittian decision, they remain different in one crucial respect: the rule of recognition does not actively *shape* its resulting legal order. As a foundation, it is inert; its purpose is to neutralize the conflictual function of moral argument while preserving its political weight. This compares to Schmitt, who sees these two features as fundamentally linked. A decision in Schmitt’s sense does not merely put the weight of legitimacy beyond a set of legal procedures, it actively *creates* and *structures* those procedures. The law is made vital only through its continued association with the still-active force of a political distinction; therefore, every judgment about the content of the law is simultaneously an act of political formulation.

The positivist distinction between application and creation, in this way, constitutes a crucial nexus point for this clash. As we have seen, one of the key features of positivism is its attempt to isolate the powerful generative force of political meaning, capturing it with the rule of recognition, driven by the fear that if this force infects the day-to-day judgments of a legal system, law itself will dissipate under the stress of irresolvable disagreement. In this way, the rule of recognition promises that law’s exceptions may be managed, even *harnessed*. The crucial question, then, is whether the pristine interiority of law can survive this limited

accommodation to the necessity of decision. That is: can Hart's firewall, meant to separate the successful practices of normal judgment from the terminal intrusion of extralegal reasons, be sustained? This question will be the subject of Chapter 3.

Chapter Three – Law’s Exceptions: Positivism and Political Theology

This chapter takes up the problems of positivism. One goal is to demonstrate that my somewhat unorthodox reading—which focuses on the enigmatic potential for the rule of recognition to provide a gateway between fact and value—is both necessary and appropriate. It is necessary because the internal logic of positivism pushes inexorably in this direction. It is appropriate because the specter of Schmitt’s critique looms over the entire enterprise of positivist analysis. The Hart/Dworkin debate exposes these fault lines, and forces a constructive reinterpretation of positivism’s potential.

However, the second and more essential goal is to demonstrate that despite the many strengths of positivism, it cannot extinguish the lurking fact of law’s exception. Dworkin’s critique helps to catalyze this argument, by isolating the key barriers positivism erects against the onslaught of indeterminacy. In light of the inevitable re-occurrence of moral reasoning we may now identify the true core of positivism. It is not simply a descriptive treatment of law as it objectively exists; it is *also* an active procedure of neutralization, which allows its practitioners to corral the potential danger of exceptional politics intruding into the sphere of law.

While positivism can escape from many prongs of Dworkin’s critique, the victory is a Pyrrhic one. Success arises only through a fundamental convergence in their approaches, one that condemns positivism to precisely the sort of submission to law’s exception that it is designed to avoid. In both cases, the exception is treated as a manageable risk, a danger intrinsic to the process of interpretation, which can be

wrestled to permit a return to normalcy. The only difference is the manner in which they approach this task.

For Dworkin, the exception is resolved by judges, who expansively interpret the law to *discover* an already present but unseen unity. Given this goal, he makes it his highest priority to remedy the disjunctures. As each hole is patched, each seam re-hemmed, law is restored to its status as a unified whole. In this sense, Dworkin's approach is more acutely attuned to the problem of the exception. Unlike Hart, who starts from the premise of normalcy and builds outward, Dworkin takes the indeterminacy of law as its core feature. This difference is fundamental. Hart's goal is to reduce the points of contact between irresolvable, extra-legal values and the coherent world of legal judgment. Dworkin seeks precisely the opposite: for him there is *nothing but* the overlap. The supposedly normal conditions that Hart seeks to analyze lie forever beyond the event horizon of human reason. Therefore, instead of trying to distinguish law from its exceptional origins, Dworkin insists on thinking about law as that exceptional structure, and nothing else.

However, where Schmitt takes the essentially exceptional nature of legal reason to demonstrate the basic *discontinuity* of law and violence, Dworkin draws a different conclusion. If everything is exceptional, he believes, only moral reasoning can provide the organizational structure to produce meaningful law. This reliance on moral reason, however, cannot be justified. The authoritative function of law is factual, and cannot be derived from such moral reasons. And to the extent that such a

claim is attempted, the only possible result is chaos and the eruption of anarchy.¹ Just as Hart has argued, Dworkin's approach strips away the entire meaningfulness of law, and replaces it with incompatible absolute moral reason. In Schmitt's terms, it requires a deeper theology of judgment, one which it cannot defend or even acknowledge. The full implications of this argument will be explored in chapter 4. For now, it is only necessary to note this problem in Dworkin as illustrative of the deeper problem in liberalism writ large: its emphasis on reason depends on an unreasoned and unreasonable presumption of moral justification that necessarily precedes any such reason.

What will become clear over the course of this chapter is that Hart is not ultimately so different. Along with Dworkin, he shares an expectation that law and morality may be fit together into a broader system of political order capable of generating obligations of the peculiarly legal sort. If the rule of recognition challenges the necessary juxtaposition of law and morality, it does not do so categorically. After all, the entire purpose of positivism, for Hart, is to allow these two distinct forms of reasoning to supplement one another. Law and morality are not permitted to overlap, but *are* chained together with the same purpose. As with Dworkin, this underlying purpose is necessary to catalyze the meaning of both legality and legitimacy, but cannot be articulated from within those structures. It remains forever elusive, a rainbow that always lies just beyond the horizon.

¹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), p. 52.

This suggests that the most important feature of the Hart/Dworkin debate is its *absences*, those elements that sustain their disagreement and foreclose assessment of what lies beneath. Both dance around the problem of the exception but ultimately evade it rather than defeat it. In doing so, they obscure the truly political function of law. The following two chapters will therefore be devoted to unraveling the implications of this argument, to show that this core feature of legal order—its neutralization of the problematic gap between order and reason—organizes and ultimately collapses the Hart/Dworkin debate. Even more, this effect is not coincidental but instead reflects the underlying *necessity* of their debate. That they each frame law in this fashion is essential to the operations of political liberalism, which requires that debate take place on terms that produce endless churn but which can never challenge the incommensurability of its underlying political unity.

To approach this idea, we will step away from the macrocosmic examinations of law and turn to the particular case of individual interpretation: judicial discretion. This, it will become clear, is perhaps the most important and sustained topic of disagreement between Hart and Dworkin. If the rule of recognition is more an idea than a material fact, its emergence into the world takes place primarily through the practice of discretion. It stamps order onto the general indeterminacy of language, not by reference to an external truth but simply through the decisive act of judgment. This process involves borrowing the stabilizing influence of law's core and applying it to the less secure outer edges, effectively bootstrapping the decisions on how to apply the law in penumbral cases.

I. The problem of discretion

Chapter 2 established that the success of positivist law depends on interpreters being able to ascertain its content in a sufficiently wide range of cases to solidify its normal operations against those lingering instances of enduring disagreement. Moreover, this basic mechanism of legal stability itself depends on the formal structure of law. Its system of secondary rules and their termination in the rule of recognition establish regularities that inhibit the intermixing of political and legal judgments. We can now supplement that picture by noting that the successful use of judicial discretion is one of the most important of these regularities.

Although the full implications of this discretion are quite complex (as we shall soon see), the principle is very simple. While Dworkin refuses the very premise that law contains gaps, Hart is obliged to explain how judges can operate in circumstances of genuine indeterminacy. Because his approach offers no definitive structure, it must necessarily span from core cases of clear usage to ‘penumbral’ cases where the nature of legal obligation is ill defined. While unfortunate, such vagueness cannot be evaded: “uncertainty at the borderline is the price to be paid for the use of general classifying terms.”² Therefore, a mechanism must be provided to solidify the loose formation of law in these locations. The answer is discretion: the capacity for judges to simply choose among the potential options, and in doing so collapse the multiplicity of choices into one single and authoritative result.³

² Hart, *The Concept of Law*, p. 125.

³ Hart, *The Concept of Law*, p. 128.

When exercising such discretion, the judge is both constrained and free. She is constrained because the power to decide is fully enclosed by law—it exists only because she has been delegated the responsibility by a positive rule. Furthermore, she is empowered only to choose among reasonable options; it is not an absolute liberty.⁴ And it is also a responsibility as much as a power. Since the law cannot remain indeterminate, the judge is tasked with producing a definitive answer.⁵ However, the decision is also free, because the ‘penumbral’ spaces in which discretion is necessary are by definition unclear. In such cases, legal reasoning reaches a cul-de-sac. If a decision is to be made, it must depend on extra-legal reasons—on unstructured forms of moral and political reasoning.⁶ The danger this would normally pose is neutralized because the context of her decision has been appropriately filtered through the airlock of the rule of recognition. Her choice might be informed by moral reasons, but those reasons are *only* supplemental. They are contained by the procedures that sharply define the discretionary role. This filtering mechanism means that judicial discretion still primarily involves *applying* rules (albeit ones that are somewhat vague) and does not require *creating* them.

Discretion is crucial because it occurs in the precise location where the rubber meets the road. As we have seen, the rule of recognition is an important conceptual tool for clarifying the filtering mechanism of law, but it is *only* an idea. Its genius is

⁴ Hart, *The Concept of Law*, p. 136

⁵ Of course, not every potential disruption reaches or requires authoritative legal decisions. Many are settled via political means or simply left unresolved in the background. Courts may strategically abstain or refuse to hear cases, pass the buck, etc. But as a general rule, the potential for resolution must be available.

⁶ Hart, “Postscript,” p. 253-254

purely formulaic until it is actually applied by flesh and blood social actors. It is they who must actually come to shared terms, and in so doing generate the underlying legitimacy that sustains the rule as a framework for legal obligation. Discretion models this abstract transformation, but in a specific and material way. Through the activity of discretion, a judge enacts the theoretical potential of the rule of recognition, securing the temporal unity of the law while permitting it to accommodate new circumstances. This plays an important role in enabling legal flexibility, which is necessary given the reality of constant flux driven by unexpected shifts in ideology, technology, or simple random chance. No system of positive law could ever anticipate every potentiality, but such events cannot be permitted to introduce terminal discontinuity. Discretion, therefore, helps to recuperate the coherence of law, allowing it to accommodate new worlds without losing its basic structure.⁷

In doing so, it preserves the gap between judgment and legislation in a quite simple way: by *occupying* that space. This is not an absolute barrier; the edges bleed on both sides. But the space is large enough to accommodate conceptual leakage without the two poles themselves blending. Given this, it might be best to consider discretion as a spectrum rather than a bright line. At one end is pure application. This is the core realm of interpretation, where the legal form of life is well connected and stable. Virtually everyone will agree on virtually every question here; any lingering differences will be technical and (relatively) inconsequential. It is therefore the realm

⁷ Hart, "Postscript," p. 251-252

of common, habitual engagement with law. To the extent that judges are involved, they are simply experts on law, armed with the techniques and knowledge base to precisely define the contours of the case. At the other end are the acts of pure creation, which generate new content and new rules. Legislation is a common example, but executives also engage in rule-making, and even the public itself may do so through initiatives or referenda.⁸ Within the constraints set up by the existing structure of law, these creative agents are granted the capacity to generate new rules. They are procedurally bound, but free to apply whatever substantive values they desire within those constraints.⁹ Discretion is barely relevant to either of these areas, because they mark the boundaries of judicial action. In the first case, there is virtually no disagreement and thus little need for judgment. In the latter case, the law does not yet speak so there is nothing for judges to interpret.

Discretion, then, mainly exists in the space between these extremes. However, it does not always take precisely the same form. At the edges, where simple application and simple creation bleed into discretionary judgment, the use of discretion is correspondingly shaped. We may therefore distinguish two broad types of discretion, defined by the two poles. Of course, this typology is not sharply delineated; some of each is always present in a particular case. But nevertheless,

⁸ It is important to distinguish this sort of creation from the underlying creative act of producing a legal order in the first place: the constitution of a state. The constitutive act possesses a sort of sovereignty that is not found within the system of law. For Hart, once the system is established, “the rules are *constitutive* of the sovereign.” Hart, *The Concept of Law*, p. 75. This compares, however, with Ackerman who sees an inherent flexibility within the law, even at the base level of its constitutive meaning. This distinction, between change *within* law and change *of* law will be discussed in Chapter 5.

⁹ Hart, *The Concept of Law*, 31.

distinguishing the two forms will help to clarify the range of possible uses and dangers inherent in the act of discretion.¹⁰

The first type, which I will term standard discretion, occurs with some regularity in normal judicial activity.¹¹ In these cases, most will agree on the structure of law, which rules are relevant, and how they generally apply. However, they will occasionally differ on precisely how to evaluate those elements. The role of the judge is to step into this border territory between law's core and its penumbra to impose an authoritative interpretation. In such cases, the judge still sees herself as applying law rather than creating it. In doing so she has the discretion to choose among legally acceptable interpretations by drawing on reasons that originate outside the law. Those reasons do not *overwhelm* legal reasons; they are used exclusively to fill in the gaps between generality and specific application. Without this sort of discretion, the law would require impossible degrees of complexity, and would need to anticipate every potential future dispute.¹²

The second type I will refer to as 'creative discretion,' because it closely resembles the sort of legal creation usually associated with legislation. It occurs at the edges of judicial responsibility, where even general rules do not speak loudly, if at all. These are, for obvious reasons, the places where discretion is most needed. Because they lie at the limits of law, interpretive conflicts are greatest here, which means that

¹⁰ This typology is mine, not Hart's. While he does not expressly treat discretion as a singular type of legal judgment, his discussion tends to discuss it in an undifferentiated fashion. Its edges are simply edges, not distinct types of discretion.

¹¹ Here I am drawing on Hart, *The Concept of Law*, pp. 121-132.

¹² Hart, *The Concept of Law*, p. 129. See also Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (New York: Russell and Russell, 1961), p. 146.

Hart allows for a limited, creative “rule-producing function.”¹³ In this limited set of cases, the study of law ceases to be descriptive and becomes constructive. The judge does not merely bridge the gap between the generality and particularity of a rule but actually *creates* a new rule to fill a legal void. Still, even at this extreme, discretion is still not free or unconstrained. It remains restricted in the same fashion as all form of discretion: it occurs only where judges are tasked with the choice, and must still conform to all other rules in the grand network tied back to the rule of recognition. If these constraints are met, though, the judge becomes capable of creating new positive law.

The danger associated with standard discretion is relatively limited. If the realm of discretion shrinks too much—if the terms of law are seen as clear and unambiguous—positivism will descend into the vacuousness of bare formalism, which was so discredited in the legal realist turn of the early 20th century.¹⁴ If the law is never in doubt, then this is only because it covers a vanishingly small number of possibilities.¹⁵ Any legal system without meaningful room for discretion will be too cramped to generate obligations in even a moderately complex society. Of course, this problem is more theoretical than it is practical; discretion *does* exist and is regularly utilized. Therefore, the issue is not how to create discretion—it will emerge organically as gaps in a legal system present themselves—but rather to *describe* how this discretion fits within the legal system.

¹³ Hart, *The Concept of Law*, p. 132.

¹⁴ For a summary of the development and growth of anti-formalism, see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995), pp. 9-64.

¹⁵ See Hart, *The Concept of Law*, 89-91.

The dangers of creative discretion, however, are far more pressing. Here the risk is that the use of discretion will expand to widely, covering a wide range of matters that should fall purely into the realm of legal creation, not application. Such law-making in the guise of interpretation risks destroying the delicate balance between legality and legitimacy so crucial to Hart's whole project. The perception of judicial restraint is one of the key features sustaining the legitimacy of legal interpretation. If the public must accept authoritative decisions from judges, they will desire certification that those decisions live up to the promise of separation in law and morals. The judicial expert who *describes* law deserves acclamation; the activist judge who *imposes* a subjective morality on the public does not.¹⁶ While the law certainly can withstand the limited exercise of such discretion, the more that it grows in scope, the more it resembles Oliver Wendell Holmes' description of law as nothing but "prophecies of what the courts will do in fact."¹⁷ As the scales grow unbalanced, the value of legal reasoning (as distinct from purely political reasoning as conducted by legislatures) fades, and the importance of extra-legal reasoning expands enormously—precisely the result Hart is trying to avoid.¹⁸

¹⁶ For an excellent survey of the concept of 'judicial activism' and its deployment over time, see Keenan Kmiec, "The Origin and Current Meanings of 'Judicial Activism,'" *California Law Review* 92, no. 5 (Oct 2004). For Hart, the desire to avoid overreach explains the tendency among judicial actors to hide their constructive role. They prefer to "disclaim any such creative function," in the interest of preserving the court's general legitimacy. Hart, *The Concept of Law*, p. 132.

¹⁷ Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 110, no. 5 (March 1997), p. 994. See also Hart, *The Concept of Law*, p. 11-12.

¹⁸ See Habermas, *Between Facts and Norms*, pp. 200-203.

Containing discretion

To contain this problem Hart offers three distinct arguments, meant to demonstrate that discretion may be held in check: opportunity, substance, scope. *Opportunity* restrains the circumstances in which discretion is exercised. As we have already specified, discretion exists only in the penumbral spaces, where the reach of law is undefined. There is no discretion at the core of law where terms are not contentious, or outside of law where politics reigns supreme. Discretion is also limited in its *substance*. It does not grant unrestrained freedom of action; it is merely the opportunity to choose among legally acceptable options. There might not be a single correct answer, but there are certainly *incorrect* ones. This is particularly true for standard discretion, where the range of options is clearly constrained. And while it is less obvious in creative discretion, the judge is still limited by the larger framework of rules that authorize her decision. She is only empowered to create rules because existing ones establish that power. Further, even creative discretion cannot contradict other existing rules.¹⁹ Finally, discretion is limited in *scope*. Judges exercise this power in response to specific cases in need of resolution: “since the judge’s powers are exercised only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes.”²⁰

Each of these defenses begs the question. The opportunity for discretion *is* limited, but the decision about whether a case is discretionary is itself a discretionary decision. Even more, the decision about where on the spectrum a case falls is also

¹⁹ Hart, “Postscript,” p. 275.

²⁰ Hart, “Postscript,” p. 273.

discretionary. The only thing that conclusively establishes the reach of a general rule is the act which cements a particular interpretation—i.e. the judge's decision.²¹ In a certain sense, this restates Dworkin's argument about the interpretive nature of positivism. At the core of any *description* of the law is a commitment to values that cannot be articulated within that description. This is why Dworkin is extremely skeptical of discretion. To him it is simply a less precise way of stating the interpretive responsibility to evaluate the law with integrity; there is no genuine discretion because judges still feel themselves bound by this interpretive obligation imposed by the structure of law.²² This concern is magnified by Hart's own admission that the inclusion of moral tests in law (at those junctures where positive law incorporates principles) is nothing more than a call for the judge to exercise "law-making discretion."²³ These connective points, where morality is incorporated, are supposedly kept secure by the judge's enduring obligation to enforce the rule of recognition—which is thought to filter out the poisonous potential inherent in this moral incorporation. But we have just seen that the instance of discretion is the precise space in law where the rule of recognition is weakest.

The 'substance' restriction suffers the same problem. Separating a set of options that are legally valid but equally viable and a set that are legally invalid depends on a set of interpretive assumptions that must be simply hypothesized and

²¹ This is the essence of the debate over 'judicial activism.' Whether a judge *creates* new obligations or simply sheds light on preexisting ones depends on one's point of view. The constraining function of her decision depends entirely on whether one believes the claim to have discovered a legal basis. But since everyone possesses an interpretive ability, the authority of this judgment necessarily depends on something beyond the pure force of reason.

²² cf. Dworkin, *Law's Empire*, pp. 9-10, 129-131.

²³ Hart, "Postscript," p. 252.

cannot be defended. Again, we can see the kernel of this objection in Dworkin. In “Model of Rules I” he notes that any so-called exercise of discretion is better understood as obedience to the principles within the law.²⁴ Finally, while most judicial systems include ‘scope’ limits such as the American restriction of judicial decisions to the specific facts of the individual case, these limits are routinely exceeded. In some cases, crass political motives may push judges toward such conclusions, but one need not default to an extreme form of legal realism to discover a danger here. Even assuming the best of intentions, the simple fact of different interpretive judgment carries uncertainty into that choice. This is Dworkin’s argument about theoretical disagreement, as seen in the *Snail Darter* case. Judges may well believe themselves to be applying law, even if other observers can only perceive judicial creation.

Hart acknowledges the potential risk in all these concerns, but plays down the danger. Line-blurring is only perilous, he thinks, if it introduces controversial uncertainty into “all or most cases.”²⁵ The theoretical possibility cannot be denied, but as an empirical matter this does not destroy the potential for legal order. Of course, in some cases the order will dissipate, but these are simply failed systems. They do not reveal a fundamental flaw in positivism, which is merely designed to show how the rule of recognition establishes “general conditions which correct legal decisions must satisfy in modern systems of law.”²⁶ Discretion is sustainable, therefore, as long as it

²⁴ Dworkin, *Taking Rights Seriously*, p. 35.

²⁵ Hart, *The Concept of Law*, p. 251.

²⁶ Hart, “Postscript,” p. 258.

takes place within a system of obligations that derive force from underlying social rules, but which do not depend directly on any specific social rule for validity.

The problem, however, is that his explanation of the stability of interpretation in each case depends on the presumption of stability in the other cases. The rule of recognition depends on the practice of discretion, because it is only through the slow accretion of such choices that the law obtains lucidity. As an analogy, we could say that the rule of recognition contains enormous potential energy but it requires a point of contact with material practice for that energy to take kinetic form. Discretion is that point of contact, where the theoretical potential is made real as the judge applies the rule and decides what it requires.²⁷ These discretionary decisions are not merely judgments on law; they are enactments *of* law. Without them, the supposedly stable interior would be crushed by the weight of the ever-growing realm of disagreement about application. This means that, at least in a certain sense, those who decide on the *application* of law are constructing more than simply the content of law in penumbral zones. They are also supporting the basic *existence* of law as such. But, simultaneously, the practice of discretion is incoherent without a rule of recognition to guide it. It is only the attachment of discretion to a larger structure of reasons that prevents it from spilling completely into the realm of arbitrary creation.

This chicken/egg problem might appear to be the sort of pointlessly philosophical naval-gazing that was subjected to Wittgensteinian derision earlier, but there is a subtle difference. The semantic sting failed because it portrayed Hart as

²⁷ As per Wittgenstein, we discover the function of a practice through its use. The meaning of law is discovered through its use in language games, and discretion is the most pointed example of such a game. Wittgenstein, *Philosophical Investigations*, §29-43.

needing perfect, shared agreement on terms, which his approach does not require. But Hart *does* depend on the idea that legal interpretation is at least primarily descriptive, rather than legislative. And, furthermore, he presumes that discretion is merely a recuperative feature of law, a necessary maneuver to bolster its defenses, while the rule of recognition is primary. However, if discretion is just as fundamental to the structure of law, then the supposed distinctions between positivism and legal realism fade into meaninglessness. Therefore, where Dworkin's concern about semantic stability was a purely theoretical objection that presumed the necessity of an abstract linguistic foundation, this objection is more concrete. It asks what physical mechanisms inhibit the splintering of legal order—what provides them with legitimacy?²⁸ Or: what *concretizes* a certain order, if its foundation is permanently elusive?

Of course, at the level of society the divisions between core, penumbra, and what lies beyond are reasonably clear. The problem is that those social distinctions do not prefigure the judicial choice. Quite the opposite: they *rely* on that choice. The terms are malleable and almost infinitely flexible. What appears to be the core may quite swiftly come into doubt, based purely on the shifting tides of societal judgment. This potential for endless fluctuation is a serious problem for the positivist picture of law. While Hart is right to think that the simple fact of mutual construction is sufficient grounding for most circumstances, this is not enough. Informed by Schmitt, we must question what organizes and sustains these normal conditions of law. This

²⁸ We must be wary of overstating this concern. The puzzle is not *whether* this mutually supportive relationship can sustain a concept of law—it clearly can—but *how* it does so and what it means.

requires looking deeper, to explore how the structural indeterminacies of law manifest in exceptional cases. In a particularly illuminating passage from *Political Theology*, Schmitt discusses this very problem:

Every legal thought brings a legal idea, which in its purity can never become reality, into another aggregate condition and adds an element that cannot be derived either from the content of the legal idea or from the content of a general positive legal norm that is to be applied. Every concrete juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment.²⁹

In the actual production of judgment, the whole apparatus of law as a social phenomenon grows ephemeral. Its specter haunts the decision, but may exercise no tangible force. In that moment the judge does not *apply* the law but actually *embodies* it. She cannot appeal to any legal capacity—neither formal nor substantive—but must depend on something that precedes such distinctions. The force which guides her decision, then, cannot be weighed against legal reasons; it exists in a different world from them. It sustains the possibility of legal order without itself being part of that order. Furthermore, this exceptional capacity cannot be limited to a defined set of discretionary cases, because the decision on whether discretion holds is itself discretionary.

In this moment, the function of the rule of recognition—to filter moral reasoning into the law while stripping it of its chaotic character—is condensed into the form of the judge. Her choice is not structured *by* law but is instead the structuring mechanism *of* law. Recall that the rule of recognition is not a literal rule, but is merely

²⁹ Schmitt, *Political Theology*, p. 30

a convention. It exists to the extent that a rough consensus agrees to treat it as the basis of a shared legal order. In the case of discretion, however, the contours of that consensus are still unformed. The judge is asked to step into the breach and actively generate new meaning, and this request is essentially unregulated. The discretionary decision is therefore *sovereign* in a certain sense. Because the judge is asked to decide on the application of the rule, and this decision also defines the meaning of the rule itself, then her decision cannot be captured by law at all. It is a decision on the exception, not a decision in the normal framework of law.³⁰

As a result, judgment *about* the law is inextricably political. The simple binary application/creation is insufficient to describe what takes place in this decision, because each half still presumes that the judge is working within the confines of a stable rule of recognition. This is different from Dworkin's objection. Here, the lack of regulation inherent in a discretionary decision eats its way backward into the consensus at the supposed core of law, not by challenging the premise that its source may be defined, but by challenging *which* definition holds. We might say: there is not one single rule of recognition but instead are many of them.

And here the house of cards grows unstable. Hart hopes to transform arguments over what is 'right' (moral/political fights) into arguments over what the law actually demands (legal fights). By removing the necessity that rules (apart from the rule of recognition) be 'social rules,' he hopes to inoculate them from the

³⁰ Habermas notes that this recourse to discretion means that judges are inexorably drawn to "a decisionistic conclusion...Judges fill out their discretionary leeway with extralegal preferences and orient their decisions, if necessary, by moral standards no longer covered by the authority of law." Habermas, *Between Facts and Norms*, p. 203.

dangerous sort of indeterminacy. However, that transformation is nothing but an illusion. If these arguments are actually about which rule of recognition to endorse, they will be persistently wrenched into the realm of extra-legal reasons, of legitimacy. For example, one may insist that the law *is* X because X is authorized by the rule of recognition, which determines the legal order. Hart correctly notes that this argument does not collapse if X +/- 1 is also permitted. These are close enough to permit cross-pollination of justification. But what about another who believes the law to be Y, and insists that the rule of recognition authorizes this interpretation? While this could be pitched as an attempt to *make* the law into something else, very often it is not. As Dworkin demonstrates, such claims are usually articulated as simply being better statements of what the law truly demands.³¹

The problem of theoretical disagreement therefore is far stronger than it might initially seem. Once invoked in the context of the rule of recognition itself, it introduces a political dimension into the very soul of law. Arguments that Hart wishes to pitch as wholly extra-legal—as battles over who will be permitted to institute their preferred concept of the good—become legalized. The creative, revolutionary spirit that drives them is portrayed as already contained with the currently existent law. Because these are arguments about the rule of recognition, the exception to law's determinacy, they cannot be locked into place. As we have seen, the basic rule is constituted only through the fact of persistent discretionary affirmations—which themselves are only possible because of the very rule they structure. This mutual

³¹ Dworkin, *Law's Empire*, p. 42.

dependency means that every specific judgment, however minor, implies the possibility of basic disagreement.

Hart's approach necessitates (without ever articulating it directly) a picture of law where every single judicial decision is itself a decision on the entire apparatus of legal order. Most of these decisions will articulate rules of recognition that differ in only the most imperceptible ways—which is what permits the premise of core and penumbra to be sustained—but at the deepest level the whole structure of the law is nothing but penumbra and every decision is *creation* rather than *judgment*.³² The choice stands outside legality and is only folded back into the law afterwards, under the guise that the judge has merely exercised discretion. The appearance of continuity that this provides cannot be located in the internal coherence of law but is wholly dependent on the contingent interests of political legitimacy. If those interests hold, the judgment will be legalized—treated as the justified use of discretion. If not, the decision will be ignored or even countermanded, treated as illegal.

As a result, for all that Hart's theory purports to describe the actual content of law, when drawn to its necessary conclusion it only clarifies the essentially unstructured origin of the rule. While the rule of recognition *does* constrain all the rules that emanate from it, the potential number of such structuring rules is infinite. Each decision about a rule therefore requires enacting a slightly different form of the

³² David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Herman Heller in Weimar* (Oxford: Clarendon Press, 1997), pp. 6-8.

rule of recognition.³³ In effect, while the semantic objection may have been misguided, Dworkin's broader argument for the necessity of constructive legal interpretation may indeed be on the right track. As long as the rough consensus of legal subjects remains centered on relatively similar understandings of the rule of recognition, the occasional differences will be relatively unimportant. The foundation, most of the time, simply does not demand terminal justification. But once we understand legal arguments in their extreme form to be disputes over what the rule of recognition *is*, it becomes quite clear why this model falters in the face of genuine exceptions. In cases where the penumbras threaten to overtake the smooth operation of normal order, judicial decisions represent a political void and the law ceases to be anything but a supplement to the true practice of social order.³⁴ At the extreme edge of this process, Dworkin argues, law becomes nothing but a "grotesque joke,"³⁵ a cruel veneer meant to hide the purely self-interested motives of those claiming to interpret it. That is the path to legal nihilism.

³³ We might characterize these choices as micro-political reassertions of the constitution-making power, which are paradoxically conducted *in the name* of fealty to an unchanging constitutional order. See Schmitt, *Constitutional Theory*, p. 126.

³⁴ Schmitt, *Legality and Legitimacy*, p. 36.

³⁵ Dworkin, *Law's Empire*, p. 44.

II. Emergency and discontinuity

Hart's concept of law is both practically as well as theoretically dependent on the normal conditions of legal order. The depoliticization of reasons succeeds because people choose (consciously or not) to proceed as if it were successful. But what happens when they confront emergencies that break apart the normal case, when the system itself is under threat? The most obvious example is war, where the survival of the state is at stake. There are countless examples of seemingly illegal actions conducted during wartime and justified in this way.³⁶ But emergencies need not be so all-encompassing to provoke this sort of response; economic, social, or even cultural dangers might provoke fear of this sort.³⁷ The defining feature here is a discontinuous threat, one that provokes an argument about the basic structure of rules, which demands action that cannot be prefigured by a clear consensus of legal justification. These cases invite debate over the nature of law in the same fashion as Dworkin's principles: they demand decisions that must be justified but which cannot be certified against alternative judgment. In this way, they are also analogous to the cases that provoke the need for creative discretion, where decisions must be made in absence of legal guidance. But emergencies press the problem of discretion to the breaking point.

³⁶ For example, any number of Abraham Lincoln's actions during the Civil War stepped well beyond the designated powers of his office. He initiated numerous wartime actions before Congress could be convened to grant him authority, including a naval blockade, the suspension of *habeas corpus*, and arrests without warrants. Over the course of the war, he also conducted military tribunals against civilians, ignored judicial opinions that contradicted this authority, and issued the Emancipation Proclamation through executive fiat.

³⁷ Many of Roosevelt's justifications for elements of the New Deal sat on shaky foundations. His bank holiday was loosely justified by the World War I Trading With the Enemy Act, while the National Industrial Recovery Act effectively ceded legislative authority to the president. More recently, in the wake of the 2008 financial crisis, executive agencies and the Federal Reserve exercised extreme informal authority to stabilize the financial industry.

In the emergency case, the doubt about legality inherent in discretion becomes material and potentially catastrophic.

Positivism and emergencies

Positivism seems to offer a strong defense against the disruptive effects of emergencies. After all, the positivist makes no claim about the value or efficacy of law—she merely seeks to describe it. Therefore, when politically or morally necessary action falls outside the posited structure of law, this should pose no problem. Such activity is permissible; it simply not be couched as legal. The positivist goal is simply to *explain* the contours of the emergency, so that if a response is necessary it can be taken outside of law, rather than polluting the clarity of law's authority. The emergency, by this account, is simply a reiteration of the basic problem of separating legal and extra-legal reasons. The coherence of law depends on its capacity to be described without reliance on external justification.

But if, as we have seen, Hart ultimately depends on an underlying moral justification to establish the basic coherence of legal order, this permits emergencies to infiltrate the whole system of legal reasoning. It is, in essence, the extreme case of discretion, which transmutes all previously-distinct legal reasons into one fundamental question of how the rule of recognition itself will be understood. But unlike discretion, which occurs only within the context of normal shared reasons, the emergency has the potential to provoke a tidal wave that washes over the entire system and flushes out legal content. If the crisis is large enough, one can imagine it

fundamentally altering the social norm that founds the rule of recognition itself—and thereby shifting the entire scope of ‘the law.’

Joseph Raz offers one possible response to this dilemma. For him, the apparent risk of such spillover derives from a misunderstanding about the nature of law’s authority. Rules are obligatory because of their placement within a legal system, not their quality. They continue to hold even when overwhelming political or moral reasons appear to counteract them. This is because reasons possess different characters. The reason for exceeding (or even violating) the law is a ‘first-order’ reason, a reason of the normal sort. Similarly, the reason for following the law is also of the first-order. Like Dworkinian principles, these reasons may weigh against each other and the final determination should simply be to “act on the balance of reasons.”³⁸ However, there are also second-order reasons, which are reasons for acting, or not acting, on the normal sort of reasons.³⁹ In particular, the law contains an ‘exclusionary’ sort of second-order reason, which instructs its analyzers to ignore all other reasons except those grounded in social sources.⁴⁰ Law’s authority is defined by these exclusionary reasons—they explain why law generates obligations even in cases that contradict one’s personal judgment about the balance of reasons.

For Raz, emergencies do not challenge this structure of positivist legal obligation. They may, of course, provoke “a peculiar feeling of unease” when the law instructs us to act against our own political or moral judgments.⁴¹ But in those cases,

³⁸ Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), p. 36.

³⁹ Raz, *Practical Reason and Norms*, pp. 39-40.

⁴⁰ Raz, *The Authority of Law*, pp. 46-47.

⁴¹ Raz, *Practical Reason and Norms*, p. 41.

we are nevertheless bound by an exclusionary reason that neutralizes all further analysis of obligation. This exclusionary reason does not cancel our extra-legal sentiment—we are free to believe the law incorrect or unwise—it simply asserts a lexical priority that blocks such reasoning from generating legal obligations.⁴² In a sense, second-order reasons provide a kind of instruction manual for evaluating the force of first-order reasons. The second-order reasons do not rely on external moral justification, but reflect the function of law to be authoritative, to “constitute reasons” for its subjects, even if no other reasons exist.⁴³ For the purposes of description, the law retains its clarity even in the face of extraordinary circumstances.

Take the simple case of a speed limit. One who is late for an important meeting might choose to exceed its requirement, but such pressing need does not alter the enduring legal obligation. The emergency explains why she chooses to break the rule; it does not change the rule’s force, or alter the rule’s content. The same logic applies for even the most extreme forms of emergency. If an action is truly necessary, that necessity must be established outside of the law. The case for extralegal action in an emergency depends on establishing a value higher than legality. The act must be worth doing even though it is illegal, and this necessity does not produce legality. If it is undertaken, it is done *against* the authority of law.⁴⁴

The cleanliness of this approach is appealing. The problem, however, is the same one we have just observed in the case of discretion. This analysis only resolves

⁴² Raz, *Practical Reason and Norms*, p. 43.

⁴³ Joseph Raz, “The Problem of Authority: Revisiting the Service Conception,” *Minnesota Law Review* 90 (2006), p. 1012.

⁴⁴ Raz, *The Authority of Law*, p. 52.

the problem by defining it out of existence. If Raz is correct that legal reasons must exclusively draw their justification from social sources, then what is the source for the premise that reasons bind at all? Where in the law, in the positive social acts that make up its entire content, may one discover the justification for the necessity of justification? Nowhere, because this is merely a condition of practical reason itself. The purpose of authority, the reason why law is infused with an exclusionary rule, is to “secure conformity with reason.”⁴⁵ Law is capable of preempting non-legal reasons, that is, if and only if its legitimacy produces a more coherent relationship of reasons. But once this is admitted, then the introduction of non-legal reasons is once again possible. If a rule is incoherent, one may refuse to enforce it in the name of increasing the conformity with reason. Even further, if the plain text of a law appears to necessitate an unreasonable result, the underlying force that sustains the exclusionary rule will also assert itself.

This produces the potential for a different sort of exception, one that is *internal* to law. As Hart established in his debate with Fuller, the rule of recognition is theoretically capable of supporting any content. However, a specific rule of recognition, once constituted and actively engaged, creates a unique set of obligations. The particular way that it resolves the problems of moral reason creates a structure that generates expectations of continuity. So, what happens if duly authorized agents promulgate rules directly antithetical to the terms of its construction? If law is supposed to regularize activity and ensure the smooth function

⁴⁵ Raz, “The Problem of Authority,” p. 1017.

of social order, what if legislation is passed permitting the arbitrary enforcement of all rules?⁴⁶ What if the ruling party amends the constitution to ban all other parties? Or even to ban future elections outright?⁴⁷

These are exceptions of a different sort. The actions undertaken appear to be permissible according to positivist law, since they assert justifications that stem from within the law and thus cannot be blocked by an exclusionary reason. The question that they raise is one of continuity. What ties together a legal order that may be filled in such radically divergent ways? Is the rule of recognition simply an agreement to treat a historical set of facts as a continuous chain of legal order? And is there any legal action whose effect is so enormous that it constitutes a *change* of the system rather than an internal reorganization? What distinguishes revolution from amendment?⁴⁸

If so, law is ‘saved’ in the face of emergency only by stripping it of all meaning. Law as understood in this fashion is infinitely malleable and its content is determinate only insofar as one interpretation of the rule of recognition exerts sufficient legitimacy to establish an enduring character. This is a hollow victory. As we saw with discretion, law is constructed in response to the appearance of gaps. The case of the emergency merely expands this process tenfold. To exercise discretion requires a pre-existing framework, the rough consensus on settled law, but the defining feature of an emergency is *precisely* that it exposes a gap in that consensus.

⁴⁶ See Fuller, “Positivism and Fidelity to Law,” pp. 650-655.

⁴⁷ Schmitt, *Legality and Legitimacy*, p. 30

⁴⁸ Cf. Bruce Ackerman, *We the People: Foundations* (Cambridge: Belknap Press of Harvard University, 1991), “Chapter 2 – The Bicentennial Myth.” See also Schmitt, *Constitutional Theory*, p. 125-129; Schmitt, *Political Theology*, p. 24.

The question at hand, in such cases, is whether to legalize extra-legal action.

Resolving this question does not simply *add* to law in the same sense as normal creative legal activity, it actually determines a far more fundamental question about the true essence of the legal order. That is to say: emergency action does not just pose a problem of interpretation; it generates indeterminacy regarding the very question of what makes law in the first place.

For example, an executive asserting the penumbral right to emergency power effectively claims the authority to generate legal obligations outside of the normal procedures of validation. It might, for example, argue that economic instability poses an existential threat to the constitutional order and legitimates seizing private assets. This assertion, in contradiction to the ‘plain facts’ of the law, is defended by appealing to a deeper justification in the structure of the law itself. To critics, this will appear as pure sophistry—an assertion of the right to transform political emergencies into legal ones and thereby take actions independent of any legal constraint. The executive may of course respond that the emergency power is still restrained by the same sort of restrictions that were supposed to limit discretion: opportunity, substance, scope. That is: emergency action is limited to a small set of circumstances, permits only as much extra-legal action as necessary, and can only act in the specific area of the emergency. These limits, though, are entirely artificial. Whether the exception is triggered depends on the interpretation of the emergency, which is precisely the issue under consideration in the first place. There is no legal standard for judging the nature of an emergency; that is what makes it an emergency. As with

other sorts of discretion, the practical effect is to *create* a new rule to permit such seizure in a legal void.

Of course, the assertion of emergency power will not generally be framed as the production of new law. Instead, it will be treated as a *legal* exception to the normal order, no different than the sorts of exceptions explicitly established in via prior legislation. A discretionary affirmation of the emergency act amounts to the assertion of a singularly general rule implicit in the structure of law itself. That rule: to preserve the functional operation of the other rules.⁴⁹ The emergency action may then be treated as simply the enforcement of this rule. The use of judicial discretion to assess this use of power is only coherent if such a general rule is assumed: otherwise the judge would have no power to authorize or restrict the act. If the general rule does exist, however, the judge need only *apply* it to carve out a previously unseen limit on the other positive rules. In effect, a reason declares ‘you must do X...unless you should not.’

Raz uses second-order reasons in an attempt to re-impose order against the potential chaos that this idea produces. However, the same problem exists for second-order rules themselves. An exclusionary reason forbids the use of moral reasoning to establish law, except when it does not. This may be described in two different ways, and that bifurcation produces the illusion of legal order. In one case, the exclusionary rule is overwhelmed by non-legal reasons; law is trumped by politics. In the second case, the implicit exclusionary rule is re-articulated to accommodate new information.

⁴⁹ Schmitt, *Constitutional Theory*, p. 76. This could be seen as derivative of the general premise that ‘ought implies can.’ No law can sensibly be applied if its own structure negates its application. Cf. Posner and Vermeule, *Executive Unbound*, p. 5; Rawls, *Theory of Justice*, pp. 238-239.

In effect, the discretionary act of judgment asserts the continuity of law *as such* even as the apparent content of law shifts. But this distinction is self-defeating. It shows that the only true difference is whether the political structure has catalyzed the problem sufficiently to override the general extra-legal commitment to stability. If the effect has not yet been triggered, it always could be. In effect, the concept of emergency reveals that every reason contains the possibility for its own cancellation.

This means, in effect, that every rule is haunted by the possibility of nullification. While good law cannot be overridden easily—it requires a genuinely exceptional case—the standard for determining whether a particular situation warrants such a response exists entirely outside the scope of normal law. This means that *no* rule is truly cemented; it always contains the implicit caveat: unless absolutely necessary.⁵⁰

Therefore, through the creative function of judgment, ever-expanding rings of differentiation are possible—each of which claims to be a more precise limit on the positive content of law. By neutralizing political emergencies, the argument goes, the law is protected from the intrusions of extra-legal reasons. In aggregate, however, these exceptions reveal the positive content of law to be *wholly dependent* on political circumstance. We have already seen that the rule of recognition is not a singular and identifiable ‘rule’ but instead is a complex social rule—with all the attendant confusions. The assertion of emergency clarifies the terms on which the *social* status

⁵⁰ Schmitt, *The Concept of the Political*, pp. 50-51. Schmitt makes clear that such reservations are crucial to the very concept of law: “these reservations are, according to their logical structure, no mere exceptions to the norm, but altogether give the norm its concrete content. They are not peripheral but essential exceptions; they give the treaty its real content in dubious cases.”

of the rule of recognition is sustained. The claim ‘this is legally necessary even though no explicit rule authorizes it’ is, in essence, an assault on the existing consensus regarding the rule of recognition. By claiming to enforce the existing rule, one does precisely the opposite. The claim of an emergency-exception performatively generates a *new* rule of recognition: identical to the previous one except for its permission of this emergency power. This act determines law’s scope, but is not itself *of law*. Therefore, **to integrate the emergency act into law simultaneously also integrates law into the emergency**; the mountain comes to Muhammad even as Muhammad goes to the mountain. As a result, the content of law is open to potentially infinite and arbitrary shifts.⁵¹

This sort of flexibility takes us beyond the debate over positivism and morality. Obviously, Hart is willing to accept that law is still law regardless of its content—this is the core feature of his debate with Fuller over whether, for example, the Nazis had a legal system.⁵² He still insists, however, that such law follows procedural forms that make it capable of determinate judgment; we may not like the law of the Nazis but we can nevertheless describe what it is. However, the indeterminacy created by the feedback of emergency and discretion is of an entirely different form. Here the problem is not that law may be given ‘bad’ content but the more basic dilemma that the procedures of legal authorization generate no meaningful constraint on *any* content, good or bad. A political actor may assert emergency power,

⁵¹ Schmitt, *Constitutional Theory*, pp. 195-196.

⁵² Hart, “Positivism and the Separation of Law and Morals,” pp. 617-621.

and the very nature of that assertion undermines all efforts to impose legal restrictions on the scope of such power.

Moreover, once the formal limit on extra-legal action is surpassed, the only basis for distinction left is the appeal to a shared concept of the good. But such a shared concept is precisely what is unavailable in such circumstances. Therefore, reliance on extra-legal mechanisms violates the most basic premise of the social contract: that law will be exercised on terms that all can collectively affirm. The assertion of emergency powers denies the basic principle of ‘equal chance’ by asserting special powers for those who happen to obtain a temporary majority.⁵³ In such conditions, trust in legality cannot help but dissipate. This was, for example, one key problem in Weimar Germany. Papen, Schleicher, and Hindenburg asserted emergency powers against the practice of liberal democracy—in an effort to withstand the social and economic crises of the Great Depression—but in doing so neutralized any formal case against the National Socialists asserting the same emergency authority.⁵⁴

As a result, even if the law is salvaged, this is accomplished only by obliterating the pretense of genuine constraint. When push comes to shove, law is only as strong as convenience. Underneath the supposed rule of law lies a political decision waiting to burst free.⁵⁵ The only relevant question, in such a circumstance, is: *who is capable of deciding* on the existence and scope of an emergency? That question, which may only be assessed in terms of political legitimacy, determines the

⁵³ Carl Schmitt, *Legality and Legitimacy*, pp. 31-32.

⁵⁴ See Dyzenhaus, *Legality and Legitimacy*, pp. 23-25.

⁵⁵ Schmitt, *The Concept of the Political*, pp. 50-51

entire effect of the emergency. It is the difference between illegal actions and legalized exceptions, between a coup and the restoration of law.

III. Positivism and the depoliticization of law's morality

We now arrive at the crux of the matter. If law's purpose is to provide authoritative judgments, as Hart believes, the problems of the emergency are catastrophic. On precisely those matters which provoke intense feelings and deep concern, law is weakest. All arguments about the nature of the emergency recursively return to a battle over how to understand law in the first place. Any attempt to describe the law regarding exceptions is nothing more or less than a political argument to prefer a particular understanding of the rule of recognition. That it is pitched as if it were an argument about the factual content of a shared rule of recognition only demonstrates the political potential intrinsic to all legal interpretation.

If this account is correct, law is essentially formless, merely a tool of those who possess the legitimacy to infuse it with meaning. Again, this is essentially Hart's position in his debate with Fuller: law is simply a set of connected obligations, whose value depends entirely on the manner in which it is employed. But contra Hart, that meaning possesses no internal stability. The apparent regularity provided by law, so crucial to preserving social stability in the face of irresolvable convictions, is an illusion. It certainly can hold in normal cases, but on any issue of sufficient importance and provocation the shroud is pulled aside and the forcefulness of extra-legal reasoning returns. And crucially, this possibility is ever-present. The potential for any case to produce emergency-reasoning means that every application of the normal legal model is still bound up in the larger political debate about the nature of

such emergencies. That is: the choice to declare a matter settled law is simultaneously *also* a decision to secure the stratified, bureaucratized order against its potential usurpation.

Combating the exception: the merging of moral reason and political authority

This casts Hart's project in a new light. Because *every* legal judgment always implicitly contains the potential for political intervention, the law is never genuinely settled—not even in the loose sense that Hart desires. There is no way to describe law without also thereby participating in the construction and justification of law. This, of course, is one of Dworkin's key points in *Law's Empire*: positivism is not truly descriptive but is simply interpretive in a conservative fashion. Looking at this argument through the lens of the emergency case multiplies its importance significantly. The crisis provoked does not merely expand the size of the penumbra, but can instead cast doubt on *the entire scope of law*. It is not just that actions may be granted legality through retroactive legislation. Rather: the retroactive judgment claims to *re-describe the law as always having permitted* the action. In effect, the interpreter of law asserts the capacity to refigure the rule of recognition upon which the very right to judge is founded. As a result, the one who decides on the nature of the emergency is sovereign in a way that is supposed to be impossible in modern legal orders. The capacity to incorporate new content is unrestrained—it emerges from a void of pure extra-legal reasoning—in the fashion that is supposed to be restricted to the singular function of the rule of recognition. The creative power of the

decision on the exception is exponentially larger than the simple legislative power. Its constraining function (the procedure of law) is, in fact, a multiplier, which turns even the most purely descriptive enterprise into an active process of political restructuring.

This problem requires a fundamental reconceptualization of what is at stake in the debate over the nature of law. Dworkin argues that a positivist theory of law fails because it cannot sustain the semantic unity necessary to generate meaning. Law, if understood purely in positivist terms, contains no mechanism for preventing its own fracture under the weight of interpretive discrepancies. Hart claims that this will occur only in those cases where the political community that forms the law has drifted significantly apart. We can now see, however, that this indeterminacy is neither limited nor rare. Instead, it is built into the very foundation of law itself.

This has enormous implications for the temporal function of law. The durability of legal order, one of its key defining features, is illusory. Temporal continuity is possible only at the cost of infinite malleability. A system of rules continues to bind over time, but the only feature linking the past, present, and future content of those rules is simply the declaration of unity. Its shifts do not occur through the slow movement of penumbral territory, or the accretion of new discretionary judgments but through basic reconstructions of law as such. In effect, the unity of law depends on its political structure, and this dependence cannot be isolated by Hart's positivist devices, but must be constantly re-iterated via a never-ending set of decisions on the nature of emergency. Each decision in these 'hard cases' is not conducted against the background of a rule of recognition but instead is

part of the process by which the rule of recognition is *made present*. Therefore, the law obtains its normalcy not through its *distinction* from non-legal reasons—trapped in the amber that is a stable rule of recognition—but rather must be constantly produced and reproduced through the *infusions* of such non-legal reasons.

Such infusion carries an intrinsically moral character. To assert continuity in ‘the law’ presumes a moral framework that connects that which once appeared to be the rule of recognition with what is now accepted. Without such a moral basis, the continuity of law would be purely a matter of form. Precisely because law is always open to fracture when the depoliticizing masks are cast aside, the purely factual content of law is essentially arbitrary. To bind together past present and future, then, requires some stabilizing influence—capable of stepping outside the plain analysis of procedure to examine the binding elements. Such a universalizing gaze is necessary to authenticate the changes as sustaining the coherence of law, as shifts in application rather than revolutions that constitute new law. To decide that the rule of recognition authorizes, or even necessitates, a particular course entails a moral commitment to the idea that this unbounded interpretive act is not truly unbounded but was in fact prefigured by the very rule under consideration. It asserts the durability of law—as a distinct institution capable of generating its own sort of obligation—against the threat of political necessity.

However, in order to succeed, this asserted unity must be capable of imposing authoritative obligations—that is, obligations capable of overwhelming individual opinion—and such obligations are entirely parasitic on the preexisting political

structure out of which they grow. Positivist law obtains its coherence only because it is backed by moral *reasons* as well as by political *legitimacy*. That is, it requires sustenance from both fact and value, and this support depends on those two elements working in synergy. Therefore, positivism is in its essence a theory about the unity of law and morality, which simultaneously asserts their separation. Its most basic premises, it seems, utterly contradict.

This paradoxical core of positivism is tremendously important. It reflects a crucial blurring of the nature of authority, one that strikes to the very heart of what makes liberalism a unique political form. The problem is that Hart sees the *manner* in which law secures its legitimacy as essentially unimportant—indeed, an explicit goal of positivism is to avoid building this question of external legitimation into the concept of law. For this reason, he is agnostic about the difference between moral and political justification. From the internal perspective of law, they are both simply non-legal reasons. But once we see that *both* are necessarily included within the law, it also becomes clear that positivism's limited concession to moral reasoning is far more extensive than it first seemed. The bridge of moral reasoning—supposedly limited to the rule of recognition—is in reality a device through which the political alters its appearance between two forms. The liberal field of the political and the liberal concept of law, therefore, are merely two *aspects* of a deeper political structure. And the mechanism for generating their apparent distinction *conceals* this deeper structure.

It is depoliticizing in the same way that Rawlsian political liberalism was described in Chapter 1. The objection is, once again, that the form of politics made visible by this theoretical mode of inquiry is not political at all. It is instead a shield used to block inquiry into the true political rupture that bubbles beneath the law. This means that the underlying plasticity of law—the way it depends on authorization that cannot itself be contained or even understood—is the true essence of legal order in modern liberalism. Contra Hart, law is not supposed to generate obligations outside of morality. In fact, the opposite is closer to the truth. As Dworkin says, moral reasoning cannot be eliminated from law because law itself is normatively structured to its core. The problem—for both Dworkin *and* Hart, as we can now see—is that the ‘core’ is illusory. It can neither be sustained by its normal functions nor interpretively recuperated. This becomes *apparent* in the problem of the emergency, but the emergency is merely the eruption of a deeper conceptual discontinuity, which might better be understood in Schmitt’s terminology as *the exception*. Emergencies do not *create* the fractures in law; they are merely the locations at which law’s gaps are made most apparent. Thus, the true importance of the emergency is not that it defines a circumstance where politics *intrudes* into law—where the facts of political necessity trump legal rules. Quite the opposite. The emergency is most important because it provokes the aggressive assertion of law’s continued coherence.

Law as an instrument of neutralization

We can now see how the assertion of legal continuity against emergency, either through gap-filling measures (like Hart) or universalizing measures (like Dworkin), does not defend the rule of law against political interference. Instead, it simply enacts a particular *form* of politics: namely, neutralization. This blunts the sharp edges of conflict via a noble lie, which states that the operations of statecraft are ultimately grounded in determinate rules.⁵⁶ The goal of this neutralization is to filter changes in the moral timber of society through the medium of the law in order to prevent them from becoming *political* battles, to blunt their potential for social disruption. It is an attempt to prevent moral conflict from becoming activated as a friend/enemy distinction.⁵⁷ Such depoliticization does not erase the political functions of governance, nor does it even contain them. Instead, it hides them in plain sight, by masquerading as the supposedly neutral requirements of law.

Given this, positivism cannot help but fail on its own terms. Rather than *describing* a genuine and externally coherent separation, it helps to produce a particular, limited *sort* of separation. By re-articulating political argument as legal reasoning, positivism provides a mechanism for cloaking the manner in which politics and law represent the same underlying functions of power. Further, by providing a justificatory mechanism for institutionalizing such changes, it is of a part with the

⁵⁶ Carl Schmitt, "The Age of Neutralizations and Depoliticizations," in *The Concept of the Political*, pp. 89-90.

⁵⁷ Schmitt, *The Concept of the Political*, p. 28. He argues that liberalism "has attempted to transform the enemy from the viewpoint of economics into a competitor and from the intellectual point into a debating adversary. In the domain of economics there are no enemies, only competitors, and in a thoroughly moral and ethical world perhaps only debating adversaries."

political technique of depoliticization, which uses legal forms as a mechanism to communicate political power through bureaucratized means. The veneer of neutrality provides a crucial shield against the *appearance* of political intrusion, but only by promulgating a false conception of politics itself.

In this respect, Hart's theory no longer seems to offer productive possibilities beyond those offered by Dworkin. To 'protect' law from political reasoning in the name of *eliminating* its moral features is simply the mirror image of protecting law from political reasoning by *prioritizing* its moral features. Hart's conception does not merely include a moral foundation; it is *nothing but* that foundation. By insisting on the separation of law and morals, while simultaneously helping to secure precisely such a linkage in the form of a depoliticizing neutralization, positivism actively inculcates a moral frame of reference. It does so by de-linking the object of its description from the logic of political necessity—thereby generating a powerfully universal claim about the potential for neutral description, which is all the more unassailable because it is not supposed to be universal at all.⁵⁸

Hart and Dworkin, then, are not truly engaged in a debate as one might traditionally understand the term. Their approaches do not contradict but instead simply emphasize two (incommensurable) aspects of the same underlying political form. On the one side, the law cannot generate the fact of political order without simultaneously instituting a concept of legality. This can be seen clearly in Hart, whose rule of recognition hints at the exception but can only use this device to

⁵⁸ Dyzenhaus, *Legality and Legitimacy*, p. 43.

structure a broader legal relationship. The ungrounded exterior of law itself remains wholly outside of Hart's reach. This reflects the depoliticizing impulse of liberalism: to contain its expression of political identity through the forms of procedure. Conversely, a concept of legality is meaningless without a prior commitment to a principle of legitimacy. For all that Dworkin seeks to draw together decision and justification, his entire theory remains caught within the deep fact of its particular community. This reflects the universalizing impulse of liberalism: to assert the specific conditions of a temporally, culturally, and politically situated social order as if they were eternal truths. Together, these depoliticizing and universalizing moves represent the basic instability and flux of a liberal political order—the way that it protects its foundations from assault by denying their very existence.

Law's institutions and the absent political

The unifying feature we have observed in Hart and Dworkin is their refusal to accept the reality of political *decision*. Both adopt models for legal neutralization, intended to deny or marginalize the arbitrary exercise of sovereignty. They simply emphasize different aspects of the project. And even more importantly, they each *de-emphasize* the *same* aspect. This is in fact the essence of their debate. By looking at what cannot be said, we begin to perceive the true outlines of the political, in the liberal sense. Politics, we might say, is defined as the gap across which these theories of law cannot cross on their own terms. Hart seeks to sharply restrict the contact points between the flux of subjective judgments and the practice of law, but once his

view is examined through the lens of the exception, it is revealed to do precisely the opposite. The desire to limit the expression of a connection between the idea of legal order and its enforcement cannot sustain itself; the force of the exception remains a kernel in every form of its enactment.

Both diagnose a deep problem in liberal theories of the law—the place where it purports to leap across the divide from concept to practice, from fact to norm—and therefore propose elaborate structures to neutralize that concern. The Hart/Dworkin debate starts from the premise that the proper task of legal theory is to resolve this problem, but perhaps Schmitt's single most penetrating insight is that this gap is not an error, the result of a failure to fully develop a theory of law, but instead is itself the very heart of liberalism as such. This explains why it can seemingly contain such multitudes and contradictions—in some cases emphasizing equality, in others liberty, insisting on the universality of its principles but also assuming the contingency of all claims to truth, and so forth. These apparent tensions drive endless debates among the political theorists of liberalism, some seeking definitive resolution and other expressly refusing that goal. Hart and Dworkin are merely one example among many of this classic division. But by applying these concepts to the basic question of 'what is law' they perfectly illustrate one of Schmitt's key points in stark terms: at the most basic level, **the political structure of liberalism is defined not by its substantive content but by the formal relationship it takes to the idea of the exception.** There are liberalisms that prioritize factual content and liberalisms that reason outward from principles of value, but neither side achieves a definitive victory. Instead, the political

practice of liberalism endlessly vacillates between these two approaches –with individual interlocutors providing nodes of thought. Thus, the larger project of ‘liberalism’ becomes apparent only through collective engagement. Its unifying impulse is to filter out genuinely political concepts, in a Schmittian sense. Friend/enemy distinctions are evaded rather than engaged, as liberal politics only shuttle from one side to another on the backs of competing theories, in a state of permanent, depoliticizing limbo.⁵⁹

Liberal theology

This brings us all the way back around, in a slightly altered manner, to Hart’s original concern for the synergy between legal interpretation and legal order. The value of depoliticization, as he sees it, is to shield legal debates—necessarily subject to limited indeterminacy—from the far more dangerous and comprehensive variety of rational indeterminacy. The thought is that such separation will preserve law’s coherence, keeping it available as a resource for the authoritative resolution of conflict. Now that we have troubled the separation, we can see this motive in a new light. Neutralization does not push politics outside of law. Quite the contrary, in fact. It simply regularizes the relationship between the two, providing a mechanism for understanding them as essentially synergistic. No emergency may be understood as a genuine emergency because true emergencies disrupt the frame of reference needed to describe an exceptions in the first place. And similarly, no political disagreement

⁵⁹ Dyzenhaus, *Legality and Legitimacy*, p. 39.

may be seen as fully outside law. They are instead tethered to law through the construct of the rule of recognition.

Once again, by comparing him to Dworkin, the essential structure of Hart's argument is laid bare. Both share the same underlying faith: that the system of law can encompass the world of legal possibility. This commitment is less obvious in Hart, because he denies that the *legal order* is expansive, but the basis for that claim is a deeper commitment to the descriptive possibility of law. Hart still represents a 'will to truth,' a commitment to the capacity for reason to demarcate and preserve meaning through categorization. This commitment is an expression of faith in absolute terms. It is, as Nietzsche says, "esoteric through and through, with all external additions abolished, and thus not so much its remnant as its kernel."⁶⁰

This is the *theological* core of liberalism, ineffable and indeterminate, but made apparent through its consequences. The drive for neutralization is grounded in the premise of an individual subject, free and unencumbered. This *individual* sovereignty of the multitude creates a tension that denies any genuine exercise of sovereignty—in the sense of an unregulated decision that generates new order.⁶¹ This is an all-encompassing premise, one which captures the supposed distinction between legal and extra-legal actions and nullifies it. The extra-legal is never truly *outside* of law because the outside is simply that which has not yet been incorporated.

Therefore, no matter how discontinuous a threat may appear, it is always possible to

⁶⁰ Friedrich Nietzsche, *On the Genealogy of Morals*, trans. Walter Kaufmann and R. J. Hollingdale, (New York: Random House, 1967), p. 160.

⁶¹ Michel Foucault, *Society Must Be Defended: Lectures at the College de France 1975-1976*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003), p. 37.

recuperate its difference. In this way, the threat is fully depoliticized. The enemy is never truly an *enemy*, but is instead a *heretic*—a mistaken attitude toward the truth, not an alternative truth. Such heresy must be stamped out because its proponents disrupt the smooth operation of the law; that is, they distract its followers from the righteous path.

The potential proliferation of heretics therefore produces a mandate for reclamation. The whole of the body of law must be reinstated, ideally through an act of conversion that draws the heretic back into the fold. The problem is that this preferred option, reincorporation, is impossible on its own terms. Because the edifice of law is constructed on the basis of *reasons* it cannot speak to heretical disagreement, which goes beyond the realm of reasons. This provokes the dark underside of conversion: the necessity for police actions to expel such dangerous ideas.

This is particularly destructive for Dworkin. His faith in the quality of moral reason leaves him incapable of articulating a method for resolving the bubbling fact of heresy. After all, the legal heretic's reasons are moral in precisely the same way as law's defenders. They each believe in the righteousness of their interpretation.⁶² If there is to be any resolution of such conflict, it may only be provided by the crudest tool of all: the simple fact of force. Dworkin wants to insist that the law bears the moral force of universal reason, but he cannot account for the fact that its *application* always reinstates the moral particularity of a specific community. His faith in reason

⁶² Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (New York: Verso, 2000), p. 107.

cannot be reconciled with the fundamentally unreasonable core of faith itself. And this problem is apparent in Dworkin's own normative claims. The premise that law must be treated with integrity is itself a moral claim that must be tested, but can only be defended using the very apparatus that it constructs. This results in an endlessly recursive chain of reasons that can never speak to the necessary authority of law. That authority depends simply on faith. As a result, the concept of law is universal, but the practice of law is heavily policed. Furthermore, Dworkin can offer nothing to those who disagree except for the opportunity to argue endlessly. This is devastating to his project, which is organized around the necessity of justification for coercion.⁶³ But such justification is the one thing his faith in integrity absolutely cannot provide. Heretics cannot be persuaded to accept the justice of their punishment; they are defined precisely by their refusal to sublimate faith within justification.

This critique of Dworkin bears a great deal of similarity to the positivist one already discussed. They also called attention to the unresolvable core of Dworkin's interpretivism and its destruction of the potential for authoritative resolution. And, by refusing to frame the discussion about law's content in terms of moral reasons, the positivists seek to avoid the necessity of terminal justification. We can acknowledge that the content is arbitrary from the perspective of law, they think, without such arbitrariness eroding the justification for coercion.

However, framing the law in this fashion does not erase the problem but merely rephrases it. Just as with Dworkin, the positivist approach necessitates endless

⁶³ Dworkin, *Law's Empire*, p. 1-2.

police action to sustain the coherence of their secular order. Both are organized around a mandate for coherence. They therefore represent nothing more than two halves of the same commitment to the principle of foundations: a commitment necessary to hold the looming abyss of legal nihilism at bay. In each case, they speak *around* the exceptional form of law, call it into existence through the absences of their debate. Their notions of law are anti-messianic, seeking certitude through the procedural forms of this world. But those procedures are cognizable only in hindsight, through the drawing of patterns and ascribing meaning to them. As such, this form of legal reasoning is never capable of comprehending the radical disjunctures that transform the purely abstract possibility of law into the living and breathing law of an active political order. In short: because they cannot articulate the exception, they may only articulate what *has been*, not what *is*, and therefore also not what *is to be*.

Drawing back, we might say that the purpose of theoretical inquiry—as embodied in this debate—is to impose the pretense of order against the persistent fact of exceptional disjuncture. It translates the revolutionary spirit of an age into language, gives it a secular history, and explains its necessity in a fashion that denies the fact that it could have ever been otherwise. It speaks order against chaos. If political theology is defined by eruptions that structure belief, which generate a new temporal order in which normative judgment is possible, then the secularized variant is defined by the radical denial of time itself. There is no creation; there are only the emanations of an uncreated and ever-present structure of reason. Liberal theory provides an explanatory logic (and an accompanying justificatory regime) that

historicizes and limits the scope of liberal *political* institutions to their material emanations. Is this not the essence of ‘justice’—to convince its practitioners that the bleak formality of law includes a secure moral basis for social order that exceeds its own banality and expresses the genuine normative potential of shared human life?

Armed with this logic, the bourgeois *Rechtsstaat* remains glued together as a conceptual object, even if it cannot sustain a genuine, political unity. That this formal structure can remain valid even as it is taken over by the most extreme and illiberal forces in society only heightens the danger.

IV. An alternative theology: Hans Kelsen's pure theory of law

We have treated Hart as firmly committed to the separation of law and morality, a commitment that is necessarily constrained by the limits of language and social order. His soft positivism is the attempt to explain how legal reasoning may utilize moral reasoning without becoming overwhelmed by it. Its failure might be read as indicative of a general lack in positivism. Before leaping to this conclusion, however, it is worth exploring an alternative form of positivism, that of Hans Kelsen, which approaches the *gaps* of law in a different fashion and might provide a different mechanism for talking about the exception. Kelsen is a particularly helpful object of study because he was a contemporary and interlocutor of both Hart and Schmitt. As such, his work provides a helpful bridge for assessing the implications of a Schmittian critique in contemporary liberal legal circles.

While Kelsen is often treated as virtually indistinguishable from Hart on all important matters—indeed, Hart drew heavily from Kelsen in structuring his concept of law—they are not identical. Their limited areas of distinction, moreover, offer significant insight into the problems of justification at the boundaries of legal reasons that have been posed in this chapter. In this section, therefore, we explore the possibility that a positivism grounded in Kelsen's approach might be capable of avoiding the traps that Hart falls into, while also resolving the Dworkinian concerns about indeterminacy.

Kelsen's argument is, at its core, very simple. Unlike Hart, who admitted a certain necessary overlap among concepts due to the loose structures of ordinary

language, Kelsen seeks a perfect and absolute barrier. His goal is a truly ‘pure theory’ of law, a scientific approach that works completely independent from political or moral questions: “The postulate of complete separation of jurisprudence from politics cannot sincerely be questioned if there is to be anything like a science of law.”⁶⁴ Kelsen describes justice as “an irrational ideal,” something his pure theory simply must ignore.⁶⁵ He desires to scrub these polluting elements from legal science, leaving behind a concept of law as simply “a system of valid norms.”⁶⁶ To clarify this normative goal, he distinguishes between moral and hypothetical ‘oughts.’ A moral ought makes a claim upon the goodness of an action. A hypothetical ought demands far less; it says only that within established rules of operation certain actions are linked to certain responses.⁶⁷ Violation of the law does not *cause* the punishment as a matter of fact nor does law make a moral judgment about the *value* of such punishment. It only designates the latter as an obligatory response to the former.⁶⁸ In terms of the law, the purpose of a norm is to make clear that it would be valid to link legal condition with legal consequence. The relevant matter of judgment is not sin, morality, or a sense of the good; the only matter the law adjudicates is lawfulness itself.⁶⁹

⁶⁴ Kelsen, *General Theory*, p. xvii.

⁶⁵ Kelsen, *General Theory*, p. 13.

⁶⁶ Kelsen, *General Theory*, p. 162.

⁶⁷ Mathematics meets this standard—two and two makes four not because it is morally right but because the order that must exist for those concepts to have meaning obligates that one provoke the other. The rules of a game function similarly. A chess match ends at checkmate because the rules state that this constitutes the valid victory condition. See Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley Paulson (Oxford: Clarendon Press, 1992), p. 23.

⁶⁸ Kelsen, *Introduction*, p. 25.

⁶⁹ Kelsen, *General Theory*, p. 54.

While the vehemence of his commitment to the separation of law and non-legal reasons distinguishes him from Hart, their approaches nevertheless run in close parallel. At the level of basic structure both seek to trace validity back through a chain of justifications, a chain that must terminate at a point from which all validity arises. For Kelsen, because he is unswervingly resolved to preserve the distinctness of law's normative structure, this originary point must remain *within* that system of justification. This compares to Hart, whose rule of recognition is a *social* rule, not a legal one, and thus falls outside the normal chain of validation. All that can be said in favor of the rule of recognition is simply that it exists and is affirmed. Kelsen disagrees. For him, the "reason for the validity of a norm is always a norm, not a fact."⁷⁰ If the rule of recognition cannot be validated by a norm then it itself is not a norm and cannot be the basis for validating other norms. As such, he does not adopt the duality of internal and external perspectives on law. For him, all statements about law can only be internal.⁷¹

This difference is real, but does not immediately appear to be particularly consequential. Hart's choice to treat the zero point of law as factual rather than hypothetical makes little difference for the content of his system. In many respects, their approaches are interchangeable, with Hart perhaps offering a modest refinement and simplification of Kelsen's stubborn and vaguely mystical focus on norms.⁷²

⁷⁰ Kelsen, *General Theory*, p. 111.

⁷¹ Kelsen, *General Theory*, p. 164.

⁷² Indeed, this is Hart's position in *The Concept of Law* (p. 228). He considers his rule of recognition and Kelsen's *grundnorm* to be essentially the same idea, and the disagreement over whether to define it as a norm or social rule as relatively unimportant. In an essay describing a debate between the two of them in 1961, Hart notes that "Kelsen remarked that the dispute between us was of a wholly novel kind

However, once examined in the context of this chapter's broader argument, the difference in framing takes on a great deal more importance. After all, the problem with Hart was discovered at precisely this transitional point where law was forced to mesh with the extra-legal world. Kelsen, by refusing to accepting *any* overlap between worlds, avoids this dilemma. But without the rule of recognition, what can organize a legal order? From where does validity stem without such a social rule at the core of law? Kelsen's answer is startling in its boldness and simplicity. Rather than attempting to justify this element, he simply presupposes it. Intrinsic to any positivist statement that the law imposes obligation, he argues, is a presupposition that legal requirement itself is possible. The existence of a binding legal norm inductively demonstrates that legal norms are possible. If every norm must be validated by another norm, logic dictates that the body of positive law presupposes the idea of an infinitely validating basic norm (*grundnorm*).⁷³ By itself, this *grundnorm* imparts no content. It merely designates the procedure by which further norms may be generated.⁷⁴ Accordingly, for Kelsen, what distinguishes simple rule of force from the rule by law is not *who decides* or the *content* of a decision but instead is whether the network of decisions matches up to this presumed *grundnorm*.

While ingenious in a certain fashion, this maneuver also poses its own obvious problem, stated forcefully by Schmitt as far back as *Political Theology*. He accuses Kelsen of having "solved the problem of the concept of sovereignty by

because though he agreed with me I did not agree with him." See H.L.A. Hart, "Kelsen Visited," in *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), p. 287.

⁷³ Kelsen, *General Theory*, p. 115.

⁷⁴ Kelsen, *General Theory*, p. 113.

negating it,” simply re-instituting “the old liberal negation of the state vis-a-vis the law and the disregard of the independent problem of the realization of law.”⁷⁵ This is simply a more extreme version of the problem faced by Hart. If law is produced through the positive acts of material subjects, its coherence is *dependent* on its use by those very subjects. But this is precisely what Kelsen refuses to assess. The mere idea of the law cannot be fixed because such meaning is entirely parasitic on the manner of its application. Its meaning is not objective but is at the mercy of understanding, and thus also at the mercy of will.⁷⁶ Once again, we might turn to Wittgenstein, who decried the positivist belief that justification is a requirement for coherence, “As though an explanation as it were hung in the air unless supported by another one.”⁷⁷ The search for such explanations, whether they are termed rules of recognition or *grundnorms*, seems to be the sort of philosophy that can only “arise when language goes on holiday.”⁷⁸

Kelsen, of course, is not so blind that he cannot perceive this danger. And yet, on such a fundamental matter, his response is murky at best. He acknowledges that law depends on the commitment of its followers without accepting that this troubles his clean divide between fact and norm. His delicate formulation: “The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms.”⁷⁹ He attempts to argue here that a law may only be considered valid if the

⁷⁵ Schmitt, *Political Theology*, p. 21. See also Dyzenhaus, *Legality and Legitimacy*, pp. 108-158 for an excellent discussion of their debate.

⁷⁶ Schmitt, *Political Theology*, p. 30-31.

⁷⁷ Wittgenstein, *Philosophical Investigations*, §87.

⁷⁸ Wittgenstein, *Philosophical Investigations*, §38

⁷⁹ Kelsen, *General Theory*, p. 119.

broader legal system is efficacious, while denying that efficacy *makes* a norm valid. But elsewhere he states that “law regulates its own creation”⁸⁰ and “the ‘source’ of law is always itself law.”⁸¹ These claims are in deep conflict, and without some way to untie the Gordian knot, it is hard to see what Kelsen’s pure theory may contribute to an engagement with exceptionality.

However, if one treats the creative prong as the essence of his theory and sets aside the digression into claims about efficacy, what emerges is a more radically ‘pure’ and peculiarly theological position. While Kelsen himself does not commit entirely to this approach, it may nevertheless be drawn out of some illuminating passages. For instance:

The basic norm is not created in a legal procedure by a law-creating organ. It is not – as a positive legal norm is – valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, act.⁸²

Here the *grundnorm* is a part of law while simultaneously being beyond law. A legal order is impossible without it, but the legal order cannot define or capture it in any way. By this reading, the *grundnorm* appears as almost a photographic negative of Schmitt’s claim that the legal norm is made possible only by the sovereign act to institute “a normal situation.”⁸³ That is, the sovereign decision founds law, which is distinct from the simple exercise of power, in that it produces an internally normative system. For Kelsen, the idea of the *grundnorm* simply communicates the intrinsic

⁸⁰ Kelsen, *General Theory*, p. 124.

⁸¹ Kelsen, *General Theory*, p. 132.

⁸² Kelsen, *General Theory*, p. 116.

⁸³ Schmitt, *Political Theology*, p. 13.

character of any claim to identify law: the assertion of normative backing. An extra-legal claim does not carry the normative force of implied support in the *grundnorm*; it is power, not law. Given this, “[t]he ‘real’ rulers are the organs by whose acts norms are created.”⁸⁴ Even in the Schmittian picture, the claim to uphold law follows this form.

The radical nature of Kelsen’s claim becomes particularly clear when framed in light of the problem of discretion that so troubled Hart and Dworkin. Kelsen’s position on this matter is extremely peculiar. He initially notes that the “legal order cannot have any gaps.”⁸⁵ Faced with a hard case where positive law holds no clear answer, the judge must turn back to the basic norm, which will empower a decision. However, this norm does not constrain the content of her decision. That is: the judge may alter the apparent law, acting as legislator rather than adjudicator. Indeed, every judicial act is a mixture of creation and application of law. The authority to decide is always contained within the *grundnorm*, which designates the judge as the adjudicator of hard cases. In that sense, it is mere application. However, the *grundnorm* is wholly general and merely implied, which means the judge must *create* a new specific norm to apply to the unique case.⁸⁶ This extraordinary power exists because real legislators cannot anticipate the future. The blank spaces in legislation produce deleterious effects that must be remedied by judges. Of course, this “means

⁸⁴ Kelsen, *General Theory*, p. 152. Kelsen’s full sentence reads: “The ‘real’ rulers are the organs by whose acts norms are created which, by and large, are efficacious.” For reasons that have already been discussed, I have omitted the final clause.

⁸⁵ Kelsen, *General Theory*, p. 147.

⁸⁶ Kelsen, *General Theory*, pp. 134-135.

the abdication of the legislator in favor of the judge.”⁸⁷ Kelsen therefore shares Schmitt’s sense that legislative lawmaking is structurally incapable of anticipating exceptions. However, rather than looking to a sovereign decider *before* the law, he turns to the judge who believes herself to act *within* the law, via the imagined mechanism of the *grundnorm*. Kelsen’s judge, like Schmitt’s sovereign, is tasked with generating a legal structure on purely subjective grounds. They differ in that the judge is buoyed by the presupposition of a *grundnorm* that authorizes this act. However, this *grundnorm*, as discussed above, is truly exceptional in Schmitt’s sense that “the exception is that which cannot be subsumed.”⁸⁸ The basic norm must exist, because otherwise the consistent structure of legal norms would break down, but its existence cannot be posited from within the world it generates.

His theory of law, then, offers a complete system where the completeness is made possible only by a willful disregard for the *fact* of the exception. He recognizes that positive law encompasses all things, except for its own reality; in other words, the *grundnorm* is the exception to legal positivism itself. In this respect it is a divine principle, an idea embedded in the structure of thought itself rather than a product of secular human ordering. Unlike Hart, whose legal system was ultimately parasitic on politics, or Dworkin, who seeks to make politics parasitic on law, Kelsen suggests a far more absolute disjuncture. If taken seriously, this notion of the *grundnorm* cannot be circumscribed by an implicit reliance on the external world. It must simply be taken as an article of faith.

⁸⁷ Kelsen, *General Theory*, p. 148.

⁸⁸ Schmitt, *Political Theology*, p. 13.

There are therefore two different aspects of a decision in Kelsen's legal theory. In one case, the judge is a sovereign legislator, capable of altering or remaking every apparent obligation of law and doing so *in the name of* law. In the other, the judge is entirely restrained by the *grundnorm*, which must be honored before any other judgment is possible. In the first sense, Kelsen's judge is put into the same position as Hart's: entirely dependent on a political decision but structurally forbidden from enacting one. In the second sense, she is a Dworkinian: committed to a normative order that prefigures and erases all apparent gaps. But the key difference is that for Kelsen these two ideas exist simultaneously but completely out of phase from one another. No vocabulary may travel between them. They are cognizable as two facets of the same problem *only* because they each presuppose the same ephemeral principle: a *grundnorm* which cannot be further articulated. Just as the absences helped to define the Hart/Dworkin debate, the absence is also crucial here. By prying apart these two notions of legal decision, Kelsen provokes a radical discontinuity, one which prevents his judge from responding to law's apparent gaps with the tool of discretion. That is: by denying even the smallest relationship between the normative responsibility to *apply* existing law and the political responsibility to *create* new law, Kelsen forbids the judge's implicit turn to Dworkinian ideas of integrity to generate continuity (to conceptually *refuse* the gap).

There is a possibility, then, of reading Kelsen as *expressing* the exception of law, by piercing through the illusion of 'gaps.' What appear to be gaps, we might then argue, are instead the precise locations where law's expression is made possible. They

are irresolvable and indeterminate, dark spaces into which new content must be added, and through which rational order becomes possible. The judge is, on the one hand, wholly unconstrained by concerns for either legitimacy *or* integrity. Where both Hart and Dworkin sought to articulate procedures for limiting the judicial choice, Kelsen offers no such comfort. His judge is free to make the law anything she desires, without regard to political necessity, moral reason, or historical continuity. On the other hand, Kelsen's judge is radically constrained by her *faith* in the enduring continuity of the *grundnorm*. This faith is not a matter of fact or value; it cannot be validated by any external referent and it cannot be personalized. It must simply shine forth in its own light.⁸⁹ This approach permits the decision on law's content to take place entirely in the present tense—it is determined by the force of reason enacted by a living judge—while still hewing to the authority of the past. Reason determines the law but this determination is historically specific. Reason is universal, but it may only be applied to positive, factual order. This convergence, where past is made present without thereby losing its distinctiveness (as we saw in Hart) is the ultimate hope of liberal utopianism. To establish the enduring fact of a past, which is not erased by the perpetual churn of *becoming*, is the necessary condition for the corresponding possibility of a future. The concept of justice lives within this potential. We cannot understand the demands of justice without the ability to disentangle what presently *is* from what ought to *become*. And we cannot enact the demands of justice without the ability to create enduring obligations, to see our present as dependent on our past.

⁸⁹ Schmitt, *Political Theology*, p. 29.

Still, this radical feature of Kelsen's theory should not be overstated. It is a kernel in his work, a latent idea in need of full expression, and one that he himself increasingly disavowed over time. Indeed, his efforts to develop an element of efficacy seem targeted at erasing the need for this peculiar theological core. This makes a degree of sense, since the 'pure theological' reading is of more theoretical than practical value. While it accounts for Schmitt's critique in one sense, it still cannot effectively respond to the internal existential violence of the legal form—those who function as a fifth column, using law in order to subvert legal order.⁹⁰ They employ the forms of legality, but do so in the service of a political goal that threatens the entire basis of law itself.⁹¹ If such destructive forces cannot be extinguished, they will bring down the legal system from within. The most concrete example of this problem is Schmitt's own Weimar Germany, which proved incapable of preventing the Nazi takeover.⁹² There, the lack of genuine political unity produced a landscape of groups who were antagonistic to the basic premise of constitutional order. Faced with strong challenges from radical movements on both the left and the right, the center could not be sustained. Absent an intrinsic pathos, an animating spirit capable of staving off such elements, the formal unity of legalism is far too weak to stave off such threats.⁹³

In a sense, the problem with this reading of Kelsen is simply that it is *too* theological. While he demonstrates the possibility of a normative system that

⁹⁰ Schmitt, *Legality and Legitimacy*, p. 11.

⁹¹ Schmitt, *Legality and Legitimacy*, p. 10.

⁹² Dyzenhaus, *Legality and Legitimacy*, p. 5.

⁹³ Schmitt, *Legality and Legitimacy*, 9.

accounts for its own exceptional status, there is still no means for such a system to itself be validated without falling into the trap of endless recursive nihilism. He can establish the form of the law and the content of its decisions, but cannot provide a self-legitimizing mechanism for establishing *who* should decide. That decision is constrained by the law, but the decision about which law to employ (which *grundnorm* to presuppose) is controlled by whoever is authorized to decide—something which depends on which law is chosen. The result: anyone may claim to legitimately decide based on a presumed *grundnorm*, and the question reverts to the simple matter of who is capable of putting force behind an interpretation.⁹⁴ As such, this reading of Kelsen challenges the notion of a drab positivism, but does nothing to translate the theological potential of law into anything more. Moreover, by unshackling legal judgment from the obligation to decide on the exception, Kelsen's approach lays bare the essential emptiness of positivism. Without its neutralizing function, positivism is merely a husk with no material purpose.

In principle, Kelsen offers a far more exciting concept of law; in practice, there is no meaningful distinction between it and an orthodox formalism. He remains trapped by the same dilemma that plagues Hart and Dworkin. By emphasizing the theological aspects of a liberal concept of law, Kelsen completely removes that concept from the realm of material order, and finds himself enacting the mirror image

⁹⁴ Schmitt, *Legality and Legitimacy*, p. 33. This, of course, bears a striking resemblance to the critique of Dworkin. There is a crucial difference, though. Kelsen explicitly recognizes the essential component of violence in law. His definition of an unlawful act makes this explicit: that is unlawful which may be responded to with coercive force. However, this recognition still falters at the idea of *exceptional* violence—the initial violence that renders all other violence intelligible. See Kelsen, *Introduction*, pp. 26-28.

of Hart's problem. His rule of recognition was stripped of its theological potential by its necessary subservience to a framework of 'politics' that utilized precisely the same system of legal reasoning that the rule itself was supposed to exceed. Kelsen's *grundnorm* simply does the opposite; by refusing to engage in political reasoning it *confines* its theological insight to a hermetically sealed universe. The disruptive potential is blocked by the very structure of its own reasoning from constituting any political meaning. Thus positivism, in either case, is trapped by its own premises. To the extent that it is theological, it is ephemeral; to the extent that it has material weight, that very materiality forces it back into the realm of the commensurable.

V. Conclusion – Liberal political architecture and the Hart/Dworkin debate

Positivism is haunted by the exception, and not merely in an abstract or theoretical sense. An unstated fear of the exception is what drives its irredentist drive to incorporate every potential disruption into its descriptive capacity, and what causes its adherents to do so in the name of limitation and neutrality. This explains the slipperiness of Hart's debate with Dworkin. Both operate within the confines of a commitment to the strength of reason, and that shared idea is precisely what undermines the stability of their arguments. For all that they purport to be arguing about 'what the law is,' this is precisely the question that neither can genuinely engage. Their debate brings us no closer to understanding the content of law, because law's content is ultimately nothing other than the very exception that both struggle so hard to excise. Still, if the debate cannot help us to *define* the law, it does help us greatly to understand the way in which the peculiarly liberal form of law *operates*.

We will find little help in the content of their argument, but must instead look to what is consistently and aggressively *unexpressed*. Because they each embrace the premise that law is determined through a relationship to its indeterminacies, their dispute is framed by a single shared underlying need: for law to resolve the gaps at the heart of political order. The key difference is how they frame those gaps. For Hart, political society is riven with conflict of an enduring and unresolvable sort. Such disagreement is inevitable due to the limits of human reason; it can organize shared terms but cannot establish them as objective truths. The law, then, exists to stamp a certain degree of organization onto the entropic structure of reason. Dworkin,

by contrast, sees reason as fundamentally unified, capable of speaking truths that ought be universally endorsed, and the purpose of law is to express those truths against the unreasoned and unreasonable facts of political disorder.

Framed this way, the debate clearly maps onto the general shift in political theory over this time period, where the broad trend has been away from grand theories and universalizing explanations, embodied for our purposes in Rawls' declension from *Theory* to *Political Liberalism*. Dworkin might be seen as a fading remnant of post-war optimism, which dreamed of a liberal consensus founded in the ideal of global unity centered on the ideals of freedom and democracy. That consensus, particularly strong in the United States of the 1950s and 1960s, saw progress on all fronts: endless growth, civil rights, the aggressive promotion of liberal values abroad. Hart, by contrast, stands for a more pragmatic sense of legal possibility, one far more appealing to a post-1968 world structured by long periods of economic stagnation and recession, increasingly uneven distribution of wealth and power, and far more emphasis on the role of identity-based critique. As David Dyzenhaus argues, these conditions have profoundly shaped liberal philosophical debates of all sorts—where it has become increasingly gauche to suggest the possibility of genuine shared normative communities.⁹⁵ Rawls' own shift toward the idea of reasonable pluralism is merely one example among many.⁹⁶ As the liberal consensus has faded, the force of a Dworkinian dream for law seems to fade as well.

⁹⁵ *Legality and Legitimacy*, pp. 218-219.

⁹⁶ Wolin, "The Liberal/Democratic Divide: On Rawls's Political Liberalism," p. 113. Also see *Theory of Justice* at p. 4 where Rawls states quite clearly that the basic conflict of society is about how its goods are distributed, as opposed to whether it can produce sufficient goods in the first place or how to resolve the enduring inequity of a cramped political economy.

Many those to whom it may have initially appealed have likely been persuaded by the broader political trends—away from the Great Society and toward trickle-down economics, away from so-called ‘judicial activism’ and toward a normative discourse of ‘judicial restraint’—to see his approach as utopian and incapable of grappling with the cold fact of political dissensus.

While tempting, this ‘just so’ story is insufficient. Certainly, there is value in critiquing Dworkin’s erasure of the political. However, we have also seen that the concept of the political brought to life by the positivist attack on Dworkin is dreadfully cramped. Just as with Rawls, the ‘political turn’ does not genuinely invigorate politics but only clarifies a different method for neutralizing it. Positivism cannot free politics from the pollution of law, nor vice versa. It can only produce a different *mode* of depoliticization, one which claims to resist the dangers of Dworkin’s approach while in fact mimicking them. Under the guise of detaching politics from law—meant to free political legitimacy from the false security of legal order—Hart does precisely the opposite. In his approach, law and politics are fused together by their shared silence. Politics is therefore stripped of its vitality, linked inextricably to the formalizing mode of legal reasoning, even as such reasoning is itself radically unconstrained. Political legitimacy for a society informed by Hartian positivism can only emerge from a void, from the unspoken and unspeakable unification of law and politics.

I have used the analogy of entropy to describe the goal of positivism: to establish a pocket of order within the general disorder of irreconcilable values. The

problem is that positivism cannot explain the source of the energy needed to sustain its barrier against chaos. Life on earth, for example, is possible within a universe of entropy only because the sun creates a temporary closed system in which order may prevail. But the existence of the sun requires that the underlying physics of the universe permit such isolated expenditure of energy. Positivism can offer no such unified theory. That reason is capable of generating an ordered relationship of obligation, within a closed system, cannot be demonstrated; it must simply be taken as a matter of faith.

The inductively-driven ordinary language approach is more than capable of demonstrating a convergence of meaning, even establishing a relatively clear picture of law's boundaries in normal circumstances, but this order cannot be *reasoned* to its foundations. It is, ultimately, as arbitrary as the world outside. Hart's attempt to resolve this problem through the rule of recognition does not genuinely shield law; in fact, it does precisely the opposite. Like a poorly-designed patch, it does not just fail to seal the borders but actually creates a weak point through which chaos may enter. And further, because the device of the rule of recognition asserts a unity in the structure of law it brings this risk to *every element* of the legal order. Since it suffuses the entire apparatus of law, every legal judgment necessarily contains a prior determination of the political question: *who may decide?* The result: a world in which the exception is at stake in every aspect of law but cannot be acknowledged, and a corresponding series of debates that purport to be about questions of legality (what is

permissible, what is open to interpretation, etc.) but which are in fact about *who we are*.

With this argument, we have reached a crucial point in our attempt to unravel the meaning of the Hart/Dworkin debate. It has become clear that Hart's concern about the conflation of authority and morality in Dworkin must be turned back on him. While positivism *does* successfully limit indeterminacy in a certain sense, it only achieves this result by hollowing the practice of law. The result is a formal structure that resembles law, but which lacks any of its cutting force. The shell of law permits a limited set of coherent legal judgments, but at the cost of rendering them politically inert. The lurking moral basis of Hart's argument draws him inextricably back into the world described by Dworkin.

Moreover, the terminal convergence of these approaches represents the deep structure of liberal political thought—the secular theology, which imports the external necessity of verification but strips it of all constitutive force. We have seen this at work in Rawls' attempt to develop a political concept of justice, but the Hart/Dworkin debate provides a new angle for assessing this effect. Each of them represents one half of the neutralizing function of liberal legal order—its capacity to excise the necessity of decision and thereby render sovereignty an endlessly diffuse force. They are merely offering competing techniques for managing law's exception. This shared motivation establishes an underlying unity, against which particular strategies may be enacted. Their differences are therefore not theoretically grounded but simply reflect two different aspects of the same order.

The Hart/Dworkin debate, as depicted so far, is doomed to endlessly circle around a dying star. It takes place within a closed system of knowledge, which neither approach is capable of piercing. And this is similar to the barrier faced by Rawls at the end of chapter 1. There is no unification of legality and legitimacy, only an irresolvable battle over the terms in which that failure will be expressed. Without a *foundation* upon which justification may be stabilized, there are only neutralizations and exceptions; there can be no justice.

In light of this problem, Chapter 4 begins the task of reassembling an external basis for justification by exploring Dworkin's late career efforts to expand the framework of value far beyond the narrow realm of law.

Chapter Four – The Differend of Justice

Thus far we have explored the Hart/Dworkin debate through the lens of indeterminacy. Chapter 2 set out the terms of the argument: Dworkin accuses positivism of failing to acknowledge the indelible problem of theoretical disagreement, while Hart accuses interpretivism of destroying the unique function of law by making it subservient to irresolvable moral disputes. Chapter 3 then dug into this seeming binary in order to expose a deep-lying similarity in their approaches. These chapters have diagnosed the limitations of legalistic treatment of law. Their failure to engage with law's exceptions leaves them incapable of drawing law and politics together, and thus granting concrete existence to the abstract principles of justice upon which they rest.

Dworkin's critique of positivism provides the entry point for this argument: law cannot be shielded from the eruptive violence of its own foundation because no judgment is ever truly secure. However, as we have seen, his interpretive approach is similarly imperiled by this problem. He presumes an a priori consensus on the value of moral reason but seems to provide no basis for bringing that consensus to life. In this chapter, I will explore Dworkin's relationship to legal exceptionality in more depth, focusing on his attempts to sustain the practice of justice against the inevitable reoccurrence of indeterminacy. Dworkin's approach promises to extract a durable core of normative reason from the superstructure of legal confusion by viewing retroactive justification as the *purpose* of legal reason, rather than as a flaw.

As we shall see, this is a *redemptive* project, one that shares a great deal with Rawlsian political liberalism. For Dworkin, justice is fundamentally integrative, obtained via the negation of unjustified violence (exclusion committed without purpose). Such justice is not a *result* to be achieved but rather a *process* of continual transition—always done in the name of a redemptive principle that exceeds material achievement. This motivation lies at the very core of modern political institutions of law and state. Indeed, fidelity to the redemptive potential of shared meaning is the highest expression of the political form of secular modernity, a world without theological certainty where faith must be transferred to the architecture of justice.

Once again, as with both Rawls and Hart, I am attempting to explore the deep structure of Dworkin's argument. In doing so, I necessarily exceed the terms in which Dworkin himself phrases his position. My goal is to articulate unstated but crucial threads within his work that clarify the nature of his redemptive efforts.

In this process, I once again face the dilemma of a theorist who work undergoes significant changes over time. Chapter 2 already noted a shift from his treatment of legal principles in the first critique of Hart to the more complex structure of law as integrity. In this chapter, I push further forward, to discuss his culminating work *Justice for Hedgehogs*. As with Rawls, one important question is whether his most recent work constitutes a fundamental shift or simply a refinement. My conclusion here is also similar to the one I reached with Rawls: these works exhibit important continuities, but in less than obvious ways. To draw out the thread between these works requires attending to the *absences* that they share. The redemptive spirit

of Dworkin's work becomes impossible to ignore in *Justice for Hedgehogs*, but once it is uncovered we may trace backward to discover that the seeds were planted long ago.

The element of redemption in Dworkin's work is critical, not because the politics of redemption is unique to him because precisely because it is so ubiquitous. Dworkin merely calls the omnipresent structure of 'justice as redemption' into particularly sharp relief. The great error of most extant treatments of justice (Dworkin included) is their unwillingness to embrace the necessity of redemption. Because it appears to contradict the spirit of secular justification, it is hidden, erased, obscured, and neutralized. In Dworkin and Hart, however, we may observe the absolute limits of these efforts and the impassable barriers on which they founder. Informed by this insight, we may then turn away from the desire to repudiate the redemptive impulse and instead pursue the far more difficult task of translating redemption into the material systems of political order, which will be the mission of chapter 5.

I. Revisiting Dworkin: the hermeneutics of integrity

As we saw at the beginning of Chapter 3, there is a sense in which Dworkin's work engages the exception more directly than Hart. While his approach could be interpreted as an attempt to *eradicate* the exception—by imposing an external and unified concept of law—this framing could be reversed in a peculiar way, to say that Dworkin eliminates *everything but* the exception. Legal judgment is never truly normalized because it cannot be settled. Of course, many standard cases are treated as relatively stable, but this is only a matter of expediency. Because no question is independent of any other, there is no such thing as interpretation without justification. Speaking about a particular rule or principle, therefore, is only possible in the context of the entire normative system of law. This means that the law is at root nothing but a series of hard cases.¹ Instead of the limited and confined discretion found with Hart, Dworkin's judge is *always already* participating in the constructive act of building a legal order. There is no pre-interpretive law; there is only the community of law in which the judge actively participates, and the law is nothing other than the collective judgments of its enacting community.

Again, this framing is certainly not meant to imply that Dworkin is reducible to Schmitt. The 'exceptional' nature of legal judgment remains constrained by the structures of reason and justification; it is not truly exceptional. As the previous chapter concluded, this is in fact the key structural similarity between Hart and

¹ See Dworkin's discussion of the full interpretive process undertaken by his Judge Hercules, *Law's Empire*, pp. 239-266. He concludes: "It is obvious that the speed limit in California is 55 because it is obvious that any competent interpretation of California traffic law must yield that conclusion. So easy cases are, for law as integrity, only special cases of hard ones," p. 266.

Dworkin: their ultimate reliance on the coherence of reason and justification. The difference is that Dworkin's approach centers this necessity. Where Hart fought an essentially defensive campaign—futilely seeking to plug leaks in the dike against the inevitable floodwaters—Dworkin pursues an offensive strategy. He cannot *evade* the Schmittian critique, but can at least provide a more aggressive framework for responding.

In particular, his approach offers a powerful mechanism for situating the relationship between law's authority and its coercive effect. For positivism, these are separate issues. One may quite reasonably describe the content of a rule without offering any argument in favor of its enforcement. The psychic doubling that this creates—between rational evaluation and moral judgment—is the essence of its neutralizing effect. Dworkin disagrees. For him, one cannot make a claim about what the law says without also asserting the correctness of its enforcement. To enforce a law *is* to assert its legitimacy, and this legitimacy stems from nothing other than the moral justification of its practitioners. By collapsing this distinction, Dworkin generates a structural concordance between the activities of legal judgment and the practices of political coercion. That is: the basis on which a judge interprets the content of law (the fact of what it obligates) is identical to a political actor's justification for the *force* of law. Both of them rely on a larger concept of the good as the basis for their actions. And when that criteria is fulfilled, the procedure of political coercion is not only legitimated; it is necessitated. The justification for coercion is therefore inextricably connected to the content of that coercion.

This approach profoundly reconfigures the relationship between law and emergency, which proved so devastating for Hart. Positivism could not restrict the response to an emergency on the basis of content because the defining feature of a true emergency is that it provokes an existential conflict between the structure of law and its apparent content. Hart was trapped by the fact that emergencies could be ‘legalized’ by reincorporating them into the formal system of law—even if the result generated a fundamental discontinuity in the coherence of that law. If the law is seen in Dworkin’s terms, however, the emergency may be approached quite differently. Since every case, no matter how mundane, depends on a re-articulation of the conditions for law itself, every act of judgment shares the same form as a decision on the emergency, and the experience of emergency itself is normalized by the nature of legal reasoning. This, of course, collapses the distinction between political judgment and legal description, but that distinction has not proved sustainable in any case. The virtue of Dworkin’s approach may simply be that it takes this impossibility as its baseline, rather than shrouding it in the language of scientific neutrality.

Interpretive obligations: fit and best light

Of course, this infusion of moral judgment does not resolve the underlying problem. That Dworkin more explicitly acknowledges the normative theology that underlines his approach to law accomplishes little in and of itself. This will be of genuine value only if law as integrity may be distinguished from a straightforward and orthodox treatment of natural law. Can it grapple with the ever-emergent forms of

discontinuity, or does it simply reflect yet another way of rehabilitating and therefore neutralizing them?

One crucial strength of law as integrity is its treatment of meaning. While Dworkin, as we have seen, *does* believe that most (perhaps all) legal cases have ‘right answers’ and further believes that ascertaining these right answers depends on the capacity for moral reasoning, he remains strongly resistant to the idea that such meaning may ever be conclusively established. Law, for him, is held together by a shared commitment to the procedures of moral reasoning, but it is *not identical* with those procedures. As with Hart, the influence of Wittgenstein is clearly apparent in his argument. He argues that interpretation develops out of a community that shares a “form of life sufficiently concrete so that the one can recognize sense and purpose in what the other says and does.”² This requires only a “similarity of interests and convictions” that is “sufficiently dense to permit genuine disagreement.”³ The difference is that Dworkin, unlike Hart, offers a mechanism for linking together the stabilizing force of this form of life and the interpretive practice of law.

This mechanism reveals itself through the tension between the obligations of ‘seeing the law in its best light’ and ‘fit.’⁴ So far I have spoken primarily about the first matter, which necessitates that one assess the quality of available interpretive options according to a larger picture of moral reason. In the *Snail Darter* case, we observed two Justices each attempting to read the content of law in its best light, but discovering a theoretical disagreement about how to do so. However, the second half

² Dworkin, *Law's Empire*, p. 63.

³ Dworkin, *Law's Empire*, p. 64.

⁴ Dworkin, *Law's Empire*, pp. 52-53.

of this equation imposes important constraints. One must still see it as the best version *of that thing* and not some other thing. This requirement of ‘fit’ signifies that “the history or shape of a practice or object constrains the available interpretations.”⁵ The legal thinker treats the actual practice, not an abstract idea of law. The first element, to see a thing in the best light, arises out of the constructive nature of interpretation. The law does not exist external to those who seek to understand it, which means there is no objectively determinate answer to a given question. The second element, to treat the thing itself, derives from the fidelity one owes to the object of interpretation as a material fact. To simply remake it in universalizing terms would obliterate the very process of interpretation; it would replace interpretation with coloniality.

Because interpretation is driven by both of these elements, it offers a crucial flexibility. Those who disagree may always work together to find registers of communication that will accommodate mutual understanding. If they both genuinely seek to treat law with integrity, their approaches may converge or shift. The process is never complete, but must always be readjusted as new hard cases present themselves and provoke new possibilities.⁶ This flexibility was diagnosed as a weakness in the previous chapter—for positivists, Dworkin’s commitment to endless justification robs law of its key function to establish authoritative rule—but we can now see the flaw in this argument. Dworkin does not propose anarchic disobedience in the name of a higher law. His commitment to the necessity of fit creates genuine and relatively

⁵ Dworkin, *Law’s Empire*, p. 52.

⁶ Dworkin, *Law’s Empire*, p. 258.

stable limits on the potential for radical disjunctures. The law is, for him, a shared object. It may be shifted, but this is a slow process, not something that may simply be enforced against the existing consensus. For example, someone who argues that law means chaos and disorder is not metaphysically wrong; it is conceptually possible to conceive of law in that fashion. However, such a person would share no useful form of life with those who treat law as a matter of justice or fairness. Their interpretive practices simply do not overlap in a fashion that makes useful engagement possible.⁷

The flexibility of law as integrity, then, is not unregulated but instead functions in much the same way that discretion was meant to for positivism. It emerges out of the dueling obligations of fit and best light. As interpreters butt up against those requirements, they must continually assess and re-assess. The eventual product is therefore never fully stabilized but obtains “reflective equilibrium” similar to that which we found in justice as fairness.⁸ Dworkin’s approach differs from Rawls in an important respect, however. For Dworkin, there are no ‘intuitive’ inputs, only the back and forth of interpretation and justification.⁹ Every assessment must start somewhere, and will often be based on agreement about “what apparently goes without saying,”¹⁰ much like the core of law in Hart is defined by those elements that provoke no meaningful dispute. Unlike with Hart, though, Dworkin’s model

⁷ Dworkin, *Law’s Empire*, p. 71.

⁸ Georgia Warnke, *Justice and Interpretation* (Cambridge: MIT Press, 1993), p. 70.

⁹ Dworkin, *Law’s Empire*, p. 424 fn 17. Another difference is noted in *Justice in Robes*, p. 161: “the equilibrium I believe philosophy must seek is not limited, as his is, to the constitutional essentials of politics... If political philosophy is not comprehensive in its ambition it fails to redeem the crucial insight that political values are integrated, not detached.” This unified picture of value will be discussed in Part II.

¹⁰ Dworkin, *Justice in Robes*, p. 248.

acknowledges the potential inherent in every case to trouble even the most apparently solid components. While the foundation rests on an assumption of what goes without saying, that assumption itself is also subject to constant revision and reflection. As soon as a communicative net is self-sustaining, it ceases to contain any true ‘center.’¹¹ Interpretation of the law is therefore not a straight line leading outward from a starting point (a purely deductive model) nor is it a series of concentric circles moving from core to penumbra (as with positivism). Instead, it might be better to think of legal reasoning as a series of connecting spirals. At any given moment, certain assumptions will be so deeply embedded that they establish the context for all other distinctions. Over a period of time the center necessarily shifts, but the entire object under consideration retains structural coherence that is not available to the purely descriptive project of positivism. The adherents of law as integrity are engaging their capacity for normative judgment to undertake the excavation of a particular legal order. This is not an abstract project but is fundamentally historical.

In this way, law as integrity escapes the trap of historical displacement: the potential for endless reconfiguration, which evacuates historical meaning and replaces it with the understanding of the present. This is a key problem for positivism. Indeed, it represents one of Hart’s key objections to Austin—if the law is simply the orders of a sovereign, it lacks the continuity that makes law a unique form of obligation. But, even with Hart, the ever-lingering possibility of emergency creates an unbridgeable gap between the supposedly factual historical content of law and the expressed-

¹¹ Dworkin, *Taking Rights Seriously*, pp. 159-164; Dworkin, *Justice for Hedgehogs*, p. 117.

content of a present order. Positivism, at root, depends on an unstated fact of sovereign decision that cannot be located historically. For its adherents, it is a tool to facilitate the description of objective facts in their continuity. But in reality it is a political technique for constructing a social order that *asserts* such continuity. On the reverse side, the standard approach to natural law is ahistorical in a different sense. It asserts a timelessness that is wholly outside of history. Right is a matter of God's eternal will, or stems from the unchanging characteristics of reason. If such an approach can be said to exist inside of time in any sense, it is locked perpetually in the future, in a time when we will finally comprehend the logic of God's reason.¹² This is a messianic attitude, in the sense that the possibility of truth drives us forward toward an ever-receding horizon of understanding.¹³

What law as integrity offers, in contrast to these approaches, is the possibility of a true constraint on the endless reconfiguration of law, a historical limit on the freedom of judgment. Its dual principles of 'fit' and 'best light' create a stronger commitment to history than the seemingly more direct form found in positivism. This is because the externally derived normative element functions as a gyroscope that prevents the commitment to fit from becoming merely a mechanism for neutralization. In law as integrity, history matters a great deal, but does not present itself as a pure matter of fact. The requirement to interpret law with integrity arises

¹² Cf. Walter Benjamin, *The Origin of German Tragic Drama*, trans. John Osborne (London: Verso, 1998), p. 45.

¹³ Cf. David Novak, "Maimonides and Aquinas on Natural Law," in *St. Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives* ed. John Goyette, Mark S. Latovic, and Richard S. Meyers (Washington DC: Catholic University of America Press, 2004), p. 63: "the reign of the Messiah will once again enable the Jews to observe all the precepts of the Law, which themselves have never lost their perpetual normative force."

from an underlying mode of justification that resides in a *present* political community. This permits adjudication that is grounded in the historical fact of a legal order, without mythologizing its structure. It treats the past, then, not as an objective fact immediately cognizable, but as an obligation: something that must be drawn into the present as a shared resource that permits collective engagement.¹⁴

In an effort to describe the productive tension provided by the two obligations of fit and best light, Dworkin approvingly cites Gadamer, “whose account of interpretation as recognizing, while struggling against, the constraints of history strikes the right note.”¹⁵ This reference is important, because it provides a crucial clue to the nature of time and historical meaning in law as integrity. To explain, let us take a brief detour to discuss the rough outlines of Gadamerian interpretation, before returning to Dworkin.

Gadamer and hermeneutics: fusing horizons

For Gadamer the relationship between past and present is tremendously important. The perspective of the present is impossible to escape, simply because it is the standpoint from which any active judgment must be essayed. However, the present is not a moment in time, so much as it is the location from which understanding flows. Interpretation must simultaneously describe the genuine historical specificity of the object in question while also drawing that object into the present moment, in a sense *making* the object present. This project necessarily

¹⁴ Dworkin, *Law's Empire*, p. 227

¹⁵ Dworkin, *Law's Empire*, p. 62.

produces discontinuities, as the past and present may never perfectly align.¹⁶ But this limitation—the necessary discontinuity between past and present—is not a burden but is instead the necessary precondition for understanding.

In a sense, this is quite similar in objectives to both Hart and Dworkin. However, they are concerned primarily with the content of the law, and see interpretation as the means by which that content could be understood and applied. Gadamer, by contrast, is more interested in the *act of interpretation itself* than he is with its subject or its result. Here he follows Heidegger, arguing that understanding is not something possessed by subjective agents but instead is implicit in the structure of conversation itself.¹⁷ Truth, to the extent that it is possible, is constituted by the space in between a subject and a text; it is not something discovered or articulated *by* the subject.

The limitations of knowledge are essential to understanding. Because the truth of the other in an ideal sense is permanently beyond reach, interpretation carries a dual responsibility, of expectation as well as humility.¹⁸ The expectation is an interpreter's frame of reference. One can learn nothing from someone who is completely alien. There will be no common language, no idiom. However, when one anticipates obtaining something from a text (or person, or idea), she projects her own experience onto that other. To balance this element of imposition, one must work with humility, which entails being open to the possibility that meaning will not reveal

¹⁶ Hans-Georg Gadamer, *Truth and Method*, second revised edition, trans. Joel Weinsheimer and Donald G. Marshall (New York: Continuum, 2004), p. xxix.

¹⁷ Gadamer, *Truth and Method*, p. 293.

¹⁸ Gadamer, *Truth and Method*, p. xxxii.

itself easily. Because minds and language are not identical there will always be fissures, when meanings are understandable but not yet understood.¹⁹ The hermeneutic subject accepts this possibility, not in the name of neutrality, as a liberal theorist might demand, but rather in the name of sensitive bias.²⁰

The Enlightenment, Gadamer argues, has taught us to treat prejudice as an unadulterated negative, as the bane of objectivity and the prioritization of self-interest over justice. But this is itself a (specifically modern) prejudice: paradoxically, a prejudice against prejudice.²¹ That effort to wipe away prejudice stems from the desire to generate knowledge, as opposed to understanding. The former is a project of control whereas understanding is about engagement.²² Knowledge takes place within the boundaries of a horizon; it depends on the preformed network of concepts and effective history. The place of a subject in a particular moment provides her with a broad but finite horizon of potential information. Understanding, by contrast, *shifts* horizons. By engaging with a perspective outside of an effective history, one's own perspective must also shift. Understanding only emerges out of the friction of two different horizons overlapping, fusing, and mutually engaging. It requires openness as well as tension.

The concept of fit seems drawn from precisely this insight: it treats the law as a product of interacting horizons, a shared practice of valuation over time. Within the context of law as integrity, a commitment to seeing a thing in its best light might

¹⁹ Gadamer, *Truth and Method*, p. 270.

²⁰ Gadamer, *Truth and Method*, pp. 271-272.

²¹ Gadamer, *Truth and Method*, p. 277.

²² Gadamer, *Truth and Method*, p. xxxii.

therefore be phrased as simply an attempt to understand the object of inquiry, while recognizing that it might remain beyond comprehension. This gives us a new frame of reference for discussing the concept of ‘fidelity’ to law. If law as integrity is read in the context of Gadamer’s hermeneutics, its project is not metaphysical certainty but instead is an attempt to fuse horizons, to solidify an interpretive community that may constitute a form of life in which meaning is possible. That is: commitment to the ‘fit’ of a concept is a crucial prejudice that helps to generate one’s individual horizon of truth. Without such a horizon, the interpreting subject cannot engage with the object as an independent thing.

Compared with the problems of positivism, discussed in Chapter 3, Dworkin offers a ray of light. This is still a technique of neutralization but in a distinct way, insofar as it aggressively engages with law’s exception. Instead of treating it as a gap to be filled, with the associated implication that the rest of law is coherent and stable, it actively defines the law via its exception. These discontinuities are provocations, demands for reconfiguration, which *vitalize* the system rather than threatening to tear it apart. Just as the past imposes a productive tension in our interpretive framework, the political emergency does as well. It is not a threat to be managed but an invitation to re-establish the order. The system of law does not simply gain continuity but instead *makes* itself continuous through this engagement.

II. Hedgehogs all the way down: a true unity of value

This treatment of Dworkin suggests a far more radical potential in his argument than was originally apparent. If law is a decentralized, intersubjective web of meaning, then each particular exception need not endanger the entire apparatus. It may be approached, brought into reflective equilibrium, and incorporated or discarded. But neither result will leave law wholly unchanged. This means that law as integrity is *organized* by the force of the exception, even while it retains the coherence of its legal structure across time and space.

However, just as with Hart, we must be attentive to the ways in which refinements do not truly exorcise the exception but only drive it deeper into the fabric of the argument and thereby make its effect all the more comprehensive. In Dworkin's case, this danger manifests through the lurking question that goes unnamed at every step: *why value law in the first place?* If law is a web, what holds this web of value together and imbues it with meaning? For Hart, this problem of justifying law itself is external to legal analysis. The law has meaning to the extent that people value it, and this is all that one can say. Therefore, 'why uphold the law' is never a legal question. It is the baseline against which law is measured, the basis for its authority. But because Dworkin sees law's enforcement and its content as inextricably linked, he cannot evade the question in this way. It is not enough to simply say 'some communities value law and the task of legal analysis is simply to describe the object of their concern.' The theory of law must itself justify law; this is

the essence of an interlinking network of normative justification.²³ If law deserves to be followed, the reason must come from inside its own set of values. This is the problem detailed at the end of chapter 3. Dworkin's appeal to legality will collapse under its own weight unless he can demonstrate the value of law *within* legalism.

Why integrity: the return of the exception

Despite the importance of this task, Dworkin is curiously circumspect on this point. The value of law is a subtext throughout *Law's Empire*, but only rarely discussed directly. For example, he approaches the problem obliquely by pondering how judges may determine whether a legal system is basically just. This is important because it clarifies the general sense among people that some legal forms may be so corrupt as to no longer deserve any respect. The law of the Nazis, for example, falls outside the 'form of life' of law as commonly accepted, and is therefore undeserving of the practice of integrity.²⁴ But how can one make that judgment without predetermining the conclusion and violating the principle of integrity? Reflective equilibrium theoretically provides the answer. But just as with Rawls in chapter 1, it seems to presume its own structure. Its success depends on a background agreement that law should have significant force in normal cases. Without that agreement, he says, there would be no point in having law:

We think the law should be obeyed and enforced, and there would be very little point to treating law as an interpretive concept if we did not. So we can

²³ Dworkin, *Justice in Robes*, p. 161. He argues that the answers to these questions must somehow all hang together because the justification for law and its content both derive from the same linked set of values.

²⁴ Dworkin, *Law's Empire*, pp. 107-110.

isolate and concentrate on the grounds of law by assuming cases that are ‘normal’ in that way. We can ask: given the (roughly agreed) force of law in normal circumstances, how, exactly should it be decided when some rule or principle is part of our law?²⁵

We would do well to pay attention to the work done by ‘normalcy’ in this argument, particularly given the importance of the relationship between normal and hard cases discussed in the previous section. In this case, Dworkin appears to rely on precisely the sort of justification that he elsewhere accuses of falling victim to the semantic sting. That is: he relies on the normal, everyday case to establish the basic contours of a practice.

Fundamentally, therefore, Dworkin reverses his claim that law is defined by interpretation rather than the plain facts of rules. The interpretive process starts from a core factual assertion that law deserves to be followed, and only from this founding premise may the further claims about integrity obtain meaning. Of course, this seems to be a perfectly reasonable assumption. Why would people worry about the content of the law if they did not believe that law is itself valuable in some way? However, this innocuous leap demonstrates that Dworkin—just as much as Hart—still depends on the existence of simple facts in order to establish the content of law.

Dworkin does acknowledge this confusing feature. His Judge Hercules, he says, is guided by a “spirit of integrity” which comes from “the standpoint of political morality as a whole.”²⁶ He tries to make this an interpretive claim rather than a metaphysical one by arguing that “integrity makes no sense except among people

²⁵ Dworkin, *Law’s Empire*, pp. 111-112.

²⁶ Dworkin, *Law’s Empire*, p. 263.

want fairness and justice as well,”²⁷ but this correlation between integrity and morality cannot be justified; it simply has to be assumed.

As a result, unlike all other features of a normative order—which Dworkin believes are *relational* values, in flux and potentially open to alteration by the practices of their practicing communities—the premise that valuable things deserve to be treated with integrity is a principle of *identity*. For Dworkin, this is simply what it means for something to be valuable, that it invites an attitude of fidelity. Therefore, any effort to affirm the value of integrity already presupposes the principle that value *derives from* a relationship of integrity. Dworkin expresses this element of his argument wonderfully in the conclusion to *Law’s Empire*: “The actual, present law, for Hercules, consists in the principles that provide the best justification available for the doctrines and devices of law as a whole. His god is the adjudicative principle of integrity, which commands him to see, so far as possible, the law as a coherent and structured whole.”²⁸ With the perspective of Schmitt available to us, we can clearly see that the theological language of this claim is not accidental; **Dworkin has identified integrity as a prior assumption that *gives life* to the rest of law**. Without this value, he cannot explain why a judge would choose to believe law implies force at all.

The scope of law, in this approach, is defined by a sort of meta-principle: the principle that principles matter. For integrity to work as a measure of law, its practitioners must work from a prior shared commitment to the premise that law is

²⁷ Dworkin, *Law’s Empire*, p. 263.

²⁸ Dworkin, *Law’s Empire*, p. 400.

desirable. This principle, unlike all others, does not appear to be subject to the normal operations of reflective equilibrium. If it were called into question, the entire process of judgment would lose its coherence. It is the principle that affects all other principles equally, and thus cannot be recalibrated.

As we observed in Chapter 3, such logic is doomed to failure. It may produce a universe of normatively-infused judgment, which can indeed generate a series of successfully self-referential linked obligations. But this is only possible because it presumes a deeper theology of judgment. The moral case for integrity itself, for Dworkin, falls outside the event horizon of reflective equilibrium. It cannot be justified but must only be presumed. Just as with Hart and Kelsen, Dworkin assumes an underlying physics capable of producing coherence, which will allow his closed system of reason to stave off the entropic force of arbitrariness. This enables a functional universe of moral logic that can produce normative legal obligation, but the cost of such a universe is the neutralization of everything that falls outside of its remit.

The hedgehog's logic: justification all the way down

To summarize: law as integrity, for all its strengths, suffers from a critical lacuna: it can tell a judge how to act with integrity but cannot explain why a judge should choose this method in the first place. Its interpretive mode requires an act of faith to assume that law deserved to be treated with integrity. This means its entire

apparatus is parasitic on a prior, external choice to affirm a “larger integrated network of political value” that enframes the entire structure of legal reason.²⁹

Over time, Dworkin became convinced of the need to widen the scope of his argument. This expansion concludes in *Justice for Hedgehogs*, the final work completed before his death, which seems to have been intended as a capstone on his entire career. In it he claims to resolve the errors and limitations of his normative attitude toward legal interpretation by broadening the scope of interpretation to link together the analytic evaluation of law’s integrity with the moral evaluation of one’s basic worldview. *Justice for Hedgehogs* promises nothing less than a full integration of “theories of truth, language, and metaphysics with and into the more familiar realms of value.”³⁰ Skepticism about universal principles, he argues, is philosophically incoherent. The claim “there is no moral obligation to do X” is a moral claim; it states an absence of obligation and thus affirms the principle that it would be wrong to think X was obligatory. Even more, the claim that “there is neither a moral obligation to do X nor a moral obligation to not do X” is *still* a moral claim because it asserts a claim to truth.³¹ Even if the judgment is that judgment itself is impossible, this retains the belief that one can credibly judge all judgment to be impossible.³² By this account, the arguments of positivists, deconstructionists, and all those in between suffer from the same basic flaw: they rely on an external form of

²⁹ Dworkin *Justice for Hedgehogs*, 405; see also Jiří Příbáň, “The Time of Constitution-Making: On the Differentiation of the Legal, Political and Moral Systems and Temporality of Constitutional Symbolism,” *Ratio Juris* 19, no. 4 (Dec 2006), pp. 462-465.

³⁰ Dworkin *Justice for Hedgehogs*, p. 264.

³¹ Dworkin *Justice for Hedgehogs*, pp. 40-45.

³² This is his characterization of deconstructionism. See Dworkin, *Justice for Hedgehogs*, p. 21. The problem with this description will be discussed in more detail later.

skepticism which looks beyond itself for justification, to an Archimedean point where one may judge morality from outside morality.³³ Even law as integrity fell victim to this problem as it smuggled the notion of fidelity to law into the process of interpreting it.

As a result, all seeming distinctions between types of moral order are facile, as are distinctions between objects of interpretation and the interpreting subject. If concepts seem to contradict, this is simply a product of thinking like a fox; the hedgehog's perspective will reveal a deeper unity and coherence. In particular, since law is an interpretive practice, any claim about it is a moral claim and must therefore fit into a comprehensive moral picture of the world. Thus, Dworkin subjects the process of legal interpretation itself to a deeper form of interpretation. Embedded within any interpretive act, he says, is a basic concept of truth. The universal feature of all moral statements is that they contain a self-affirming principle that statements can be valid.³⁴ Once again, Nietzsche's notion of the 'will to truth' is tremendously valuable here. As with Hart, Dworkin retains a commitment to the underlying premise that reason is capable of generating concrete meaning that can withstand the waves of incoherence that plague existence.³⁵ The difference is that Dworkin explicitly acknowledges this commitment and seeks to justify it. The nature of that justification depends on a very specific conception of truth.

³³ Dworkin *Justice for Hedgehogs*, p. 31.

³⁴ Dworkin *Justice for Hedgehogs*, p. 7.

³⁵ See Nietzsche, *On the Genealogy of Morals*, p. 160. The discussion of Hart and the will to truth is in Chapter 3, section III.

He does not mean the commonsense form in which physical facts may be “barely true,” meaning that their truth has no meaningful relation to the rest of the world.³⁶ This form of truth describes an externally-stable world, and the act of description is independent. That is: the universe could simply be otherwise in this single case without requiring any significant changes in its structure or meaning. It is true that I reside in the state of California, but if I did not, the universe would trudge on in precisely the same fashion. The truth of such a claim exists *within* a stable and uncaring universe. By contrast, moral truths of the sort that interest Dworkin cannot be ‘barely’ true because moral truths stem from *reasons* rather than objective facts. To develop this thought he makes another distinction, this time between explanation and justification. To explain why something is true one must presume a stable background of bare facts against which the evidence may be leveled. To justify something is a different matter entirely; it is a question of judgment and thus rests on a moral premise (at root: that judgment is, in fact, possible at all).³⁷ Physical evidence does not *make* something true in a scientific context; it merely suggests what the truth might be. In moral argument, however, the reason is what *makes* something true. Absent this distinction, Dworkin’s project to reveal a unified theory of value would stall in its tracks due to a lack of evidence. His focus on reasons rather than proof changes the frame of reference.

From where do reasons derive, then? Only from other reasons. Each one is validated by reference to other moral reasons, which in turn are validated by more

³⁶ Dworkin, *Justice for Hedgehogs*, p. 114.

³⁷ Dworkin, *Justice for Hedgehogs*, p. 82.

moral reasons. Value must be unified, Dworkin argues, because each part of the moral argument is defended only by referencing other parts. The defining feature is *interpretive consistency*—moral claims are true when they fit together with other moral claims and false when they cannot be incorporated into the fabric of a moral universe. This changes the nature of reflective equilibrium. It is not about organizing intersubjective meaning within the dual obligations of ‘fit’ and ‘best light’ but instead is a process by which truth claims are brought together, so that each may help to confirm the others. In this approach, “the argument ends when it meets itself.”³⁸ The skeptical demand for proof that stands outside or prior to such recursive chains reflects a simple logical error—that demand is as much a moral claim needing justification as any other. It is, as the saying goes, turtles all the way down.

This does not, however, mean that truth is simply up for grabs. The search for an external frame of reference to confirm moral truth is a fool’s errand, but this does not mean that there is nothing to make one opinion more correct than another. For example, Dworkin thinks it perfectly reasonable to argue that Stalin’s actions were morally bankrupt regardless of what Stalin himself believed.³⁹ Again, the claim that “your morality is up to you” is itself a moral claim that imposes itself on the world just as much as any other. If all judgment is morality then disagreement is always a dispute about the objective nature of truth. The durability of such disagreement simply demonstrates the necessity of interpretation.⁴⁰ If this is correct, then the essential moral object is not truth *itself*, but instead is a fidelity to the *search* for truth.

³⁸ Dworkin, *Justice for Hedgehogs*, p. 117.

³⁹ Dworkin, *Justice for Hedgehogs*, p. 51.

⁴⁰ Dworkin, *Justice for Hedgehogs*, p. 51.

The unifying moral obligation that is shared across moral reasoning is the principle of responsibility and self-respect. We cannot truly value ourselves unless we treat the search for moral rules as genuinely important. Put another way: we cannot articulate a reason to conceive of ourselves as objectively important without also acknowledging others as equally important.⁴¹

Dworkin believes this approach, which treats law as merely “a branch, a subdivision, of political morality” provides a unified picture of the world.⁴² Law as integrity implicitly grasped this, but stopped short of a full realization because it saw law as a distinct object of study, rather than expressing it as merely one link in a larger chain of moral reasons. Shifting to the hedgehog’s perspective, therefore, can genuinely eradicate the necessity for exceptions. A fully unified web of moral value, expressed through a constantly-moving process of reflective equilibrium, will not see anything as truly exceptional. Rather than simply depending on an arbitrary choice that cannot be justified, which grounds law but is not of law, the hedgehog asserts that even such decisions may ultimately be redeemed. There is no external vantage point from law, because law is coterminous with political existence as such. To be in the world is to act within law. This does not require a decision on the exception, as Schmitt thought; it is a call to faith, to the belief that the moral order has already revealed itself to us.

⁴¹ Dworkin, *Justice for Hedgehogs*, p. 112.

⁴² Dworkin, *Justice for Hedgehogs*, p. 406.

The role of history: fidelity or transcendence?

If the hedgehog's approach offers a new and more fully comprehensive response to the gap between law and moral reason, it also sacrifices elements of the previous approach. Law as integrity was defined by the productive tension between 'fit' and 'best light,' which established a recursive relationship between past and present, between history and creation. In *Justice for Hedgehogs*, Dworkin splits apart that relationship. Now, the best version of law is simply the one that expresses its value in a unified fashion. The frame of reference is one's own moral universe, which may well include fidelity to the object of inquiry but always conceives of that fidelity as conceptually subordinate to the larger demand for unity.

With this change, Dworkin has seemingly abandoned the idea that law serves as a medium between fact and norm. The hedgehog has no need of individualized tools for resolving this gap; the unity of value alone is sufficient to eradicate all apparent disjunctures. Similarly, Dworkin has also seemingly abandoned the Gadamerian premise that past and present are fundamentally discontinuous. That idea pays too much fealty to the past as an independent object of interpretive value, leaving its moral structure encased in the amber of a particular historical tradition.⁴³ It renders the fundamental assumptions of that tradition safe from scrutiny, placing them outside the scope of reflective equilibrium, and is therefore fundamentally limited. Of course, one cannot ignore the perspective from which one appraises a text—reasoning is not *ahistorical*—but this does not generate an obligation to *honor*

⁴³ See Dworkin, *Justice for Hedgehogs*, p. 66, 319, 415.

such history.⁴⁴ This is particularly odious in the face of extreme evil found in a collective past. Why treat decisions such as *Dred Scott* or *Korematsu* with integrity? What is gained by affirming them as part of a moral order that deserves validation? For Drucilla Cornell and Nick Friedman, Dworkin's new approach is laudable precisely because it no longer values "the precedence of the past over both the present and the future."⁴⁵ Any appeal to history is itself a moral judgment, one that can only be evaluated through the lens of the progressive present.⁴⁶

This concern about the conservatism of hermeneutics is by no means a new idea. Habermas, for example, argues that the inherent imbalances within history *structure* interpretation; they cannot be challenged by it. Since no appeal to reason is possible from outside tradition, distortions are built into seeming consensus. For this reason, hermeneutics is subject "to the repressivity of forces which deform the intersubjectivity of agreement as such and which systematically distort everyday communication. It is for this reason that every consensus, as the outcome of an understanding of meaning, is, in principle, suspect of having been enforced through pseudo-communication."⁴⁷ Gadamer's approach requires good faith from all parties, but history can never play such a role. Its deformities will be incorporated into the present without challenge, thus "nullifying or rendering absurd our emancipatory

⁴⁴ For some examples of such critiques cf. James Donato, "Dworkin and Subjectivity in Legal Interpretation," *Stanford Law Review*, 40, no. 6 (July 1988); Drucilla Cornell and Nick Friedman, "The Significance of Dworkin's Non-Positivist Jurisprudence for Law in the Post-Colony," *Malawi Law Journal*, 4, no. 1 (2010); James Fleming, "Fidelity to Our Imperfect Constitution," *Fordham Law Review*, 65, no. 4 (1997).

⁴⁵ Cornell and Friedman, "The Significance of Dworkin's Non-Positivist Jurisprudence," p. 24.

⁴⁶ Cornell and Friedman, "The Significance of Dworkin's Non-Positivist Jurisprudence," p. 82.

⁴⁷ Jürgen Habermas, "The Hermeneutic Claim to Universality," *The Hermeneutic Tradition: From Ast to Ricoeur*, ed. Gayle Ormiston and Alan Schrift (Albany, NY: State University of New York Press, 1990), p. 267.

aspirations.”⁴⁸ The prejudices of the past are built into the hermeneutic relationship by the simple act of taking them as legitimate.

According to the progressive argument, Gadamer and law as integrity both err by valuing form over content. The interpreter ought to instead prioritize truth that exceeds the limits of a specific conversation. Fidelity to the text is a means for pursuing that goal, not the goal in itself, and tradition is valuable only if a unified conception of value gives us good reason to imbue it with value. The ideal act of interpretation draws the external object out of its original time and place to make it *present*. Past wrongs are not to be respected simply because they are part of a continuing order, but instead should be excised so that a genuinely unified moral order can be sustained. The process of reflective equilibrium in *this* sense requires a certain timelessness. It must express the ever-evolving truth of an omnipresent *now*, in which the past is never truly past but instead is renewed by the constant obligation of justification. If it can do so, there is hope for redeeming even the most foundational truths, to burrow through the Wittgensteinian bedrock against which one’s spade is turned.⁴⁹ If all reasoning is understood as a unity, it should be possible to offer reasons for that which lies beyond reason.

Gadamer might respond, however, that this recuperative treatment of truth is merely an evasion. The unity of value implies that every dissonance may ultimately be expressed through incorporation; the appearance of the gap disappears in the expression of underlying truth. But this logic misses precisely the point that law as

⁴⁸ Alan How, *The Habermas-Gadamer Debate and the Nature of the Social: Back to Bedrock* (Brookfield, VT: Avebury, 1995), p. 143.

⁴⁹ Wittgenstein *Philosophical Investigations*, §217.

integrity grasped: that the presence of difference is the very condition of thought. The experience of the gap between one's effective history and the effective history of an object of interpretation is the only vantage point from which horizons may be fused.⁵⁰ The exceptional disjuncture is an invitation to meaning-making; a world without gaps would need no bridges and thus would produce no understanding. Indeed, understanding is *nothing but* the temporary bridges built across these gaps. The call for unity is therefore fundamentally self refuting. The desire to excise gaps (between reasons and their justification, between subject and object, between past and present) is in fact the most perfect representation *of* those gaps. In the name of *truth*, the hedgehog destroys the possibility of *understanding*.

Faced with the inherent doubt that comes from fusing horizons—its imperfection and incompleteness—Dworkin shies away. He perceives this insecurity as dangerous, and therefore instigates a search and destroy mission: finding every instance of disorder and quashing it under the weight of moral unity. Against the seeming nihilism at the heart of interpretation, he “would rather will nothingness than not will.”⁵¹

From the hermeneutical perspective, then, Dworkin's choice to double down on the principle of unity is a colonizing act, whereby the judge attempts to enforce her will upon the law, to compel coherence and meaning. Such efforts produce a false form of closure, in which the interpreter *creates* meaning while claiming to merely discover that which was already there. As such, fidelity to the principle of reason

⁵⁰ Gadamer, *Truth and Method*, p. xxviii.

⁵¹ Nietzsche *On the Genealogy of Morals*, p. 97.

constitutes a sort of theological underpinning for the otherwise rigidly secular attempt to construct a Kantian moral unity. But such reasons are forever beyond the scope of their own cognition. At their limit, justification must give way to the simple admission of (in Gadamer's terms) prejudice.

III. Justice as redemption: the formal unity of interpretation

The development from law as integrity to the unity of value is analogous to the shift in Rawls' work from *Theory* to *Political Liberalism*. In both cases, we are left to wonder whether the newer approach constitutes a revision or a replacement. The debate described in the previous section—progressive defense vs. Gadamerian critique—is organized primarily around the presumed disjuncture between the old and new approaches. The Gadamerian treatment portrays the unity of value as a betrayal of the radical potential in law as integrity. It defects from the force of history and makes a commitment to the philosophy of presentism. The progressive defenders, by contrast, see this prioritization of the present as crucial. If reflective equilibrium is to be truly free floating, as a fully normative approach must, it cannot be held down by the weight of history. That obligation presses down on the process, subjects it to the force of friction. Dworkin seems to concur. He now sees law as integrity as insufficiently detached from the particularity of experience, trapped by its affiliation with an effective history that denies the potential for universally valid statements of truth. Law as integrity is situated and contextual; its interpretative practices must be made to fit into its particular historical context. The unity of value refuses this limitation on reason.

However, the caesura on this subject is far less clear than it might initially seem. In fact, as one digs into the content of law as integrity, every move made in the hedgehog's approach is prefigured. Once one looks in the right way, it is clear that law as integrity *already contained* a structural hierarchy of present judgment over

past object. The apparent shift is a better understood as a parallax effect: the result of looking at the same phenomenon of judgment from different perspectives.

Furthermore, this parallax effect extends beyond the specific case of Dworkin.

Pulling on the common thread does not merely unravel his work; it extends all the way to the edges of interpretive practice as such. Just as the rule of recognition became a Trojan's Horse, creating a weak point that captured the entire mode of positivist reasoning, the unifying structure of interpretive theory means that even the most radical of approaches can be put at risk. This means that, for all that Gadamer helps to diagnose the flaws of the hedgehog's approach, his hermeneutics also remain trapped within the same ultimate justificatory logic of the present.

Specifically, every interpretive approach (along with the positivist ones that they supposedly oppose) is founded on a *redemptive narrative*, which treats the exception as an opportunity for the recuperation of order. It seeks to encompass the exception and defines itself *via* this incorporation. This is the theological spirit of modernity: the promulgation of endless speculative theories of redemptive justice—theories which, in their articulation, facilitate the depoliticization of the actual, material, violent presence of order. Such justice may come to mean fidelity to an interpretive past, to a timeless morality, or to the bare structures of posited law. But in any case, the one thing justice *cannot* mean is the straightforward admission of unjustifiable violence at the heart of political unity. This essential violence is the theological remainder, the necessary byproduct of endless and irresolvable debates within the field of legal reasons. We are asked to justify, but all justification occurs

only against the background of debts that may never be repaid, owed to those whose very existence was nullified to establish the specific, material present within which such debates take place.

The problem of redemption is central to our discussion of justice and legitimacy. As we draw out its implications over the rest of this chapter, it will become clear that thinking about justice in the context of redemption is essential, not just for understanding Dworkin's place in the debate over law and morality, but thinking through political theory as such. Redemption, if improperly theorized, renders law little more than a bureaucratic device for the experience of exceptional violence. But if properly understood, redemption *also* creates an avenue through which such violence may be politicized and therefore drawn back out from the ahistorical structure of time. Chapter 5 will undertake that task. Before doing so, however, it is necessary to detail the precise movements of justice, redemption, and temporality.

Interpretation as redemption in law as integrity

For those who perceive a shift in Dworkin's work, the element of temporal obligation is a key locus. Law as integrity, they believe, was characterized by a strong commitment to historical meaning, which is now reversed. However, examining Dworkin's description of 'fit' in *Law's Empire* suggests that the supposed domination of past over present is illusory:

Law as integrity pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for present

law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did (sometimes including, as we shall see, what they said) in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future.⁵²

In this account, the past that is valorized is not a ‘real’ past—a distinct object beyond the scope of our present horizon—but is simply an image in the mind of the interpreting subject. The authority granted to precedent represents nothing more than the judge’s obligation to reconcile her current position (made possible only by the aggregated events of the past) with her capacity for moral reason. She owes nothing to the past as such, but only relies on it to the extent that it affects the present necessity for coherence.⁵³

That coherence is made possible by treating the mistakes of the past as clarifications of that which we will no longer do. This is the true meaning of integrity: those acts are not simply cast away but instead are held within the law as negated principles. We honor the story of the law by progressively re-constituting it. Past and present are bound together by conceiving of mistakes as amenable to rectification through law, rather than through revolution. This teleology of progress provides a mechanism for affirming the principles of a moral order against its historical failures.⁵⁴ The contiguous moral values that unify a constitutional history come to life precisely through their progressive incorporation into the present.

⁵² Dworkin *Law’s Empire*, pp. 227-228.

⁵³ Allan Hutchinson, “Indiana Dworkin and Law’s Empire,” *Yale Law Journal*, 96, no. 3 (January 1987).

⁵⁴ Meister, *After Evil*, pp. 85-86.

Understood this way, the obligation of fit was never a genuine commitment to the externality of history, but rather was an internal obligation of reason. Its emphasis on unity always required incorporation of the past *into* the present; the river could only flow in one direction. History is a tool for securing the legitimacy of judicial decisions, something that occurs only in an ever-present now, not an independent text imbued with its own moral capacity. Accordingly, *Justice for Hedgehogs* simply states clearly what was already implicit; the priority of moral coherence is absolute, while the obligation to an imagined past endlessly recedes. In this way *justice as redemption* unifies the logic of interpretation. By reading the positive values of a moral order against its failures, the system is redeemed and the continuity of community is preserved without asserting a timeless perfection.⁵⁵ Justice, in this context, is the expression of a basic shared human dignity, which suggests that no one is beyond the possibility of redemption. Dworkin's interpretive method was therefore never in need of rescue from a conservative reliance on tradition over present judgment. Instead, it needed a philosophical justification for *why* such judgment is permitted to colonize its subject. *Justice for Hedgehogs* provides that justification, by framing it as redemption rather than colonization.

Gadamer and redemption

What then of Gadamer? Dworkin's redemptive impulse is his commitment to integrity, but is there any reason to think that Gadamer's hermeneutics functions in

⁵⁵ cf. Jack Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge: Harvard University Press, 2011).

the same way? After all, he actively resists the incorporative techniques of enlightenment thought, which collapse the incommensurable gap between past and present into a unifying logic of reason.⁵⁶ However, as Jacques Derrida argues, the very attempt to theorize this gap imposes a form of unity. Even as he attempts to evade the logic of rationality, Gadamer's interpretive procedures necessarily re-impose a will to meaning. This is because "we can pronounce no single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest."⁵⁷ The very act of interpretation involves the generation of order.

In particular, Derrida focuses on the concept of 'good will' that sustains understanding and the fusing of horizons. Good will, for Gadamer, is the necessary condition for successful interpretation. It does not insist on the construction of a single truth but rather seeks the understanding that is possible among truths. This permits consensus without agreement.⁵⁸ This notion of good will, however, is ill-equipped for the hidden traps and closures that Derrida sees as intrinsic to communication. Even more, good will is infeasible in the context of an unreliable interlocutor. For good will to produce understanding, both the subject and object of interpretation must remain open to the other.⁵⁹ But this cannot account for objects of inquiry that actively seek to block shared meaning, such as the patient of

⁵⁶ Gadamer, *Truth and Method*, pp. 273-274.

⁵⁷ Jacques Derrida, *Writing and Difference*, trans. Alan Bass (Chicago: University of Chicago Press, 1978), pp. 280-281.

⁵⁸ Hans Georg Gadamer, "Reply to Jacques Derrida," in *Dialogue and Deconstruction: the Gadamer-Derrida Encounter*, ed. Diane Michelfelder and Richard Palmer (Albany, NY: State University of New York Press, 1989), 55.

⁵⁹ Gadamer, *Truth and Method*, p. 355.

psychoanalysis, with whom “the aim is to understand, not what the other wants to be understood, but exactly that which the patient wishes to conceal.”⁶⁰

Once again, the fact of historical wrongs clarifies this problem. When interpreting the law, one must constantly struggle with a legal history replete with grave injustice. The Gadamerian interpreter, facing such a reality, is forced to search for a foothold of good faith—a way in which the injustice may be understood without being affirmed. This appears to be a relativistic process, in which all injustice is reconfigured as simply a different truth, equally deserving of understanding. However, it contains a deeper principle of unitary value. To seek understanding of the legal order means, implicitly, to retain faith in the potential good will of its structure. One must be willing to read its failures as horizons not yet fused. This faith, as with Dworkin, enacts a narrative of continuity.

Moreover, the manner in which horizons may be fused depends on a hidden form of exclusion, stemming from the necessity for mutuality. While engagement may shift horizons, it can only occur if both sides are willing to put themselves at risk. This means that the “hermeneutic experience extends as far as does *reasonable beings*’ openness to dialogue.”⁶¹ While he intends this to clarify the essentially limitless scope of dialogue, it is crucial to note how casually Gadamer slips into the language of reasonableness, the concept that has given us such pause in the case of Rawlsian political liberalism. And this corollary is not simply in word choice. Once Gadamer is read in light of the broad fidelity to redemption, the similarities with

⁶⁰ Richard Shapcott, *Justice, Community and Dialogue in International Relations* (Cambridge: Cambridge University Press, 2001), p. 191.

⁶¹ Gadamer, *Truth and Method*, p. 570 emphasis added.

Rawls become striking. Both require the posited framework of the reasonable—defined as the willingness to converse on terms that arise out of but do not impose any particular effective history.⁶² Gadamer fills this concept of reasonableness with less content than Rawls, but this does not alter the basic formal similarity. Just as with liberalism, this approach encounters a paradox in the unreasonable object, one that does not act from good will. With such an agent (whether it be text, legal history, or biological person) there is simply nothing to be said. But what distinguishes genuine enemies (who seek only destruction and will never embrace mutual understanding) from those that are simply misunderstood? Nothing but the judgment of reasonable subjects. The unreasonable enemy is thus conceptually essential—it clarifies the capacity for dialogue through its absence—but cannot itself ever be included in dialogue. The result is a form of stasis, in which such objects linger in a sort of perpetual limbo and mark the undefined exteriority of hermeneutic engagement. In Derrida's terms, this reveals that the supposed "continuity of *rapport*" at work in hermeneutic understanding is built upon the deeper structure of "the interruption of *rapport*, a certain *rapport* of interruption."⁶³

Redemptive unities: the search for truth

Both Dworkin and Gadamer challenge the plain facts conception of truth. For Dworkin, truth exists independent of interpretation, but is *experienced* through

⁶² Cf. Rawls, *Political Liberalism*, pp. 37-40.

⁶³ Jacques Derrida, "Three Questions to Hans-Georg Gadamer," in *Dialogue and Deconstruction: the Gadamer-Derrida Encounter*, ed. Diane Michelfelder and Richard Palmer (Albany, NY: State University of New York Press, 1989), 53.

constant small iterations of reflective activity. Precisely because his basic truth is complete unity, it may only manifest through endlessly fractured judgment. Its universality makes it an endlessly particularized subject of inquiry. Gadamer provides the mirror image. Because truth is never external to its expression, it is found within the process of interpretive relations. Truth can never be prophetic (a full truth), because it cannot exist outside the effective history of its understanding. However, this limitation imposes a more fundamental and resilient truth: the truth of the hermeneutic process itself.⁶⁴

In different ways, each expresses faith that truth may redeem any interaction. Nothing is so wrong that it cannot be understood, if only good faith is employed. And further, in each case a brand of universality is asserted via the negation of the *purely* particular. This is the key insight to be gleaned from *Justice for Hedgehogs*. Dworkin accurately exposes the deep universal structure of all interpretive efforts, even Gadamer's. However much they pay fealty to the notion of openness, that commitment is founded on a form of negation. Because exclusion cannot be *avoided*, it must instead be *redeemed*. The hedgehog's justice is therefore neither more progressive nor more universal than any other approach: it merely expresses those features with greater clarity.

⁶⁴ Cf. Gadamer, *Truth and Method*, p. xxii, xxxiv.

IV. The differend of justice: violence beyond redemption

Each of these interpretive models is struggling with the same problem: how to articulate a concept of fit that does not self-destruct under the weight of an interpretive unity. Because none can accomplish this goal, they default to redemptive stories, whereby the remaining gap between what is best and what is understood may be justified. In this respect, they all construct theodicies, interpretive models meant to not just explain the fact of evil but also to incorporate that evil into a broader narrative of the good.

The danger of redemption is that it will impose unity upon difference without any justification for the manner in which it does so. To redeem exclusion is to impose unity. But such unity is formal, immaterial, ahistorical, and abstract. It is therefore wholly detached from the concrete unity of legal order, which is diachronic and specific.

We see this problem most explicitly in *Justice for Hedgehogs*, which establishes the infinitude of value. Dworkin correctly, and quite brilliantly, demonstrates that there is no ‘outside’ to value; it encompasses the entire universe. The problem is that he can take us no further. The infinitude of value is still bounded: one may travel endlessly, only to end up right back at the starting location. It is therefore a *secular* infinity, one without beginning or end, an eternal *present*. The different approaches to interpretation may vary widely (across, for example, law as integrity, the unity of value, Gadamerian hermeneutics, soft or hard positivism, and the original position) and these will grow or shrink the nature of their infinitudes, just

as the set of all even numbers (infinite but entirely rational) is smaller than the set of all real numbers (infinite and irrational). However, all of these approaches share the same underlying problem, which manifests as a version of Russell's paradox: they may seek to create a set of all things but cannot account for the system of thought necessary to generate such a set in the first place.⁶⁵ In the case of the law, this obscures the lingering necessity of legal decision—something that can be justified by, but never incorporated into, the unity of value. The exception which founds the law.

To clarify the nature of such exceptions, particular to the context of legal interpretation, Lyotard's concept of 'the differend' is tremendously helpful. The differend is a lingering injury that falls outside the accepted terms of the language game in which it is manufactured. It cannot be addressed on the terms of a shared interpretive structure because it represents pain beyond articulation. It is like an untranslatable word, whose meaning is altered when expressed in a different language. To the extent that it can be filtered into a new language it loses an element of its own identity; it becomes a new, slightly different concept. For example, the attempt to litigate the Holocaust founders on the incapacity for legal concepts to capture the world-destroying nature of that act. This washes away its unique texture and renders it banal.⁶⁶ The well-meaning attempt to express fidelity to its victims therefore falters in the face of its ineffable reality.

⁶⁵ Cf. John Barrow, *The Infinite Book: A Short Guide to the Boundless, Timeless and Endless* (New York: Pantheon Books, 2005), pp. 67-76, 166-168.

⁶⁶ Jean-François Lyotard, *The Differend: Phrases in Dispute*, trans. Georges Van Den Abbeele (University of Minnesota Press, 1988), pp. 56-57.

In making this argument, Lyotard treads on familiar ground. Like Dworkin and Gadamer, he also emphasizes the endlessly recursive process of understanding, the impossibility of stepping outside interpretation. For him this is expressed: “To doubt that one phrases is still to phrase.”⁶⁷ Just as an argument against moral obligation is still a moral argument, a claim against the capacity of language to represent remains a representational claim. Any attempt to limit the scope of interpretation, therefore, is self-contradictory. The “last phrase” ceases to be final as soon as it is named as such. The very phrase that marks it as final reveals it to be otherwise.⁶⁸ As such, Lyotard shares the perception that judgment is limited to endless recirculation with no objective resolution.

The key difference is in his attitude toward this limitation. For Dworkin, the lack of external certainty proves the unity of value; if there can be no permanent foundations, all that is left is a secular world of linked justifications, a closed universe. But what if the question of externality is divorced from the question of *foundations*? Self-justifying grounding may be impossible, but this does not foreclose the possibility of a second type of external object: *remainders*. While foundations are positive externals—they provide the secure basis from which a moral claim may be advanced—remainders are negative exclusions. They exist in a space beyond reason and evade explanation or even comprehension.⁶⁹

The defining feature of every concept of justice in our secular age is its attitude toward such remainders. In every case an attempt is made to formalize them,

⁶⁷ Lyotard, *The Differend*, p. xi.

⁶⁸ Lyotard, *The Differend*, p. 11.

⁶⁹ Alain Badiou, *Wittgenstein's Antiphilosophy*, trans. Bruno Bosteels (New York: Verso, 2011), p. 94.

to comprehend them, to make them explicable. They cannot be erased in a *material* sense—violence and exclusion are indelible features of a world without God—but they can be *neutralized*. This entails fitting them into a conceptual scheme, sorting them, explicating them. As soon as one is capable of correctly formulating the act of violence, it ceases to be arbitrary; it is given meaning through its articulation.

Justice is therefore the practice by which distinctions are drawn between forms of exclusion. In the first case are those who suffer for no cause (victims). In the second case are those who inflict suffering without justification (perpetrators). The line is drawn in this fashion in order to generate legitimacy for a certain kind of violence: the punishment meted out by a collective will. The collectivization of judgments on violence is necessary to restrain victims from lashing out and thus becoming perpetrators of violence themselves.⁷⁰ In a very real sense, justice is nothing else but the performance of this distinction. It comes into being through the negation of illegitimate violence.

This negative depiction of justice is crucial. It demonstrates that the elimination of violence itself is not the target. Instead, the goal is to categorize violence such that it is all forced into the matrix of justification. In effect, the lingering fact of injustice is what drives the perpetual motion of interpretation.⁷¹

⁷⁰ Meister, *After Evil*, 35. For a classic example of this attitude toward law cf. Locke, *Second Treatise of Government*, pp. 272-276, 350-353.

⁷¹ Once again, the problem of historical 'errors' proves clarifying. In the face of a grave injustice such as slavery, the interpreter toes a narrow line. She cannot pretend that the past was just—which would forfeit the possibility of moral judgment—but neither can she simply declare 'that was not us' because this fails to treat the historical event as a legitimate subject of inquiry. It would erase the specificity of the object and impose a featureless anti-prejudice. However, between these two risks a third option is possible. To fuse horizons does not just reject past injustice but instead *redeems* it; it declares that the evil of the past is of a part with the moral act of judgment that exists now. Despite their different

Exclusion is therefore given active meaning. It is not simply a lamentable fact, but instead a necessary feature. Injustice exists to necessitate its own redemption. The concept of justice permits the marking of violence. In the first case, it is treated as justified, and thus acceptable, even necessary. In the second case, it is unjustified, and in need of remedy. Quite often, this remedy is nothing other than the application of the first sort of violence. Violence exercised in the appropriate fashion is not merely acceptable; it is the basis on which the entire conceptual order hangs. Through such categorization, the appearance of a disjuncture is actually the crucial lever for reincorporating and reconstituting the legal order.⁷² Through the administration and organization of violence, the idea of justice is transformed into law, and the political nature of this act is hidden from view. In this way, both justice *and* law lose their structural integrity; they become shadows of one another, rather than active forces of political identity.

Formative violence

Material violence, then, creates the tension through which justice may come into being. This means that law's core function is to concretize this distinction, to divide the world between legitimate and illegitimate violence and its core problem (its

attitudes, each of the interpretive methods discussed here embraces this process in essentially the same manner.

⁷² Walter Benjamin, "Critique of Violence," in *Selected Writings, volume 1 1913-1926*, ed. Marcus Bullock and Michael Jennings (Cambridge: Belknap Press of Harvard University, 1996), pp. 236-253.

aporia) is the existence of violence that is neither.⁷³ This is a *formative* violence, which exceeds the politics of gain and loss. It cannot be expressed in terms of justice, but is a revolutionary and creative violence—the clearing away of space so that normative order may be written. The violence of this enclosure is never merely conceptual but instead depends on the active destruction of those who threaten to disrupt the spatial enclosure.⁷⁴ The American case offers a particularly stark picture, of the continent-wide project of Indian extermination that formed the basis of a new United States.⁷⁵ However, the problem is not uniquely American. Every legal order is built on the ashes of that which came before. We are all “taking the place (or living on the ruins) of a vanished civilization.”⁷⁶ If it is turtles all the way down, then each turtle is birthed out of the ashes of those that came before.

Formative violence necessarily escapes the dichotomy of just and unjust suffering because its enactment eradicates suffering entirely. The victims of formative violence *no longer exist*, and the ruins of preexisting civilizations cannot ask for justice. Further, *all* that remain are the beneficiaries of their absence. As such, everyone is a perpetrator and the very idea of justice is no longer tenable, since there

⁷³ Jacques Derrida, “Force of Law: The Mystical ‘Foundation of Authority’,” trans. Mary Quaintance, in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (New York: Routledge, 1992), pp. 3-67.

⁷⁴ Schmitt, *The Nomos of the Earth*, pp. 69-75.

⁷⁵ Cf. Meister, *After Evil*, p. 102, who argues that Lincoln’s redemptive project of national recovery reflects a sophisticated attempt to transition between the evil of the past and justice that is to come. Lincoln’s noble vision of recovery is a “survivor story” in which the North should not attempt to impose victor’s justice on its defeated enemy. Rather, all parties should see themselves as collective survivors engaged in a process of national recovery. However, even this noble vision remains founded on exclusion. After all, “in Lincoln’s own story of America it was not essential for indigenous peoples to survive. He assumed that we, as their successors, were to *survive them*.” See also: Gary Gerstle, *American Crucible: Race and Nation in the 20th Century* (Princeton, NJ: Princeton University Press, 2001), pp. 20-21; Alexander Saxton, *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth Century America* (London: Verso, 1990), p. 153.

⁷⁶ Meister, *After Evil*, p. 289.

is no meaning to be found in ‘justice’ if guilt is collective and total. The community of justice, by the very logic of interpretive unity that binds them to the concept, cannot accept the thought that the entire community is itself the perpetrator of mass injustice that can never be redeemed. Instead, they must treat justice as the obligation to “deplore what happened to prior inhabitants without wishing that it hadn’t.”⁷⁷

By this account, justice is distinguished from injustice only by reference to the temporal state of those who suffer. Injustice means the denial of dignity to present-existing individuals, while justice is nothing more than the absence of active unjustified suffering. Because the act of formative violence, the initial expression of law’s *aporia*, is locked into the past it completely evades the potential for remedy. The lingering silence of those who have been cast aside by history therefore constitutes the differend of justice. Because they are not part of the interpretive process that makes up the community of justice, they play no role in articulating the concept. One may remember, or seek to learn lessons, but justice may only exist among those who share a social world.

At first glance, formative violence appears entirely distinct from contemporary exclusion. It is a tragic fact, but one whose effects are locked permanently in the past. Certainly, this is the story told by secular modernity: right and wrong may be judged only through the lens of finitude. We observed this first in Rawls, who turned to the original position in order to escape the weight of history, to inscribe the existing community of value as the adjudicators of their own justification.

⁷⁷ Meister, *After Evil*, p. 289.

Via Dworkin, however, we have come to see that formative and present violence cannot be detached in this way. His brilliant unification of all interpretive models under the framework of justice clarifies that formative violence cannot help but seep into the practices of everyday justice. Because every judgment is linked together, no judgment is free of its origin. The battle must constantly be re-fought. Every ‘interruption,’ to borrow Derrida’s phrase, must be brought into the fold, through violence if necessary. Such violence is justified because the alternative would be to acknowledge the possibility of violence beyond justice. Further, this process can never be ended. In drawing the distinction between victim and perpetrator, the judge must always generate a third perspective capable of evaluation. This third standpoint necessarily lies outside the logic of justice that is supposedly universal. And any effort to incorporate that third will only generate a new position of judgment, against which the original concept may then be judged. This recursive impossibility for incorporation constitutes a “meta-differend” intrinsic to the idea of discussion.⁷⁸ Each individual case of injustice thus appears available for incorporation, but the position of judgment itself always lingers as a remainder of justice.

The goal of law, therefore, is always *both* an attempt to remedy injustice by incorporating it into the moral order *and* an effort to exterminate the lingering violence that defies incorporation. As such, even the fusing of horizons can never be truly open; it always includes an element of colonization: even if only in the characterization of that which refuses understanding to be ‘unreasonable.’ The cover

⁷⁸ Lyotard, *The Differend*, p. 26.

of legitimacy enacts a dual exclusion. In the first place, it marks the perpetrator's body as an acceptable location for suffering, thus pushing it outside the scope of moral justification. Second, it eradicates the particularity of the victim's suffering. By fitting it into a scheme of ultimate redemption, it "ultimately preordains the irreducible experience of suffering to a foretold redemption, meaning that [it] doesn't really allow suffering to *be* in its otherness but has already reduced it to sameness beforehand."⁷⁹

Pain, law, and interpretation

These logics of redemption serve a very specific purpose. They are not merely free-floating theories but instead are necessary and inevitable results of a system of law founded on the depoliticization of radical violence. The redemptive narrative isolates the fact of violence, modulates it, legalizes it. It treats the fact of violence as an inspiration to justification, to a logic of persuasion, whose goal is not to justify the coercive act *to* those upon whom it is exercised but instead is to justify its exercise precisely because they cannot agree. To organize the concept of law around this goal entails drawing together a community who may then punish those who remain exterior. The force of law is justified entirely by the fact that such outlaws could have been persuaded but chose not to be.

This is precisely the problem with reasonableness in Rawls. It offers universal salvation but does so on poisoned terms. That is not an accident, or a failure of

⁷⁹ Alain Badiou, *Five Lessons on Wagner*, trans. Susan Spitzer (London: Verso, 2010), p. 39.

theoretical precision, but is the inevitable result of a mode of justice built on formative violence that it cannot acknowledge. The capacity of persuasion to shift horizons ends precisely at this moment of expressive force and in so doing creates an irresolvable gap within the process of justification. This problem is captured particularly well by Robert Cover, in his excellent critique of *Law's Empire*. For Cover, Dworkin's approach is dangerous because it focuses on the procedure of justification and writes out the existence of the subject upon whom this law is written. The outlaw who suffers the decision is reduced to being nothing but the receptacle of legal violence. For such a person the law produces no redemption but only the bare fact of pain.⁸⁰ Such pain, by its nature, can never be fit into the realm of justification; indeed, pain "destroys language itself."⁸¹

In the case of torture, for example, even a full confession cannot confirm the legitimacy of the process. The problem is *not* simply that torture violates a moral norm of law (as Dworkin might argue). Given the fluidity of law, torture is always theoretically susceptible to legitimization. The measured distribution of violence could be justified via substantive arguments (exceptional need) and/or procedural ones (appropriate restraint/due process). While some regimes may restrict the use of torture, it can always be reincorporated post-facto. Understood in the context of the differend, however, the problem of torture extends beyond its specific application to encompass the entire apparatus of violence itself. Torture cannot be folded into a rational judgment about value because the entire purpose of torture is to *break* the

⁸⁰ Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986), p. 1629.

⁸¹ Cover, "Violence and the Word," p. 1602.

rational world apart.⁸² Between the wielder and object of pain, no shared community is possible and “any commonality of interpretation that may or may not be achieved is one that has its common meaning destroyed by the divergent experiences that constitute it.”⁸³ Consider the torture scene at the end of *1984*. O’Brien inflicts pain on Winston Smith with the intention of completely realigning Smith’s subjectivity. The experience of pain destroys resistance not by overwhelming the desire for freedom but rather by breaking the capacity to understand freedom as anything other than slavery.⁸⁴

It may seem overly dramatic to analogize torture and the abstract workings of a legal system, but at root they are one and the same. The law is not simply an abstract phenomenon; it “is built only to the extent that there are commitments that place bodies on the line.”⁸⁵ And the important binding feature of law is not the people’s willingness to affirm its principles but is their commitment to make themselves martyrs to its purpose, that is: to commit violence in its name. That such martyrdom has become highly formalized and abstract in the modern world does not change the underlying fact. Judicial decisions that purport to honor the hermeneutic process necessarily overlook the institutional structure of those judgments; they miss the “pre-legal” feature of legal interpretation.⁸⁶ The law is a political object, one held together by the collective administration of violence in the name (a particular concept

⁸² Cover, “Violence and the Word,” p. 1603.

⁸³ Cover, “Violence and the Word,” p. 1609.

⁸⁴ George Orwell, *1984* (New York: Signet Classic, 1983), p. 205-209.

⁸⁵ Cover, “Violence and the Word,” p. 1605.

⁸⁶ Dean Goorden, “Dworkin and the Phenomenology of the ‘Pre-Legal’?” *Ratio Juris* 25, no. 3 (September 2012), pp. 393-408.

of) justice.⁸⁷ And the interpretive community of law is always a finite body built *against* its excluded remainders.

In this way, the formative violence of law manifests in *every* decision. Law's structural exclusion is not simply the abstract loss of faded civilizations; it is instead carried forward through the act of interpretation and made present. As a permanent disjuncture in the concept of justice, formative violence ensures the continual re-enactment of daily injustice. The judgment is made to distribute pain, but that pain cannot be conceptually fit into the normative order of justice. Behind the veil of interpretation lie only material bodies that suffer, bereft of law's redemption.

Cover's analysis of the world-destroying fact of pain demonstrates the very real consequences. A brick wall of implicit violence blocks the persuasive appeal of law from obtaining universality. In the body of the accused criminal, its terminal breakdown is made clear. Recall Dworkin's argument that moral reason is founded on the doctrine of responsibility: that one must treat others as objectively important in order to make any moral claim. The dark underside of this premise is made clear in an innocent-seeming passage about mutual recognition. Because respect is mutual, he argues, moral agents must respect others "only so far as they accept the burden of responsibility...because only then do they really accept that equal importance."⁸⁸ The criminal facing the violence of incarceration, or the exterminated ghosts of the past, will find little comfort in this sense of mutual respect.

⁸⁷ Fred Dallmayr, "Hermeneutics and the Rule of Law," in *Legal Hermeneutics: History, Theory, and Practice*, ed. Gregory Leyh (Berkeley: University of California Press, 1992), pp. 17-18.

⁸⁸ Dworkin, *Justice for Hedgehogs*, p. 113.

The limits of reason

Dworkin attempts to resolve the tempestuous battle that has defined modern politics—legality vs. legitimacy, morality vs. politics. Faced with seeming perpetual indeterminacy, he refuses to collapse the contradiction by choosing a side. Armed with a deep faith that goodness may be found within the scope of human reason he reaches into Schrödinger’s box and draws out a hedgehog. However, this very faith is itself the perfect realization of reason’s limit. By stripping away all the rough edges from the normative case for justice and expressing it in all-encompassing terms, Dworkin takes us onto “slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also, just because of that, we are unable to walk. We want to walk: so we need friction. Back to the rough ground!”⁸⁹ That is: by treating justice as a subject of reason, he removes it as far as possible from the active practice of law. If justice is simply a matter of persuasion, then the *enactment* of its precepts becomes relegated to mere enforcement. What is lost here is the way in which such enforcement, the delineation of a line between us and them, is the essence of judgment itself. Law’s violence thus is fully externalized; *it becomes the differend of law*.

As such, *Justice for Hedgehogs*, by seeking to completely eliminate the exclusions of politics that stem from a relativistic worldview, circles entirely around to meet itself on the other side. Its terminal point of enclosure is found by reversing its most basic maxim. If relativism is always a moral concept, then so is the opposite

⁸⁹ Wittgenstein, *Philosophical Investigations*, §107.

true: every moral concept is ultimately a form of relativism. And the more that justice is differentiated from the world-breaking fact of violence, the closer it comes to enacting precisely the violence it seeks to end. This rephrases the endless theological question “why does evil exist?” in its most perfect secular form. If evil is understood as injustice then, contra Dworkin, such evil is itself the condition of possibility for justice to be conceived.

V. Conclusions: the concept of law and the concept of the political

The last three chapters have excavated the Hart/Dworkin debate, with two purposes in mind. First, I have engaged with them as competing theories of law. This is a philosophical project. Here, the introduction of Schmitt's terminology has proved helpful, to illuminate lacunae in their arguments, philosophical traps. Second, I have contextualized the material development of these theories. Why have these specific approaches defined contemporary legal disagreement? What do they signify and what do they produce? How do they constitute techniques of governmentality, as opposed to descriptions of genuine obligation?

The first, theoretical task invites a constructive response. The gaps it unearths are problems to be resolved. As we amend and refine our theoretical capacity, we may hope to close these spaces or at least manage them better. The second task, however, calls into doubt the value of theoretical inquiry itself. With each new articulation and development, we come to view the Hart/Dworkin debate as a pantomime, a mere reflection of forces that cannot be articulated, the underlying power relations that infuse the machinery of a modern political order. These are *material* problems that exceed the scope of theoretical analysis. To theorize law in this way amounts to, in Marx's terms, fighting phrases with other phrases, "in no way combating the real existing world when they are merely combating the phrases of this world."⁹⁰

⁹⁰ Karl Marx, "The German Ideology," in *The Marx-Engels Reader*, 2nd edition, ed. Robert Tucker (New York: Norton, 1978) p. 149.

We must take this second concern seriously. But we must simultaneously resist the impulse to overdetermine this effect. The Hart/Dworkin debate is not simply the secularization of a theological concept (though it is, of course, that as well). It is also the construction of a new mode of political existence that organizes its subjects in two distinct worlds, which overlap but never interact. These are two *phases* of reality. The first is the realm of arbitrary politics, which coalesces around a decision on the exception. It is expressed via the idea of *emergency*. The second is the realm of formal legal obligation, which neutralizes the experience of political indeterminacy through the practice of *pluralism*.

While it is tempting to declare the latter entirely parasitic on the former, this ignores a crucial shift in the nature of sovereignty. The normative principle of redemption is unique for its ability to destroy the linear structure of time itself. Because it draws the experience of all exceptions into the present, it is capable of sustaining any substantive content (as we saw with Hart). However (as we saw with Dworkin) a formal logic survives even this chaos: the logic of redemption itself. The unique capacity of ‘justice as redemption’ is its ability to collapse the experience of time into a singularity, an impossibly dense thicket of endless possibility experienced as one point. In this process, as all possible liberalisms are drawn together in an immanent present tense, their specific content is evacuated. The actual, material order may claim any of these substantive values as its *raison d’être*. It may stand for liberty or equality, for perfect representation or the absolute freedom of the atomistic subject, fact or value, legality or legitimacy. However, this destruction of substantive meaning

does not reduce politics to the purely arbitrary. Instead, the underlying formal logic of redemption endures. This is what provides the formative structure against which every other claim may be valorized or dashed to pieces. It is sovereignty without a sovereign, as was expressed via the Kelsenian *grundnorm*.

Justice as redemption therefore stamps a normative structure even onto its own exceptionality. This norm, alone among norms, escapes the rule that “the norm is destroyed in the exception.”⁹¹ It has no content itself, but holds all other content in a sort of limbo.⁹² By denying the possibility of temporal distance, it negates the possibility of material distinction. There is no space for ‘friend’ and ‘enemy’ because those categories presume that a decision may generate durable order. They depend on the existence of time-that-is-to-come, in which the distinction is enforced. This means that every apparent rupture in understanding is reincorporated. But not by a decisive act and not by a genuine *break* in the normative universe. There are no entry points for a decision *on* the exception, because the endurance of the moral order *is* the form that exceptions take in this form of life. There are no miracles in liberalism, no Events that wholly rupture the existent moral universe; there is only the perpetually-present flux of understanding expressing itself as law.⁹³ And any changes are understood, in retrospect, to have already been prefigured.

This creates a genuine continuity, albeit one that is aggressively non-political. And this is the peculiar strength of liberalism. It does not stamp itself onto the powerful features of political life: sovereignty, decision, violence. Instead, it

⁹¹ Schmitt, *Political Theology*, 12.

⁹² See Dyzenhaus, *Legality and Legitimacy*, p. 89.

⁹³ Meister, *After Evil*, p. 151-152.

surrounds them, draws on their energy to sustain itself while never acknowledging this debt.

The political theory of contemporary liberalism, therefore, is essentially a technique for conceptualizing happenstance as necessity. Value is not objectively unified, but it may be *understood* as such by attaching the label ‘justice’ to whatever arbitrary grouping takes hold of the world. In a sense, this is a prophetic task: to speak about what *is* as if it were what *had to be*. In effect, the supposedly sacrosanct values of liberalism are revealed to be castles built on shifting sands. All that is truly continuous is the *belief in continuity*. This belief is capable of hollowing out political institutions are re-filling them with any content, because it provides the conceptual tools for justifying any mode of being as just. Through this maneuver, the idea of liberalism survives even as its material institutions rise and fall. And the exception need never be fully expressed.

The result: hidden battles over the control of an institutional matrix, none of which may ever be permitted to truly rise to the threshold of political violence. This means that whoever wins is always already constrained by the institutional limits. Their power will never be truly decisive because it rests within a locked system of economized political life. This, again, reflects the idea that secularization is more than a stylistic transformation. It cannot truly erase the exception—which is intrinsic to the potential for meaning-making—but it can suffocate its expression by trapping it within formal procedures.

This, as we have seen, produces a seam of extreme and irrevocable violence at the core of liberal order. It must constantly rewrite its formative violence into the present, under the guise of eradicating injustice. However, this effect also accounts for its peculiar and durable strength. The doubt it introduces cannot be extinguished, but it *can* be accommodated and tolerated. The subjects of liberal order simply come to live with their inter-messianic, secular condition. They cope via the mechanism of redemption, which takes the inexplicability of loss as the starting point for political order. Political liberalism, then, obtains normative coherence through a neutralization of the exception, but this neutralization is *formal*, not decisive. Rather than imposing a logic of incorporation or destruction (a friend/enemy dynamic), the mode of redemption holds the exception as a permanent distance. Like an asteroid captured by a planet's gravity, it becomes a new satellite of the depoliticized order. The liberal political mode, uniquely, is able to trap the exception, to trade on its authority without ever permitting its genuine expression.

The logic of redemption may be best understood by counterpoising it against two other ways of approaching lingering obligation. The first seeks to *repay* our debts, the second to *repudiate* them. The former attempts to restore the justice of law by rectifying its errors. It is the standard framing of a progressive liberalism; as debts are repaid, equilibrium is restored. The latter ends obligations through revolution. It refuses to acknowledge the legitimacy of their claimants and therefore ushers in a new system of obligations and responsibilities. Liberalism, an emergent political doctrine built on an economic revolution driven by escalating structures of credit and

debt, tears apart this binary. It demands debt, because its existence ensures durable and mutual relations among otherwise alienated subjects, but its concept of justice is organized around the necessity of repayment. If debt could truly linger, it would create permanent distinctions among subjects and would erase the fundamental equality on which liberalism is grounded.⁹⁴

The solution is to reverse the relationship. Rather than treating debt as an instrument of social relations, debt is understood as the conceptual structure for understanding political possibility. Political justice is expressed through the consistent necessity of organizing debt relationships, managing them, pricing their continued existence. Debt therefore exceeds the scope of material existence; it lies outside the chain of reasons. Like the *grundnorm* it cannot be justified because it is the mechanism which enables justification. Specific debts may be repaid or repudiated, of course, and the majority of legal philosophy is devoted to these projects. But debt itself exceeds these limits. As an instrument of political possibility, debt enables the production of further obligations. It is the exception that is perpetually in need of redemption, and can therefore never be resolved. The promise of equality, the commitment to universality, the affirmation of inalienable human dignity, these are utopian claims that defy fulfillment. Our eternal obligation is to act as though we might resolve these debts—even though we never will—and our attitude toward that necessity is what makes us who we are. This move draws the debt forward, uses it to define a *political identity* of shared community, one where everyone depends on

⁹⁴ David Graeber, *Debt: The First 5000 Years* (Brooklyn: Melville House, 2011), pp. 121-126.

everyone else and no one is free from the debt that this mutuality creates.⁹⁵ This situates *all* as the victims of debt as well as the perpetrators, and this enables the necessary and continual exclusions—the extermination of those who came before us, the hard lives of those who built up the nation, those who were enslaved, those who are now imprisoned, and so forth—to be honored. The logic of redemption does not demand the erasure of those differences; it only demands that we justify their continuation by experiencing the pain of their necessity.⁹⁶ We regret the exclusion, without wishing that it were otherwise.

In this, we see the defining feature of liberalism, particularly its contemporary ‘political’ form. Not its substantive commitments nor its procedural guarantees, but its mode of *justification*. Specifically: justification as the management of the exception via a concept of justice. It may take a variety of forms specific to the circumstance of its articulation—it may mean equality in one sense, rule of law in another, democracy or authority, the general will or the representative decision—but these are ephemeral. The traditional ensigns of liberalism are widespread and diverse; they derive from the history of their articulation but are not *subject* to that history. Instead, they are specific deployments of this underlying liberal model of legitimation, *necessitated* by the material condition of their time, but which in their articulation *exceed* that time.

The strength of liberalism is this bifurcated relationship between necessity and transformation. This is what enables its practitioners to *depoliticize* the violence

⁹⁵ On the notion of ‘social debt’ and collective obligations, which cannot be repaid but instead demand redemption, see Graeber, *Debt*, pp. 69-71.

⁹⁶ The difference principle is, certainly, a prime example of this phenomenon.

intrinsic in its expression while simultaneously *wielding* that violence to eradicate all dissent. The first, neutralizing move happens by depicting the base material conditions of authority (the formative violence necessary to sustain legitimacy) as locked into an unchanging past, a past that we may regret but cannot alter. The second, constitutive move happens by negating the very notion of temporal distance, by extracting all material events from diachronic time and rearticulating them as elements of universal and immanent time. Hart represents the tendency toward the former, Dworkin the latter. Together, they illuminate the underlying structure of political liberalism: always already determined by its historical and material condition, but is also radically free from such determination.

One of Hegel's great insights was to see the task of theory as reconciliation. One does not change the world to enact one's freedom, but discovers one's freedom in the world as it must necessarily be.⁹⁷ Studying Hart and Dworkin offers a different perspective on this notion. The task of liberalism is not simply to reconcile dependent subjects with the conditions of their own understanding, to situate them within an external and necessary universe. Instead, it *erases* the externality of the world, draws it inside and makes it a part of liberal subjectivity itself. To enact these debates, to speak the redemptive logic of liberalism, is an intensely *political* act. It is to preach the (secularized) holy word of one's own redemption. And, as a corollary, one must also wield the sword of this justice against the heretics who threaten secular order through their insistence that history imposes material obligation upon us. These

⁹⁷ G.W.F. Hegel, *Outlines of the Philosophy of Right*, revised edition, trans. T.M. Knox (Oxford: Oxford University Press, 2008), pp. 322-323. See also Rawls, *Lectures on the History of Political Philosophy*, pp. 331-332.

heretics are dangerous because they threaten to disrupt the entire mode of exchange through which order is possible.

And this is why we must be attentive to the debates over legal philosophy: because the law is the place where this maneuver is birthed. It is the nexus where necessity and justice meet, where past and present are drawn together and the moral and political universe are condensed into a singularity. Law, and it alone, is capable of expressing the normative necessity of de-normativizing the world. The conceptual framework for this move is built into the fibers of the economic and political order, but it requires law's specific sense of necessity—and the specific sort of emergency that this provokes—for the reaction to be ignited. Legal philosophy is therefore crucial to our understanding of political possibility, not because the law expresses the limit of politics but because it is a wormhole that fundamentally *alters* the political form.

Armed with these insights, we now return to Rawls and the concept of political liberalism. It is no longer feasible to claim that this approach is 'political not metaphysical' in the sense that Rawls desires, but neither are we doomed to treat this as a failure of the theory. Political liberalism must be 'ideal' in order to catalyze its redemptive spirit, but it is now clear that this ideal treatment must be drawn back into historical time. The promise of justice, its theological core, is the dream that exclusions may be rectified without being erased. It is the task of the final chapter to explore whether this promise can indeed be redeemed.

Chapter Five – A Political Concept of Justice

Every treatment of justice is in some sense a redemptive project, whether or not this is made explicit. It is the hidden subtext of the Hart/Dworkin debate, in which the problem of justice lurks behind every seemingly straightforward attempt to clarify the nature of law. In reconstructing their argument, it no longer seems possible to say what law 'is,' because that question presupposes a shared form of life within which value may be situated. But that is precisely what law cannot provide. In the place of unity, the law offers authority (the promise that disputes will be resolved decisively) and justice (the promise that authority will be exercised with integrity). But these values simply beg the question. Who decides what will be authoritative? And for whose sake must it be exercised justly?

In effect, the appeal to legality is torn by two conflicting necessities. First, it must acknowledge the contingency and plurality of value; law's purpose is to define the limits of agreement among difference. Second, it must assert a transcendent structure of value against which conceptual order may be measured. The inability to square this circle means that violent exclusion inevitably reappears, in forms that are never justified because they cannot be *acknowledged*. This problem is particularly acute in approaches such as Dworkin's, which explicitly argue for transpolitical truths. But as we have seen, the impulse lingers even in the most restricted concept of

law. The will to truth infects the *roots* of the investigation, and any conclusions eventually drawn are nothing but the fruit of the poisoned tree.¹

This chapter returns to the Rawlsian framework, informed by this insight. The goal is to reformulate the idea of political liberalism by characterizing it as a particular institutional structure through which redemption becomes manifest. The support for this argument lies in the concept of reasonableness. As we saw in chapter 1, Rawls is unable to capitalize on the force of this concept because he refuses to treat it as a genuine form of political identity. Despite occasional hints to the contrary, he cannot bridge the gap between the reasonableness of *reasons* and reasonableness as a *mode of political order*. The first is concerned with normative structure and the latter with the relationship between reasonable political identities and their unreasonable antagonists. Because these two elements remain disconnected, the principle of rationality expands to fill the void, and the radical potential of reasonableness is neutralized.

We then turned to Hart and Dworkin, to illustrate the two halves of this effect. For them, redemption is a necessary response to the hidden, exceptional form of law—the ever-present fact of revolutionary violence that lies at the limits of justification. If every value and decision is called into doubt by the nature of law itself, one final hope still remains: that which cannot be justified may still be redeemed. For Hart, this emerges through the idea of discretion, which materializes and embodies the rule of recognition. For Dworkin, it is experienced primarily

¹ Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003), pp. 4-7.

through the burdens of temporality. Therefore, while this idea of redemption beyond reason is tremendously powerful, neither Hart nor Dworkin are capable of harnessing it. The spark of redemption can reignite the force of *law*, but only by simultaneously negating the concept of *legality*. The practice remains, but its meaning is stripped.

But a new sense of reasonableness is possible, one that finds order *within* rather than *against* the terminal emptiness of secular political order. This alternative form of the reasonable is defined by *openness*. It is not a destination or even a direction; it is instead a process of continual renewal in which even its own conceptual structure is called into doubt. Only with this framing may justice finally be turned back upon itself, to generate authority through exclusions beyond reason. Justice in this sense cannot *mediate between* two worlds, but is a way of expressing unity in bifurcated terms so that it may become comprehensible. When it does this successfully, justice becomes a technique of legitimacy—a framework through which law may be constructed, but under which ‘legality’ is only ever a secondary effect. The task of law is therefore not to mediate between fact and norm, or between legality and legitimacy, but rather to express these binaries so that they may be engaged and transformed.

The purpose of this chapter is to explore these ideas. It begins with a discussion of Rawls’ efforts to resolve the problem of unreasonable doctrines. How may they be excluded without undermining the deeper promises of a shared political world? Rawls provides several answers, none of which are fully successful. But if the concept of reasonableness and its practical manifestations are split apart, a singularity

emerges, a single point in which exclusion and inclusion become intermingled and horizons disappear. By treating this moment of discontinuity as the *essence* of reasonableness it becomes possible to construct order outwards from the exception, rather than treating the exception as the disruption of the normal case.

Applying this idea to the practices of legal development, I then turn to Bruce Ackerman's concept of 'constitutional moments.' While Ackerman's idea remains trapped within the presumption of baseline order, his idea of revolutionary reform provides a useful meta-structure for conceptualizing the practices of justice within a political community oriented toward the rule of law. In my argument, constitutional moments are persistent, and the indeterminacy they provoke is *both* catastrophic *and* necessary.

Through this eternal unrest, the supposed conceptual gaps within liberalism may be drawn together and expressed as different facets of an underlying order that unites justice and legitimacy. This unity does not expand outward to restore the dominance of legality, but neither does it collapse inward into the bare chaos of politics. Instead, it permits a durable tension between legality and extralegality. Through the mediating force of reasonableness, we are now capable of understanding law to be *both* the positive emanations of political authority *as well as* the moral frameworks of political identity. The purpose of law is not to keep these two worlds separate or to draw them together (as we saw in Hart and Dworkin). Nor is it to tether them together so that they may move in the same direction together (as, for example,

in Habermas). Instead, law's function is to *express the exceptionality* of their unification.

If this treatment of law is viable, its strength depends entirely on the world-building capacity embedded in the idea of reasonableness. This, then, is the subject to which we will first turn.

I. Engaging the unreasonable

For Rawls, the existence of unreasonable people is unfortunate, but ultimately insignificant. His concern is with the articulation of “realistic utopias,” grounded in the faith that all people share the baseline potential for reasonable engagement.²

Justice, therefore, describes the production of a basic legal structure in which reasonable people may live productive and mutually sustaining lives.

Unreasonableness is merely a footnote to this project. Those who cannot or will not embrace the necessity of reasonable justification are to be tolerated, occasionally accommodated in limited circumstances, and if all else fails may be coerced into adherence to the precepts of law. Each particular community must establish the precise balance of these options, but this is a relatively easy task as long as the basic structure of justice remains operational. The necessity of dealing with unreasonable people necessitates additional layers of legal construction, but this is not the *essence* of law.³ In this respect, Rawls is similar to Hart: both are concerned with the normal experience of law, and are willing to tolerate vagueness in the edge cases.

As we have seen, however, this attitude depends on an act of sleight of hand. It requires presuming stability within pluralism, and then using that stability to corral the experience of emergency. But reasonableness, just like Hart’s positivist concept

² See Rawls, *The Law of Peoples*, pp. 19-25.

³ See Rawls, *Political Liberalism*, pp. 183-187, where he discusses exceptions to the domain of reasonableness. While some may possess different capabilities (mental or physical) and tastes (extravagant or simple), these are subsumed under the base assumption that “everyone has the capacity to be a normal cooperating member of society.” Rawls acknowledges that this assumption is somewhat idealized, but still sees it as sufficiently general to establish the terms for fairly dealing with difference. This is similar to his treatment of children; they must be guided in their unreasonable youth, but the full perspective of an entire life will certify the necessity for this guidance. See Rawls, *Political Liberalism*, p. 18.

of law, is too weak to sustain the illusion. Beneath the fact of reasonable pluralism lies the seething disorder of exclusion that cannot be described, much less justified. These forms of the unreasonable are differends, the necessary byproducts of normal order which cannot be fully articulated. This is the true exception of political liberalism, one that cannot be captured in the simple frame of public reason.

Still, although Rawls fails to engage this problem in these terms, he is not *entirely* unaware of the danger lurking here. In fact, he offers three distinct mechanisms for engaging the unreasonable. Each is designed to acknowledge the reality of unreasonable others whose forms of life must be treated as legitimate but upon whom the law must nevertheless be enforced. His first attempt (the argument from background culture) is roughly positivist in attitude, while the second (the inclusive view) aligns more closely with Dworkin's normative interpretivism. Unsurprisingly, the failures of these two approaches also closely model their analogous counterparts. Both reflect a laudable desire—to acknowledge the existence of obligations to even the unreasonable—but this sort of toothless universalism is precisely the medium through which the depoliticizing structure of secularism is re-established. By subdividing the category of 'the unreasonable' into two variations (dangerous and benign), Rawls replaces *reasonableness* with *reason* as the core structuring mechanism of exclusion. To draw distinctions within reasonableness erodes its strength as a singular category for structuring identity.

However, his third treatment, the 'proviso,' doubles down on the preeminence of reasonableness and thereby steps beyond the confines of a purely legalistic

treatment. While it is more of signpost for future development than a fully realized theoretical concept, the proviso demonstrates the viability of expanding the frame of reasonableness. Following through on its promise will reintroduce the element of temporal flux and the creative force of political action. It will redeem the idea of redemption.

We will begin the recuperative project by exploring these three ideas in more detail, with an eye toward building a concept of the unreasonable that meets the requirement of the political exception.

The argument from background culture

The first approach is essentially defensive, insofar as it emphasizes the relatively limited circumstances in which reasons are to be excluded. Namely, public reason is obligatory only in cases of “constitutional essentials and questions of basic justice” such as “who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property.”⁴ It is not required for the many, far more mundane, political issues that organize daily life. In those cases, the introduction of nonpublic reasons is permissible.

Furthermore, as established in chapter 1, the limit imposed by public reason is not a coercive, legal restriction but instead is a limit on what ought to be taken as a valid justification. Critics often miss this point and treat Rawls as promoting strict limits on speech itself, failing to see his clear acknowledgement of the wide-ranging

⁴ Rawls, *Political Liberalism*, p. 214. See also: Rawls, *Political Liberalism*, p. xlviii.

and essentially unrestrained nature of social conversation. He only insists that limits be imposed at the level of public justification for political decisions.⁵ While reasonable people will often be inclined to present reasonable arguments, they are not legally *obliged* to do so. The subject of political liberalism is only required to pitch her argument in public terms if she desires to establish a case for political coercion. Public reason is therefore not a tool for policing the internal psychology of its practitioners, but is a measure of justification.⁶

The purpose of this argument is to demonstrate the wide range of political locations in which comprehensive normative arguments are permissible. Public reason must be sanitized, but only for a limited set of issues and in a constrained fashion. As such, it permits much of the same open-textured moral reasoning that Rawls' critics often insist his approach excludes.⁷ In this sense, we might best view Rawls as refining the Hobbesian task of promoting stability. His limited restrictions on the full exercise of moral reasoning are justified, so the argument goes, because they are the bare minimum requirement for securing order in the context of pluralism.

This suggests that public reason is simply a necessity, not an object of intrinsic value

⁵ See Martha Nussbaum, "Rawls's Political Liberalism: A Reassessment" *Ratio Juris* 24, no. 1 (March 2011), p. 12: "Although Rawls does not make this point sufficiently explicit, he is clearly thinking of discussions in the context of political decision-making, not the sort of discussion of constitutional ideas and conceptions in which citizens often engage in informal social associations in the 'background culture.'" Also see Rawls, *Political Liberalism*, p. 215, which states that the limits of public reason "do not apply to our personal deliberations and reflections about political questions, or to the reasoning about them by members of associations such as churches and universities, all of which is a vital part of the background culture. Plainly, religious, philosophical, and moral considerations of many kinds may here properly play a role."

⁶ This harkens back to the discussion of Wittgenstein. Public reason admits no private grammar of justification. Its reasons are the reasons of its practitioners *together*, never individually.

⁷ See Rawls, "The Idea of Public Reason Revisited," p. 142 fn 28, where he notes that Seyla Benhabib's critique of political liberalism misses the mark, because she insists on the importance of a Habermasian public sphere but fails to identify how this is to be distinguished from his idea of the background culture.

but a tool wielded by the community to sustain itself *as* community. It possesses no trans-historical content because it is not an independent idea. It exists only to the extent that a community of reasonable pluralism calls it into existence as a device to secure their mutual liberty.⁸

This argument, of course, closely mirrors the positivist conception of law. Just as with positivism, it seeks to treat its subject matter (whether law or public reason) as a contained formal process whose content is determined by inputs from the background culture. The advantage of this approach is its ability to preserve the internal coherence of public reason while still acknowledging the value of new and controversial reasons. They may be developed in the background culture *first* and only later integrated into public reason.⁹ This filtering process neutralizes their dangerous elements, ensuring that changes in public reason are possible without endangering its structural integrity.

However, just as the positivist case faltered on its demand for exceptional structure, so does the attempt to demarcate a limited terrain of public reason. Since the realm of the public may only be determined by a prefigured conception of what counts as a ‘fundamental question,’ its apparent limit is illusory. It begs the question of reasonableness. A wide range of nonpublic reasons are permitted, but not *unreasonable* nonpublic reasons, because those insist on attempting to impose themselves onto questions it has *prima facie* labeled sacrosanct. Since reasonableness

⁸ For a defense of Rawls along these lines, see Chad Flanders, “The Mutability of Public Reason,” *Ratio Juris* 25, no. 2 (June 2012).

⁹ See Flanders, “The Mutability of Public Reason,” p. 200: “What we need is a way that public reason can change without violating public reason itself, and this means exploring change that happens through the ‘background culture’ of society.”

is defined by the acceptance of limits on politicization, the argument from background culture establishes a space for dissident voices only by sanitizing precisely that feature that distinguishes them. These values may be freely held only to the extent that they remain inert. Illiberal values and peoples are held in protective custody, kept safe from the danger they pose to themselves and others.

The background culture, then, is far less open to difference than it seemed at first. It certainly is not capable of accommodating “doctrines that reject one or more democratic freedoms.”¹⁰ These, Rawls says, are inevitable and unfortunate blights on a democratic society, which “gives us the practical task of containing them—like war and disease—so that they do not overturn political justice.”¹¹ This language, which treats unreasonable doctrines in dehumanized and noxious terms, is pernicious to say the least. It suggests that certain doctrines are simply beyond the scope of deliberative engagement. Such people cannot be reasoned with or engaged, but are viral infections against which the political culture must be inoculated. They are no longer subjects; they are simply *threats*, objects of risk to be neutralized through depersonalized practices of institutional management.

This also demonstrates that reasons cannot be separated from those who hold them. By judging reasons as unreasonable, Rawls enables the exclusion of *people* under the pretense that only their arguments have been blocked. That this is done in the name of inclusion only heightens the illusion. The supposed reciprocity that this entails, the openness to radical difference, is utterly false. Difference may only be

¹⁰ Rawls, *Political Liberalism*, p. 64, fn 19.

¹¹ Rawls, *Political Liberalism*, p. 64, fn 19.

introduced through the device of reasonableness, which does not merely restrict the sort of reasons that may be offered in public justification but also restricts the *variety of identities that may proffer reasons at all*.

While nothing about the concept of a background culture *necessitates* this attitude, neither is it simply a coincidence. What we discover in the argument from the background culture are the lurking tropes of liberal toleration. Since the difference between dangerous and tolerable doctrines is itself a political distinction, it is beyond the reach of those upon whom that distinction will be leveraged. As a result, the relationship between the political conception of justice and its excluded referent is trapped within legalized procedures that cannot be penetrated. Just as with positivism, the effort to resolve the problem of exclusion by capturing it within legalistic forms is doomed. Because this requires deferring the matter of reasonableness, it shields the formal and substantive judgments within liberalism from their political superstructure and neutralizes the radical potential of political liberalism.

The inclusive view

Therefore, we must step beyond this most restrictive case and explore the elements in *Political Liberalism* that caution against drawing such a firm line between political and background culture. The point is not to *abandon* the demarcation but instead to theorize its exceptions. In particular, to understand how public reason is implicated even in the most seemingly ‘private’ deliberations, and vice versa. This project is difficult, in part because Rawls himself mystifies these questions. As we

have seen, he is strongly motivated to resist the imputation of a hidden metaphysics and this desire generates blind spots in his work.

These blind spots are especially strong in the case of the ‘inclusive view,’ which states that citizens may introduce reasons grounded in their comprehensive doctrines, “provided that they do this in ways that strengthen the ideal of public reason itself.”¹² This contrasts with the argument from background culture, which offers an exclusive view—only permitting reasons that are strictly public in nature. The point of the inclusive view is to account for broad context, to see the forest as well as the trees. For example, Rawls says, there is a legitimate place in public reason for abolitionists or civil rights leaders to assert comprehensive moral reasons for political change if the system against which they struggle is so manifestly unjust that it destroys the potential for fair deliberation. This suggests that the limits of public reason cannot be entirely dehistoricized. The veil of ignorance measures reasonableness, but it may justifiably be pulled aside if the particular circumstances necessitate, as long as public justification remains the terminal objective. Therefore, “the abolitionists and the leaders of the civil rights movement did not go against the ideal of public reason...provided they thought, or on reflection would have thought (as they certainly could have thought), that the comprehensive reasons they appealed to were required to give sufficient strength to the political conception to be subsequently realized.”¹³ In a sense, the invocation of such values speaks to the higher purpose of public reason, even if the values themselves do not fit within it. If

¹² Rawls, *Political Liberalism*, p. 247.

¹³ Rawls, *Political Liberalism*, p. 251.

the exclusive view, as discussed above, is analogous to positivism, the inclusive view is far closer to interpretivism. Focusing on the *ideal* of public reason demands the more complex forms of balancing outlined by Dworkin. We might even treat this ‘ideal’ as a moral concept at the heart of public reason, a principle upon which its practical requirements must rest.

This analogy helps to clarify both the strengths and weaknesses of the inclusive view. It is valuable to the extent that it exposes the fragility of rigid lines. There is no point in upholding the letter of public reason if this results in its destruction. More prosaically, permitting limited introduction of moral arguments helps to facilitate the transformation from mere *modus vivendi* to overlapping consensus by reducing doubt. If citizens are permitted to reference their sincerely held beliefs, they may operate in good faith that their consensus is genuinely affirmed and not simply a temporary utilitarian calculation.¹⁴ However, the inclusive view is also weak in the same sense that we observed with Dworkin. It leaves a number of crucial questions unanswered. Who determines what counts as strengthening the ideal of public reason? How is the ideal to be understood at all? What distinguishes a good-faith effort to serve the ideal of public reason from a destructive attempt to sabotage its operation? Since these questions do not appear to be governed by public reason, we possess no framework for shared evaluation. The inclusive view is therefore only inclusive in the colonizing sense. A wide range of reasons is available, but only if

¹⁴ Rawls, “The Idea of Public Reason Revisited,” pp. 153-155.

they match a predetermined set of liberal presumptions which may not themselves be scrutinized.

The proviso and the fluidity of time

The dichotomy of inclusive and exclusive views, then, does not unlock the problem of unreasonable perspectives because in either case, they are treated as errors to be managed or restrained. In his third attempt, however, Rawls takes a different approach. The ‘proviso’ is first discussed in *The Idea of Public Reason Revisited*, and reads:

reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons—and not reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.¹⁵

This is a far more ecumenical approach. With this amendment, Rawls expands but also precisely defines the interaction between nonpublic and public reason. And importantly, he does so by explicitly acknowledging that any effective response to these exceptional cases depends *entirely* on the force of reasonableness. The proviso restricts the deployment of nonpublic reasons in two simple ways: 1) they must be reasonable and 2) their conclusions must be confirmed via public justification at some later date. This compares to the inclusive view, which subjected public reason to *formal* restrictions that could (in exceptional circumstances) be revoked. The proviso does not rely on such formal limits, but instead utilizes the ever-present

¹⁵ Rawls, “The Idea of Public Reason Revisited,” p. 152.

organizational force of reasonableness to manage the entire spectrum of justification. The former approach treats exceptional cases as necessitating a break from the normal rules; the latter treats the exception as the persistent feature of order itself.

This modification is relatively small, but does have two important effects, one that is clearly intentional and another that is more speculative. The first effect is that the proviso ceases to police the *content* of public discussion. As we saw in chapter 1, the demand for reasonableness imposes a very specific conceptual limit that does not require (indeed, that does not allow) further digging into moral reasoning. And apart from this single restriction, the proviso permits *any* reason to be introduced; its focus is the justification of its *conclusions*, not on the reason itself. In effect, the proviso acknowledges that deliberation may occur primarily in moral terms while still producing reasonable results.¹⁶ This meshes with our understanding that an overlapping consensus is far stronger when its support is grounded in moral reasoning.

The second effect is more tenuous, and is not flagged by Rawls himself, but is nevertheless tremendously important. It stems from the fluid nature of time embodied in the proviso. By stating that nonpublic reasons may be validated *at a later date* by the introduction of publicly valid reasons, Rawls taps into the redemptive logic of liberalism in a peculiar way. He historicizes reasonableness by acknowledging that seemingly private reasons may, with the wisdom of time, come to be understood as fully consistent with public reason. In effect, private arguments may be rehabilitated

¹⁶ Burton Dreben, "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), pp. 342-345.

not through replacement by different, public arguments but instead by a shift in perspective that reveals them to have *always already* been public. That such arguments appear to rely on nonpublic justifications is an illusion produced by the constrained political imagination of the time.

Once again, take the case of the 19th century abolitionists. Using the proviso one may argue that their invocations of religious fury and the equality of all humanity under God were perfectly acceptable because they stood in for the underlying truth that slavery is a gross violation of reasonableness. Although this perspective was not considered valid at the time—any argument for fundamental equality of slaves would have been wholly exterior to the contemporary political form of life—it may be *retroactively* imputed to the abolitionists. Even if they saw themselves as the righteous servants of a religious faith, their arguments were also wholly compatible with the basic equality that grounds political liberalism. Linda Zerilli, discussing Frederick Douglass, characterizes this argument aptly: “Douglass can be seen as affirming the fundamental principles of public reason and merely asking that they be extended—as they conceptually could have been according to Rawls—to slaves.”¹⁷ His arguments, one might say, affirmed a *better* sense of the reasonable than the one held by his contemporary political order.

However, as Zerilli goes on to argue, such a framing negates the particularity of those it purports to acknowledge. To ‘redeem’ reasons in this fashion is merely code for colonization. Speakers like Douglass were *not* attempting to integrate

¹⁷ Zerilli, “Value Pluralism and the Problem of Judgment,” p. 13.

themselves into an order of liberal reason.¹⁸ They were instead making radical, revolutionary demands—political demands—and we “would miss the sheer political force of Douglass’s speech if we were, with Rawls, to redeem Douglass’ nonpublic reason with public reason.”¹⁹ To grant them recognition only by grinding away their uniqueness treats them as unknowing servants for a transcendent form of liberal justice. This is the logic of forced conversion, whereby specific and distinct identities are collapsed together under the sign of a universalizable principle.²⁰ Most problematically, it re-establishes the domination of ahistorical timelessness by denying the possibility of something genuinely new. As Zerilli writes of Douglass: “his conversion was no mere return to what was always already there, but a creative, indeed transformative political action: an action that, together with the interpretations of like-minded abolitionists, redefined the meaning of the Constitution as a radical document.”²¹ The abolitionist arguments were not just external to the logic of public reason; they were direct *challenges* to that logic. To the extent that such arguments are redemptive, it is a *theological* redemption, not a secular one. Through language, a new world is asserted, one that cannot be grasped through persuasive argument but

¹⁸ See Frederick Douglass, “The Meaning of July Fourth for the Negro,” in *Frederick Douglass: Selected Speeches and Writings* (Chicago: Chicago Review Press, 2000), p. 196: “At a time like this, scorching irony, not convincing argument, is needed. Oh! had I the ability, and could I reach the nation’s ear, I would today pour out a fiery stream of biting ridicule, blasting reproach, withering sarcasm, and stern rebuke. For it is not light that is needed, but fire; it is not the gentle shower, but thunder. We need the storm, the whirlwind, and the earthquake.”

¹⁹ Zerilli, “Value Pluralism and the Problem of Judgment,” p. 13.

²⁰ Zerilli, “Value Pluralism and the Problem of Judgment,” p. 14. “Rawls’s inclusive account of public reason redeems ‘conceptually’ what were, historically, nonpublic reasons at the expense of neutralizing the political character of making judgments and claims.”

²¹ Zerilli, “Value Pluralism and the Problem of Judgment,” p. 19.

must be experienced as a foundational truth. The truth of the moral universe exceeds the grasp of the political world in which they are forced to be articulated.

II. Respect and the unreasonable: re-interpreting the proviso

According to these arguments, the proviso remains trapped within the false forms of redemption that we found in chapter 4. It promises an abstract salvation, one intrinsic in the process of reason, which therefore evacuates the political spirit of those who affirm it. Every revolutionary demand is prefigured and acontextual. It is a cold, lifeless logic—one which cannot admit the existence of truly dissident voices. The scope of their demands, their moral energy, their forcefulness: each are extinguished. In such a world, all progress is reform and all reform is progress, while revolution is unthinkable and unthought.

However, while these criticisms are powerful, they reflect only one possible interpretive approach. Sadly, Rawls' discussion of the proviso is quite brief, leaving little textual support for moving in a different direction. Even the revised introduction to *PL*, where he argues for replacing the inclusive view with the proviso, does little to elaborate on the effect of such a change. He certainly does not argue that it constitutes a significant reformulation of the strategy of neutralization exhibited in much of the rest of the book.²² Still, it is worth asking whether the proviso might offer something genuinely new, beyond the constrained logic of pseudo-redemption. Rawls himself was either unable or unwilling to address this potential, but we not so constrained.

²² See Rawls, *Political Liberalism*, p. 1.

The proviso and the breach

Rather than seeing the proviso as a mechanism for radicalizing the experience of difference, I suggest that we depict its two distinct but overlapping temporal perspectives—‘now’ and ‘validation yet to come’— as expressions of two *horizons on the idea of reasonableness*, to borrow Gadamer’s term. By this account, the proviso is not meant to *eradicate* the confusion intrinsic to the inclusive view (over who determines what counts as the ‘ideal of public reason’) but instead to *express* that confusion in a more productive way. Since the final determination of reasonableness is dependent on the community of the reasonable, it is a recursive phenomenon. This means ‘validation to come’ does not necessarily imply colonization of a dissident voice but may instead describe a shift in the contours of what *counts as reasonable*. And importantly, it bespeaks a theology of mutual conversion. The excluded referent may redeem its nonpublic moral values through their re-articulation as public reasons, but so also may the terms of public reason tread the road to Damascus and face the terminal limits of their exclusiveness.²³

The result is never certain and never entirely safe. Indeed, this is the defining feature of such encounters: they necessarily provoke the possibility of total disruption. If all things are potentially in doubt, then stability itself may no longer be described theoretically, but may only be derived from the arbitrary convergence of material practice. This is a terrifying prospect for the dream of liberal politics, and we

²³ Here I am thinking of Uday Singh Mehta’s injunction in *Liberalism and Empire* that we must conduct “conversation across boundaries,” (p. 216) particularly in light of his accusation that Rawls uses reasonableness to police the idea of inclusion (pp. 49-50). The proviso, I believe, includes *both* of these characteristics. It does perform a gatekeeping role, but does so on terms that generate conversation rather than quelling it.

have seen that Rawls at times remains in thrall to the perceived necessity of order. This is what drives him to propose neutralizing dangerous elements by denying their right to frame arguments in *political* terms.²⁴ The proviso does not erase that desire, but it does suggest a counter-current in his work. As Miguel Vatter argues:

Rawls' proviso indicates that the idea of public reason needs a supplementary moment of self-reflection, which could bring it to acknowledge that its single-minded adherence to "the strongest reasons" may be its tragic weakness. The single-minded pursuit of the strongest reasons, and their achieving a superior right, signals an absolutization of the dimension of legitimacy within the political which may, in the long run, be a source of instability for the political association.²⁵

Left unchecked, concern for the security of public reason will grow excessive. Over time, its sovereign aspect will impose a colonizing logic which, by affirming the "strongest reasons," will merely impose "the reason of the strongest."²⁶ The proviso offers a counterweight to this impulse, one that exceeds mere toleration. Its attitude is open-ended and inviting rather than legalistic and constrained. It suggests the possibility that relationships within public reason might be grounded first in respect and concern, and only secondarily in the formal mechanisms of justification.

This recalibrates the expectations for generating legal order and the sense of obligation owed to apparently unreasonable voices, which compares to the more conservative take on Rawls, expressed here by Chad Flanders:

²⁴ Recall his description of certain doctrines as similar to 'war and disease.' Also see Sala, "The Place of Unreasonable People Beyond Rawls," pp. 258-259.

²⁵ Miguel Vatter, "The Idea of Public Reason and the Reason of State," p. 260. Vatter does not believe the proviso successfully threads the needle between the demands of legitimacy and the demands of mutual respect because it continues to lack the necessary self-reflexivity to hold these conflicting impulses at bay. For all the reasons discussed in this section, I believe the proviso (as I have defended it, though perhaps not as Rawls did) is indeed capable of accomplishing this task.

²⁶ Miguel Vatter, "The Idea of Public Reason and the Reason of State," pp. 259-260

What we need, though, is an explanation of how public reason changes and so can adapt to allow novel reasons, but in a way that does not itself violate the strictures of public reason. The importance of Rawls's claim about an *ideal* of public reason is that it provides for the fact that we might one day adopt a form of public reason that fits with what, substantively, is just. The abolitionists...by arguing in terms of their ideal...might still be considered to be honoring public reason, broadly construed. But this, I have argued, is wrong: We do not honor public reason by breaching it.²⁷

Flanders accurately describes the effect of the proviso, but draws completely the wrong conclusion. To him, its breach of normalcy represents nothing but danger, and must be rejected. But this is backwards. In fact, *there is no other way to honor public reason except in its breach*. Its vitality is founded on its own disruption; it is only through the constant reiteration of its boundary conditions that the political order may generate new constitutive meaning. Without recurrent threats to its stability, the formal unity of politics will grow increasingly abstract and detached from the concrete historical conditions of its subjects. This is the danger of bureaucracy: that its institutional memory will neutralize the experience of historical change, sand away the rough edges, and produce a frictionless world of an eternal *now*.²⁸ As we observed in the Hart/Dworkin debate, such neutralizations cannot completely eliminate the exception, but they can formalize it, to the point that it ceases to generate political valence.

To sanitize public reason, then, is also to suffocate it. The breach must be both feared and embraced, because it provides the entry point for revitalization as well as destruction. The dissident voice that insists on being heard invites a response that

²⁷ Flanders, "The Mutability of Public Reason," p. 200.

²⁸ Jürgen Habermas, *The Theory of Communicative Action, Vol. 2*, trans. Thomas McCarthy (Cambridge: Polity Press, 1987), pp. 362-363.

cannot be prefigured. By its very nature, it poses a marginal question—neither wholly external (and therefore antagonistic to humanity itself) nor wholly internal (and thus neutralized before it can be heard). It poses a political problem and demands a decision. Disruptions of this sort challenge the political community by forcing it to *decide* which condition applies—whether to treat the disruption as unlawful or as exceptional. That choice is the essence of politics itself, and it cannot be made except in relation to the possibility of a breach. Therefore, the provocation of unreasonableness generates the constant motion necessary to drive political life, the friction that draws the idea of justice out of abstraction and into the concrete activity of judgment.

This potential for internal disruption exists as a specter in liberalism's political institutions, often restrained by the ideology of secularism but never wholly extinguished. It lingers in every decision, but is dispersed via the pluralization of judgment, which replaces a single sovereign decision with a plethora of tiny ones. The fact of unreasonableness is the persistent and enduring *limit* of that pluralizing move, usually hidden but impossible to eradicate. The radical function of the proviso is to *express* the unreasonable as a subject of potential understanding located within the breach of public reason. It recognizes that the distinction between reasonable and unreasonable cannot simply be assumed but must be performed. And this only occurs through encounters with the 'unreasonable' in which the content of reasonableness itself is at stake.

Inclusion and exclusion: fugitive justice or civil disobedience?

The radical potential of discontinuity is teased as far back as *Theory*. There, Rawls notes that a “theory of justice must work out from its own point of view how to treat those who dissent from it.”²⁹ Part of this process entails distinguishing outright rejection from internal critique. The former, which we might call conscientious refusal, asserts a contrary set of values as justification for violating the strict terms of the law. It does not directly make a claim on justice, but simply states that one’s own moral doctrine does not permit compliance with the policy.³⁰ The latter, civil disobedience, is internal to the values of a social order. It seeks to “address the sense of justice of the majority,” to challenge particular policies that it has enacted.³¹ Put simply, refusal violates the law because it is *immoral*; disobedience violates the law because it is *unjust*.

In either case, Rawls thinks, a well-constructed theory of justice is obliged to acknowledge the value of such dissent and make limited accommodations for those who pursue it. In the first example, while non-compliance is technically unlawful, the general respect due to all participants in the social world (those who on balance affirm the principles of justice) permits exceptions as long as they promote a larger social good. As an example, Rawls points to pacifists, who he thinks may legitimately refuse mandatory military service because the broad strokes of pacifism comport exceedingly well with the principles of justice, and because pacifists provide a moral conscience that challenges society’s tendency to err in favor of aggressive military

²⁹ Rawls, *Theory of Justice*, p. 370.

³⁰ Rawls, *Theory of Justice*, p. 369.

³¹ Rawls, *Theory of Justice*, p. 382.

policy.³² There is a clear resemblance between this argument and the proviso; in both cases Rawls emphasizes the potential for external moral arguments to bolster the internal structure of justice. Similarly, the case for treating civil disobedience differently than mere unlawfulness bears a strong resemblance to what would later be called the inclusive view. The act of disobedience, Rawls thinks, contributes to the larger practice of legality even as it violates one particular rule.³³ In effect, it pits two competing principles against one another: one says that justly formed law must be followed while the other says that good-faith disagreements about the obligations of justice must be given serious consideration.

The problem with both of these formulations, however, is that they presume a prior commitment to the principles of justice but provide no mechanism for uniting that commitment with the act of resistance. And this is precisely what the proviso, as I have interpreted it here, offers. It collapses the distinction between disobedience and refusal and demonstrates a new possibility: a *fugitive* form of political engagement that is neither internal nor external to the law but instead is an eruptive, threshold condition of legality.³⁴ Such claims are not pleas for recognition (requests to incorporate one's voice into the harmony of accepted public reason) but instead are

³² Rawls, *Theory of Justice*, p. 370.

³³ Note that this treatment of disobedience is still committed to the intrinsic value of law. One may respect the principles of the dissident and value her contribution, but this respect does not erase the opposing value of the law being challenged. This must be compared with, for example, Martin Luther King Jr.'s insistence that one has an overriding duty to disobey unjust laws. Rawls desires to *affirm* this belief without *ascribing* to it.

³⁴ I use the term 'fugitive' to describe this sort of engagement in order to invoke elements of Sheldon Wolin's work on fugitive democracy. Cf. Sheldon Wolin, "Fugitive Democracy," *Constellations* 1, no. 1 (Dec 1994). I draw this analogy with some trepidation, given Wolin's scathing critique of *Political Liberalism* (discussed in chapter 1). However, the aspects of political liberalism emphasized here access important components of this fugitive idea, while still preserving some of the institutional structure of Rawls' argument.

assertions of dissonance and crisis. In Rawls' approach, unreasonable persons may still deserve acknowledgment as long as the form of their difference is ultimately non-threatening. The fugitive reason does not meet this test. They must be engaged, not because they represent an acceptable form of unreasonableness but instead because they call into doubt the existing structure of its limits. The threat of the fugitive is, quite simply, the possibility that those asserting the mantle of reasonable political judgment *could be wrong*.

With Rawls, the attempt to differentiate tolerable and intolerable forms of the unreasonable simply reintroduces the contingency of liberal judgments and throws political liberalism back onto the horns of the old dilemma. This approach does not suffer the same defect. It acknowledges the potential legitimacy of certain forms of unreasonable attack, but it does so through a recursive judgment against its own attempt to translate 'the idea of reasonableness' into the concrete practice of reasonable political order.

Political liberalism, understood in this way, cannot escape the violence of its exclusionary judgments, nor can it accept the introduction of unreasonable political identity. But it can *express* the necessity of this exclusion as an active, historicized practice, rather than as a decontextualized universal. Its normative structure imposes sharp limits on the incorporation of the unreasonable, as it must. After all, unreasonableness is the core danger against which political order arranges itself. But this exclusion is necessarily contingent because its stability is not transcendent but is

dependent on the encounter with such fugitive eruptions. And, in every such encounter, *both* identities are called into doubt.

This argument provides a different perspective on the role of fugitivity within liberal democracy. In Wolin's account, the fugitive expression is *essentially* anti-institutional. Constitutional structures exist primarily to restrain disruptions, to channel disagreement, to manage interests, while the "fugitive character of democracy" is antithetical to such principles.³⁵ While this binary is accurate in broad strokes, it risks eliding the crucial interdependence of these elements. The spirit of fugitivity is not purely negative, articulated against the order demanded by constitutionalism, but also carries its own sense of constitutive structure. Fugitive eruption, that is, does not simply seek to disrupt institutions; it also attempts to construct new institutional linkages.³⁶ To destroy is also to enact, just as to build is also to eradicate. The relationship between institutional order and fugitive attack is therefore *both* antagonistic *and* co-productive. Through its disruption, the imaginative connection between legal unity and political unity is temporarily detached, but not completely separated. Political liberalism, enfram'd by a strong concept of reasonableness, seeks to describe the manner in which these two forms of unity are reconstituted.

Obviously, not every revolutionary act is amenable to incorporation. The point is not to re-impose a concept of terminal human unity underneath the articulation of

³⁵ Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought*, expanded edition (Princeton: Princeton University Press, 2004), p. 602.

³⁶ See Jennet Kirkpatrick, "Democracy on the Lam: Crisis, Constitutionalism and Extra-legality," *Contemporary Political Theory* 11, no. 3 (2012), pp. 266-269.

political difference. Quite the contrary. The value of political liberalism is its capacity to acknowledge the persistent incongruity of dissidence, and to build its constitutive principles *out* of that lingering fact. It drags the foundational ideal—the utopian premise of constitutional order—out of its transcendental mode and restores it to history. This ensures that if a doctrine is truly unreasonable, the swift and decisive exercise of force will be possible, but will be guided by material necessity, not by transcendent ideals. In this formulation, the concept of reasonableness provides a technique for disentangling dissidence and *ressentiment*; the former stems from genuine and essential disagreement while the latter represents nothing but aggrievement. The threat posed by dissidence is experienced as a challenge and is potentially transformative, while the threat posed by *ressentiment* is far more insidious and far more destructive. It negates the possibility of justice.

This offers new perspective on the abolitionist positions described above. It is no longer necessary to place them wholly inside or outside public reason. They instead represent the possibility of *movement* in this marginal space. Therefore, their specificity may be respected from within a schema of liberal value by seeing it as affirming a *new* principle of justice in the name of the community that is yet to come. This respectful engagement levels an accusation against the existing political community and instigates a crisis of faith. In effect, it politicizes the implicit judgment on the line between public and private reason, and calls upon the political

community to rearticulate that line.³⁷ Both inside and outside law, it is an *internal exception*, which draws the *practice* of law up short and in doing so disarticulates legality and legitimacy without thereby abandoning the possibility of justice.

Frederick Douglass is not redeemed because his reasons confirm the preexisting truth of liberalism. If anything, the opposite is true. His view grows into reasonableness as the community of public reason comes to understand itself as falsely constructed. Douglass is redeemed by post-facto locating him within the community of political liberalism but only to the extent that this community is *also* redeemed through its capacity to eradicate the unjust exclusions that had previously organized it.³⁸ That eradication does not happen simply through shifting the laws—the 13th amendment, Reconstruction, the Civil Rights Act, etc.—but also takes place in the process of justification itself. Justice is not achieved when the law matches moral necessity; justice is the *process* through which the horizons of a political culture are shifted and rearticulated.

Reasonableness and political identity

Unreasonableness, understood in this context, is no longer an antiseptic and depoliticized problem. Instead, it represents two far more extreme possibilities: destruction and reconstruction. When faced with the persistent danger of the

³⁷ We will return to this idea in the following section, examining it through the lens of Bruce Ackerman's concept of the 'constitutional moment.'

³⁸ This actually squares quite closely with Zerilli's own arguments. See her statement that "the claim to 'we the people' does not call upon an already existing subject formed through consensus on basic political principles only to affirm them. Rather, it is a form of speaking and judging that unsettles how we understand those principles and the apparent coherence of the 'we' that denies its contingent and exclusionary character." Zerilli, "Value Pluralism and the Problem of Judgment," p. 19.

unreasonable and illiberal, the political community has two options. First, it may exert coercive force to sustain itself against their provocations (and thus mark them as enemies) or it may incorporate them (and thus redefine itself). The crucial feature of political liberalism is its ability to acknowledge *both* possibilities and to treat each as integral to the formation of its political identity.

In the first case, its banishment is *particular* and *decisive*, never universal. Where the decision is made to exclude (to mark the disruption as unlawful), it is an *active* choice to reiterate the barrier between interior and exterior. This results in the exclusion of some elements but does so within the context of an ideal of reasonableness grounded in humility, in the sense that *it could have been otherwise*. This temporal discontinuity lingers as the condition through which judgment is possible at all. As a result exclusion is decisive but never final, because it cannot be extracted from its historical condition. The limit is permanent, until it ceases to be so.

In the latter case, inclusion is never simply toleration—the grudging acceptance of unreasonable doctrines provided that they remove themselves from public deliberation—but always indicates the process of coming to understanding (*verstehen*).³⁹ Such inclusion is always poised against a background of potentially cataclysmic change, and this possibility creates a space in between two poles. Dissident voices are therefore no longer constrained by the binary of toleration and holy war (depoliticized acceptance or radical opposition). They may instead pursue

³⁹ See Hans-Georg Gadamer, “Hermeneutics and Logocentrism,” in *Dialogue and Deconstruction: the Gadamer-Derrida Encounter*, p. 118.

the goal of revolutionary redemption, which challenges the structure of public reason from within.

Either response collapses the wave of function of the disruption and replaces it with a line of demarcation. In doing so, it constructs a new political unity. That is: it binds disparate identities together via the application of political *violence*. This is true even in the inclusive case. The incorporative act cannot be detached from its exclusionary basis; understanding always entails loss, as ambiguity fades and is replaced by order. The recognition of another as reasonable is meaningless unless framed against the continued risk of the other who remains *unreasonable*, or the possibility that you yourself are committing an unreasonable exclusion.

In this description, I am guided by Habermas' account of the "dual character of legal validity."⁴⁰ Validity may be measured either in terms of legality and legitimacy. Both are true depictions, but they are not reducible to one another; they exist on dual tracks and may only be regarded from different points of view.⁴¹ However, I differ Habermas in one very important respect. For him, these aspects of legal development are *essentially* distinct, and their unification in law is always grounded in that conceptual difference. But this account erases the *exceptional* character of their asymmetry, which is not located externally but is an internal feature of justice itself. That is: the different tracks of democratic order (its factual and its normative aspects) are not objectively-determinate distinctions that exist 'out there.' They are discontinuities within the act of reason.

⁴⁰ Habermas, *Between Facts and Norms*, p. 29.

⁴¹ See Habermas, *Between Facts and Norms*, "Chapter 1 – Law as Social Mediation between Facts and Norms," particularly pp. 28-34.

To explain, we must look to Habermas' accusation that political liberalism pursues a strategy of avoidance in the face of moral reason. This is driven, he believes, by the concern that opening up public discourse to normative questions will endanger the sanctity of private morality by exposing it to the burdens of public justification.⁴² But the dual structure of deliberation renders this fear groundless. To open the discursive process to full engagement does not erode the stability of public reason because "deliberative politics proceeds along two tracks that are at different levels of opinion- and will-formation, the one constitutional, the other informal."⁴³ This means that the boundary between public and private individual reason may be preserved on one track—at the level of institutional protections—even while it is called into doubt on the other. And over time, the border may shift, but only "after a public 'struggle for recognition' can the contested interest positions be taken up by the responsible political authorities, put on the parliamentary agenda, discussed, and, if need be, worked into legislative proposals and binding decisions."⁴⁴

This account is quite similar to Rawls' argument from background culture, but its weakness is slightly different. Where the argument from background culture suffered from the positivist limitation on the scope of justification—what takes place is the background culture cannot be regulated *by* public reason—Habermas offers a discourse theory that *precedes* the split between law and morality, and therefore can

⁴² Habermas, *Between Facts and Norms*, p. 312.

⁴³ Habermas, *Between Facts and Norms*, p. 314.

⁴⁴ Habermas, *Between Facts and Norms*, p. 314.

treat them in a unified fashion without collapsing their distinction.⁴⁵ But as we saw in the discussion of Dworkin, every attempt to precede morality is itself a moral claim. This means that discourse is not an independent force between law and morality, but is simply another iteration of the doubt posed by moral reason. The mistake of both Dworkin and Habermas is to regard this as an unqualified negative. The introduction of totalized risk, of systemic disorder *is* deadly. But it is also the only means by which the system may be revitalized. This is the lesson of Frederick Douglass, whose scathing critique cannot be reduced to a ‘struggle for recognition,’ as Habermas says, since it is an attack on the process of recognition itself.

And it is only through such attacks that the underlying unity of political order may be understood. Understanding is always incomplete, because it is called into existence through the experience of its own disruption, but this incompleteness is an *internal* feature of law rather than an *external* reality. Differences are therefore the effects not the causes of political judgment.

It is important to be clear on this point. I am not asserting a ‘pre-political’ unity, nor making a linear claim that unity precedes disorder in historical time. Instead, I am appealing to the Kelsenian idea of the *grundnorm*, the possibility of unity that is intrinsic to the experience of disruption. This idea of unification in the encounter with difference is a form of politics built on the foundations of its own exceptionality, which treats the dual structures of democratic order as effects, rather than causes, of justification. Accordingly, the binding grammar of political life is

⁴⁵ See Habermas, *Between Facts and Norms*, p. 79, where he discusses the limitations of Rawls’ attempt to distinguish political justice and morality. This, Habermas thinks, loses track of the enduring importance of distinguishing *law* and morality.

necessarily in a perpetual state of flux. ‘Who counts as reasonable’ is always an open-ended question. The capacity for continued promulgation of communal identity qua identity requires ongoing engagement with reasonable disputants. The public of the reasonable does not exist prior to its articulation—it comes into existence *by being spoken*. Thus, only the flux of political debate can provide confirmation of continued reasonableness. Without this sort of conflict played out in the field of public reason, the moral good of political order will calcify and lose its constructivist force.⁴⁶

In effect, reasonableness must test itself against the possibility that **it is its own enemy**. Given this lingering doubt, the decision to exclude is always experienced as a wound. It marks both the incapacity of reason to transcend gaps in understanding as well as the hope for overcoming this limit in the time that is still to come. Reasonable political communities operate in perpetual motion: justice can never be certified but must always be sought. This endless search for justification provides the basis for decisions—rather than, as in Schmitt, decisions generating the capacity for justification. The community of political liberalism therefore regards its enemies as real enemies, not as depoliticized outlaws against humanity.

Once again, we can find hints of this potential in Rawls, particularly in his claim that “the present enemy must be seen as a future associate in a shared and just peace.”⁴⁷ Such a relationship is possible because political liberalism establishes a firebreak between the uniquely political value (reasonableness) and all other non-political values. The present enemy is not perceived as immutable threat, because the

⁴⁶ Rawls, *Justice as Fairness*, p. 27.

⁴⁷ Rawls, *The Law of Peoples*, p. 101.

characterization of its difference is not permitted to expand beyond the simple marker of ‘unreasonable.’ Since political liberalism is grounded in the premise that difference is permissible, even necessary, it does not mark its enemies as existential threats by the mere fact of their heterogeneity. This is the true essence of reflective equilibrium and is a stark contrast with Schmitt’s treatment of the enemy as “in a specially intense way, existentially something different and alien.”⁴⁸

This difference has important implications for stability. Because the Schmittian political offers no normative case for sustaining the fact of legitimacy, it is always at risk of disintegration. Unreasonable political orders fuse together legality and legitimacy via the decisive act of generating political (friend/enemy) distinctions. As such, their concepts of legality must always be specific and thus cannot extend beyond the scope of that specific community’s values. When faced with conflict, such a political order is left with only two options: either descend into a Hobbesian chaos as competing factions rip it apart, or develop into a new community of theological clarity. Politics is therefore defined by a series of lurching shifts between these poles: as each sovereign order loses its capacity to hold together, it will be reft with revolutionary violence until a new order is constructed. And this is a never-ending cycle; today’s friend may be tomorrow’s enemy.

Political liberalisms, in contrast, all share a compatible frame of reference: reasonableness. Though this does not imply any universal content (at root: political liberalism is, informed by Wittgenstein, simply what we do), all forms *will* bear a

⁴⁸ Schmitt, *The Concept of the Political*, p. 27.

family resemblance of sufficient clarity that reason will be possible among them. This provides the stable point of reference on which legitimacy can rest, even across major shifts in political institutions, practices, and values. Where Schmitt sees danger in the deep convergence of fact and norm, we can now perceive an opportunity. Rather than fleeing the essentially normative form of the decision and seeking certainty in concrete orders, we may affirm the decision *as* norm. The full articulation of this argument requires taking seriously the concerns of both Schmitt and Wittgenstein. This concept of the political draws from Wittgenstein a sense of constant flux and the impossibility of generating stable unity. Family resemblance is the limit to which communal self-identity can be unified. Even a well-ordered political community of liberal values cannot agree on any definitive content. However, while philosophical certainty is beyond the reach of articulation, a narrower concept of unity *is* possible: a political concept. This is found in the decision of a community to *make* itself communal by marking certain elements as exceptional.⁴⁹ By clarifying these limits, political decisions establish the terrain on which homogenous identity is possible.

⁴⁹ Hannah Pitkin phrases this relationship well, noting that “what characterizes political life is precisely the problem of continually *creating* unity, a public, in a context of diversity, rival claims, unequal power, and conflicting interests.” Hannah Pitkin, *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (Berkeley, University of California Press, 1972), p. 215.

III. Crisis and restoration: institutional change

We now have a working concept of fugitive eruptions and reincorporation, but the institutional context remains unclear. How is the conceptual development of reasonableness (and its attendant effects on both public reason and the background culture) materialized? It is not enough to theorize a better deliberative relationship; those terms must operate in concrete fashion to organize political life, to mobilize the coercive force of law. They must be made concrete. Here, the work of Bruce Ackerman on ‘constitutional moments’ is a tremendously helpful starting point, because it utilizes the same premise of temporal fluidity to explain the emergence and incorporation of fugitive elements.⁵⁰ While Ackerman’s approach does not capture the full complexity of political development, it provides a powerful skeletal structure onto which further elements may be layered. This section explores the strengths and weaknesses of his approach to legal development.

Constitutional moments

For Ackerman, constitutional moments occur when the people come together to enact fundamental changes in the basic structure of law. Such change works on a level beneath the normal, day-to-day operations of law. They reflect the power of the people, collectively organized, to effectively *re-constitute* democratic order.⁵¹ The two obvious examples in American history are the founding and the Civil War/Reconstruction. But, Ackerman insists, a full accounting must also include the

⁵⁰ His initial formulation of this argument is in Ackerman, “Constitutional Politics/Constitutional Law,” while the full articulation has been developed over the three volumes of *We the People*.

⁵¹ See Ackerman, “Constitutional Politics/Constitutional Law,” pp. 455-460.

New Deal. While this period produced no formal amendments, it fundamentally altered the scope and ambition of political power. *This* is the defining feature of a constitutional moment, and is found in each of the three examples.⁵² The Civil War Amendments, for example, were important not simply because of the explicit rights that they created but far more crucially because they reflected a cataclysmic shift in the scope of political legitimacy.⁵³

The potential for constitutional moments arises out of the dualistic structure of American constitutional democracy. In contrast with monistic models, in which sovereignty is ever-present and the law is quite simply the stated rules of the authoritative body, dualistic democracy defers the exercise of sovereign power. The sovereignty of the people is a baseline for political authority, but it is held in escrow.⁵⁴ Normative order sustains itself by prioritizing arguments for order and stability over the pursuit of political absolutes. That preference for stability generates a significant gap between law and politics.⁵⁵

This model, however, acknowledges that exceptional circumstances may alter the equation. In such cases, the normative order of law breaks apart as the congealed force of sovereignty begins to crumble under the intense pressure of political conflict. We have already seen a model of such developments in chapter 3. Law provides rules for channeling political eruptions, but those formal mechanics leave space for essentially unlimited substantive reconstruction. Ackerman's unique contribution is to

⁵² Ackerman, "Constitutional Politics/Constitutional Law," pp. 490-491.

⁵³ Ackerman, "Constitutional Politics/Constitutional Law," p. 459.

⁵⁴ Ackerman, "Constitutional Politics/Constitutional Law," pp. 462-464. In a sense, popular sovereignty is here reformulated as a rule of recognition.

⁵⁵ This argument, of course, closely mirrors Dworkin's depiction of positivism as conventionalism.

argue that even such exceptional shifts are still contained *within* the sphere of law. These eruptions *may* be truly revolutionary but are often pitched as revisions, or even as necessary corrections to sustain the continued survival of the enduring legal order. For example, Lincoln's actions during the Civil War violated numerous explicit constitutional provisions,⁵⁶ but such decisions may be retroactively deemed acceptable since they were undertaken in the service of salvaging the basic constitutional structure itself.⁵⁷ Not all revolutionary claims against the existing institutional order take this reconstructive form—some are genuine attacks on the system itself—but many do. And these, when successful, do not destroy-and-replace the old order; they instead pursue the “constitutionalization of fundamental reform.”⁵⁸

The dualist theory of constitutional change is meant to describe the relationship between law and politics in a more effective and sustainable fashion. Such systems tend toward stability, because the empirical force of law limits the scope and potential for large-scale uprising. However, under perfect conditions the transformative capacity of the people may be catalyzed. In such cases, the systemic flexibility of dualism allows the constitutional order to bend in the wind and retain its basic organizing principles even as some elements are fundamentally altered.

⁵⁶ See chapter 3, fn 36. Ackerman also notes the troublesome terms under which the Reconstruction Amendments were passed. The necessary votes to bring the 13th and 14th Amendments into force were supplied by southern states, under the threat of being denied the right to seat Senators. Through this maneuver, the states were treated both as the representatives of constitutional power *and* as usurpers of legitimate authority. See Ackerman, “Constitutional Politics/Constitutional Law,” pp. 500-502.

⁵⁷ The passive formulation of this sentence is important. As we shall soon see, *who* undertakes this judgment on necessity, and *when* they do so, is absolutely crucial.

⁵⁸ Ackerman, “Constitutional Politics/Constitutional Law,” p. 511.

Applying the framework of the Hart/Dworkin debate to this model, the dualist position certainly hews closest to the positivist approach. The durable core of law, which holds true even as its components are altered, is essentially a rule of recognition. It provides the formal structure through which changes are filtered. This is a soft positivism, though, insofar as it clearly acknowledges the important role played by principles. The powerful shifts that take place in these constitutional moments *may* include formal changes to explicit rules (i.e. – Article V Amendments) but they also include changes in core *values*. The innovative character of Ackerman's argument is to describe how alterations of core principles are fundamentally restorative. The mixing of rules and principles, by this account, is not a troublesome necessity of legal thought. Instead, the melding of the two is a positive feature, a legal device for checking against the limits of a simple 'model of rules.'

This is possible only because of the dualist's textured approach to temporality. To illustrate this point, Ackerman explicitly draws Dworkin into the conversation, referring to those like him who identify moral principles that exceed the bare historical fact of constitutional development as defenders of 'rights foundationalism.' This approach differs from both monism and dualism because it treats law as the product of transcendent reasoning rather than the situated and constructed function of ordinary life.⁵⁹ Comparing these three models allows him to characterize the unique value of reading constitutional development through a dualist lens. It is superior to the

⁵⁹ Ackerman, "Constitutional Politics/Constitutional Law," p. 466.

monistic and foundationalist approaches because each of those founders on the dangerous shoals of *time*:

The monistic democrat worships instead at the altar of the present; he supposes that he knows all he needs to know about democratic rule if he simply consults the last statutory word approved by Congress. The rights foundationalist seeks to escape the limits of time altogether; he hopes to define some ahistorical state of nature or original position to serve as a constitutional platform from which to pass judgment on history's passing show.⁶⁰

This aligns closely with the arguments of the past three chapters, which have characterized the relationship between judgment and time as crucial to understanding the force of law. Ackerman's optimism about dualism is also characterized in terms we have already discussed: "the dualist begins with neither the will of the present legislature nor the atemporal reason of some utopian assembly. Her aim is the kind of situated understanding one might reach after a good conversation."⁶¹ The fluid nature of this idea is promising. But the question remains: does such situated understanding differ meaningfully from the Gadamerian experience of fused horizons or a Habermasian deliberative engagement?

Revolutionary reform

Whatever hope it offers depends on its ability to alter the terms of political redemption. The problem with all other approaches is that they mistakenly seek to wash away all sin—their universalistic attitude toward value leaves them incapable of grappling with their own exceptional structures. Every exception must either be cast

⁶⁰ Ackerman, "Constitutional Politics/Constitutional Law," p. 477.

⁶¹ Ackerman, "Constitutional Politics/Constitutional Law," p. 477.

out or integrated. The theory of constitutional moments, however, suggests a third possibility in which exceptions are redeemed by acknowledging them as true and genuine exceptions.

Such exceptions are generated when disagreements over the nature of the constitutional order rise to the level of existential conflict. In the face of such crises, both sides appeal to the broad mandate of popular sovereignty and thus transform a legal dispute into a political one. This sense of ‘political’ is therefore very different from the standard liberal concerns about politics intruding into core values. In such contexts, neutrality is no longer available. To preserve the existing order is just as much of a political commitment as the demand for change. The resolution to such a crisis, therefore, cannot claim to uphold a perfectly continuous legal order. All that it may claim is that the actions undertaken during this transformational moment were *necessary*, that is: they were in service of the new defining principle.

This sort of necessity must be distinguished from the more common treatment, which places necessity and legality into conflict. To say that the action is necessary in this sense is *not* to simply prioritize politics over law. However, neither is it accurate to describe necessity as wholly *interior* to law. That is the problem with Hart’s positivism: it can accommodate revolutionary shifts without destroying the coherence of law, because ‘law’ to the positivist is *nothing but* the coherence of practice. And finally, necessity must *also* be distinguished from the framework of morality, which discovers necessity in the unity of value à la Dworkin. ‘Necessity’ as we discuss it here cannot be reduced to any of these limited functions. Instead, it describes the

potential for actions to be *legitimate-but-not-legal*. This claim enacts a de facto and retroactive legalization, but it does not attempt to re-write history by arguing that the mobilizing value was there at the time, or was inherent in the structure of the constitutional order.⁶² Indeed, the entire justification for the extra-legal actions is that they were necessary to inculcate this new sensibility. By framing the argument in this fashion, one cannot help but admit the contingent and historically specific nature of the law's foundational principles. They determine the basis of value within the context of their affirmation, but that context is inherently limited. It could have been, and indeed once was, different. This fact does not change the nature of the obligations established by the new order but it does *politicize* them. They cannot be valorized as the ideal emanations of a continuous constitutional order because the underlying basis for their support is situated within the possibility for radical change.

In this way, the new and old are stitched together, with neither being entirely dominant. The sovereign eruption calls the transhistorical picture of law into doubt (and politicizes its effects), but its sovereign function is still experienced *through* the structure of law. It is the impetus for constitutional development within a larger constitutional order, not the revolutionary imposition of an entirely new rule of recognition.⁶³ Importantly, this continuity cannot be secured at the moment of crisis. The recuperation of law takes place in the aftermath as the political community reflects on the scope of change and re-establishes the normative structure of its commitments.

⁶² See Ackerman, "Constitutional Politics/Constitutional Law," p. 458, on the New Deal being a genuinely new creation, not simply a return to the 'proper' constitutional principles of the founding.

⁶³ Ackerman, "Constitutional Politics/Constitutional Law," p. 474.

This post-facto rehabilitation of the shift is what distinguishes dualistic systems from monistic or purely political approaches. In the aftermath, a normative community re-establishes itself—not through a process of decisive friend/enemy sorting but through the slow accretion of commitments to affirm the new principle as legitimate. For Ackerman, such accretion is usually defined by a particular moment (a ‘switch in time’) where the dissenting elements “decide that further resistance will only lead to institutional destruction rather than electoral vindication.”⁶⁴ This choice is critical because it signals that the period of existential risk has passed. The value of sustaining the system now overwhelms the parochial concerns of the interested parties. They are not required to endorse the particularities of the new order, but they must acknowledge it as valid law and abandon efforts to fundamentally remake the system itself. This is the *legitimization* of new principles: when its antagonists return to the fold and view it as *bad law* rather than as *illegal usurpation*.

In short, this sort of constitutional reform only takes place when it rises to the threshold of existential necessity, and only becomes reintegrated when it is calmed to the point of general normative acceptance, if not universal agreement. In this way, the law is renewed and its contours are molded to fit the terms of its present circumstance. Its vibrancy is active; it is not simply the echo of past legitimacy.

⁶⁴ Ackerman, “Constitutional Politics/Constitutional Law,” p. 509.

The limits of constitutional moments: exceptions and the everyday

While there is much to recommend this approach, further development is required. The lingering gap in Ackerman's approach is his fixation on the discrete and limited nature of constitutional moments. While he acknowledges that small changes occur in the daily churn of political life, the system is heavily weighted against significant shifts. Transformations are rare, and require massive public mobilization.⁶⁵

The reasons for this limit are straightforward. Because constitutional moments instigate shifts in 'higher law,' they must be rare and exceptionally difficult to mobilize. Their regular occurrence would undermine the core premise that law is governed by rules rather than arbitrary decisions.⁶⁶ It would effectively reduce dualism to a de facto monism as the pretense of genuine normative structure fades under the onslaught of persistent disagreement. We observed a variation of this problem in the arguments for legal positivism, where authoritative resolution is necessary to prevent constant re-litigation of old battles. This is also similar to Rawls' concern that the core guarantees must be taken "off the political agenda" and put "beyond the calculus of social interests" or else risk perpetuating "the deep divisions latent in society" and betraying "a readiness to revive those antagonisms in the hope

⁶⁵ See Ackerman, "Constitutional Politics/Constitutional Law," pp. 486-488.

⁶⁶ Ackerman, "Constitutional Politics/Constitutional Law," pp. 461-462: "[T]he dualist constitution tries to prevent the daily decisions reached by government from being confused with the rare decisions reached by the People. Despite the ongoing temptation to exaggerate their authority, constitutional officers of government are not to presume that an ordinary electoral victory has given them a mandate to overturn considered judgments previously reached by the People. If they wish to enact laws that overrule previously established principles of higher law, elected politicians must take to the specially onerous obstacle course provided by a dualist constitution for this purpose. Only if they succeed in mobilizing their fellow citizens and gaining persistent popular support, despite opponents' repeated efforts to block their initiatives, do political leaders finally earn the authority to proclaim that the People have changed their mind and have given their government new marching orders."

of gaining a more favorable position.”⁶⁷ In all of these cases, the general principle of stability is lexically prior to the idea of perfect decision-making.

The problem is that this case is aspirational rather than descriptive. As we have seen in the discussion of the proviso, the terrain of ‘normal’ political life is strewn with landmines, issues of seemingly marginal importance that suddenly may catalyze radical disagreement. Some may be quickly neutralized, others may simmer indefinitely, and some may provoke systemic chaos of the sort found in a constitutional moment. But placement on this spectrum cannot be analytically defined. Resolution is always *first* a material phenomenon; only after the fire has been quenched may the retrospective task of redemptive theorizing begin.

But, in Ackerman’s argument, this recuperative analysis only occurs in a limited set of genuinely decisive cases. For the majority of cases that remain below this threshold, there will be no such re-wiring, and the scope of political life may drift away from its founding principles inch by inch. Such slow-motion revolution cannot be resolved by the straightforward dualistic analysis, which grasps for authority in all-or-nothing movements that demand resolution. Without such nexus points we are faced with persistent simmering conflict, in which the watchword is sclerosis, not cardiac arrest. Examples abound: the growth of the security state and the promise of an unending ‘war on terrorism,’ the financial collapse of 2008 and its aftermath, increasingly dysfunctional legislative institutions and expanding executive power.

⁶⁷ Rawls, *Political Liberalism*, p. 161.

Each of these examples resides in a gray area between normal operations and constitutional disruption. They are low-level crises, not constitutional moments.

Such problems are minor in a sense; individually, they pose no meaningful threat to the basic institutions of western democracy. However, this absence of systemic risk also neutralizes the responsiveness of those same institutions. Since they are built on dualist premises, they respond very slowly (if at all) to middling danger. After all, the dominant theme of dualist democracy is the peril of over-politicization. Absent a genuine constitutional moment in which political life mobilizes aggressively, with intent and force, there is relatively little space within institutions for living and breathing political action. As a result, a great deal of policy is now conducted outside the strict confines of the law, in circumstances where the necessity of management has proceeded at a much faster pace than the reorganization of fundamental capacities.⁶⁸

The most obvious examples of this phenomenon are found in the area of security politics, where the specter of terrorism (a constant, low-level risk to be managed) has replaced the bipolar struggle of the Cold War. This has produced a world built on zones of indistinction—neither wholly inside nor outside, controlled by neither chaos nor rule.⁶⁹ These zones are conceptual, marking the imaginative space of political and legal order, but they also manifest in concrete, material locations with Guantanamo Bay and Abu Ghraib being merely two of the most notorious

⁶⁸ William Scheuerman, "Liberal Democracy and the Empire of Speed," *Polity* 34, no. 1 (Fall 2001), p. 57.

⁶⁹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), p. 19.

examples.⁷⁰ The security state encompasses torture, extraordinary rendition, domestic surveillance, foreign interventions, targeted killings conducted via drone strikes, and far more. Importantly, none of these practices are being framed in direct violation of legal order. The executive branch consistently seeks to deploy both constitutional and statutory justifications, referencing the broad powers granted by the Authorization for Use of Military Force as well as the general theory of a unitary executive to substantiate its actions. And to draw support, it seeks the legal advice of its internal Office of Legal Counsel, rather than looking outward to the judgments of authoritative sources.⁷¹

While Congress, the Courts, and the public have all attempted to curtail these powers in limited cases, these efforts have met with limited success for two reasons. First, the form of legal restriction depends on a coherent structure of authority, but this is precisely what is lacking in such cases. Second, the motivation for legal restraint is often weak. In many cases, the other actors actually prefer to delegate the responsibility for action—even if this promotes independent legal judgments by the executive. Rather than being usurpations, such executive assertions of authority might be better characterized as filling a void of political decision. For example, the executive routinely exercises force in apparent violation of the War Powers Act, but this rarely provoke meaningful controversy because Congress simply does not wish to

⁷⁰ Derek Gregory, “The Black Flag: Guantánamo Bay and the Space of Exception,” *Geografiska Annaler* 88, no. 4 (Dec 2006), pp. 405-427.

⁷¹ Bruce Ackerman, “How to Keep Future John Yoos Under Control,” *Washington Post*, February 23 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/22/AR2010022203550.html>

press the issue.⁷² Cases like President Obama's request for military intervention in Syria in the summer of 2013, which Congress failed to provide, are the rare exceptions. Far more common is de facto delegation, where the legislature escapes both responsibility and oversight.⁷³

Examples of this phenomenon abound, and extend far beyond the War on Terror. Across a wide range of issues (economic, environmental, financial, immigration, etc.) Congressional dysfunction has created a positive feedback cycle with executive assertions of authority. The legislature is restrained by institutional design, lack of clear chains of accountability, and structural limits on its capacity to respond quickly. This produces a range of legal gray spaces, where responsibility exists but is not yet catalyzed by the apparatuses of decisive authority.⁷⁴ In effect, these are political questions that demand discretionary judgment, which therefore drives politics outside the channels of 'legitimate' justification. The resulting rules are not *contradictory* to law, but neither are they clearly internal to law.⁷⁵

Another important effect of this disjuncture between legality and legitimacy is a turn toward the politics of negation, which combines characteristics of vigilante justice and civil rebellion with the procedural mechanisms of ordinary politics in order to assert a legal right to place the system at risk. Crucially, such negative

⁷² Posner and Vermeule, *The Executive Unbound*, p. 86.

⁷³ Kenneth Mayer, "Executive Power in the Obama Administration and the Decision to Seek Congressional Authorization for a Military Attack Against Syria: Implications for Theories of Unilateral Action," *Utah Law Review* 2014, no. 4 (2014).

⁷⁴ Posner and Vermeule, *The Executive Unbound*, pp. 84-90.

⁷⁵ For more on the distinction between 'rule of law' and 'rule by law' see David Dyzenhaus, "The Logic of the Rule of Law: Lessons from Willis," *University of Toronto Law Journal* 55, no. 3 (2005), pp. 690-693.

actions remain entirely within the scope of legality, even as they pose significant challenges to the operation of legal order. Their goal is reformist in one sense—they hope to preserve the formal structure of power—while also being a revolutionary attempt to assert a new organizing truth about the *operation* of that structure. In effect, such provocateurs attempt to enact a radical change in substantive goals, to be achieved via procedural mechanisms.

We have seen a particularly aggressive strand of these tactics asserted in the United States over the past decade, where procedural blockage has at times threatened to override governance as the basic form of political interaction. Examples abound. In an effort to destroy the Affordable Care Act, Republicans in Congress have undertaken extraordinary measures, including shutting down the government in the Fall of 2013. In the Senate, use of the filibuster has grown exponentially creating a de facto 60-vote requirement for all legislation.⁷⁶ In response, calls for reform of the practice have grown stronger, while the so-called ‘nuclear option’ was eventually triggered on the limited question of appointments.⁷⁷ Perhaps most troubling, the regular, necessary expansion of the debt ceiling has reached a crisis point on several occasions. While virtually everyone agrees that defaulting on existing debts would be catastrophic, this has not been sufficient to force straightforward passage. Instead, a wing of the Republican Party has adopted a strategy that transforms the continued

⁷⁶ Ezra Klein, “The history of the filibuster, in one graph,” *Washington Post*, May 15, 2012, http://www.washingtonpost.com/blogs/wonkblog/post/the-history-of-the-filibuster-in-one-graph/2012/05/15/gIQAVHf0RU_blog.html

⁷⁷ Paul Kane, “Reid, Democrats trigger ‘nuclear’ option; eliminate most filibusters on nominees,” *Washington Post*, November 21, 2013, http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html

functioning of governmental institutions into leverage for the pursuit of their substantive agenda. In doing so, they have called attention to the precariousness of political order even in the most banal circumstances.

Typically, these examples of extralegal decision-making provoke concern about the breakdown of rule of law. Whether one adopts a positivist (focusing on the limits of delegated authority and discretion) or normative (focusing on core principles at stake even at the edges of explicit rules) perspective, the desire to affirm the rule of law against its subversion remains quite strong. But such arguments are doomed because they misunderstand the nature of these cases. These are not straightforward problems within the normal terrain of a legal community; they represent the limits of that community, the place where the overlap between politics and law erupts from the stable background. Some might wish to characterize threats of shutdown or default as unconstitutional assertions of power, but efforts threats are powerful precisely because they are legal. They therefore illustrate the core fact that legal order exists only to the extent that those upon whom it is enforced treat it normatively rather than strategically.

However, the alternative approach—to declare these simply ‘political questions’ that reside wholly outside the scope of legal judgment—is also insufficient. These cases of extralegal creep are not exceptions to the normal order of law. They are instead the *result* of political order built around denial of exceptionality. Their indeterminacy cannot be resolved, because they simply reflect the basic indeterminacy of law as such. This is the case because the strong connection

between the fact of reasonable pluralism and the politics of emergency means that persistent and dangerous cracks exist throughout the *entire scope* of political life. Emergencies are not unique, discrete events; they are simply the further-politicized function of pluralism itself. To focus exclusively on the catastrophic disruptions of ‘constitutional moments’ mistakes the tip of the iceberg for its entire bulk. Law’s terminal reliance on political legitimacy subjects it to the permanent and ongoing risk of fracture in all locations. Therefore, while Ackerman provides a valuable framework for thinking about successful constitutional change, he sets far too high a threshold for triggering this effect. He cannot account for—much less resolve—the sort of slow moving constitutional crisis that defines the true political life of a liberal democracy. We would be better served to say that legitimacy is “produced not at a magic moment but continuously and over time.”⁷⁸ Only by taking such an approach may we engage with the political function of law, which is inherent in *every* decision.

Without this understanding, we will be stuck in perpetual confusion regarding the ideas of legality and legitimacy. The first step is to discard the premise of discrete moments, hermetically sealed and lexically unique. Instead, like Dworkin, we must recognize that the priority of one reason need not erase the value of a competing reason. However, we must break with him by recognizing that such balancing emerges from cracks in the system; there is no underlying unity of value. For example, administrative rulemaking may be justified even if it exceeds explicitly authorized limits. Making this judgment does not simply mean repudiating law’s

⁷⁸ Jack Balkin, “The American Constitution as ‘Our Law,’” *Yale Journal of Law & the Humanities* 25, no. 1, p. 137.

force on this matter—this is not the replacement or supersession of law by political decision. Instead, it is a communicative act, an intervention into the linguistic community of the law that both exceeds and affirms its boundaries. It is accordingly an expression of new possibility both *within* and *without* the existing framework of legality. The mirror image is also possible. Liberal democratic systems are replete with *legal* acts that nevertheless lack *legitimacy*. Examples include: gross inequities in distribution of public goods, techniques that derail basic governmental functions in the service of parochial interests, etc. We first encountered problems like these in the Hart/Fuller debate, which clarified the danger of simply blurring the lines of morality and law. But once again, by transcending the conception of law as a specified terrain, we can perceive these cases as *political* in a new sense. The accusation of ‘illegitimacy’ is not simply a moral objection to the positive content of law but instead is a fugitive interruption of law’s normal function.

IV. Conclusion: beyond indeterminacy

In most ‘normal’ cases, the inherent indeterminacy of law lies dormant. The underlying unity of the political community will militate against dysfunction and encourage makeshift compromises. These cannot *resolve* the exceptional cases but will muffle their effect and neutralize their impact. Because of this tendency, Ackerman’s boundary between the ‘normal’ process of slow and small constitutional development and the large-scale constitutional moments is relatively secure. However, in a limited set of cases the propensity toward stability dissipates. And it is precisely these cases that pose the greatest danger—not because they are ‘emergencies’ that disrupt the smooth operation of pluralist law, but because they explode the mythos that differentiates norm and exception. These are problems that demand resolution. If they are to be kept from provoking large-scale constitutional crises they must be resolved or reintegrated, which requires a *decision* on the nature of the change that is demanded. Shall it be treated as an **amendment**, an **exception**, or a **revolution**? There is no external vantage point from which this question can be answered because the mere fact of posing the question *itself* generates indeterminacy. It is intrinsically a *political* question.

In a certain sense, this argument simply reiterates the standard political critique of liberalism: its rule of law does not restrain the exercise of power but merely grants it a veneer of authority. However, the *connected* nature of justice and legitimacy reveals a deeper set of restrictions that continue to function even in the face of radical indeterminacy. There is a form of law at work in even the most

exceptional cases, which allows its practitioners to draw a line between the *purely sovereign* and the *merely extralegal*. Both reference the principle of necessity but they do so in different ways. The necessity of the sovereign act is wholly creative; it emerges from a void and structures a new social world. Its necessity is self-evident, immanent, wholly present. The necessity of the extralegal act, however, is grounded in a principle of *justification*. It resists the impulse to argue from a comprehensive doctrine (whether that might be the primacy of utility or honor or religious orthodoxy) and instead submits to an enduring procedural restriction, *even as it seeks to remake the procedure in question*. And this is the crucial move of political liberalism. It permits the justification of extralegality only insofar as it surpasses the stratified legal forms of its particular moment **in order to constitute a new, self-sustaining concept of law**. It emerges from a void, in the wholly active present tense. But it is judged from the perspective of both past and future.

Dissident voices that speak in this way acknowledge an enduring current of legal obligation that surpasses every violation. This is true not merely in exceptional cases or at the margins (as in the case of civil disobedience) but also holds even at the core of law. Legal obligation endures, even up to the decision to shatter the framework of law itself, as long as this decision is taken in the name of the law. The act is unbound—no procedural sanction can grasp the enormity of law’s supersession—but this lack of concrete restriction is precisely what permits the reiteration of the deep legal form. Limits are exceeded in the present in order to grant

life to both its past and future forms. This is the idea we found embodied in the proviso, now expanded to fill the entire terrain of liberalism's political world.

It is important not to overstate the function of such legalized extralegalism. It does not automatically manifest in every case of legal violation, but is merely a potentiality. The *gap* within liberalism is intrinsic to its structure and cannot be extinguished. The important point noted in the discussion of Habermas, is that this gap does not exist independently from order, but instead is a unique product of liberal unification. It arises via an exception that confirms order by exceeding it. We therefore must resist the impulse toward both depoliticization as well as valorization of difference. The redemptive logic of the proviso cannot be prefigured, nor can it end the indeterminacy at the heart of liberalism. It merely offers its practitioners one route for re-constituting the political form within historical time.

This possibility is, of course, fraught with danger. It is one thing to acknowledge that the rule of law is essentially contingent (Hart, at least, would readily admit this); it is quite another to admit that law's *meaning* is fundamentally indeterminate. If it cannot be anchored to the stable function of reason (as Dworkin would like) and cannot be safely channeled through a stable structure like the rule of recognition, what ultimately makes law *law*? The answer is reasonableness, which is embedded as a standard of judgment that endures across the gap between these potentialities. It is both a legal restraint internal to the concept of law *and* a political concept that generates communal attachment.

Here we draw inspiration from Kelsen, who recognizes that the validation procedure *itself* must also be validated because every norm relies on a norm for its grounding. But unlike Kelsen, the final validation of reasonableness bends backwards; its valid procedures ultimately derive their forcefulness from the acts of individual subjects. It must be *willed* into existence by the force of moral actors. This is then the elusive bridge between ‘is’ and ‘ought,’ between fact and value, which is found not in any particular *place*, but instead is located within *time*. Judgment, undertaken in the decisive moment, is wholly *present*. It constitutes the world around the force of that decision. But in the instant of its enactment, it becomes historicized. The decision itself is wholly unregulated but its constitutive function takes form by organizing (or re-organizing) a normative order. Without this effect, the decision is pure chaos, a meaningless void. It cannot be translated into constitutive force because it cannot be understood, since all understanding must occur *within* history, as the production of normative obligations on a community of shared meaning. To understand, therefore, necessarily wrenches the decision out of its timeless *aporia*.⁷⁹

Justice is, in this sense, identifiable through the constant movement it provokes: constitutive acts that are radically unbound by preexisting meaning, but which may only be understood through retroactive affiliation with a community of meaning. Viewed as a snapshot, law is purely a normative structure—a Kelsenian system of norms chained together. However, over time, the process of reflective

⁷⁹ See Derrida, “Force of Law,” p. 24: “there is apparently no moment in which a decision can be called presently and fully just: either it has not yet been made according to a rule, and nothing allows us to call it just, or it has already followed a rule—whether received, confirmed, conserved or reinvented—which in its turn is not absolutely guaranteed by anything.”

equilibrium introduces the fact of endless churn. Law is founded on a presupposition, but the content and terms of that presupposition are themselves subject to revision and reflection.⁸⁰ This suggests that a well-formed political order is guided by the demands of justice (though it can never *be* just) to the extent that it undertakes a circular process of decision-resolution-dissipation-decision. No single piece is itself just, but the chain constitutes a medium through which the impulse toward justice manifests itself.

Because the exception is necessary for the creation of a norm, exclusion is intrinsic to the law. However, the particular content of the exception is infinitely malleable. The circular model of confirmation writes out many possibilities, but in a wholly contingent sense. Nothing is permanently excluded because nothing is permanently established, and the “struggle for reflective equilibrium continues indefinitely.”⁸¹ A series of decisions on the exception makes up the terrain of politics, and the temporary manifestations of that process constitute the law. In this context, a political theory of justice serves as a regulative idea that establishes a reasonably stable mechanism for infiltrating new concepts of the good into the apparatus of the law. It constitutes the *connective* element in the hermeneutic circle, the place where the multitude filters into a stable conception, metamorphosizes, and then re-emerges as something distinct. The result is a stable instability, where justice is imagined to be

⁸⁰ Rawls, *Political Liberalism*, p. 103. He notes here that the original position as a device of representation is not constructed, but instead simply presupposed. In this respect, it serves much the same purpose as the *grundnorm*. It is different, however, in its reflective character. The values of the legal order must justify the original position to the same extent that the original position justifies the legal order.

⁸¹ Rawls, *Political Liberalism*, p. 97.

the process of manifold *justices* engaging and hybridizing. It is a politics of promulgation rather than resolution, where truth is not a matter of universals, but instead is the product of an ever-changing public culture.⁸²

Reasonable pluralism entails a variety of equally valid notions of practical morality. Because any one might serve as the foundation for an ethical order, the purpose of justice as fairness is not to choose one among them but rather to offer a method for mediating the variety of approaches. As Kelsen insisted, this makes political liberalism a normative project, but not a moral one in its own right. It filters and sustains moral perspectives but does not itself build a moral order. However, the recursive legitimacy of political liberalism succeeds only to the extent that it abandons the search for an absolute and final concept of the law. Rawls initiates this process by seeking to detach the idea of legal grounding from the larger Kantian project of establishing an entire mode of self-justifying thought. By expanding on this idea and accepting the core theological vacancy of reasonableness, we can go further and promote a decisive model of legal decision that does not require commitment to an ever-receding sense of universality.

And in this way, we may invert the problem of debt and repudiation discussed in chapter 4. There, the indeterminacy of law creates a constantly looping set of debts that cannot be repaid but also cannot be repudiated. The sense of responsibility this inculcates is neither revolutionary nor transcendent but is stuck permanently in between these possibilities. The messianic spirit promises redemption but never

⁸² Rawls, *Political Liberalism*, p. 37.

follows through. The political concept of justice, by contrast, actively resists the impulse toward neutralization. The demand for reasonableness inserts the revolutionary fervor of a political decision into the idea of neutrality and thereby transmutes neutrality into a political concept. To affirm a neutral judgment in this context is not to evacuate its political content but rather to *express* it. In this way, it also gives life to the premise of universality, by allowing it to constitute the justificatory technique that remains outside the scope of those articulating it.

This means that reasonableness is not just the *connective tissue* in a hermeneutic circle but is also its *gyroscope*, the theological remainder that provides a shared horizon of meaning. In the same way that the overlapping consensus is formed around a set of values that everyone can affirm in political terms—even if they do not incorporate those values into their subjective moral universe—the coherence of legal order depends on its exceptional eruptions being managed in terms that may be mutually affirmed. Reasonableness meets this requirement because it exerts an organizing force across the spectrum of law and politics. It is the one durable normative premise, the single principle that does not collapse in upon itself. The enduring force of the law may both be *grounded in* and *judged by* its reasonableness.

Therefore, it may be deployed as a conceptual limit on decisions—even those that are otherwise wholly unregulated. Because reasonableness links together the decisive moment of judgment (a singularity removed from history, creative and destructive) and the restorative process of validation (enfolding over time, secular) it provides a standard for adjudicating claims of *necessity*. Only those actions that

sustain their legitimacy through reference to a shared concept of reasonableness are permitted to leverage the transmutation of necessity and justice. In this respect, reasonableness performs an analogous function to the rule of recognition for Hart—i.e. it establishes the terms through which all other elements are validated. But reasonableness bears one crucial difference. Unlike the rule of recognition, this is a *true* exception. It is not a legal concept but instead represents the limits of conceptual thought itself. Because of this, reasonableness accomplishes *both* functions of positivist legal structure. It works like the rule of recognition to organize the secular forms of legal construction by creating a cognizable and concrete frame of reference. But it also works like the *grundnorm* to theologize this experience by wrenching it out of the momentary experience of time. It both *represents* and *exceeds* the finitude of reason as a standard of judgment.

Conclusion – Justice and Legitimacy

This work has been organized around two meta-questions of politics. First, what is justice? Second, what is law? Neither question admits to straightforward answers. In contemplating them, we have been buffeted by competing obligations, binary demands that appear irresolvable: equality vs. liberty, individual vs. state, fact vs. value, and so forth. The hedgehog's argument correctly identifies a falsity at the core of the apparent conflicts—they are inevitably drawn back together by the mutual necessity for justification. And yet, the argument for unity founders on the exception: that which is neither whole nor incomplete, neither inside nor out. This exception seeps back into *all* political judgment, and in doing so crushes the argument for unity under the weight of its own absolutism.

In the case of justice, we have explored a variety of mechanisms designed to manage this risk by delineating techniques for re-establishing limit conditions—judicial discretion, legal interpretation, civil disobedience, the constitutional moment—but each founders in the same way. They lack reflexive certification and therefore cannot restrain the experience of the exception. It inevitably escapes its chains and reappears at the core of political life, rather than at its margins.

The same is true for law. In the Hart/Dworkin debate, the question 'what is law' proves to be a black hole, an inescapable vortex that crushes all other questions within its gravity well. There is a sense in which positivism is correct; we possess no frame of reference for determining the meaning or scope or value of law except by assessing the manner of its constitution. However, Dworkin is also right in part. He

correctly notes that the constituting forces of law must themselves be legalized, or else they cannot be held in place. They will dissipate and ‘law’ will cease to mean anything other than the exercise of sovereign will. These dueling obligations leave us at a loss in the project of *defining* law, but they nevertheless have helped us a great deal in understanding its *function*. Because it is obliged to serve two radically different purposes—irreconcilable and absolute—it cannot truly achieve either. Therefore, to the extent that law may be said to ‘rule,’ it does so primarily through the nullification of political questions. Law isolates and excludes by marking an appropriate range of analysis and denying the possibility of litigation to all issues that fall outside of it. In this way law becomes a tool of *delegitimation*, a device for eradicating risk rather than a platform for reconciling conflicts.

By reading these twin failures together, a moment of clarity is achieved. The argument for political liberalism in chapter 5 suggests an alternative way of characterizing unity, one that takes the exception as a starting point not a conclusion, and which derives justice *out of* such exceptionality. This approach cannot change the basic function of law—it remains trapped within its own contradictory necessities—but nevertheless offers hope. That hope takes the form of a redemptive promise, that the limits of law will be redeemed by the practices of justice.

Rule of law and the promise of redemption

But, one might still ask, why this return to law at all? Even if justice may be reconceived, does the appeal to *legal* practices not simply re-assert the constrictive

structure of depoliticization and thereby return justice to its role of normative colonialism? By this argument, law is simply the material technique through which the undecidability of justice is filtered, so that it can be deployed as the legitimating force for the distribution of capital, authority, and power. The rule of law is a chimera, an institutional trap, against which radical political necessity must orient itself.¹ The lesson to learn from the critique of exceptionality, this argument insists, is that all exclusion is *political* and therefore all action must also be politicized.

The forcefulness of this critique cannot be easily dismissed. There is no denying that the institutionalization of politics has been conducted in much the manner described here. Further, the idea of justice, no matter how noble the intentions behind it, has often provided a veneer behind which the bare operations of power could commence. Nevertheless, I am resolved to heed the warning of E.P. Thompson:

I am not starry-eyed about this at all. This has not been a star-struck book. I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.²

Here we find an argument for reading law as a *promise* every bit as much as it is a material practice. This bifurcated function, which I have treated primarily as a limit condition for its effective articulation, is also the heart of its redemptive potential.

The rule of law inevitably imposes barriers and exclusions, but this very fact is also

¹ See Wolin, "The Liberal/Democratic Divide: On Rawls's Political Liberalism," pp. 101-106; Wendy Brown, "Neo-liberalism and the End of Liberal Democracy," *Theory and Event* 7, no. 1 (2003).

² E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), p. 266.

what allows it to constitute a framework through which reconciliation and redemption may become mutually cognizable.³

This is because law's capacity to exert control over the scope of political life depends on its constant reiteration of this underlying spirit. No matter how battered and torn the principle may become, it remains a flickering ember within the structures of neutralization and administrative order. We have already seen one way in which this gap may be exploited—by seeking to employ legal means of destroying law—but these tactics may just as easily be used by those who seek to *redeem* law's promise. Law's exception is not simply an opportunity to impose order against chaos; it is also the reverse, a chance for chaos to introduce itself into the structure of bureaucratic life and affirm the promise against the fact.

It is important not to overstate this case. The limited potential for rewriting law's scripts must be balanced against the manifold ways in which it may neutralize the expression of difference. For this reason, we must sharply delineate between strategies that use law as a medium through which political exceptionality may become manifest and those that use law to smother and marginalize. The former treats law as a lever for the *expansion* of political possibility; the latter seeks to institutionalize politics and thereby restore the basic structure.

³ We find a particularly acute example of this idea in *Invisible Man*. Ellison's protagonist is haunted by his grandfather's advice to "agree 'em to death and destruction," but over time comes to understand this as a radical reappropriation of the possibility for shared value. To agree is to affirm "the principle on which the country was built and not the men...because he knew that the principle was greater than the men, greater than the numbers and the vicious power and all the methods used to corrupt its name." Ralph Ellison, *Invisible Man* (New York: Vintage International, 1995), pp. 573-575.

For some, the growth of extralegal administrative action and the ever-widening scope of executive authority are clear examples of the need to restore legal restraint. For others, law may be employed to rectify gross injustices in the criminal justice system, in economic distribution, in the permissiveness of public culture, or any number of other areas. While laudable, these impulses are also dangerous and potentially counterproductive. As discussed in chapter 5, they may very easily be coopted, turned away from the principle of law *as such* and channeled into the far more restrictive realm of law *as legality*. This distinction is crucial. To affirm law in the sense that Thompson means, to embrace its radical potential for reconciliation and redemption, requires a far broader assertion of authority than the simple appeal to legal history or positive rules. It must be grounded in the constituting spirit of law, which exceeds the bare facts of a particular order without ascending to the transcendental heavens of pure morality. It must be affirmed as law *qua* law.⁴

In light of this necessity, we might therefore declare that one essential purpose of political theory is to develop a framework for speaking to that meaning. And on this front, we find ourselves drawn back to the question of justice, that ghostly presence on the edges of law that drives us to decide but itself remains undecidable.

A political concept of justice

Political liberalism, with its emphasis on reasonableness as the unifying feature of political judgment, is uniquely suited to engage with justice and the rule of

⁴ Thompson, *Whigs and Hunters*, p. 260.

law in this context. Because it recognizes that justice is nascent in *both* the constitutive act as well as the constituted order—without being wholly located in either—it can treat the indeterminacy of legal order as an invitation to justice rather than as a demand for secular universalism. The political concept of justice reawakens the theological premise embedded within the drive to universality, experiencing it as the possibility of an external force that can stamp itself onto us. But we *particularize* this awakening by seeing the externality of this force as the *external part of ourselves*. Legitimacy, here, is the constant renewal generated by such discontinuous order, which is experienced *via* law (and therefore via the state) but is not *of* law.

Justice, in this sense, provides the mediating function between the constitutive power of the people and the constituted power of the political apparatus. This means that political liberalism is conceptually open to the possibility of radical change. Each encounter with an emergent, dissident voice opens up the possibility of exceptional, even revolutionary shifts in the normal order. Such change may touch on any aspect of the system because *no* aspect is sacrosanct except for the mediating structure of reasonableness itself. This bare limit, however, produces a far more significant restraint than it might first appear. While it inculcates a *sort* of radical openness, such openness is far less expansive than in the case of Gadamer. This is because the requirement of reasonableness organizes the entire chain reaction, even if it does not determine any specific element. If justice is the ghostly engine of political decisions, then reasonableness is the medium that *channels* its elusive form.

Therefore, while every particular substantive right is theoretically open to revision, the entire package of those rights is always organized in a consistent fashion. Moreover, the family of legal obligations cannot be changed *en masse*. Every shift in the contours of justice is always relative and may only be measured against the terms in which it was previously understood. This revised form of reflective equilibrium means that even within the exceptional state created by a dissident eruption, there is still a frame of reference for measuring the decisions that are undertaken. Those decisions are emphatically political. After all, every exclusion is political, but none is more so than the struggle over what will be included in the scope of political debate itself.⁵ But their political form does not reduce them to pure decisionism. The embedded structure of reasonableness establishes continuity from norm to exception to norm—continuity that cannot be secured through pure legality.

Schmitt teaches us that the decision may never be fully excised. Political liberalism takes that lesson to heart, and seeks to express the necessity of decision as an integral component of justice itself. It identifies the impetus of justice that catalyzes the experience of *aporia*, which infuses the decision without colonizing it, and in doing so it reflects the temporal discontinuities intrinsic to political organization. Its justice may never be wholly *present* but appears only as a messianic necessity or as a force for retroactive redemption. Therefore, to assert the force of normative order—even in the exceptional case where norms themselves dissipate—draws together *is* and *ought* as the dueling manifestations of an underlying inclination

⁵ Misak, *Truth, Politics, Morality*, p. 119.

toward justice. This re-presents the forcefulness of historical commitments, in effect renewing the oath of fealty to their precepts. And to the extent that it alters that law, this act is neither revolutionary (replacing old with new) nor reformative (rearranging the package of values without shifting their structure) but instead is *exceptional*. It asserts the concrete unity of a present political identity, whose organizing principle is fidelity to the idea of justice as redemption.⁶

That fidelity creates an enduring obligation within a political community to honor its values in the breach, *even though there is no legal obligation to do so*. This continuity, which inflects the particular legal arrangements with a transhistorical spirit, unifies the present form of law's collective constitutive order with the past and future possibilities of that law. In effect, the concept of justice is a mechanism for preserving the unity of a people beyond the precise instant of its founding by allowing a *series* of constitutive moments to become conceptually linked. It constructs a normative form through which a present-constitutive-moment aligns itself, and the durability of this form ensures a robust instantiation of political identity, even when faced with radical disjunctures.

And with this movement, the unification of liberalism's 'normal' and 'exceptional' problems is completed. The fact of reasonable pluralism is the standard case, an ever-present reminder that political unity depends on *understanding* not *agreement*. The emergency is the experience of disruption, which provokes the need

⁶ While this exerts a sort of normative force, that force does not *derive* from a norm. Reasonableness endures only because it escapes the limits of normative reasoning. In the exception all norms are meaningless, but they may still manifest through the medium of reasonableness, which draws them out of the secular world of legal order and allows them to appear as political concepts.

for redemption via the re-drawing of lines. The specific facts at stake in any given emergency are important, of course, but they only become catalyzed *as emergency* to the extent that they pose a systemic risk in this particular way. Emergencies are dangerous because they expose a fault line between law and politics—between norm and decision. But in this danger, they also represent *possibility*. To face the emergency is to risk dissolution, but it is also to accept the possibility of redemption.

Justice and legitimacy

By way of concluding remarks, I would like to comment on the role of theory plays in organizing the *practices* of justice. Over the course of this work, I have presented a challenge to the standard readings of law and justice and offered a political concept of justice as an alternative. I hope that this argument will not strike my readers as simply a castle in the sky, an abstract intervention into the world of ideal theory. Nor should it be reduced to just another critique of liberal depoliticization. If my argument is correct, these goals must themselves be joined together. I am not making an argument about what liberalism *should* be, nor am I precisely describing what it *is*. The lesson we have learned is that these two tasks must be undertaken simultaneously, even if every attempt to do so necessarily shatters on the terms of its own articulation.

I characterized this effect in chapter 3 as liberalism shuttling back and forth between totalizing theories, and thereby underwriting a deep state of depoliticizing limbo. This is correct in a sense, but the role of political theory is to describe (and

through describing to help *generate*) an organizational structure that binds these shuttling movements together. As I have argued: justice, understood as a *political* concept, is capable of establishing coherent political meaning in this relational identification. And public reason is the device it employs to organize this process.

Given this, it would be a mistake to speak about a uniquely ‘political’ form of liberalism. *All* liberalism is political. The only question is whether this political function can be successfully expressed. And this is the value of ‘political liberalism.’ It expresses the enduring doubt at the core of any given social world. The successful form of political liberalism does not exist in the abstract but must be given life through a process of sanctification. It lives on faith, and without constant renewal—which is both active and particular—it will wither and die. This means that actual experience of liberal order, its constitutive identity, cannot be described in reference to the traditional ensigns of liberalism (freedom, equality, the capacity to order one’s own life, liberty, the primacy of the individual, rule of law, etc.). These are necessarily *ahistorical* concepts; they exist outside of historical time. But the structuring of order is always enacted in a concrete temporal space by concrete subjects.

This is what distinguishes justice, in the sense that we have described it, from every other value within liberalism. Justice is the manner in which these ahistorical concepts obtain concrete historical (and therefore political) meaning. Justice enables liberty-as-concept to be reborn as the liberty of a particular, material, and political community. Justice is what rescues equality from the meaningless of its universality

and bestows a constitutive power upon it. For this reason, we make a grave error if we mistake the historical forms of civic engagement for the *necessary structure* of liberal democracy. They are simply iterations, brought to life through the concrete and everyday engagements of a political community. But for liberalism to successfully embody its political possibility, it must acknowledge the irresolvable fact of temporal discontinuity. In short, there is no ‘going back.’ The civil society of past eras has disappeared and cannot be recovered. Legitimacy must always be constituted anew, and its *telos* is recursive, not linear. Similarly, politics does not ‘end’ in the perfection of justice, the state, or the market. These are all brought into existence *and destroyed* through the operative form of constitutive judgment. The very experience of their becoming is also the experience of their erasure.⁷ Therefore, while the forms of engagement may change in fundamental ways,⁸ as long as their underlying ideational structure endures, so too will a political community of justice and legitimacy.

This community, the redemptive community of justice, is organized around a principle of reasonableness, which represents the miraculous possibility of order-through-chaos. Stability is transformed from a principle of limited resiliency—the bare minimum of unity necessary to sustain the practices of individual freedom—into the immanent potential for collective existence. This is a dynamic and open-ended process, characterized by the persistent threat of disruption. But rather than attempting to resolve that threat through metapolitical negation, political liberalism *uses* the irresolvable fact of uncertainty to catalyze and particularize the construction

⁷ Vatter, “The Idea of Public Reason and the Reason of State,” p. 255.

⁸ See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge: MIT Press, 1991).

of its political forms. This does not mean we are wholly in the dark at the moment of decision. Quite the contrary. We are armed with the concept of law, the urgency of necessity, and the structuring framework of public reason. Each of these exerts itself upon the possibility of judgment. The act of enforcing law, therefore, is political in nature because the content of law is itself at stake in the decision. Judgment cannot be predetermined, derived from moral order. It must always be undertaken against the possibility of its own destruction.

To decision to include or exclude, then, must be taken in the name of a universality that cannot be obtained through reason alone. The force of the choice arises outside the rational world; it emerges from the chaos of ontological difference. This means that all values are contestable, all forms of unity at risk. The assertion of executive authority in the face of emergency, the act of civil disobedience, jury nullification, refusal to pay taxes, outright rebellion. To exclude those who hold beliefs that necessitate these actions is simultaneously *required* while also being *unjust*. It is only through the constitutive force of judgment, structured by the unrelenting force of necessity, that a line may be drawn.

By ‘necessity’ I do not mean the crude invocation of means over ends. That logic is justifiably resisted by Rawls (and Dworkin) as ultimately self-refuting. But neither is it sufficient to treat, for example, liberty interests as lexically prior. Instead, the strong deference toward liberty interests (if it exists at all) is conceptually dependent on the revolutionary possibility of justice itself. One does not choose to value safety over liberty but instead chooses to accept the responsibility of self-

creation with all the risks that this entails. The future, as such conceived, is open-ended. To face this possibility is to pass through an unknown door. Only on the other side, in the process of reconciliation, will the meaning grow clear.

In this way justice, as the process of a political community coming to know itself as reasonable and sustaining that knowledge over time, *achieves the unity of value*. But it does so in a tightly constrained fashion. Reasonableness is inherently incomplete. It is always, on the one hand, a sacred concept incapable of perfect materialization for which one must reach without hope of contact. But it is also, on the other hand, a secular reality. Its renewal is only possible in the encounter with difference and subsequent reconstitution of order. Without these interactions, political liberalism will wither and die. It is sustained by faith, and faith can never be wholly abstract. It must emerge from the material conditions of life, from real people and the real values that drive them.

This element of faith has been slowly throttled by the promulgation of formal devices. Its constitutive authority has been fragmented, dispersed into an informal market of pre-political identities. But it cannot be completely extinguished. The purpose of theoretical analysis grounded in a political concept of justice is therefore: first, to *demonstrate* the continued primacy of political life, even in this age of neoliberal fragmentation and second, to *harness* this force. Doing so affirms the fact of justice against the impossibility of its articulation. It is an act of renewal.

This remains a fundamentally *liberal* project, because it depends on a particular conjunction between the individual and social order. The subject of this

order remains the classic liberal individual, an independent moral agent, an originator of political possibility. It is this individual who initiates transformation, by positing reasons against the norm and testing the stability of its foundations. She is not radically free, but is constrained by the very logic of justification through which her reasons may be articulated. However, that logic does not hold her by virtue of universal principles; it depends entirely on the collective commitment to reasonableness as the measure of justification. That commitment is necessarily contingent, precisely because its existence depends on disruption. This suggests that the primary agent of political liberalism is the *disobedient* subject, the disruptive influence, the one who provokes the necessity of decision, the heretic who preaches the inadequacy of the status quo, the deep wound, the seemingly unreasonable.

We must turn these insights on ourselves, if we are to have any hope of escaping the gravity well of contemporary politics. The problem is that the battles of our time are generally not conceptualized *as* battles. Rather than recognizing the life and death struggle of political life, the technicians of liberal order defer and evade. They treat all challengers as outlaws, and allow the mechanical operations of power to swallow them up and neutralize their concerns. They lament the persistence of inequality and exclusion but offer no pathway for redress. They invoke the rule of law as a unifying device, a shared form of the good about which all should agree. And they critique all those whose demands exceed the scope of acceptable deliberative engagement. Their concept of justice is expansive in principle but sharply constrained in practice. When faced with unreasonable comprehensive doctrines, liberalism can

only offer its weak brand of uneasy secularism. It is no surprise that such appeals often fall on deaf ears.

A revitalized political liberalism must abandon these principles. Justice must be reformulated, made *political*. Rather than appealing exclusively to law in the material sense—as a secularized simulacra of decisive authority—we must turn our attention to the theological essence of law. That is: to the law as a constitutive mode of shared political identification, as a promise. Or, more simply: to **law's legitimacy**. In doing so, we must acknowledge it as an active, vital force, one that enframes every judgment of political necessity and legal obligation. And we must cease to regard the accusation of theological roots as defamatory.

In its political form, justice transcends the simple flux of liberalism, which is traditionally experienced in a wholly domesticated form through the logic of pluralism. Political justice, by contrast, is dynamic. It destroys and creates. Its demands are incommensurable. Instead of fleeing the exception, or attempting to control it, justice is discovered through the absences it marks. We find evidence of justice in the expressions of pain and exclusion, as well as in the promises of unity and reconciliation.

When thousands of mourners gather at the funeral of Michael Brown to hear the Reverend Al Sharpton declare “Justice is going to come!” what sort of justice do they imagine?⁹ A trial for Darren Wilson, the police officer who killed him?

Compensation for his family? Perhaps. But most likely they envision something

⁹ *New York Daily News*, “Rev. Al Sharpton rouses crowd at Michael Brown's funeral: 'Justice is going to come!'” August 25, 2014, <http://www.nydailynews.com/news/national/michael-brown-supporters-line-funeral-article-1.1915903>

broader: a change in the nature of political life itself. We must learn to recognize both forms as acceptable motivations for law. Further, we must begin to regard justice as the *process* as well as the *result*. It enunciates a doctrine of salvation, the hope for unity grounded in the shared justification of the exclusions necessary to make communication possible. To work in service of justice is to live in faith, in the belief that the inevitable exclusions (upon which every political community is founded) can be redeemed. And further, that this redemption will come not from some external force but instead will be derived from the internal structure of justice itself.

This is a grave responsibility, and one that has all too often been evaded by the theorists of liberal democracy, particularly those inspired by Rawls. They have followed him in the pursuit egalitarian foundations of reason. Their motivation is clear: if we can describe what is truly shared, we will be able to establish a genuine and durable limit on the scope of justification.¹⁰ The problem with these approaches is their deferral of decision. The responsibility for exclusion is depersonalized, located in the concept of reason. For them, this is the essence of ‘liberalism’ itself, to scrub away every distinguishing mark of political, cultural, or social identity—race, class, gender, taste, belief, attitude. While these are, of course, crucial aspects of an individual’s self-realization, they exist entirely outside the realm of political shared reasons that operate on terms available to all. According to this logic, the role of the theorist is to be an arbiter of proper deliberation, an external adjudicator of political demands.

¹⁰ Cf. Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Belknap Press, 1996); Amy Gutmann, *Liberal Equality* (New York: Cambridge University Press, 1980).

I reject this gatekeeping role. The theorist does not exist outside of the terms of political engagement but is part of the process. To describe a set of values as ‘unreasonable’ is to become an active participant in the form of life of ‘the reasonable.’ Such descriptions are never neutral nor are they ever wholly free. The paradox of liberalism, as I have said, is that it excludes in the name of universality. The concept of reasonableness *animates* this paradox, stabilizes the theoretical antimony of reason, and gives it concrete form. It expresses the necessity of deciding on the undecidable, by drawing it into the realm of materialized history. The heart of political liberalism is the injunction to reject all exclusions that are unreasonable. This, and only this, constitutes an absolute limit on the construction of shared political life. It is the undying faith of its practitioners, the utopian promise of a just political order.

Bibliography

- Ackerman, Bruce. *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*. New Haven: Yale University Press, 2006.
- . "Constitutional Politics/Constitutional Law." *Yale Law Journal* 99, no. 3 (Dec 1989).
- . "How to Keep Future John Yoos Under Control," *Washington Post*, February 23, 2010.
- . *We the People: Foundations*. Cambridge: Belknap Press of Harvard University Press, 1991.
- Adams, Douglas. *Mostly Harmless*. New York: Ballantine Books, 1992.
- Anderson, Perry. "Arms and Rights: Rawls, Habermas and Bobbio in an Age of War." *New Left Review* 31 (Jan-Feb 2005).
- Arrow, Kenneth. "A Difficulty in the Concept of Social Welfare." *Journal of Political Economy* 58, no. 4 (August 1950).
- Austin, John. *The Province of Jurisprudence Determined*. London: Weidenfeld & Nicolson, 1954.
- Badiou, Alain. *Five Lessons on Wagner*. Translated by Susan Spitzer. London: Verso, 2010.
- . *Saint Paul: The Foundation of Universalism*. Translated by Ray Brassier. Stanford: Stanford University Press, 2003.
- . *Wittgenstein's Antiphilosophy*. Translated by Bruno Bosteels. New York: Verso, 2011.
- Baier, Kurt. "Justice and the Aims of Political Philosophy." *Ethics* 99, no. 4 (1989).
- Balakrishnan, Gopal. *The Enemy: An Intellectual Portrait of Carl Schmitt*. New York: Verso, 2000.

- Balkin, Jack. *Constitutional Redemption: Political Faith in an Unjust World*. Cambridge, MA: Harvard University Press, 2011.
- . "The American Constitution as 'Our Law'" *Yale Journal of Law & the Humanities* 25, no. 1 (2013).
- Barrow, John. *The Infinite Book: A Short Guide to the Boundless, Timeless and Endless*. New York: Pantheon Books, 2005.
- Barry, Brian. "John Rawls and the Search for Stability." *Ethics* 105, no. 4 (July 1995).
- Benjamin, Walter. "Critique of Violence." In *Selected Writings, volume 1 1913-1926*, edited by Marcus Bullock and Michael Jennings. Cambridge: Belknap Press of Harvard University Press, 1996.
- . *The Origin of German Tragic Drama*. Translated by John Osborne. London: Verso, 1998.
- Boettcher, James W. "What is reasonableness?" *Philosophy & Social Criticism* 30, no. 5-6 (2004).
- Brown, Wendy. "Neo-liberalism and the End of Liberal Democracy." *Theory and Event* 7, no. 1 (2003).
- . *Regulating Aversion: Tolerance in the Age of Identity and Empire*. Princeton: Princeton University Press, 2006.
- Coleman, Jules. "Negative and Positive Positivism." *The Journal of Legal Studies* 11, no. 1 (January 1982).
- Cornell, Drucilla, and Nick Friedman. "The Significance of Dworkin's Non-Positivist Jurisprudence for Law in the Post-Colony." *Malawi Law Journal*, 4, no. 1 (2010).
- Corwin, Edward. "The 'Higher Law' Background of American Constitutional Law." *Harvard Law Review* 62, no. 2 (Dec 1928).
- Cover, Robert. "Violence and the Word." *Yale Law Journal* 95 (1986).
- Dallmayr, Fred. "Hermeneutics and the Rule of Law." *Legal Hermeneutics: History, Theory, and Practice*, edited by Gregory Leyh. Berkeley: University of California Press, 1992.

- Derrida, Jacques. "Force of Law: The Mystical 'Foundation of Authority'." Translated by Mary Quaintance. In *Deconstruction and the Possibility of Justice*, edited by Drucillia Cornell, Michel Rosenfeld, and David Gray Carlson. New York: Routledge, 1992.
- . "Three Questions to Hans-Georg Gadamer." In *Dialogue and Deconstruction: the Gadamer-Derrida Encounter*, edited by Diane Michelfelder and Richard Palmer. Albany: State University of New York Press, 1989.
- . *Writing and Difference*. Translated by Alan Bass. Chicago: University of Chicago Press, 1978.
- Donato, James. "Dworkin and Subjectivity in Legal Interpretation." *Stanford Law Review*, 40, no. 6 (July 1988).
- Douglass, Frederick. "The Meaning of July Fourth for the Negro." In *Frederick Douglass: Selected Speeches and Writings*. Chicago: Chicago Review Press, 2000.
- Dreben, Burton. "On Rawls and Political Liberalism." In *The Cambridge Companion to Rawls*, edited by Samuel Freeman. Cambridge: Cambridge University Press, 2003.
- Duxbury, Neil. *Patterns of American Jurisprudence*. Oxford: Clarendon Press, 1995.
- Dworkin, Ronald. *Justice for Hedgehogs*. Cambridge: Harvard University Press, 2011.
- . *Justice in Robes*. Cambridge: Harvard University Press, 2006.
- . *Law's Empire*. Cambridge: Belknap Press, 1986.
- . *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.
- Dyzenhaus, David. *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Herman Heller in Weimar*. Oxford: Clarendon Press, 1997.
- . "The Logic of the Rule of Law: Lessons from Willis." *University of Toronto Law Journal* 55, no. 3 (2005).
- Ellison, Ralph. *Invisible Man*. New York: Vintage International, 1995.
- Flanders, Chad. "The Mutability of Public Reason." *Ratio Juris* 25, no. 2 (June 2012).

- Fleming, James. "Fidelity to Our Imperfect Constitution." *Fordham Law Review*, 65, no. 4 (1997).
- Foucault, Michel. *Society Must Be Defended: Lectures at the College de France 1975-1976*, Edited by Mauro Bertani and Alessandro Fontana. Translated by David Macey. New York: Picador, 2003.
- Fuller, Lon. *The Morality of Law*. New Haven, Yale University Press, 1964.
- . "Positivism and Fidelity to Law: A Reply to Professor Hart." *Harvard Law Review* 71, no. 4 (Feb 1958).
- Gadamer, Hans-Georg. "Hermeneutics and Logocentrism." In *Dialogue and Deconstruction: the Gadamer-Derrida Encounter*, edited by Diane Michelfelder and Richard Palmer. Albany: State University of New York Press, 1989.
- . "Reply to Jacques Derrida." In *Dialogue and Deconstruction: the Gadamer-Derrida Encounter*, edited by Diane Michelfelder and Richard Palmer. Albany: State University of New York Press, 1989.
- . *Truth and Method*. Translated by Joel Weinsheimer and Donald G. Marshall. New York: Continuum, 2004.
- Gerstle, Gary. *American Crucible: Race and Nation in the 20th Century*. Princeton: Princeton University Press, 2001.
- Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford: Stanford University Press, 1998.
- Gluck, Abbe. "How Congress Works (And the ObamaCare Subsidies Lawsuit)." *Balkinization*, December 12, 2013. <http://balkin.blogspot.com/2013/12/how-congress-works-and-obamacare.html>.
- Goorden, Dean. "Dworkin and the Phenomenology of the 'Pre-Legal'?" *Ratio Juris* 25, no. 3 (September 2012).
- Graeber, David. *Debt: The First 5000 Years*. Brooklyn: Melville House, 2011.
- Gregory, Derek. "The Black Flag: Guantánamo Bay and the Space of Exception." *Geografiska Annaler* 88, no. 4 (Dec 2006).

- Gutmann, Amy. "Communitarian Critics of Liberalism." *Philosophy & Public Affairs* 14, no. 3 (Summer 1985).
- . *Liberal Equality*. New York: Cambridge University Press, 1980.
- Gutmann, Amy, and Dennis Thompson. *Democracy and Disagreement*. Cambridge: Belknap Press, 1996.
- Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg. Cambridge, MA: MIT Press, 1998.
- . "The Hermeneutic Claim to Universality." In *The Hermeneutic Tradition: From Ast to Ricoeur*, edited by Gayle Ormiston and Alan Schrift. Albany, NY: State University of New York Press, 1990.
- . *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. Translated by Thomas Burger. Cambridge: MIT Press, 1991.
- . *The Theory of Communicative Action, Vol. 2*. Translated by Thomas McCarthy. Cambridge: Polity Press, 1987.
- Hamilton, Alexander. "Federalist 10." In *The Federalist Papers*, edited by Clinton Rossiter. New York: Signet, 2003.
- Hart, H.L.A. *The Concept of Law*. Oxford: Clarendon Press, 1994.
- . "Kelsen Visited." In *Essays in Jurisprudence and Philosophy*. New York: Oxford University Press, 1983.
- . "Legal and Moral Obligation." In *Essays in Moral Philosophy*, edited by A.I. Melden. Seattle: University of Washington Press, 1958.
- . "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, no. 4 (Feb 1958).
- Hegel, G.W.F. *Outlines of the Philosophy of Right*. Translated by T.M. Knox. Oxford: Oxford University Press, 2008.
- Hobbes, Thomas. *Leviathan*. Baltimore: Penguin Books, 1968.
- Holmes, Oliver Wendell. "The Path of the Law." *Harvard Law Review* 110, no. 5 (March 1997).

- Horton, Scott. "Deconstructing John Yoo." *Harper's Magazine*, January, 2008.
<http://harpers.org/blog/2008/01/fisking-john-yoo/>.
- How, Alan. *The Habermas-Gadamer Debate and the Nature of the Social: Back to Bedrock*. Brookfield, VT: Avebury, 1995.
- Hume, David. *A Treatise of Human Nature*. Oxford: Oxford University Press, 1978.
- Hutchinson, Allan. "Indiana Dworkin and Law's Empire." *Yale Law Journal*, 96, no. 3 (January 1987).
- Kane, Paul. "Reid, Democrats trigger 'nuclear' option; eliminate most filibusters on nominees." *Washington Post*, November 21, 2013.
http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.
- Kelsen, Hans. *General Theory of Law and State*. Translated by Anders Wedberg. New York: Russell and Russell, 1961.
- . *Introduction to the Problems of Legal Theory*. Translated by Bonnie Litschewski Paulson and Stanley Paulson. Oxford: Clarendon Press, 1992.
- Kennedy, Ellen. *Constitutional Failure: Carl Schmitt in Weimar*. Durham: Duke University Press, 2004.
- Kirkpatrick, Jennet. "Democracy on the Lam: Crisis, Constitutionalism and Extralegality." *Contemporary Political Theory* 11, no. 3 (2012).
- Klein, Ezra. "The history of the filibuster, in one graph." Wonkblog. *Washington Post*, May 15, 2012.
http://www.washingtonpost.com/blogs/wonkblog/post/the-history-of-the-filibuster-in-one-graph/2012/05/15/gIQAVHf0RU_blog.html.
- Kmiec, Keenan. "The Origin and Current Meanings of 'Judicial Activism'." *California Law Review* 92, no. 5 (Oct 2004).
- Kutz, Christopher. "Just Disagreement: Indeterminacy and Rationality in the Rule of Law." *Yale Law Journal* 103 (1993).
- Larmore, Charles. "The Moral Basis of Political Liberalism." *The Journal of Philosophy*, 96, no. 12 (December 1999).

- Leiter, Brian. "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence." *American Journal of Jurisprudence* 48, no. 1 (2003).
- Lyotard, Jean-François. *The Differend: Phrases in Dispute*. Translated by Georges Van Den Abbeele. University of Minnesota Press, 1988.
- Macintyre, Alasdair. *After Virtue: A Study in Moral Theory*. Notre Dame IN: University of Notre Dame Press, 1981.
- Marx, Karl. "The German Ideology." In *The Marx-Engels Reader*, edited by Robert Tucker. New York: Norton, 1978.
- Mayer, Kenneth. "Executive Power in the Obama Administration and the Decision to Seek Congressional Authorization for a Military Attack Against Syria: Implications for Theories of Unilateral Action." *Utah Law Review* 2014, no. 4 (2014).
- Mehta, Uday Singh. *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought*. Chicago: University of Chicago Press, 1999.
- Meister, Robert. *After Evil: A Politics of Human Rights*. New York: Columbia University Press, 2011.
- Misak, Cheryl J. *Truth, Politics, Morality: Pragmatism and Deliberation*. London: Routledge, 2000.
- Mouffe, Chantal. "Carl Schmitt and the Paradox of Liberal Democracy." In *The Challenge of Carl Schmitt*, edited by Chantal Mouffe. New York: Verso, 1999.
- . "Democracy, Power, and the 'Political'." In *Democracy and Difference: Contesting the Boundaries of the Political*, edited by Seyla Benhabib. Princeton: Princeton University Press, 1996.
- . "Political Liberalism. Neutrality and the Political." *Ratio Juris* 7, no. 3 (Dec 1994).
- Müller, Jan-Werner. *A Dangerous Mind: Carl Schmitt in Post-War European Thought*. New Haven: Yale University Press, 2005.
- Nagel, Thomas. "Rawls on Justice." *Philosophical Review* 82 (1973).

- Newey, Glen. "John Rawls: Liberalism at the Limits of Intolerance." In *Reflections on Rawls: An Assessment of his Legacy*, edited by Shaun Young. Farnham, England: Ashgate, 2009.
- Nietzsche, Friedrich. *On the Genealogy of Morals*. Translated by Walter Kaufmann and R. J. Hollingdale. New York: Random House, 1967.
- . *The Will to Power*. Translated by Walter Kaufmann and R.J. Hollingdale. New York: Vintage Books, 1968.
- Novak, David. "Maimonides and Aquinas on Natural Law." In *St. Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives*, edited by John Goyette, Mark S. Latovic, and Richard S. Meyers. Washington DC: Catholic University of America Press, 2004.
- Nussbaum, Martha. "Rawls's Political Liberalism: A Reassessment" *Ratio Juris* 24, no. 1 (March 2011).
- Okin, Susan Moller. *Justice, Gender, and the Family*. New York: Basic Books, 1989.
- Onora O'Neill. "Political Liberalism and Public Reason: A Critical Notice of John Rawls, Political Liberalism." *The Philosophical Review* 106, no. 3 (July 1997).
- Orwell, George. *1984*. New York: Signet Classic, 1983.
- Pitkin, Hannah. *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought*. Berkeley, University of California Press, 1972.
- Pogge, Thomas. *John Rawls: His Life and Theory of Justice*. Translated by Michelle Kosch. Oxford: Oxford University Press, 2007.
- Posner, Eric, and Adrian Vermeule. *The Executive Unbound: After the Madisonian Republic*. New York: Oxford University Press, 2010.
- Příbáň, Jiří. "The Time of Constitution-Making: On the Differentiation of the Legal, Political and Moral Systems and Temporality of Constitutional Symbolism." *Ratio Juris* 19, no. 4 (Dec 2006).
- Rasch, William. *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political*. London: Birkbeck Law Press, 2004.

- Rawls, John. "Discussion of PR [Public Reason] Revisited at Center for Ethics and Prof?," October 30, 1997, The Papers of John Rawls, Harvard University Archives, HUM 48 box 42, folder 19.
- . *Justice as Fairness: A Restatement*. Cambridge: Belknap Press of Harvard University Press, 2001.
- . "Justice as Fairness: Political not Metaphysical." In *Collected Papers*. Cambridge: Harvard University Press, 2001.
- . *The Law of Peoples: With The Idea of Public Reason Revisited*. Cambridge: Harvard University Press, 1999.
- . *Lectures on the History of Political Philosophy*. Cambridge: Belknap Press of Harvard University, 2007.
- . Letter to H.L.A. Hart, April 22, 1981, The Papers of John Rawls, Harvard University Archives, HUM 48 box 39, folder 34.
- . "Notes for Chicago." In [Dewey Lecture in Jurisprudence at University of Chicago Law School] New Chicago PR [Public Reason, 1995-1996], The Papers of John Rawls, Harvard University Archives, HUM 48 box 50, folder 1.
- . Note to self dated November 1986, The Papers of John Rawls, Harvard University Archives, HUM 48 box 29, folder 2.
- . Note to self dated December 1991/January 1992, In Notes and letters regarding the Overlapping Consensus, 1988-1992, The Papers of John Rawls, Harvard University Archives, HUM 48 box 42, folder 1.
- . "Philosophical Problems of the Law of Peoples." In Law of Peoples, P.U. seminar, 1995 April 1, The Papers of John Rawls, Harvard University Archives, HUM 48 Box 15, Folder 10.
- . *Political Liberalism*. Paperback edition. New York: Columbia University Press, 2005.
- . "Political Liberalism, notes and bibliographies," 1986, The Papers of John Rawls, Harvard University Archives, HUM 48 box 29, folder 2.
- . "Political Liberalism, Public Reason, Ten Questions," December 8, 1994, The Papers of John Rawls, Harvard University Archives, HUM 48 box 50, folder 13.

- . "Remarks on Political Liberalism Phil 272," Fall 1986, The Papers of John Rawls, Harvard University Archives, HUM 48 box 29, folder 2.
- . *A Theory of Justice*. Cambridge: Belknap Press of Harvard University Press, 1971.
- . "Wittgenstein investigations [undated]," The Papers of John Rawls, Harvard University Archives, HUM 48 box 9, folder 2.
- Raz, Joseph. "Authority, Law, and Morality." In *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Oxford University Press, 1994.
- . *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 1979.
- . *Practical Reason and Norms*. Oxford: Oxford University Press, 1999.
- . "The Problem of Authority: Revisiting the Service Conception." *Minnesota Law Review* 90 (2006).
- Rousseau, Jean-Jacques, "Discourse on the Original of Inequality." In *The Basic Political Writings*. Translated by Donald Cress. Indianapolis, Indiana: Hackett Publishing Company, 1987.
- Sala, Roberta. "The Place of Unreasonable People Beyond Rawls." *European Journal of Political Theory* 12, no. 3 (2013).
- Sandel, Michael. *Liberalism and its Critics*. Oxford: Basil Blackwell, 1985.
- Sandoval, Edgar, and Corky Siemaszko. "Rev. Al Sharpton rouses crowd at Michael Brown's funeral: 'Justice is going to come!'" *New York Daily News*, August 25, 2014. <http://www.nydailynews.com/news/national/michael-brown-supporters-line-funeral-article-1.1915903>.
- Saxton, Alexander. *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth Century America*. London: Verso, 1990.
- Schauer, Frederick. "(Re)Taking Hart: Review of A Life of H.L.A. Hart: The Nightmare and the Noble Dream by Nicola Lacey." *Harvard Law Review* 11, no. 3 (Jan 2006).
- Scheuerman, William. "Liberal Democracy and the Empire of Speed." *Polity* 34, no. 1 (Fall 2001).

- Schmitt, Carl. *The Concept of the Political*. Translated by George Schwab. Chicago: University of Chicago Press, 2007.
- . *Constitutional Theory*. Translated and edited by Jeffrey Seitzer. Durham: Duke University Press, 2008.
- . *The Crisis of Parliamentary Democracy*. Translated by Ellen Kennedy. Cambridge, MIT Press, 1985.
- . *Legality and Legitimacy*. Translated by Jeffrey Seitzer. Durham: Duke University Press, 2004.
- . *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. Translated by G.L. Ulmen. New York: Telos Press, 2003.
- . *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Cambridge: MIT Press, 1985.
- Schwartz, Adina. "Moral Neutrality and Primary Goods." *Ethics* 83 (1973).
- Scott, Joan. *The Politics of the Veil*. Princeton: Princeton University Press, 2007.
- Sen, Amartya. *The Idea of Justice*. Cambridge: Belknap Press of Harvard University Press, 2009.
- Shapcott, Richard. *Justice, Community and Dialogue in International Relations*. Cambridge: Cambridge University Press, 2001.
- Shapiro, Scott. "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed." U of Michigan Public Law Working Paper, No. 77 (Feb 2, 2007).
- Thompson, E.P. *Whigs and Hunters: The Origin of the Black Act*. New York: Pantheon Books, 1975.
- Valverde, Mariana. *Law's Dream of a Common Knowledge*. Princeton: Princeton University Press, 2003.
- Vatter, Miguel. "The Idea of Public Reason and the Reason of State: Schmitt and Rawls on the Political." *Political Theory* 36, no. 2 (April 2008).
- Walzer, Michael. "The Communitarian Critique of Liberalism." *Political Theory* 18, no. 6 (Feb 1990).

- . *Spheres of Justice*. New York: Basic Books, 1983.
- Warnke, Georgia. *Justice and Interpretation*. Cambridge: MIT Press, 1993.
- Weber, Max. "Politics as a Vocation." In *From Max Weber: Essays in Sociology*, edited by H. H. Gerth, C. Wright Mills. London: Routledge, 1991.
- . *The Protestant Ethic and the Spirit of Capitalism*. Translated by Talcott Parsons. London: Routledge, 1996.
- Weithman, Paul. *Why Political Liberalism? On John Rawls's Political Turn*. Oxford: Oxford University Press, 2010.
- Wittgenstein, Ludwig. *Philosophical Investigations*. Third Edition. Translated by G.E.M. Anscombe. New York: MacMillan, 1968.
- Wolin, Sheldon. "Fugitive Democracy." *Constellations* 1, no. 1 (Dec 1994).
- . "The Liberal/Democratic Divide: On Rawls's Political Liberalism." *Political Theory* 24, no. 1 (Feb 1996).
- . *Politics and Vision: Continuity and Innovation in Western Political Thought*. Princeton: Princeton University Press, 2004.
- Young, Shaun P. "Rawlsian Reasonableness: A Problematic Presumption?" *Canadian Journal of Political Science* 39, no. 1 (March 2006).
- Zerilli, Linda. "Value Pluralism and the Problem of Judgment: Farewell to Public Reason." *Political Theory* 40, no. 1 (Feb 2012).