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Alani Golanski

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NONMORAL THEORETICAL DISAGREEMENT IN LAW

Alani Golanski[†]

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I. INTRODUCTION

Many legal positivists no longer deny that there is a necessary connection between law and morality.¹ This concession, however,

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1. See Joseph Raz, *Incorporation By Law*, 10 LEGAL THEORY 1 (2004), reprinted in JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 182, 189 (Oxford U. Press 2009) [hereinafter RAZ, BETWEEN AUTHORITY AND INTERPRETATION] (acknowledging that the legal normative point of view derives what validity it has from the moral one); see also

leaves positivism's other theses intact. Positivism's central thesis is that, whether always the case, typically the case, or the case in at least one legal system, moral justification does not supply the criteria by which a rule or principle counts as legal.² Instead, a society will have an overriding social practice or convergence of official behavior that, as a matter of social fact rather than moral reasoning, determines legality.³ We can then decide what the law is without committing ourselves to a view about which decision would be morally right.⁴

If legality is determined by social convention, this being mainly a uniform judicial practice, the pull is to conclude that there is widespread agreement throughout the legal system about the ground of law and the criteria of legal validity.⁵ As a result, positivism has had a stake in presenting a picture of law in which theoretical disagreement is minimal.

If theoretical disagreement in law appears to occur somewhat frequently, however, this cuts in favor of a non-positivist conception that connects legal practice to moral assessments, which are typically controversial and subject to widespread disagreement. For instance, the legal philosopher Ronald Dworkin viewed theoretical

Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 14 (2003), reprinted in RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 166, 180 (stating that law "is a structure of authority . . . in the business of telling people what they must do" and thereby "claims to have legitimate moral authority over its subjects"); SCOTT J. SHAPIRO, *LEGALITY* 187 (2011) ("[T]he legal point of view always purports to represent the moral point of view, even when it fails to do so."); cf. Philip Soper, *Searching for Positivism*, 94 MICH. L. REV. 1739, 1741 (1996) (reviewing WILFRID J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994)) (discussing the issue of "whether and why positivism can or cannot accept moral principles as part of the law").

2. Wilfrid J. Waluchow, *The Many Faces of Legal Positivism*, 48 U. TORONTO L.J. 387, 395 (1998) (noting that depending on the variant of legal positivism one espouses the "internally sanctioned criteria for what counts as a valid legal standard" will never, or may sometimes, "make reference to morality").

3. HERBERT L.A. HART, *THE CONCEPT OF LAW* 258 (Peter Cane et al. eds., 2d ed. 1994) (1961).

4. See Jeremy Waldron, *Jurisprudence for Hedgehogs*, NEW YORK UNIVERSITY PUBLIC LAW AND LEGAL THEORY WORKING PAPERS—PAPER 417 (2013), http://lsr.nellco.org/nyu_plltwp/417?utm_source=lsr.nellco.org%2Fnyu_plltwp%2F417&utm_medium=PDF&utm_campaign=PDFCoverPages; cf. MATTHEW H. KRAMER, IN *DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS* 44, 59–60 (1999) (arguing that procedural principles that some deem to provide law with an inner morality are, in reality, equally consistent with an evil legal system).

5. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1226–27 (2009); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 513–14 (1988).

disagreement in law as endemic, and this view supported his theory of law as rooted in moral content.⁶ Judges both interpret the legal record to determine which principle best fits the conflict and seek out the right answer based on their best construction of those principles. Because the principles that judges use to interpret the legal record are derived from the community's political morality, disagreements over how to achieve the "right answer" will be especially contentious.⁷

One reason that there are competing claims about the extent to which "theoretical disagreement" exists in law is that the term can be defined narrowly or broadly. The narrow view tends to focus on the interpretive method in constitutional or statutory disputes. For example, should a constitutional provision be interpreted based on the perceived original intent of its framers, its original meaning for citizens at the time, or as a shifting blueprint for the exercise of state power alive to contemporary values?⁸ Should evaluation of an enactment be limited to its text, or account for the intent of the legislators? These controversies make up the tiniest fraction of law's practice, however vigorously they are disputed when they do arise.

This tapered construction of "theoretical disagreement" begs the question in positivism's favor. Dworkin did not see things so narrowly. He saw controversy as inhering in the argumentative

6. RONALD DWORKIN, *LAW'S EMPIRE* 7–8 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; see generally Scott Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN, *CONTEMPORARY PHILOSOPHY IN FOCUS* 22, 35 (Arthur Ripstein ed., 2007) (explaining that Dworkin's central retort to legal positivism is that "legal positivists are unable to account for a certain type of disagreements that legal participants frequently have").

7. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 225; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 126 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; cf. A.E. Dick Howard, *Oliver Wendell Holmes Devise Lecture Symposium: The Indeterminacy of Constitutions*, 31 *WAKE FOREST L. REV.* 383, 390–91 (1996) (agreeing with James Madison that because language is inherently imprecise, its meanings can be settled only upon "a series of particular discussions and adjudications") (quoting *THE FEDERALIST* No. 37, at 179 (James Madison) (Gary Wills ed., 1982)); Richard K. Sherwin, *Law, Violence and Illiberal Belief*, 78 *GEO. L.J.* 1785, 1822 (1990) ("Faced with a plurality of possible normative constructions of social reality, the question arises: How do we regulate conflicting and perhaps incommensurable ways of thinking and speaking about a given controversy?").

8. John O. McGinnis, *The Original Constitution and Our Origins*, 19 *HARV. J.L. & PUBLIC POL'Y* 251, 261 (1995); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. CHI. L. REV.* 519, 554–55 (2003).

structure of legal practice.⁹ When judges disagree in what Dworkin called “the theoretical way,” these disagreements are interpretative. Judges often “disagree, in large measure or in fine detail, about the soundest interpretation of some pertinent aspect of judicial practice.”¹⁰ To this point, it is difficult to deny that theoretical controversy is frequent in legal practice. Dworkin’s affinity with natural law theory derived from his further claim that law’s content resides in morally justified principles that practitioners should use to construe the community’s legal practice in the most favorable light.¹¹

Some positivists have tried to reconcile the existence of theoretical disagreements in law with the commitment to a social fact-based legal theory. For instance, Scott Shapiro suggests a view of legal controversy according to which interpreters debate the point of legal practice, which is, for him, an empirical question about the political attitudes and objectives of those who “designed” the legal system.¹² Disputes about a regime’s “animating ideology” are disputes about social facts, and the question becomes which methodology best harmonizes with that scheme.¹³

This article similarly seeks to reconcile the existence of widespread theoretical disagreement in law with a commitment to a social fact-based legal theory. Those disagreements are not easily characterized, however, as exercises in how best to defer to the decisions of “designers” of the legal system’s political objectives and divisions of labor.¹⁴ While courts and litigants do sometimes debate

9. DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 13 (discussing the “crucial argumentative aspect of legal practice”).

10. *Id.* at 87. *But cf.* Southard v. Morris, 31 Ohio Dec. 684, 687 (Ct. Com. Pl. 1913) (suggesting that the legal practitioner’s duty is to argue in a way that places her client’s interests in the best light, including by way of “[i]llustrations, analogies, inferences from facts proved, and in some instances, from failure to introduce proof when it appears reasonable”).

11. DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 225; *see* Jules L. Coleman, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST TO LEGAL THEORY* 157 (Oxford U. Press 2001).

12. Shapiro, *supra* note 6, at 43–47.

13. *Id.* at 48.

14. *See id.* at 47; Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 627 (1958) (stating an intuitively more appealing, albeit somewhat similar, view when he said that “the inclusion of the new case under the rule takes its place as a natural elaboration of the rule, as something implementing a ‘purpose’ which it seems natural to attribute (in some sense) to the rule itself rather than to any particular person dead or alive.”).

the original rationales for rules and statutory schemes, this sort of controversy is not particularly pervasive and does not likely account for a broader occurrence of theoretical disagreement.¹⁵

By taking advantage of philosophical resources just recently being developed in scholarship about the logic of institutions,¹⁶ this article provides a more compelling reason for agreeing with Dworkin that theoretical disagreement in law is widespread and rooted in law's argumentative structure, while at the same time refusing to draw the inference that morality and moral controversy engenders this widespread disagreement.¹⁷

Law's institutional nature renders nonmoral theoretical disagreement widely possible, and frequently actual. As an institution, law must comport with, and be sustained by, institutional logic.¹⁸ Most importantly for the purposes of this article, the sort of cooperation requisite to the initiation and maintenance of institutional reality requires that the institution in progress abide by two general constraints. The institution must (1) direct its constitutive and regulative rules at the appropriate social phenomenon, and (2) define its power relations and commitments with a sufficient level of exactness so as to render those rules and commitments recognizable as such reasons for action.¹⁹

In the context of legal systems, these constraints supply a fertile ground for the sort of disagreement over institutional norms that may be described as theoretical. An understanding of the logic of institutional power and authority shows that "theoretical" disputes in law are, in the first instance, best understood as controversies over the standards for determining whether the existing legal materials are sufficiently *directed at* the present

15. Cf. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 133 (2011) (arguing that "[d]isagreements among lawyers about the best interpretation of particular statutes are . . . symptoms of submerged and often unrecognized disagreements about" such deeper and more refined issues as democratic, political, and moral theory).

16. See *infra* Section II.A; see also John R. Searle, *Searle versus Durkheim and the Waves of Thought: Reply to Gross*, in 6 ANTHROPOLOGICAL THEORY 57, 58 (2006).

17. Cf. WILLARD VAN ORMAN QUINE, THE PAUL CARUS LECTURES: THE ROOTS OF REFERENCE 51 (1974) ("It is one thing to learn the difference between right and wrong, and another thing to suit the action to the word.").

18. See *infra* Section II.A.1.

19. See *infra* Sections II.A.1–2; see also JOHN R. SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION 154–55 (2010) [hereinafter, SEARLE, MAKING THE SOCIAL WORLD]

circumstances, and whether they provide a solution to the new matter with sufficient *exactness*. Accordingly, this article will discuss the logical structure of institutions, with a focus on the “deontic” commitments—i.e., rights, obligations, duties, entitlements, and so forth—that institutions engender, and the “exactness” and “intentionality” constraints on such institutional power.²⁰ It also invokes the familiar notion of “persuasive authority,” albeit from a new angle, to explain how institutions evolve in the face of those constraints.²¹

Next this article will discuss the emergence of legal institutions as a vehicle for regulating interactions and transactions.²² These are the primary units of human social endeavor over which law exercises its institutional authority, regardless of any larger ends that law’s regulatory apparatus may be aimed at achieving. Law’s institutional constraints must permit the legal system to function as intended, and must ensure that it remain capable of regulating the relevant social transactions. Accordingly, this article will next focus on how understanding institutional structures and constraints may affect our theory of law.²³

Finally this article will demonstrate that the foregoing analysis of institutional logic, as applied to law, best explains the phenomenon in law well-described as theoretical controversy.²⁴ Rather than pointing primarily to a moral ground for legal validity, controversy in law arises in the first instance when it is uncertain whether existing law has created rights, duties, and obligations with a precision sufficient to inform the new exercise and whether, or in which way, the prior legal materials have been “directed at” the present circumstance.²⁵ In this regard, theorists have traditionally been too eager to overlook disagreement about whether and how past legal materials and judicial decisions may fit the new situation, and have leapt too readily to the realm of justification.²⁶

20. See *infra* Sections II.A.1–2; SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 152–55.

21. See *infra* Section II.B.

22. See *infra* Part III.

23. See *infra* Part IV.

24. See *infra* Part V.

25. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 25.

26. E.g., HART, *supra* note 3, at 253 (explaining that, for Dworkin, “the truth of any proposition of law ultimately depends on the truth of a moral judgment as to what best justifies and since for him moral judgments are essentially controversial, so are all propositions of law”).

II. THE LOGICAL STRUCTURE OF INSTITUTIONS

A. *Searlean Analysis*

For several decades, John R. Searle has been an influential philosopher of mind, language, and consciousness.²⁷ In the 1990s, he linked his thinking in those areas to ideas about the ways in which people organize their interactions and structure society, and has thereby become the leading philosopher of social and institutional reality.²⁸

1. *What Is an Institution?*

The theory of intentional states of the mind provides the crossway, in Searle's thesis, from consciousness to social structures. Intentional mental states, such as beliefs, desires, and ordinary intentions, are those that are directed to, and are about, things in the world.²⁹ These need not be conscious states; I may believe that the Brooklyn Bridge spans the East River even when not thinking about this.

There is also such a thing as *collective* intentionality.³⁰ If we are sponsoring a conference on collective intentionality, or about Star Trek, then to that extent, and in that endeavor, we share certain intentional states such as beliefs and ordinary intentions, probably also desires, hopes, and fears.³¹ Searle sees limitations in the work of the pioneering philosophers addressing collective intentionality because they have mostly presupposed that collective or "we"

27. E.g., John R. Searle, *Meaning and Speech Acts*, 71 PHIL. REV. 423, 423–32 (1962); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33 (1969) [hereinafter SEARLE, *SPEECH ACTS*], JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* (1992); JOHN R. SEARLE, *THE MYSTERY OF CONSCIOUSNESS* (1997); JOHN R. SEARLE, *CONSCIOUSNESS AND LANGUAGE* (2002).

28. See Margaret Gilbert, *Searle and Collective Intentions*, in *INTENTIONAL ACTS AND INSTITUTIONAL FACTS: ESSAYS ON JOHN SEARLE'S SOCIAL ONTOLOGY* 31, 31 (Savas L. Tsohatzidis ed., 2007) (noting Searle's "classic" 1990 work in the nascent field of the philosophy of social phenomena).

29. SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 25.

30. See John R. Searle, *Collective Intentions and Actions*, in *INTENTIONS IN COMMUNICATION* 401–16 (Philip R. Cohen et al. eds., 1990); JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 25 (1995) [hereinafter SEARLE, *CONSTRUCTION OF SOCIAL REALITY*].

31. SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 25.

intentions are reducible to individual or “I” intentions.³² Searle argues that collective intentions are “biologically primitive” phenomena not reducible to individual ones: “There is no reason why we cannot have an irreducible we-intention in each of our heads when we are engaging in some cooperative activity.”³³

“[S]ocial facts” are collective intentional facts.³⁴ Even so, these facts are not particularly human. Lions and wolves hunt in packs, birds build a nest together, and ants and bees engage in highly sophisticated group activities.³⁵ A more complex form of social fact emerges when the group assigns a function to a thing. A branch can be used to perch on. A rock can be used to smash a coconut. But at this level, the object as it physically exists in the world allows it to function in that way, and its intrinsic physical features suffice.³⁶

Institutional facts are a certain kind of social fact. This uniquely human level of reality begins with the assignment of functions that can be fulfilled by virtue of collective recognition and human cooperation, and not because of an object’s intrinsic physical features.³⁷ If collective acceptance underwrites the assignment of a function at this level, then the entity charged with

32. See generally MICHAEL E. BRATMAN, *FACES OF INTENTION* 143–61 (1999); MARGARET GILBERT, *ON SOCIAL FACTS* 432–36 (Georg Meggle ed., 1989); SEUMAS MILLER, *SOCIAL ACTION: A TELEOLOGICAL ACCOUNT* 68, 71–74, 80 (Cambridge U. Press 2001).

33. SEARLE, *CONSTRUCTION OF SOCIAL REALITY*, *supra* note 30, at 24; SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 47. For a competing position, see Seumas Miller, *Joint Action: The Individual Strikes Back*, in *ESSAYS ON JOHN SEARLE’S SOCIAL ONTOLOGY*, *supra* note 28, at 73 [hereinafter Miller, *Joint Action*] (noting that “the constitutive attitudes involved in joint actions are individual attitudes; there are no sui generis we-attitudes”); see also GILBERT, *supra* note 32, at 432 (attempting to frame a middle way, stating, “[t]he conclusion seems to be that humans as singular agents and humans as members of plural subjects are ontologically on a par. Neither is prior as far as ontology goes”).

34. SEARLE, *CONSTRUCTION OF SOCIAL REALITY*, *supra* note 30, at 122.

35. See JOHN R. SEARLE, *MIND, LANGUAGE, AND SOCIETY: PHILOSOPHY IN THE REAL WORLD* 121 (Weidenfeld & Nicolson eds., 1999). Some critics say that Searle gives non-human animals too much credit, because while these may exhibit complex socially-coordinated behavior, they “do not really have shared or collective intentionality of the human kind.” Hannes Rakoczy & Michael Tomasello, *The Ontogeny of Social Ontology: Steps to Shared Intentionality and Status Functions*, in *ESSAYS ON JOHN SEARLE’S SOCIAL ONTOLOGY*, *supra* note 28, at 113–14. This debate is too fine-tuned for present purposes.

36. SEARLE, *CONSTRUCTION OF SOCIAL REALITY*, *supra* note 30, at 38–39.

37. *Id.* at 123–24.

fulfilling the function takes on a certain status, and the assignment is therefore one of a “status-function.”³⁸

Searle’s oft-stated example of the assignment of a status function imagines a primitive tribe building a wall around its territory. Over time, the wall erodes and eventually leaves only a line of stones on the ground. Now, however, rather than a wall functioning to keep neighbors out by virtue of its physical characteristics, the larger community collectively recognizes and accepts the boundary symbolized by the line of stones.³⁹ A normative reality, unique to human culture, has emerged separate and apart from the physicality of the entities involved.⁴⁰ Non-human animals might be trained not to cross a line, perhaps in response to stimuli and conditioning,⁴¹ but their natural behavior would arise from a disposition, and likely not from the collective acceptance of a norm.⁴²

The logical structure of the assignment of status functions in human culture is “X counts as Y in context C.”⁴³ Because this assignment does not depend on the brute physical structure of the thing at issue, language is typically the necessary medium by which X may count as Y in context C.⁴⁴ The new status exists only by convention, and “words or other symbolic means” permit the community to signify thing X as having meaning and status Y. The social practice might be to treat Sitting Bull as chief, but that symbolic move requires thoughts and language is the vehicle of such thoughts.⁴⁵ At this symbolic level, a normative reality emerges in which community members develop an evaluative attitude and

38. *Id.* at 123.

39. *Id.* at 39–40.

40. *Id.*

41. Ivan P. Pavlov, *The Conditioned Reflex*, in I.P. PAVLOV: SELECTED WORKS 245, 248 (J. Gibbons ed., S. Belsky trans., 1955).

42. See SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 71.

43. See SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 20; see John R. Searle, *What Is an Institution?*, 1 J. INST. ECON. 1, 22 (2005).

44. SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 69; cf. Gertrude Elizabeth M. Anscombe, *On Brute Facts*, 18 ANALYSIS 69, 71 (1958) (describing “brute” institutional facts as “the facts which held, and in virtue of which, in a proper context, such-and-such a description is true or false, and which are more ‘brute’ than the alleged fact answering to that description”).

45. SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 73 (noting that strictly speaking, any conventional marker will fill this role).

justified expectations that others will adhere to the status functions in play.⁴⁶

Searle's next moves are particularly relevant to our analysis of law as an institutional phenomenon.⁴⁷ To advance from private expectations to social structures and the creation and maintenance of institutions, those community members need to declare their status in some way, implicitly or expressly.⁴⁸ It is when participants commit themselves in a public way to satisfy expectations, "according to the normative conventions of a language," that they create obligations and other sorts of deontic commitments.⁴⁹ Legal and governmental officials take an oath of office, those marrying say "I do," the note in one's hand declares itself legal tender for all debts, and so forth.

Because institutional facts do not flow from the mere physical presence of the objects and entities comprising the institution,

46. See Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1196 (2015) (quoting DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 57); cf. Steven Schaus, *How to Think About Law as Morality: A Comment on Greenberg and Hershovitz*, 124 YALE L.J. FORUM 224, 236 (2015) ("Obligatory actions are those we are accountable to others (including ourselves and perhaps everyone) for performing, and this sets them apart from actions that are only recommended.").

47. These are not necessarily next in a chronological or historical sense, but rather in a logical or conceptual sense, such that what has been stated so far are the more basic components of an explanation of institutional reality. See Aristotle, *Metaphysics VII § 1028a 34–36*, in 2 THE COMPLETE WORDS OF ARISTOTLE 1623–24 (Jonathan Barnes ed., rev. Oxford trans., 1984) (1956).

48. See SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 85; cf. SAMUEL WILLISTON, *SOME MODERN TENDENCIES IN THE LAW* 127 (Baker, Voorhis & Co. ed., 1929) (opining that, "to be useful," legal doctrines must be capable of being understood by the ordinary citizen, hence be declared clearly); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 232–33 (William Rehg trans., The MIT Press 1998) (1992) (proffering a similar view).

49. SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 88 (bypassing the distinction that should be made between normativity and deontology); cf. Jules L. Coleman, *Mistakes, Misunderstandings, and Misalignments*, 121 YALE L.J. ONLINE 541, 557 (2012) ("It is important to distinguish between the deontic and nondeontic areas of the normative landscape. Sometimes we assess behavior as careless, inattentive; but we recognize that even careless and inattentive behavior may provide benefits—and not merely to those who benefit by saving the costs of greater attentiveness or care. Other times, we characterize our conduct in terms of duties and rights, powers and liberties: claims we have against others, authority we have over them, and demands that we can stand or call upon. Roughly, the latter is part of the deontic area of the normative landscape; the former is not, or at least need not be.").

there must be a collective recognition, and some level of acceptance, of the deontic status of the individuals, objects, procedures, forms and so forth, that make up the institution.⁵⁰ This collective recognition might well be reducible to individual recognition in tandem with community members' mutual beliefs about how things are.⁵¹

But more than collective recognition is required for the institution to function. People must act in reliance upon, and in conformity with, the rights and obligations engendered by the institution. In other words, for non-accidental institutional transactions to occur, there must be not only collective recognition, but also cooperation and a non-reducible collective intentionality.⁵² Such transactions are minimally cooperative endeavors at the least, rooted in a collective intention to cooperate, and usually based on a mutual commitment to a common set of rights and obligations sustained by constitutive and regulative institutional rules.⁵³

Now we have arrived at a fairly robust description of institutional reality. There are a few more things that should be said about the logic of this reality, as Searle has argued it. As shown,⁵⁴ an institution must be constituted by rules that permit the individuals, entities, or objects involved to "count as" having a certain significance and status within the institution. A rule creating landlords' rights to evict tenants invests them with a status by which they wield certain powers of eviction, and makes this the case by representing it as being the case.⁵⁵ In linguistic terms, the

50. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 57.

51. *Id.* at 57–58.

52. *See infra* note 175 and accompanying text (explaining that, in order for institutional transactions to successfully occur, collective recognition must be supplemented by some minimal level of cooperation, and the institutional rules be deemed to be reasons for the actors' conduct).

53. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 58 (using the example of the institution of money, explaining that whereas the "existence" of this institution may merely require collective recognition, the ability to engage in monetary transactions requires a further level of cooperation).

54. *See supra* notes 37–40 and accompanying text (explaining the conceptual step taken from assignment to functions, based on the physical attributes of the entity at issue, to the assignment of status functions separate and apart from the physicality of the entities involved).

55. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 97.

constitutive rule announced by legal officials is a speech act known as a “standing declaration.”⁵⁶

In some contrast, institutions are also comprised of other sorts of rules, these being regulative rules that govern behavior within the institution.⁵⁷ Rules requiring landlords to make necessary repairs to a dwelling, or tenants to pay their rent on time, are examples of regulative rules. And these, in linguistic terms, are known as “standing [d]irectives.”⁵⁸

It is not necessary that individual members of an institutional community subjectively “approve” of the institution or its rules. Even a transaction permeated with fear and loathing depends on a minimum level of cooperative intention.⁵⁹ The ability to transact within the institution in all events requires cooperative behavior manifesting the “we” intention characterizing a non-reducible collective intentionality.⁶⁰ As a product of the collective recognition and understanding of the rights and obligations generated by status functions, the institution provides participants with reasons for action.⁶¹ The critical and sustaining feature of institutional reasons for action is that these reasons are “desire-independent,” separate and apart from what the participants may desire for themselves at that moment, and arising from collective rights, obligations, and duties.⁶² The landlord may not want to repair the plumbing, or the tenant may not desire to pay the rent, but mostly they do so.⁶³

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 103–04.

60. See Gilbert, *supra* note 28, at 38.

61. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 103; cf. SAMANTHA BESSON, THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW 4 (2005) (noting that the law functions analogously to provide disputants with reasons for settling their disagreements, namely, by “providing us with a way to agree to disagree or agree on how to do so”).

62. See SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 70; SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 127–31; cf. JOSEPH RAZ, PRACTICAL REASONS AND NORMS 183 (Oxford U. Press, 1999) (1975) (explaining that “[a]n exclusionary reason merely requires us to avoid something which other reasons make legitimate, but do not require”). Searle dissents from classical views of rationality, which deny the feasibility of desire-independent reasons for action. See JOHN R. SEARLE, RATIONALITY IN ACTION 10, 26 (2001). As an aside, the subtle distinctions between Searlean desire-independent reasons and Hartian and Razian “content-independent” peremptory reasons become particularly interesting in light of recent positivist views about the connection between law and morality.

Now these are just John Searle's views of the logic of institutional reality, or at least an attempt to paraphrase them. Other thinkers may have other views, although much of the debate in this area focuses on Searle's philosophy.⁶⁴ We next ask, what are the key implications of his theory, and what constraints do they entail?

2. *Institutional Constraints*

For Searle, the core feature of institutions is their structuring of deontic power, a means by which people are induced to do what the institution requires of them.⁶⁵ This power usually resides in the creation of desire-independent reasons for action, within the institutional setting.⁶⁶ In this regard, "A has power over S with respect to action B if and only if A can intentionally get S to do what A wants regarding B, whether S wants to do it or not."⁶⁷

The sort of intentionality most important here is the ordinary kind, by which A intends a certain outcome.⁶⁸ If A intends that S

HERBERT L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM* 243–44 (1982); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35–36 (Oxford U. Press 1988) (1986).

63. See also LON L. FULLER, *THE MORALITY OF LAW* 22 (Yale Univ. Press rev. ed. 1969) (describing the ways in which "duties generally can be traced to the principle of reciprocity," such that, in the example just given, the landlord's and tenant's desire-independent reasons will be interdependent).

64. See generally Miller, *Joint Action*, *supra* note 33; Mattia Gallotti & John Michael, *Objects in Mind*, in *4 STUDIES IN THE PHILOSOPHY OF SOCIALITY: PERSPECTIVES ON SOCIAL ONTOLOGY AND SOCIAL COGNITION* 1, 5 (Mattia Gallotti & John Michael eds., 2014) ("The recent debate on social facts has grown from the pioneering work of John Searle, whose conceptual apparatus is now taken widely, though not unquestionably, as the starting point of most analyses of social ontology.").

65. See SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 148–51, 169.

66. JOHN R. SEARLE, *FREEDOM AND NEUROBIOLOGY: REFLECTIONS ON FREE WILL, LANGUAGE, AND POLITICAL POWER* 9 (2007) [hereinafter SEARLE, *FREEDOM AND NEUROBIOLOGY*].

67. SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 151.

68. See Leo Zaibert, *Intentions, Promises, and Obligations*, in *CONTEMPORARY PHILOSOPHY IN FOCUS* 52, 60 (Barry Smith ed., 2003) (suggesting that the distinctions Searle draws in other work—differentiating between "prior intentions" and "intentions-in-action,"—may be of limited usefulness even in the context of Searle's own theory); see also SHAPIRO, *supra* note 1, at 211, 213, 309 ("[T]he institutionality [sic] of law is ultimately grounded in intentions."). This analysis is moored in a view that likens laws to plans, and law to a planning mechanism aimed at settling society's moral disputes. Shapiro's approach thereby appears to

stop his car at the corner and has the capability and authority to erect a stop sign there, then A has power over S in that context. Other sorts of intentional content will also come into play, such as the parties' beliefs about driving and road signs, their fears or anxieties about being ticketed by the police, and their hopes concerning safety.⁶⁹

Human beings ordinarily exercise power through their speech acts and the typical form of this exercise is the standing directive.⁷⁰ So this exercise of power must have an intentional, or propositional content, meaning that the exercise of power must be about, or be directed at, something.⁷¹ The propositional content should convey conditions capable of being satisfied by the institutional actors.⁷²

Searle describes two relevant constraints on the concept of power that inform the logic of institutional reality. First, the concept of power is logically connected to the concept of the intentional exercise of power—toward what end is the power intended, believed or perhaps desired to be exercised; Searle calls this the “intentionality constraint.”⁷³ “The intentional exercise of power may have unintended consequences,” and the intention may sometimes even be unconscious.⁷⁴ Perhaps, for example, the crossing guard moves the child on towards school while being conscious only of getting her to the other side of the street. Nevertheless, the crossing guard's authority arises in the context of the institution's collective intention to educate the child.

Notably, intentionality in the ordinary sense of intending a certain outcome is self-referential. If we intend the object in the corner to be a chair, we must think of it as a chair.⁷⁵ If one intends to get to Chicago by train, in order for this intention to be satisfied,

rely on intentionality as limited to ordinary intentions, those that “take plans as their objects.” *Id.* at 127.

69. See SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 25.

70. *Id.* at 97.

71. Fred I. Dretske, *The Intentionality of Cognitive States*, in 5 MIDWEST STUDIES IN PHILOSOPHY 281 (Peter A. French et al. eds., 1980), *reprinted in* THE NATURE OF MIND 354, 354 (David M. Rosenthal ed., 1991).

72. Cf. SCOTT SOAMES, ANALYTIC PHILOSOPHY IN AMERICA—AND OTHER HISTORICAL AND CONTEMPORARY ESSAYS 75 (2014) (arguing that “we must derive the intentionality of propositions from the intentionality of those who entertain them”).

73. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 151.

74. *Id.* at 151.

75. SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 53.

the intention itself must figure causally in the outcome, here arriving in Chicago by train.⁷⁶ The same would not be the case if we simply desired to get to Chicago, without yet intending how to bring this about.

The second constraint on the concept of power is the “exactness constraint.”⁷⁷ For the institution to function, and for participants to recognize its nature and know what may be expected of them, the intentional content of the power relations upholding the institution—that is, what has been collectively intended and believed to be the case—should be sufficiently specified.⁷⁸ Participants in the institution must be capable of knowing, although they need not actually know, what is expected of them, and more generally what status-functions have been assigned.⁷⁹

Recall that Searle’s formula for constitutive rules is: fact “X counts as status Y in context C.”⁸⁰ The Y term is not sustained by virtue of the physicality of the object or entity, and so there must be an intersubjective appreciation, and collective acceptance, of the assignment of the status-function.⁸¹ The assignment must be sufficiently specified to permit such collective recognition.⁸² It is also a condition of ascribing legitimacy to an exercise of power that one be able to say who holds the power, who is subject to that power, and what is the intended effect of its exercise.⁸³ If the logic of institutional reality rests on intended outcomes, assigned status functions, collectively-held intentions, and collective recognition or acceptance of the resulting institutional structures, as Searle

76. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 36.

77. *Id.* at 152.

78. *Id.*

79. *Id.* Of course, participants in an institution need not “discuss” power even when exercising or being affected by it. However, status functions must be assigned with sufficient exactness to render such a discussion possible in a “satisfactory” way.

80. *See* SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 40.

81. *Id.* at 39–41; *see also* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 147 (2d ed. 2009) (saying, for example, that “laws are normally the product of authoritative acts”).

82. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 152.

83. *See id.* at 155; *see also* ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 21 (2d ed. 2005) (“From the perspective of pragmatics, an act of communication succeeds if and only if the hearer recognizes S’s intention.”).

contends,⁸⁴ there will have to be some level of specificity in the intentions and assignments underlying the deontic powers thereby created and sustained.⁸⁵

The Finnish moral and social philosopher Raimo Tuomela has articulated a quite Searlean account of social structures.⁸⁶ He specifies that several kinds of activities or entities can qualify as a social institution.⁸⁷ These include social practices (such as sauna bathing on Saturdays in Finland), objects (such as money), individual properties (such as ownership), linguistic entities (such as natural language), interpersonal states (such as marriage), and social organizations, most of which are typically society-wide, norm-governed group practices.⁸⁸ He interestingly adds, however, that

84. SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 57; *cf. id.* at 103–04 (“One mark of recognition or acceptance is continued usage of the institution and institutional facts Acceptance need not take the form of an explicit speech act and can range all the way from enthusiastic endorsement to grudging acquiescence.”). Again, while Searle’s social ontology is the most influential programme at play in the area of social philosophy, and is enlisted as a foundation for this Article’s discussion of controversy in law, each of his contentions may be subject to dispute and interpretation. *E.g.*, George P. Fletcher, *Law, in CONTEMPORARY PHILOSOPHY IN FOCUS* 85, 99 (Barry Smith ed., 2003) (“When modern legislatures start enacting new laws, these laws become binding—at least according to the conventional view—not because they are accepted but because they are validly enacted.”).

85. See Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181, 181 (1988) (effectively referring to the functional of competition over the federal government’s intentionality in assigning state and federal officials the status of implementing federal law); Note, *Reforming the Initial Sale Requirements of the Private Placement Exemption*, 86 HARV. L. REV. 403, 407 (1972) (suggesting that the Supreme Court’s intended outcomes will be defeated when its stated standards “are so vague that they do not offer a workable basis” for construing statutes); *cf.* In re Williams, No. 1999CA000128, 2000 WL 222033, at *2 (Ohio Ct. App. Feb. 22, 2000) (emphasizing that the “vagueness doctrine . . . applies to legislation that lacks clarity and precision”).

86. RAIMO TUOMELA, *THE PHILOSOPHY OF SOCIALITY: THE SHARED POINT OF VIEW* 182–211 (Oxford U. Press, 2007). Whereas Searle grounds his analysis in the deontic status and status functions informing the logic of institutions, Tuomela’s focus is more broadly concerned with the conceptual and social status that characterizes institutional reality and he deems Searle’s view to involve a “stronger” kind of social institution. *Id.* at 196–97; *see id.* at 203 (saying that “Searlean deontic status can be reinterpreted to be a subcase” of Tuomela’s expression of a social institution). In all events, these distinctions should not come into serious play regarding law and legal institutions.

87. *Id.* at 194.

88. *Id.*

“[o]nly group items that are represented as existing by the group are institutional.”⁸⁹ This should not mean that all community members will have to be conscious of the norm or practice, or even support these without conflict; it might be the case that a small group of officials specify the norm, rule, or structure, so long as the larger group collectively recognizes the general ethos upon which the officials may act.⁹⁰ One further insight by Searle, significant enough to keep in mind, is that higher levels of status functions can be imposed on entities that have previously been assigned status functions.⁹¹ A relatively simple institution can thereby engender a more complex one. Promises, for instance, have status functions because they are collectively recognized as carrying obligations or duties to make good on the promise.⁹² But in a certain setting, and at a logically higher level—one, that is, that refers to, incorporates, and contextualizes the deontic force of the promise as such—a promise can create a contract or count as a necessary step toward marriage.⁹³

More schematically, in the collective intentional assignment of the form, “X counts as Y in context C,” the Y term in the simpler institution can become the X term in the more complex one.⁹⁴ Stones on the ground may count as a boundary neighbors collectively accept they should not cross in the simpler setting, but iterating upward the boundary may mark off a separate political or quasi-political territory. Or as Searle puts it, an utterance (X1) may count as a promise (Y1) in C1, but under certain circumstances C2, that very promise (X2) counts as a contract (Y2).⁹⁵ Now with the contract itself as a context (or Y2 = C3), a particular action as X3 can count as its breach (Y3), and so on.⁹⁶

B. *The Logical Role of Persuasive Authority*

We should now have approximately set out Searle’s project. There is one refinement worth making for the legal theory context, and in respect of institutions generally. This refinement is

89. *Id.*

90. *See id.* at 31.

91. SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 80.

92. *Id.*

93. *Id.* at 82.

94. *Id.* at 80.

95. *Id.* at 125.

96. *Id.*

important because institutional philosophy has not yet fully fleshed out the logic of institutional evolution. The literature speaks to the logical role played by status function assignments within the institution,⁹⁷ but not yet the structural factors motivating and legitimizing the evolution of such assignments and institutional change over time. The concept of persuasive authority should provide a fruitful research program in this regard.⁹⁸

Searle does not distinguish much between power and authority.⁹⁹ This is not to say that he finds them synonymous; rather, authority falls within the range of deontic powers, which for Searle “are rights, duties, obligations, authorizations, permissions, privileges, authority and the like.”¹⁰⁰ Although Searle does not say more about the discrete nature of authority, he seems to use the term in a familiar way. His sense of “authority” is the one that flows both from and constitutes institutional power, and that is interwoven with duties, rights, and obligations.¹⁰¹ As one example, an official within an institution will have the authority to perform certain acts.

There is another sense of “authority” that is sometimes complimentary, but not subordinate or tantamount, to institutional deontic power. In this second sense, authority is minimally a linguistic source capable of influencing intentional states, but without imposing obligations.¹⁰² In everyday parlance we speak of the “power to persuade.”¹⁰³ A linguistic source is presented or becomes available in some way, rises to conscious awareness, and carries an influential force capable of affecting beliefs.¹⁰⁴

97. See, e.g., SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 46.

98. See generally Chad Flanders, *Towards a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 63–64 (2009).

99. See, e.g., SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 8–9 (generally classifying “rights, duties, obligations, requirements, permissions, authorizations, entitlements, and so on” as “deontic powers” engendered and carried by status functions).

100. SEARLE, FREEDOM AND NEUROBIOLOGY, *supra* note 66, at 98.

101. *Id.*

102. E.g., NICHOLAS HARPSFIELD, TREATISE ON THE PRETENDED DIVORCE BETWEEN HENRY VIII AND CATHERINE OF ARAGON 232 (Camden Society 1878) (stating, “[t]hen lasheth he forth many authorities and examples”).

103. Henry P. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1934 (2003) (discussing *Bush v. Gore*, 531 U.S. 98 (2000)).

104. Cf. Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 HASTINGS L.J. 771, 774–75 (1999) (struggling to convey a sense of

The two senses of authority may in general be aligned as “practical” and “theoretical,” respectively. Much has been written about the effects of the former sort of authority within and upon institutions, particularly law.¹⁰⁵ Theoretical authority, on the other hand, is typically rooted in an expertise, but usually without the intent and ability to impose duties that characterize practical authority.¹⁰⁶ This sort of authority may be an object, perhaps a document, an affair, individual, or entity, always linguistically expressed, that may originate within the institution¹⁰⁷ or that may derive from an “other-institutional”¹⁰⁸ or non-institutional source.

Consider, for instance, two books about a national park. One conveys authority in the first sense. It sets out the rules and regulations for use of the park (Searle’s “standing directives”), discusses the agency charged with issuing those rules, and cites the statute establishing (by “standing declaration” in Searle’s terminology) the agency and the regulatory scheme for the national park. The second book, perhaps issued by an unaffiliated group of “friends of the park,” is dedicated to revealing scenic routes that may be taken in the park, the location of its streams and waterfalls, and so forth.¹⁰⁹ The interesting aspect of this example is

the search for persuasive authority in the legal context, including the search for authority “in the context of ancestral judicial experience”).

105. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 37 (Clarendon Press 1986) (“Orders and commands are among the expressions typical of practical authority. Only those who claim authority can command.”).

106. Compare HERBERT L.A. HART, *Commands and Authoritative Legal Reasons*, in *READINGS IN SOCIAL AND POLITICAL THEORY: AUTHORITY* 92, 107 (Joseph Raz ed., 1990) (noting that theoretical authorities may hold sway over matters of belief rather than conduct), with Joseph Raz, *Authority and Justification*, in *READINGS IN SOCIAL AND POLITICAL THEORY: AUTHORITY* 115, 123 (Joseph Raz ed., 1990) (explaining that practical authorities may fulfill the function of imposing duties, among other functions).

107. The persuasive source contemplated here originates within, or has been issued by, the institution, but not as an item imbued with deontic powers. See *infra* note 109.

108. Exemplifying the use of other-institutional sources as persuasive authorities in the legal context, for example, is Justice John Paul Stevens opinion in *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988), taking guidance from the policies of several foreign nations concerning the death penalty.

109. The book on scenic routes may, of course, have been issued by the agency itself in charge of the park, hence institutionally, and yet, because of its content and intended purpose, does not carry deontic authority. But right now we are interested only in the possibility that the source is extra-institutional.

the non- or other-institutional source of the authority. The institution may incorporate or adopt the authority, perhaps by offering the “friends” book at the park’s gift shop, or by recommending it to visitors. In this case, the institution will have changed, to that extent.

Nor is the sort of authority just discussed—that is, of an influential or persuasive source—the same as bare influence. Many extra-institutional factors, including weather conditions, manipulations of a resource, and so on, may exert bare influence over institutions.¹¹⁰ These will not qualify as persuasive authority. Nor need the “exercise” of influence, a human endeavor, be linguistic, as when someone pulls the lever that may release the flood waters. These sorts of events and efforts, however, also do not qualify as “authority.”

But more precisely, the sort of persuasive authority we are concerned with here need not necessarily be theoretical, and need not necessarily embody any expertise. It is, as stated, a linguistic source capable of influencing intentional states, but without imposing obligations.¹¹¹ This persuasive authority may comprise a system of background norms or an independently existing institution. Perhaps it is a dress code, for example, or Robert’s Rules of Order, systems of norms not adopted by the particular institution at issue. Once adopted, however, those authorities may now be enforced in the context of the adoptive institution.¹¹²

Absent persuasive authority or other outside influence, it would be difficult to explain how institutions evolve. For example, the medieval community may decide, by some accepted procedure, to use squirrel pelt as their form of money; until the group

110. See, e.g., RAZ, *supra* note 62, at 99 (noting that such exertions of influence as manipulation of the money supply will affect “people’s reasons for action,” but are “not the exercise of normative powers”).

111. See *supra* note 102 and accompanying text.

112. Cf. Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. INT’L L. 51, 113–14 (2009) (“Voluntary lesson drawing, according to [Richard] Rose, occurs when domestic policy-makers are dissatisfied with the existing state of affairs; define the problem and mark it as potentially solvable through the adoption of new rules, institutions or policies; look outside their domestic system to an external source identified as a potential model for emulation; form the perception that the external practices, rules or institutions are successful in solving difficulties identical, or at least comparable to those at home; and determine that the external rules are not only technically transferable, but politically acceptable.”).

collectively accepts this change, squirrel pelt does not have the status or function of money within that institution, and is an extra-institutional item.¹¹³ This is a trivial point on its own. However, perhaps the institutional criteria for selecting the medium of exchange are portability and intrinsic value, being a medium not too plentiful yet not too scarce.¹¹⁴ Less than ideal experience with squirrel pelt exchange leads to mammalogical inquiry,¹¹⁵ and soon the institutional criteria themselves are modified to include durability and divisibility. Extra-institutional persuasive authority—which in law may derive either from non-legal sources or from precedents set down in other jurisdictions—has guided institutional evolution.¹¹⁶

III. THE EMERGENCE OF LEGAL SYSTEMS

As a conceptual matter, people interact prior to, and without the necessity of, a legal system. We will stipulate that when an interaction results in gain or loss, the interaction is a transaction. The set of interactions that are transactions may be equal to or some portion of the full set of interactions. Some would say that the set of transactions is necessarily greater, since perhaps we can effectively transact at a distance without interacting.¹¹⁷ But here we presuppose that any such transaction suffices to be deemed an interaction, that is, some sort of action or influence upon another that may or may not involve gain or loss.

113. See TUOMELA, *supra* note 86, at 183, 186.

114. WILLIAM S. JEVONS, MONEY AND THE MECHANISM OF EXCHANGE 25–26 (Kegan Paul, Trench & Co. eds., 7th ed. 1885) (noting many of the types of objects that have been used as currency in various cultures, such as whale's teeth by the Fijians, the Egyptians' engraved stones, corn by the Norwegians and ancient Greeks, olive oil in the Ionian Islands, and cacao nuts in the Yucutan).

115. See NORTH AMERICAN FUR AUCTIONS, WILD FUR PELT HANDLING MANUAL 30 (2009) (instructing that for use of a squirrel pelt, "The front feet should be cut off close to the body, leaving just enough to tuck in to the fur side. The tail must be split. Not doing this can result in taint due to the lack of exposure to the air.").

116. See, e.g., Reid v. Life Ins. Co., 718 F.2d 677, 680 (4th Cir. 1983) (looking to precedents in other jurisdictions for persuasive authority); cf. City of Milwaukee v. Chi., Milwaukee, St. Paul. & Pac. R.R. (*Milwaukee Road*), 269 N.W. 688, 689 (Wis. 1936); United States v. Magluta, 198 F.3d 1265, 1280 (11th Cir. 1999) ("[A] district court's error is not 'plain' or 'obvious' if there is no precedent directly resolving an issue."), *vacated on other grounds*, 203 F.3d 1304 (11th Cir. 2000).

117. See generally Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1321 (2002).

Transacting happens in various ways, both intentionally and accidentally. People injure one another, sometimes intentionally, sometimes accidentally.¹¹⁸ They make promises, carve out territory and spaces for living and for more transacting, and also plan for lots of things, including death. Something happens between us once and then twice. We become motivated, by our psychology and nature, to structure the next interaction efficiently because the alternative is waste.¹¹⁹

As transactions, broadly defined to include accidental occurrences, take place in the pre-legal social group—promising, injuring, planning and so forth—they give rise to entitlements, commitments, obligations, and other deontic facts, including deontic emotions such as blame and resentment.¹²⁰ Questions inevitably arise about how to organize, coordinate, and prioritize those obligations, resentments, powers, and practiced means to intended ends.¹²¹ Security and liberty interests are at stake and must be balanced. Without a structure for accomplishing these ends, however, the smooth functioning of the group cannot get off the ground or continue. A legal system emerges, which begins with collectively-recognized regulative and constitutive rules.¹²² Legal practice arising in the legal system brings with it an argumentative structure and argument about the nature of that argumentative structure.¹²³

118. See, e.g., *Coleman v. Twin Coast Newspaper, Inc.*, 346 P.2d 488, 490 (Cal. 1959) (“[A] right to relief arising out of the same transaction or series of transactions exists where several plaintiffs sue for personal injuries suffered in the same accident.”).

119. Cf. Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups*, 7 PSYCHOL. PUB. POL’Y & L. 36, 64 (2001) (describing how a certain face recognition schema “allows for quicker and more effective processing, just as other types of recurring patterns are processed more efficiently and automatically”).

120. SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 147–48; see also Carla Bagnoli, *INTRODUCTION TO MORALITY AND THE EMOTIONS* 1, 26 (Carla Bagnoli ed., 2011).

121. See Joseph Raz, *Introduction to AUTHORITY* 1, 7 (Joseph Raz ed., 1990) (expressing the view that “the need to secure coordination is one of the main arguments for political authority”).

122. See Fletcher, *supra* note 84, at 85–86.

123. See generally DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 24–26; Peder B. Hong, *A Theory of Final Argument in Civil Trials*, 21 HAMLINE L. REV. 31, 55 (1997); cf. Colin S. Diver, *Sound Governance and Sound Law—Administrative Law: Rethinking Judicial Control of Bureaucracy*, 89 MICH. L. REV. 1436, 1446 (1991) (book review) (questioning whether “judicial pluralism” is justified, given the varied

This view has affinities with Dworkin, for whom law's "most abstract and fundamental" point was to "guide and constrain" governmental coercion.¹²⁴ This approach constructively interprets past political decisions and thereby views those decisions in their best light from a moral point of view to determine when collective force is justified.¹²⁵ There is a logic to constructive interpretation by which the project manifests in various stages, each involving a "different degree[] of consensus" within the community.¹²⁶ Although Dworkin did not speak in terms of the logical structure of his approach, he made it clear that the first stage—the "pre-interpretive" stage—was conceptually prior.¹²⁷ This is the stage at which we identify the rules and standards, perhaps the statutory words, taken to provide the tentative content of the practice, but at which "a very great degree of consensus is needed."¹²⁸

For Dworkin, skepticism about whether a regime resting on little more than the raw data identified at the pre-interpretive stage comprises anything beyond a tentative or minimally "legal" system is justified.¹²⁹ That view seems wise. At the same time, Dworkin's pre-interpretive stage generally coincides with what we have just described as the conceptually primary stage characterizing the emergence of a legal system.¹³⁰ Dworkin's second, "interpretive," and third, "post-interpretive," stages involve increasing levels of disputation concerning which outcomes best fit and justify the prior materials, and correspondingly lesser degrees of community consensus, and hence the proliferation of theoretical disagreement.¹³¹

If we go a bit further and ask toward what end government coercion would be exercised in the first place, the answer by our model is to regulate transactions, broadly defined, as these

reasoning and outcomes that would depend "on the convictions of the judge or panel involved").

124. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 93.

125. *Id.*; HART, *supra* note 3, at 248.

126. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 65.

127. *Id.* at 65–66.

128. *Id.*

129. *Id.* at 103–04.

130. *See supra* text accompanying notes 120–23 (suggesting that human interactions engender promising, injuring, planning, and so forth, these giving rise to deontic commitments, rights and obligations, and the inception of primary legal rules and principles).

131. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 66–67.

naturally arise within the community. This regulative apparatus, in turn, may serve any of a number of political ends, including social domination, dispute resolution, or other ends. In all events, the conceptually prior scheme—or “pre-interpretive” stage in Dworkinian terms—consists in regulative and constitutive rules and, perhaps, standards.¹³²

The definitions of regulative and constitutive rules at least appear to neatly distinguish them. Frederick Schauer explains that constitutive rules are rules that “create the very possibility of engaging in conduct of a certain kind. They define and thereby constitute activities that could not otherwise even exist.”¹³³ The rules of chess create the possibility of playing chess; they do not, however, make possible the movement of wooden medieval pieces on a checkered board. Regulative rules, on the other hand, are seen as governing antecedently or independently existing behavior and behavioral patterns.¹³⁴ In practice, however, rules that may be thought of as constitutive—often, but certainly not always, being procedural—“have their regulative side.”¹³⁵ Thus, to some significant extent, the distinction between regulative and constitutive rules will be vague.¹³⁶

The rules of law are sometimes constitutive of state-enforced rights and obligations. Due process principles, for example, may constitute the procedural fairness that is due to parties facing

132. See Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773, 1786 (2006).

133. FREDERICK SCHAUER, PLAYING BY THE RULES: PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 6 (Tony Honoré & Joseph Raz eds., 1991); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 25–28 (1955).

134. SEARLE, SPEECH ACTS, *supra* note 27, at 33.

135. SCHAUER, *supra* note 133, at 7; cf. Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. L. REV. 371, 397–98 (2012) (noting one scholar’s argument “that constitutional self-binding is both regulative and constitutive, limiting and creative, disabling and enabling”) (citing STEPHEN HOLMES, PASSIONS & CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 163 (1995)); RAZ, *supra* note 62, at 109 (“There is nothing in Searle’s explanation to suggest that his classification is exclusive, that the same rule cannot be both regulative and constitutive.”).

136. E.g., Ignacio Sánchez-Cuenca, *A Behavioral Critique of Searle’s Theory of Institutions*, in ESSAYS ON JOHN SEARLE’S SOCIAL ONTOLOGY, *supra* note 28, at 175, 178 (“Contracts are constitutive rules that define the rights and obligations of the parties who enter into some exchange Yet, the exchange is not made possible by the contract.”).

punitive measures from legal adjudicators.¹³⁷ Yet once the legal system, or any other sort of institution, is functional, the constitutive rules “lose their constitutive character within those institutions, serving instead to regulate antecedently defined behavior.”¹³⁸

As group members interacting—or at least theories about this or the representations the members bring into the interactions—is conceptually prior to their law, so is the community’s construction of innumerable rights and obligations, balancing security and liberty interests, conceptually, prior to law’s prescriptions. These informal deontic structures evolve into webs of background norms that both influence behavior and empower, subtly or bluntly, coercive responses to violations of those norms.¹³⁹ Courts develop their embodied or practical philosophies by determining which rights and obligations law should enforce. These, in turn, dialectically influence the community’s norms.¹⁴⁰ The legal system’s coercive capability may not be strictly necessary to a concept of law, but “in the world of law as it exists and as it is experienced, coercion is rampant and sanctions are omnipresent.”¹⁴¹

The legal system may create a rule for enforcing promises as follows: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹⁴² In the area of personal injury, members of the group internalize a sense of obligation when its breach gives rise to some level of collective resentment because it violates a governing norm the group may reasonably be expected to infer.¹⁴³ People liberally assign fault, even when actual

137. ROBERT S. SUMMERS, *FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY* 343 (2006).

138. SCHAUER, *supra* note 133, at 7.

139. *See generally* SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 155; ÉMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 56 (Steven Lukes ed., W.D. Halls trans., 1982) (1895), (“An outburst of collective emotion in a gathering . . . is a product of shared existence, of actions and reactions called into play between the consciousnesses of individuals.”).

140. *See generally* Janine Young Kim, *Hate Crime Law and the Limits of Inculpation*, 84 NEB. L. REV. 846, 888 (2006).

141. Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 605 (2010).

142. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

143. *See generally* Allan Gibbard, *Wise Choices, Apt Feelings*, reprinted in *MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES* 179, 197 (Stephen Darwall et al. eds., Oxford U. Press 1997).

fault is improbable.¹⁴⁴ The legal system may declare that duty in tort is an obligation or set of obligations to adhere to a particular standard of care, which the law recognizes as binding across the community, and for the injurious breach of which the law allows a private remedy.¹⁴⁵ Criminal law, as well as tort, may develop to safeguard the community from freewheeling resorts to the vendetta or blood feud.¹⁴⁶

As the legal system evolves, aiming to fulfill its primary mission of regulating the people's broad range of transactions, it is both the sovereign's unique governing apparatus, and abstractly institutional. The notion that legal systems emerge to regulate transactions is not intended to restrict our view of the range of possible purposes that may drive the emergence or maintenance of a legal system, or of *any* legal system. The primary engagement between law and its subjects is at the level of the legal system's regulation of their transactions, which are a species of their interactions.¹⁴⁷ Toward which end law regulates these transactions, whether this be social domination and control, dispute resolution, the constructive ordering of norms or morality, or some other aim or combination of aims, poses a different question.

Legal philosophers have not paid much recent attention to law's institutional constraints, which if soundly analyzed should inform their view of law's nature. Searle's original and elegant theory about institutions, whether accepted in whole or in part, should significantly impact this discussion.¹⁴⁸ Thinking about law's institutional nature may, in turn, help refocus our understanding of controversy in law.

144. See Ray Glier, *Dodgers' Jones Plumbs Depths of Hitting Slump*, N.Y. TIMES, (Apr. 22, 2008), http://www.nytimes.com/2008/04/22/sports/baseball/22jones.html?_r=0.

145. See *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007); *A.W. v. Lancaster Cty. Sch. Dist.* 0001, 784 N.W.2d 907, 913 (Neb. 2010).

146. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 53–54 (1983).

147. See *supra* text accompanying note 117.

148. See generally Fletcher, *supra* note 84, at 101 (noting that “[o]ur easy reliance” upon Searle’s terminology “illustrates how useful Searle’s conceptual framework can be in formulating views in legal philosophy”).

IV. BECAUSE LEGAL SYSTEMS ARE INSTITUTIONS, INSTITUTIONAL CONSTRAINTS MUST APPLY TO THEM

Legal systems regulate transactions, but what regulates legal systems? The answer should be, first, the structural requirements that constrain all institutions, and, second, institution-specific secondary rules that constrain the actions of legal officials. Of these, structural constraints pertaining to all institutions must be prior. Any secondary rule contrary to those constraints would undermine the system's institutional grounding.¹⁴⁹

If the logic of institutions entails that they are constrained by intentionality and exactness conditions, then the same must hold for law. The nature and complexity of legal systems as institutions will diverge dramatically from that of other sorts of institutions.¹⁵⁰ Nevertheless, the strong thesis upholding the new social ontology is that all human institutional reality derives from, and rests on, the assignment of status functions and is constrained by conditions of intentionality and exactness.¹⁵¹ Those constraints upon institutional power should similarly constrain legal institutional power.

This is not necessarily to agree, with thinkers such as Scott Hershovitz, who seeks to transcend the Hart-Dworkin debate, that there is no distinctively legal domain of normativity.¹⁵² However, as suggested earlier, human interactions and transactions, and the range of deontic and normative phenomena which these give rise to, are conceptually prior to the emergence of legal systems.¹⁵³ To that extent, the thesis here, like Hershovitz's, may be characterized as "eliminativist [sic]."¹⁵⁴

149. See generally FULLER, *supra* note 63, at 39 (demonstrating as a practical matter, for instance, that a secondary rule prohibiting the issuance of any additional rules, precluding the publication of rules which would permit subjects to know what they are "expected to observe," or other secondary rules which would effectively defeat law's intentionality and exactness constraints, would thereby defeat the idea that there is "a legal system at all").

150. See Schaus, *supra* note 46, at 236.

151. See SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 151–52.

152. See Hershovitz, *supra* note 46, at 1173–74.

153. See *supra* notes 117–23 and accompanying text (positing a conceptual ordering from the social engagement of human beings in interactions and transactions, to the consequent emergence of rights and obligations, and, on that conceptual foundation, to the initiation of a legal system).

154. Hershovitz, *supra* note 46, at 1193–95.

It may nevertheless seem to be somewhat of a non sequitur to take the further step, with Dworkin in his wonderful final book *Justice for Hedgehogs*, of viewing law as a branch of political morality.¹⁵⁵ Hershovitz, however, takes the eliminativist position to “vindicate[] Dworkin’s suggestion that people disagree about what the law requires because they disagree about the moral significance of our legal practices.”¹⁵⁶ This puts the cart before the horse, for even if law does not generate its own distinctive domain of normativity, nonmoral disagreements rooted in law’s institutional nature may best explain—as a conceptual and, perhaps, empirical matter—the widespread nature of theoretical controversy in legal practice.

Again following the general contours of Searle’s argument, all institutional reality depends on a basic level of human cooperation, not necessarily for good, and possibly secured by coercion, but rooted in the collective recognition of rights, obligations, duties, and authority, that give subjects desire-independent reasons for action in the institutional context.¹⁵⁷ This collective recognition is the glue that permits observer-relative institutional facts to exist. To sustain the institution, these power relations and commitments must both be intended, or at least be capable of being interpreted as intended, and defined with a sufficient level of exactness.

When a legal case begins, or when a legal issue arises, the first step for the parties or the court is to discern whether the existing legal materials—prior decisions, enactments, and so forth—point the way ahead. If the answer is clearly “yes,” law is likely, but certainly not strictly compelled, to accept that outcome and resolve the matter. If not clear, the court will summon some manner of persuasive authority.¹⁵⁸ But either way, the controversy that defines the case will at the outset be characterized by a claim that one outcome or the other is supported by existing institutional facts which are directed at the new situation.

Institutional logic, no less when it comes to legal institutions, demands that the community be capable of recognizing that the case has been presented, that the empowered official or panel has

155. DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 15, at 405.

156. Hershovitz, *supra* note 46, at 1195.

157. See SEARLE, *FREEDOM AND NEUROBIOLOGY*, *supra* note 66, at 9.

158. See, e.g., Reid, 718 F.2d at 680 (“In deciding a question of first impression, the decisions of courts of other jurisdictions are persuasive authority.”).

resolved the case, and that, as a result, the party or parties involved must do this or refrain from doing that. Legal officials may systematically conceal the outcome, perhaps by trucking the subject away at midnight to an obscure gulag, but, in that case, the community is capable of recognizing that this sort of “infraction” is tragically handled by means of that sort of exercise of power.¹⁵⁹

In a legal system, officials and participants intend that the parties to a proceeding will leave with a sense that they understand what is next expected of them, or at least that what has occurred is capable of being construed and explained to them in rational discourse.¹⁶⁰ Although this should usually happen, some contingencies will not have been addressed, which may engender contention for future actors in their later case. Alternatively, the future actors may view the prior case as settling certain aspects of the new affair, but not others. The entity charged with interpretation, typically the court, will usually discern a minimal content that has previously been determined with sufficient specificity.¹⁶¹

Were the parties to a case or controversy to leave the scene without the sense of a certain level of clarity about the rule or norm that has resolved the matter, or that will thereafter govern their interactions, the system would be appropriately criticized as having failed to function in its communications, and more broadly in fulfilling its institutional role of regulating transactions.¹⁶²

Although depicting law’s institutional constraints as the workings of its internal morality, Lon Fuller famously articulated

159. See generally Sherwin, *supra* note 7, at 1793.

160. See WILLISTON, *supra* note 48, at 127–28 (“[T]he law must be applied by men engaged in practical affairs and by so many of them that to be useful a legal doctrine must be capable of being understood and stated by men who are neither profound scholars nor interested in abstract thought.”); cf. HABERMAS, *supra* note 48, at 232–33 (“[T]he legitimacy of legal statutes is determined not only by the rightness of moral judgments but, among other things, by the availability, cogency, relevance and selection of information; by how fruitful such information proves to be; by how appropriately the situation is interpreted and the issue framed.”).

161. See, e.g., *City of Milwaukee*, 269 N.W. at 689; *Magluta*, 198 F.3d at 1280 (“[A] district court’s error is not ‘plain’ or ‘obvious’ if there is no precedent directly resolving an issue.”), *vacated on other grounds*, 203 F.3d 1304 (11th Cir. 2000).

162. See, e.g., *In re Williams*, 2000 WL 222033, at *2 (“[W]e find the vagueness doctrine applicable . . . because it applies to legislation that lacks clarity and precision.”).

eight criteria that any legal system must aspire towards: (1) the adoption of general rules that permit the system to avoid merely ad hoc decision making; (2) the publication of those rules such that participants may be capable of knowing what is expected of them; (3) the general prohibition on the abuse of retroactive legislation; (4) the articulation of the rules such as they may be understandable; (5) the coherence of the rules such that the duties they impose are not in conflict with one another; (6) the adoption of rules that the participants are reasonably capable of obeying; (7) the maintenance of a fairly stable set of rules, thereby avoiding frequent and disorienting changes; and (8) a congruence between the rules adopted and the way in which legal officials enforce and administer those rules.¹⁶³

Fuller introduced his standards by means of a lengthy allegory, one in which conjured monarch-Rex attempts to create a legal system for his kingdom in ways that successively violate each of the eight principles.¹⁶⁴ At each step, the legal system, as an institution, breaks down, because the kingdom's subjects refuse to collectively accept the legitimacy of the unworkable scheme. As Fuller then announced:

A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.¹⁶⁵

Fuller thereby expressed an existential view of law's minimal institutional constraints. As the legal philosopher Matthew Kramer has already pointed out, however, law—and indeed Fuller's eight precepts engendering law—is as compatible with an evil legal system as with a good one.¹⁶⁶ A respect for individual cognitive autonomy presupposed by the eight precepts, for example, as readily pertains when a bank robber orders his victim to do certain things, because, in that instance, the robber implicitly acknowledges his victim's capacity for rational reflection and

163. See FULLER, *supra* note 63, at 39.

164. *Id.* at 33–38.

165. See *id.* at 39. Fuller's adjectival use of *total* is important to note, given his further acknowledgment that “the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.” *Id.* at 43.

166. See KRAMER, *supra* note 4, at 44, 59–60; see also HART, *supra* note 3, at 211.

decision making.¹⁶⁷ Fuller himself qualifies the significance of his desiderata by conceding that, “[w]ith respect to the demands of legality other than promulgation, then, the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment.”¹⁶⁸ Because Fuller’s constraints implicate the legal system’s ability to survive and persist as an institution, we can adapt them to our institutional approach without accepting the inference he draws to an inner morality for law.

The legal system assigns status functions by promulgating rules and standards to the officials who assume the duty of formulating, administering, or implementing the law in specific and more generalized areas.¹⁶⁹ As with any institution charged with a practical functionality, a legal system would dissipate and be rendered ineffectual were its assignments of rights, duties, and responsibilities to be conveyed in a manner requiring so much interpretation as to render it incapable of guiding the participants’ conduct. Rules or standards imparted solely by parable or riddle, for instance, to suggest a scenario at the extreme would be so vague and confusing as to be unworkable and impracticable.¹⁷⁰

For the most part, the meaning of a law, and of the legal duty it imposes, must be capable of being easily understood by those charged with the duty. Community members develop an evaluative attitude and justified expectations that legal officials will adhere to the status functions assigned to them and legal officials, like

167. KRAMER, *supra* note 4, at 59.

168. FULLER, *supra* note 63, at 44. Fuller’s justification for the promulgation condition somewhat parallels Searle’s claims for the institutional exactness constraint. Fuller says the requirement that laws be published “does not rest on any such absurdity as an expectation that the dutiful citizen will sit down and read them all” but rather on the practical conclusion that those who do know the law will by their behavior indirectly influence the others similarly to observe the law. *Id.* Although Fuller also includes moral language, such that each citizen is “at least entitled to know” the law, even if not individually studying it, he lays out an institutional dynamic by which power is assigned and maintained. *Id.* at 51.

169. *See, e.g.,* Hills, *supra* note 85, at 181 (“[C]ompetition between federal and non-federal officials for implementation authority helps insure that federal laws are implemented by officials who are both faithful to the purposes of such laws yet independent from Congress.”).

170. *Cf.* Note, *supra* note 85, at 407 (arguing that certain “standards laid down by the [Supreme] Court are so vague that they do not offer a workable basis for distinguishing” requirements of the Securities Act of 1933).

officials in other institutions, commit themselves in a public way to satisfy those expectations.¹⁷¹ There are no doubt exceptions, such as when a legislature enacts an abhorrent law, or even when private contractual parties execute an unconscionable agreement, known to offend judicial sensibilities.¹⁷² But in such cases expectations of judicial enforcement may not be justified.

Although Fuller's eight conditions do not necessitate an internal morality for law, they are compelling indicia of the intentionality and exactness constraints that maintain law's institutional power structures and relations. More to the point, these conditions help locate some of the focal points that may engender nonmoral theoretical disagreement over the standards governing those institutional constraints. Participants disagree over whether a ruling may have been general enough to cover their circumstance, whether a rule as published clearly enough supports a litigant's construction, and so forth. Disputes over the standards governing such guideposts, e.g., generality, clarity, understandability, coherence, and capability of being obeyed, are not in the first instance moral ones, and, indeed, legal officials will often have little patience for a detour into moral argumentation about them.¹⁷³

Less anecdotally, while non-positivists may deny that Nazi edicts were law,¹⁷⁴ it is not apparent that they would deny the Nazi apparatus to have been an institution. For a regime committed to evil, dispute over institutional constraints qualifying as theoretical would persist by virtue of the system's institutional structures and needs, but could hardly be seen as inevitably grounded in the furtherance of best moral outcomes. If such theoretical dispute over institutional constraints is more easily accepted as a matter of social fact but not morality, this only goes to show that theoretical dispute in law *qua* institution similarly need not be seen as rooted in moral controversy.

171. See SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 88.

172. See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFFALO L. REV. 185, 186–87 (2004).

173. *E.g.*, Southard v. Morris, 14 Ohio N.P. (n.s.) 465 (Ct. Com. Pl. 1913) (“Returning from the digression of moralism, the point urged by counsel for plaintiff is that the precedents all support the view that the question should have been submitted to the jury and counsel have produced landmark decisions in support of his claim.”).

174. DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 15, at 411–12.

As shown with regard to institutions generally, law's continuous functioning and maintenance depends on more than collective recognition of the duties and obligations imposed by rules, standards, and other devices for assigning status functions within the legal institution. People upon whom a duty has been imposed, or to whom a power has been conferred, will be unable to fulfill that duty or exercise that power unless the community around them engages in some minimal level of cooperation chaperoned by a collective intentionality (most significantly the group's collective beliefs and ordinary intentions), which accepts the legal rules and principles as reasons for conduct.¹⁷⁵ The citizen will apply for a passport before trying to travel abroad, engage in a certain ritual when making a will, stop at the red light, refrain from fixing prices, and so on. The student may become a lawyer, who may become a judge, at each stage holding a distinctive status and a set of obligations arising by virtue of that status.

The prescriptions followed in these instances will tend toward being sufficiently exact to be capable of being understood, even if sometimes on the basis of the retained expertise of others more qualified. But what also must be understood is the fact itself of collective acceptance. It would not be enough for Ms. Jones to follow a rule believing it to be meant only for her. She should understand that others similarly situated are not adhering to divergent rules or generally following practices that may be at cross-purposes with her own, but are engaged in the same overall enterprise.¹⁷⁶

This is not to say that the rules and standards in a legal system must serve the ends of equality or fairness. Laws may be sufficiently clear and exact to guide community members in achieving oppressive inequality or unfair domination and deprivation, and these may be a legal system's intentional objectives.¹⁷⁷ But even under this scenario, the precision of the power relations specified by the rules permits subjects to know and obey the laws, which are

175. SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 58.

176. *See generally* Raz, *Introduction*, *supra* note 121, at 10 ("I should recognize that other people are in my position and that if we all adopt a coordinating practice to follow the directives of a certain body within certain limits then we will all be able to establish and preserve justified coordinative practices which would otherwise evade our grasp.").

177. *See* Hart, *supra* note 14, at 616 (calling the Nazi legal system "a Hell created on earth for men by other men").

in turn capable of standing as desire-independent reasons for action.¹⁷⁸

Nor should the idea of a fairly equal assignment of rights and imposition of duties across the community rule out non-general, particularized expressions of law. In other words, an important aspect of the legal system is its flexibility in addressing localized or particular matters.¹⁷⁹ A town's zoning board, for instance, is charged with weighing several factors in deciding whether to grant Philippe Ifrah a variance to subdivide her property.¹⁸⁰ What is assumed by the larger community, however, is that each citizen—or at least each similarly situated (and similarly empowered) citizen—would receive fairly equal treatment, the same factors being balanced, were they to apply for such a variance.

It should be noted that George Fletcher has offered an interesting objection to the notion that the constitutive rules by which law assigns status functions “must find support in the attitudes of those for whom the institutional fact resonates as true.”¹⁸¹ Fletcher, who has therein offered one of the few responses thus far to Searle's institutional philosophy as it may pertain to law, responds that it is validity, rather than social acceptance, which functions as the chief criterion of a law's “having force.”¹⁸² Laws are deemed binding, in other words, not necessarily because they are widely accepted by the society, but rather because they have been validly enacted. As an example, Fletcher refers to the case of gay and lesbian marriages, which might hypothetically be recognized as “legal” by various legislatures, but which may at the same time not be “accepted” by society except in a narrow “technical” sense.¹⁸³

Being the prime mover behind a fairly original area of philosophical thought, Searle himself has acknowledged that his theory of institutions is nascent and will need to be ironed out.¹⁸⁴ Even so, it appears that the present theory is powerful enough to afford significant insight into controversy over the concept of legal

178. See SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 70; SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 127–31.

179. See generally RAZ, THE AUTHORITY OF LAW, *supra* note 81, at 216.

180. Ifrah v. Utschig, 774 N.E.2d 732, 733–34 (N.Y. 2002).

181. Fletcher, *supra* note 84, at 98.

182. *Id.*

183. *Id.* at 99.

184. Searle, *What Is an Institution?*, *supra* note 43, at 10.

validity, based on the idea that the assignment of status functions requires collective recognition and acceptance to work.

First, Searle points out that “acceptance” need not imply approval, but rather, may occur along a continuum beginning with a very weak grudging acknowledgment of the assignment.¹⁸⁵ In other words, the sort of collective recognition and acceptance discussed throughout this article should not be construed to imply endorsement. The level of acceptance of non-heterosexual marriage that Fletcher labels “technical” should, at the least, rise to the level of acknowledgment, however grudging, *that* such marriages have been deemed “legal” in the relevant jurisdictions, that such marriages are thenceforth “entitled,” at least within the existing legal system to the same legal benefits as heterosexual ones, and that the political and legislative mechanisms, themselves accepted by the society, have acted validly.

Second, and rooted in the logic of institutional power structures, the legal validity of the legislation provides community members with “desire-independent” reasons for action, namely, a recognition of the marriages and their now legal trappings. These desire-independent reasons function precisely because they may run counter to, or serve to exclude, what the participants may believe to be right or may desire for themselves.¹⁸⁶ They will understand that the declaration of certain words in a certain context, on the part of a same-sex couple, now counts as assigning to that couple the status of being married. Although the odd baker may refuse to take a wedding cake order from a gay couple, or the odd county clerk to stamp marriage licenses,¹⁸⁷ even they may grudgingly acknowledge their legal obligation to do so absent a

185. *Id.* at 10; SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 8.

186. SEARLE, CONSTRUCTION OF SOCIAL REALITY, *supra* note 30, at 70; SEARLE, MAKING THE SOCIAL WORLD, *supra* note 19, at 127–31; *cf.* RAZ, PRACTICAL REASONS AND NORMS, *supra* note 62, at 183 (“An exclusionary reason merely requires us to avoid something which other reasons make legitimate, but do not require.”).

187. Michael Paulsen & Fernanda Santos, *Religious Right in Arizona Cheers Bill Allowing Businesses to Refuse to Serve Gays*, N.Y. TIMES (Feb. 21, 2014), <http://www.nytimes.com/2014/02/22/us/religious-right-in-arizona-cheers-bill-allowing-businesses-to-refuse-to-serve-gays.html>; Sarah Kaplan & James Higdson, *The Defiant Kim Davis, the Ky. Clerk Who Refuses to Issue Gay Marriage Licenses*, WASH. POST (Sept. 2, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/meet-kim-davis-the-ky-clerk-who-defying-the-supreme-court-refuses-to-issue-gay-marriage-licenses/>.

further exemption granted—at least in the interim until subjected to constitutional review—by their legislature.¹⁸⁸

V. LAW'S WIDESPREAD "THEORETICAL" DISPUTES ARE NONMORAL
CONTROVERSIES ABOUT EXACTNESS AND COLLECTIVE
INTENTIONALITY

We might initially protest that, although by any definition the legal system certainly qualifies as an institution or set of institutions, it hardly seems clear that there is much exactness or expression of "collective" beliefs and intentions involved in legislation and judicial decision-making.¹⁸⁹ How will it make sense, therefore, to apply the exactness and intentionality constraints to an analysis of law? And if these constraints are included in the analysis, how will we not end up diluting our concept of law of its peculiar institutional character?

We would, for instance, call the well-worn rule *vehicles are prohibited in the park* a "law" when adopted by the appropriate law-making body. But this does not mean that the rule manifests official intentions and beliefs to sufficiently convey legal duties and obligations in a particular case. The rule is exact in a sense, but fairly imprecise when one considers bicycles, roller skates, or ambulances responding to an emergency.¹⁹⁰

Somewhat paradoxically, however, the inherent inexactness of language—and therefore of declarations, rules and laws—should actually support, far more than it may tend to refute, a Searlean institutional explanation of legal phenomena central to the long debate over law's nature. Specifically, the institutional pull within

188. Paulsen & Santos, *supra* note 187 ("Most states where same-sex marriage is legal have exemptions for religious organizations, but not for private businesses or individuals.").

189. See generally Howard, *supra* note 7, at 390 (emphasizing that language and hence legal documents are inexact and indeterminate, and require extensive interpretation); Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495, 1495 (1984) (book review) (noting the legal realists' view that "language and rules are inherently imprecise and manipulable . . . and that formal or mechanistic approaches to the law mask the far more complex relationships between law and the rest of life").

190. HART, *supra* note 3, at 607; see, e.g., *State ex rel. Miller v. Claiborne*, 505 P.2d 732, 735 (Kan. 1973) (addressing whether chickens are animals for purposes of statute forbidding cruelty to animals); *White City Shopping Ctr., LP v. PR Rest., LLC*, No. 2006196313, 2006 WL 3292641, at *1 (Mass. Oct. 31, 2006) (deciding whether the term "sandwiches" includes burritos, tacos and quesadillas).

law toward compliance with the intentionality and exactness constraints provides an interesting explanation of the argumentative structure of legal practice. Moreover, this reason may be more accessible, and ultimately more fitting, than Dworkin's because it need not rely upon a structure "hidden" beneath the surface of legal decision making.¹⁹¹ Rather, the will to comply with institutional constraints upon the creation and exercise of deontic power should be fairly well apparent on the surface of judicial decisions.

Dworkin viewed controversy in law as rooted in dispute over moral content, with judges seeking to determine which legal—or moral hence legal—principle best fits the conflict at hand and justifies the new outcome.¹⁹² Constructive interpretation rejects the idea of an "existing law" in which there will be a distinct *collection* of legal rules, principles, and other standards.¹⁹³ In a Dworkinian world, the right answer to legal cases should follow from our best interpretation of the data at hand, applying a principled consistency over time, using the soundest principles and standards of theory construction drawn from society's political morality.¹⁹⁴

This is, for Dworkin, the hidden structure of legal argumentation, which engenders widespread theoretical disagreement in pursuit not only of justice and fairness, but integrity.¹⁹⁵ A precedent carries a "gravitational force" that "escapes the language of its opinion."¹⁹⁶ It is at Dworkin's second, "interpretive" stage, in the process of justifying the practice and placing law's existing materials in their best light, and then also at the fairly marginal third, "post-interpretive" or "reforming" stage of the constructive interpretive exercise—at which interpreters fine-tune their sense of what the legal practice "really" requires so as to

191. See DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 265.

192. *Id.* at 7–8, 225, 285 (setting out his view that lawyers and judges "are really disagreeing about . . . issues of morality and fidelity," and that such controversy is rooted in "principles of justice, fairness, and procedural due process" based on "some general scheme of moral responsibility"); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1084, 1096 (1975).

193. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 343–44 ("I do want to reject . . . the picture of 'existing law' There is no such thing as 'the law' as a collection of discrete propositions, each with its own canonical form.").

194. *Cf.* Soper, *supra* note 1, at 1741–42 (discussing Dworkin's theory as just stated).

195. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 166.

196. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 112–13.

best serve the moral justification located at the second stage—that consensus becomes far less likely and theoretical disagreement may abound.¹⁹⁷

The theory of adjudication that views the “gravitational”—and deontic—force of institutionally binding determinations as “escaping” or being “hidden” from the language of those decisions appears to stand in quite some contrast to Searle’s view of the logic of institutions. Recall that, for Searle, constitutive rules that construct the institution consist in speech acts known as “standing [d]eclarations.”¹⁹⁸ It is by virtue of those declarations that institutions permit the individuals, entities, or objects involved to “count as” having a certain significance and status within the institution. At the same time, regulative rules that govern behavior within the institution are known, in linguistic terms, as “standing [d]irectives.”¹⁹⁹

This is not to say that institutional rules do not have “gravitational force” that transcends the language used to frame them or that they do not require constant interpretation. The point, however, is that the linguistic expression is primary. When an institution assigns power, it intends to communicate, and thereby needs to be fairly clear and precise lest the assignment be futile and incapable of collective recognition. Determining what sort of deontic power the declaration assigns is conceptually prior to an interpretation that may “escape” the language.

Like other speakers, courts and legislatures rely on linguistic conventions to convey meaning in an efficient and repeatable manner.²⁰⁰ In the institutional setting, the question is what power the declaration or declaring entity intends and believes itself to assign—whether a positive power, such as a right, or a negative power, such as a duty or obligation—and with what level of exactness that assignment has been made. Language functions in

197. DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 66–67, 230–31 (setting out his theory of the three stages by which law is constructively interpreted).

198. SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 97.

199. *Id.* (explaining that a regulative rule, such as “Drive on the right hand side of the road,” functions as a standing directive aimed at conditioning the behavior of drivers); *see supra* notes 54–58 and accompanying text (providing examples showing the distinction between standing directives and standing declarations).

200. *See* SEARLE, *MAKING THE SOCIAL WORLD*, *supra* note 19, at 73–74.

the institutional setting to constitute, as well as describe, the obligation, right, or duty intended to be assigned.²⁰¹

When citizens want to learn what legal right or duty they may have in a situation, they look to the statutory and regulatory materials, writings, sanctions, or permissions that the law will enforce, as well as any legal decisions that bear on the issue. Legal officials do the same when trying to figure out how to treat a case. By looking for authorities that bear on the issue, these participants seek out the data most exactly to the point. If the authority appears close enough to be decisive, the work in most cases is done. As Justice Roger Traynor put it:

[A] judge invariably takes precedent as his starting point; he is constrained to arrive at a decision in the context of ancestral judicial experience: the given decisions or, lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it into the often rewoven but always unbroken line with the past. A judge is constrained not only to heed the relevant judicial past in arriving at a decision, but also to arrive at it within as straight and narrow a path as possible.²⁰²

There should be an intuitive consensus about Traynor's view of the judge's duty. Few would disagree that the court's deliberation, even when not bound by a controlling precedent, is constrained by standards.²⁰³ The path, as straight and narrow as possible, "establishes the unprecedented case as a precedent for the future;"²⁰⁴ but the question remains whether this is accomplished owing to the moral content of law's embedded standards and principles, or by way of judicial discretion which creates the new precedent as an expression of the court's evolving practical philosophy about what the law, and self-referentially the institution, should be.

201. SEARLE, FREEDOM AND NEUROBIOLOGY, *supra* note 66, at 93.

202. Traynor, *supra* note 104, at 774–75.

203. See Raz, *supra* note 106, at 115 (setting forth normative theses concerning the types of argument required to justify claims that authority is legitimate and the factors that should guide the exercise of practical authority).

204. Traynor, *supra* note 104, at 775.

Dworkin said that the argumentative structure of legal practice, which involves theoretical disagreement “about the soundest interpretation of some pertinent aspect of judicial practice,”²⁰⁵ counts in favor of the non-positivist construction that asserts law’s moral ground. This article presupposes theoretical disagreement, but contends that the conceptually prior disagreement that happens in a theoretical and widespread way is a dispute over standards of exactness and intentionality. The controversy is thereby, in the first instance, over the social fact of whether, gauged by those standards, the given law and decisions yield the outcome.

The non-positivist claim has always presupposed that theoretical disagreement in law rests on personal and political morality, and “usually raises moral issues.”²⁰⁶ For Dworkin, theoretical disagreement wrestles over the correct way to interpret the data or practice before the court, an exercise grounded on the moral quest to make legal practice the best social practice it can be.²⁰⁷ Even in Dworkinian terms, however, theoretical disagreement is not *necessarily* grounded in morality. For this, unadorned, is a controversy “about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true.”²⁰⁸ Paraphrasing, the parties to a dispute will be engaged in a Dworkinian theoretical disagreement when they disagree about what must occur in the legal system before a proposition of law can be said to be true.²⁰⁹

And even for Dworkin, an interpretation may justify *because* it fits, and therefore “the distinction between the two dimensions is less crucial or profound than it might seem.”²¹⁰ The question of fit alone should be an area of substantial disagreement.²¹¹ At one extreme, dissents in legal decisions sometimes charge that the majority has ignored a controlling precedent and the majority may

205. DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 87.

206. BESSON, *supra* note 61, at 23; SHAPIRO, *supra* note 6, at 44.

207. SHAPIRO, *LEGALITY*, *supra* note 1, at 293.

208. DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 5.

209. SHAPIRO, *LEGALITY*, *supra* note 1, at 285.

210. DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 231.

211. See Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 *YALE L.J.* 1561, 1571 (1994) (“[E]ven the threshold question of whether the statute was ambiguous presented a hard case.”) (citing LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 70–71 (1993)).

say the same about the dissenting view.²¹² In the usual and ubiquitous practice, though, the debate is whether or to what extent the precedents cited by the adversary are distinguishable from the case before the court.²¹³ Doctrines are also parsed and distinguished.²¹⁴ Before the new dispute arises, existing legal sources—whether they be as general as a statute or judicial holding, or as individualized as a zoning variance or contract—define the status functions that constitute legal relations and regulate society.

The non-positivist view has taken theoretical disagreement to be fairly lofty, involving dispute that goes to the core of political morality. If, however, legal controversy comes down to the widespread jockeying over standards of exactness and intentionality, including issues such as ambiguity and distinguishability, then theoretical disagreement is rather quotidian. But that is quite the point: theoretical disagreement is recurrent, hence quotidian. Yet positivists have acquiesced in the grander view and have thereby engaged in responding to the “powerful” challenge.²¹⁵

Hart came to believe that “soft” or inclusive positivism, by which the identification of law may sometimes depend upon moral criteria and the “open texture” of language which renders law incomplete in hard cases, are the vehicles by which to answer Dworkin’s claim of theoretical disagreement in law.²¹⁶ The problem, however, is to account for theoretical disagreement that not only occurs in law, but that is widespread. Hart was conceptually deterred from acknowledging any such widespread controversy owing to his theoretical commitment to law’s certainty-providing function. While not “paramount and overriding,” the

212. See *Wetzel v. Lou Ehlers Cadillac Grp. Long Term Disability Ins. Program*, 189 F.3d 1160, 1168 (9th Cir. 1999) (saying that, although the dissent “claims that we . . . ignore controlling precedent . . . , we feel that our precedents require our decision today”).

213. See *United States v. Clark*, 163 F.App’x. 799, 801 (11th Cir. 2006) (“Clark gives us no sound reason for his position, and he is not able to distinguish precedent that is closely on point, the logic of which applies to this issue.”); *Carson v. Nat’l Life Ins. Co.*, 80 S.E. 1080, 1081 (N.C. 1914) (noting that prior case was “so closely analogous as not to be distinguishable”).

214. *E.g.*, *Arnold v. All Am. Assurance Co.*, 499 S.W.2d 861, 865 (Ark. 1973) (“In the law of agency the concept of ratification is closely related to the doctrine of estoppel, even though the two may be distinguished.”).

215. Shapiro, *supra* note 6, at 35.

216. HART, *supra* note 3, at 251–52.

certainty-providing function of the rule of recognition presupposed, for Hart, some limit on the degree of uncertainty that a society could tolerate.²¹⁷

What should be considered, however, is the disconnect between legal philosophy—wherein the philosopher wrangles over the concept of legal validity—and the practice it interprets.²¹⁸ Ubiquitous tension in litigated cases over standards of exactness and intentionality explains the appearance of widespread theoretical disagreement from a nonmoral perspective. The legal norms set out in the prior case may or may not apply in the present one, with its dissimilar (in varying degrees) factual context. This uncertainty has been taken to result from an inherent vagueness in the language used and now needing to be “precisified [sic]” for application in the new context.²¹⁹

In other respects, however, it is widespread stability and the *lack* of biting controversy rooted in political morality that characterizes legal systems. Were the implications of a substantial portion of institutional norms to be indeterminate, then the institution’s status would itself be fledgling or doubtful—an arrangement striving to be a legal system.²²⁰ The view, however, that law’s argumentative structure engenders nonmoral disagreement—arising from controversy over the standards governing the intentionality and exactness constraints—should align with Hart’s insight that, while the *existence* of law is relatively certain, law’s *application* in particular cases may be significantly controversial.²²¹

The present view may also benefit the Dworkinian approach to some extent, by tamping down if not resolving an irksome paradox. In Dworkin’s interpretive model, legal principles are identified in the exercise in which they are set forth to justify the legal practice.²²² Yet, the interpretive exercise seeking principles that fit the prior practice is epistemically prior. Principles must both fit and justify the legal practice at the second stage, and then, at the third, be fine-tuned based on the interpreter’s best substantive convictions about the practice and the principles identified at the

217. *Id.* at 252.

218. See MARMOR, *supra* note 83, at 4.

219. SOAMES, *supra* note 72, at 289; HART, *supra* note 3, at 128.

220. KRAMER, *supra* note 4, at 142–44.

221. HART, *supra* note 3, at 160.

222. See *supra* text accompanying note 131.

second stage.²²³ In the Dworkinian scheme we are more knowledgeable, and there is less controversy, about principles identified as fitting the practice and then we are left to ask more controversially whether the principles justify the practice. If, however, legal principles can only be demarcated at the latter stage involving justification, how can these be known to us at the epistemically prior interpretive stage gauging fit?

Rooting much of legal controversy in disagreement over standards of exactness and intentionality relocates the ground of theoretical disagreement to the interpretive exercise in which principles are measured for fit. This case must be decided and its degree of difference from the prior case becomes the focus of dispute. Each participant—whether an official or a litigant—asks whether the existing legal data, with its embedded norms, support her own interpretation with sufficient intention and specificity.²²⁴ Remaining open to the inevitable claim that existing legal materials are “distinguishable,” the court implicitly acknowledges that its decision making may cover greater terrain than provided by the given materials.

Engaging in this exercise by deciding which rights and duties have been intended or sufficiently specified, or alternatively which the law *should* assign, judges reflectively engage in the development of their practical philosophy concerning the court’s institutional role. Developing their practical philosophy, judges do not passively receive societal norms but actively participate in norm elaboration.²²⁵ Portions of prior decisions not necessary to the holding, and thereby not contained within the holding’s intentional contents, are dismissed as “obiter dicta,”²²⁶ and dicta becomes law if later adopted.²²⁷

223. DWORKIN, *LAW’S EMPIRE*, *supra* note 6, at 228.

224. *E.g.*, *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 378–79 (N.Y. 1998) (disagreeing over whether, by the language and purpose of the National Traffic and Motor Vehicle Safety Act, and its legislative history, Congress intended to preempt state common law claims for injuries arising from the lack of a driver’s-side air bag).

225. *See* Diver, *supra* note 123, at 1441 (discussing suggestions by Christopher F. Edley, Jr., “on how a reviewing court would go about elaborating norms of sound governance and how the judiciary could be better equipped, by training and expert assistance, for the demands of such a challenging assignment”).

226. *See* *Shearin v. Wayne Davis & Co., P.C.*, 637 S.E.2d 679, 681 (Ga. 2006).

227. *E.g.*, *State v. Fahringer*, 666 P.2d 514, 515 (Ariz. Ct. App. 1983).

The legal system necessarily wields power, but fulfillment of the epistemic exactness constraint is requisite to the attribution of power. When the legal system adopts the rule *vehicles prohibited in the park*, one side may argue that the exactness constraint has not been satisfied when it comes to a certain thing. The claim that law's power has not reached the use of that thing is, in effect, a claim that the thing does not exist within the rule's collective intentional content. Not, that is, until sufficiently precise social facts exist by which citizens may be able to delimit *vehicle* in the desired way.

Secondary rules, and in particular "rules of change,"²²⁸ give the *procedure* for changing the law. A statute of wills, for instance, might be seen as a rule of change from the statutory default distribution of property should a person die intestate.²²⁹ Nearly by definition then, the *content* of the testator's choice of whom to favor in his will results from extralegal considerations, whether this is persuasive authority or, more likely, the nonlinguistic influence of personal affections.

Persuasive authority runs the gamut, from the opinions of co-equal courts to legislative histories to legal treatises to Aristotle.²³⁰ A great source of the compelling nature of Dworkin's view is that, indeed, courts will hold out their reliance upon persuasive authority to be a legal, as opposed to extralegal, exercise. In the classic case of *Sherwood v. Walker*,²³¹ for instance, Hiram Walker agreed to sell his cow, Rose 2d of Aberlone, to the banker, T. C. Sherwood, both parties falsely believing Rose was barren.²³² Said the court:

This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, oftentimes [sic] tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind,

228. HART, *supra* note 3, at 95–96 (explaining that the most basic "rules of change" authorize officials to alter or adopt new primary rules of conduct for the ordinary citizen subject to those primary rules).

229. See Jeremy Waldron, *Who Needs Rules of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 327, 330–31 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

230. Flanders, *supra* note 98, at 63–64.

231. 33 N.W. 919 (Mich. 1887).

232. *Id.* at 920.

the general principles of the law, and then apply them as best we may to the facts of the case in hand.²³³

However, the *Sherwood* court then disregarded existing legal principles as applied to horses and opted for a new legal rule channeling Aristotle's *Categories*.²³⁴ The dissenting opinion agreed with the Aristotelian language, but insisted that prior authority "clearly sustains the views I have taken."²³⁵ This was a controversy over the standards inhering in the legal system's institutional exactness and intentionality constraints.

The primary controversy in *Sherwood* was whether law about horse trading was sufficiently "directed at" cow bargaining. It was also about whether prior law concerning a mutual mistake over the soundness of a horse was sufficiently directed at larger situations reaching mutual mistakes over bovine fertility. These issues suggest disagreement rooted in the intentionality constraint.²³⁶ The controversy might also be seen as stemming from disagreement over whether the existing law covered the present situation with sufficient exactness. The practitioner's first question in *Sherwood* was whether there had been a sufficiently precise assignment of Walker's right to rescind, Sherwood's obligation to replevy, or his entitlement to walk away with unexpected profit in hand.²³⁷

Exactness and intentionality disputes reveal the conceptually prior layer of controversy, and account for the argumentative structure of legal practice. The controversy arises when one side claims that a precedent covers the new kind of circumstance, while the other side deems the new situation to be of an unprecedented kind; this disagreement typically boils down to competing litigation stances in which one side defines the kind broadly enough to

233. *Id.* at 921.

234. *Id.* at 923 (fashioning a rule using the terms "substance," "quality," and "accident" derived from Aristotle's *Categories 3b10*). See Aristotle, *Categories 3b10*, in 1 THE COMPLETE WORDS OF ARISTOTLE 3, 6 (Jonathan Barnes ed., Oxford trans., 1984) (1956).

235. *Sherwood*, 33 N.W. at 926 (Sherwood, J., dissenting).

236. See MARMOR, *supra* note 83, at 129–31 (showing that there may well be secondary disputes regarding intentionality, including over the method for determining judicial and legislative intention in the ordinary sense); cf. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 187 n.179 (2008) (indicating that this level of disagreement should be minimized with regard to judicial decisions, which by their nature tend to supply reasoning and thereby, or at least, claim to be somewhat transparent).

237. *Sherwood*, 33 N.W. at 921.

support its expansive view, while the opposing side defines the kind so narrowly as to exclude it from consideration.²³⁸ The non-positivist approach has been too eager to move from the realm of fit into the conceptually richer domain of justification.

Nevertheless, Dworkin, for example, held out the search for a morally best outcome in the case of *Riggs v. Palmer*,²³⁹ as characteristic of legal practice.²⁴⁰ Even in *Riggs*, in which Elmer had murdered his grandfather in order to gain his inheritance, the outcome-determinative disagreement did not center on the moral issue. The entire appellate panel agreed that morality would frustrate Elmer's scheme.²⁴¹ The judges disputed whether the case should be decided in accord with the morally required outcome. They struggled to delimit their theoretical disagreement to the standard by which to weigh the presumed collective intention of the legislators against the precision of their statutory language regulating the making of testamentary documents.

Even for the limited range of cases arising from the unsettled construction of constitutional or statutory clauses, and in which different interpretive methodologies are available, the issue of whether prior legal assertions and stipulations are sufficiently directed to the question typically takes priority over, and often preempts, any theoretical debate concerning interpretive approaches.²⁴² Owing to its institutional logic, the legal system

238. See QUINE, *supra* note 17, at 5 (explaining that our definition of concepts and our understanding of dispositions may vary depending upon how narrowly or broadly we define the sort the thing, the "kind," at issue).

239. 22 N.E. 188 (N.Y. 1889).

240. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 15–20.

241. Compare *Riggs*, 22 N.E. at 190 (wherein the majority opinion asks, "[u]nder such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime?"), with *Riggs*, 22 N.E. at 191 (Grey, J., dissenting) (agreeing that, "if I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views which commend themselves to the conscience").

242. See *Lan-Dale Co. v. United States*, 85 Fed. Cl. 431, 435 (2009) ("While the Court would have been quite comfortable following [a different] position . . . that option is not available. The Court has no choice but to follow the precedent . . . , but it does so grudgingly, hoping that 28 U.S.C. § 1500 might be restored to its original intent in the near future."); *Phillips v. City of Oakland*, No. C 07-3885 CW, 2008 WL 1901005, at *2 (N.D. Cal. Apr. 28, 2008) (declining to decide with plaintiff, stating "[p]laintiff . . . urges the Court to apply an interpretation of the Commerce Clause based on the original intent of the framers of the Constitution. Even if the Court were inclined to adopt such an interpretation, however, it is not

ascribes a higher status to prior status function assignments, as evidenced by the existing legal materials, than to theoretical debate not arising from institutional exactness and intentionality constraints.²⁴³

A constructive interpreter may ask which outcome is morally best but, apart from questions of competence, this is not the practitioner's priority. The existing law, as communicated in the legal materials, might have successfully assigned rights and obligations, such that the parties and legal officials are able collectively to recognize the content of this assignment of positive and negative powers.²⁴⁴ The idea of this sort of success is a loose one, and a matter of degree, hinging on whether the current matter is resolved because the current participants consider themselves to be grasping, and covered by, the intentions expressed in the earlier determination. If so, the parties and officials are under the sway of desire-independent institutional reasons to act. If not, or occasionally because it seems time for a change, they turn to the complex network of persuasive authority derived from moral reasoning and other sources.

VI. CONCLUSION

Recent social and institutional philosophy affords us new analytic tools for assessing the logic and dynamics of institutions. Applying this new thinking to legal philosophy sheds further light on how we can move the latter project beyond the well-rehearsed parameters of the Hart-Dworkin debate. Efforts to do so in the past few years have been compelling, but are subject to challenge. This

free to disregard established precedent"); *Lowery v. Haithcock*, 79 S.E.2d 204, 208–09 (N.C. 1953) (“Our former decisions have liberalized the lien statute upon which plaintiff relies—perhaps beyond the original intent. Even so, we must apply the statute as heretofore construed by this Court.”).

243. Although case precedents afford a legal system a mobile and efficient means of assigning status functions and of adjusting prior assignments and functions, this article is ultimately neutral with regard to a theory of judicial precedent. Its thesis is consistent with the idea that there may be a legal system in which officials are assigned status functions obligating them to disregard or devalue prior case decisions, and thereby not to treat those individual decisions as carrying status-function-assignment functions. *See, e.g.*, Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1206 (“China does not publish U.S.-style case reporters or even formally recognize judicial precedent.”).

244. *See* MARMOR, *supra* note 83, at 21–22.

is not to say that the recent work on institutions and social ontology has necessarily been well applied here, or the current developments in legal philosophy well challenged. But perhaps this article has suggested a new approach for reconciling the appearance of widespread theoretical disagreement in law with its reality.