
LAW'S BOUNDARIES

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The history of law is in no small part the history of its boundaries. And the history of legal theory, or jurisprudence more narrowly,¹ is thus a history of exploring, analyzing, and debating these boundaries. Indeed, as far back as 1906, in a tribute to the then-recently deceased Christopher Columbus Langdell, Joseph Beale recalled that many of Langdell's students complained that his teaching, which tended to focus on older decisions from England rather than on general rules from treatises or newer American cases, "was not law."²

Seen through 2017 eyes, the student complaint that decisions by English judges on topics such as mortgages and specific performance of contracts were not law seems bizarre. What could be more *law*, we might now think, than an analysis of the holdings of English courts on the subjects just mentioned, or on, say, suretyship? But to the students who carped about Langdell's obsession with matters ancient and English, law was something narrower. For them law was constituted by general principles as stated in authoritative treatises and perhaps by currently controlling decisions (and, presumably, statutes, and various other sources of legal doctrine) of the jurisdiction within which they lived and where they intended to practice. Everything else, we suspect, was for them mere archaeology, history, or antiquarianism, none of which had a proper place in a school of *law*.

The anecdote is instructive. Because law is not simply the sum total of all the rules, principles, procedures, norms, and institutions that

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¹ Scholars these days tend to treat "jurisprudence" and "philosophy of law" as more or less synonymous. The tendency is best resisted, however, for it mistakenly suggests that only the tools of philosophy, and in practice only the tools of contemporary analytic philosophy, are suited to examining the nature of law itself, as opposed to law in particular places, and as opposed to particular branches of law. Nevertheless, the focus of this Essay is on that form of jurisprudence commonly understood as philosophy of law, even though, as will be apparent, there will be necessary excursions into those parts of jurisprudence that are decidedly less philosophical, and to those aspects of jurisprudential inquiry often ignored by contemporary practitioners of analytic philosophy of law.

² Joseph H. Beale, Jr., *Professor Langdell — His Later Teaching Days*, 20 HARV. L. REV. 9, 10 (1906).

are present throughout society at large,³ it follows that there are sources of normative guidance and factual enlightenment that legitimately exist in the wider society but that are nevertheless no part of law.⁴ Even this modest claim, however, presupposes a boundary between law and not-law, in much the same way that institutions such as law schools, law libraries, and bar examinations presuppose much the same thing. But the boundary between law and not-law is a shifting one, as our contemporary reaction to the complaints of Langdell's students indicates. The shift has not been unidirectional, and the boundaries of law, even if generally wider now than at most times in the past, still seem at some times to expand and at other times to contract. Yet although the boundaries between law and not-law are not stable, they remain no less important in delineating the character of law, legal argument, and legal decisionmaking. To know what law is, after all, requires that one know what law is not.

It is not surprising, therefore, that most of the important debates in jurisprudence over the past 200 years have been about the boundaries of law, and about the extent to which what some have thought of as non-law is, or has become, law, and occasionally about the extent to which what some have thought of as law is not really law at all. Law

³ I intend the claim in the text to be noncontroversial, to be agnostic as between positivism and natural law, and indeed agnostic with respect to virtually any extant theory of the nature of law. I mean to suggest only that law is not congruent (is extensionally divergent, in philosophical jargon) with the totality of a society's normative and institutional landscape. After all, even that foremost of natural law theorists, Thomas Aquinas, distinguished between natural law and human law, suggesting that human law was not coextensive with the idea of the all-things-considered right thing to do. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* pt. I, 1–11 q. 91, q. 96, arts. 2, 4 (R.J. Henle trans., Univ. Notre Dame Press 1993) (1269–70); see also John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 195, 203–05 (Robert P. George ed., 1996); Louis W. Hensler III, *A Modest Reading of St. Thomas Aquinas on the Connection between Natural Law and Human Law*, 43 *CREIGHTON L. REV.* 153, 153–54 (2009). And Ronald Dworkin, the modern legal theorist most committed to rejecting the idea that law consists only of those norms identified by some legal rule of recognition, nevertheless excluded policy considerations from law's "empire," RONALD DWORKIN, *LAW'S EMPIRE* 221–24 (1986) [hereinafter *DWORKIN, LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 84–85 (1977) [hereinafter *DWORKIN, TAKING RIGHTS SERIOUSLY*], and still recognized that legal doctrine more narrowly understood had a certain kind of "gravitational force," *id.* at 111–15. It is thus hard to disagree with Professor Joseph Raz's conclusion that "[so] long as we allow that it is possible for a population not to be governed by law, there must be a difference between legal standards and those which are not legal, not part of law." Joseph Raz, *Incorporation by Law*, 10 *LEGAL THEORY* 1, 15–16 (2004).

⁴ Conversely, there also exist sources and arguments that are legitimate or permissible in law but which do not count as sources of legitimate or permissible guidance and enlightenment in the larger society. Although this aspect of law's specialness — its capacity to validate that which is otherwise societally invalid — is not the primary focus of this Essay, a good example comes from Oliver Wendell Holmes's observation about *stare decisis* that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." O.W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 469 (1897).

is a source-based enterprise, and understanding its nature accordingly requires understanding which sources constitute the law and which do not. It is only to be expected, therefore, that jurisprudential debates about the nature of law are so often debates about which sources of decisional guidance are to be treated as law — what counts as law. Examining these debates, many of them closely connected to the Harvard Law School, will tell us much about the boundaries of law, and thus about law itself.

I. IN THE BEGINNING THERE WAS LANGDELL

Actually, no. In the beginning there were Isaac Parker, Nathan Dane, Simon Greenleaf, Joseph Story, and the various other luminaries who created the Harvard Law School and dominated its earliest years.⁵ And institutionalized legal education in the United States began not at Harvard but at the College of William and Mary⁶ and the Litchfield Law School.⁷ Still, in important ways the story of American legal theory opens with Christopher Columbus Langdell.⁸ Indeed, Langdell remains a convenient symbol for what some scholars understand as “formalism”⁹ and whose role persists as the foil for those who memorialize the history of American legal thought as a successive series of reactions to Langdellian formalism.¹⁰

However widespread this view of Langdell may be, it is in important respects mistaken. And it is mistaken in ways that show Langdell as a pioneer in broadening the boundaries of law, and thus in spawning a series of Harvard-associated episodes marking the expansion of what we understand as the domain of law.

⁵ See DANIEL A. COQUILLETTE & BRUCE A. KIMBALL, ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY 75–188 (2015); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 237–70 (1985).

⁶ See Thomas Hunter, *The Teaching of George Wythe*, in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 138, 138–44 (Steve Sheppard ed., 1999).

⁷ See MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 137 (1986).

⁸ See BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906 (2009).

⁹ Among a raft of examples, see DOUGLAS G. BAIRD, RECONSTRUCTING CONTRACTS 150 (2013); GRANT GILMORE, THE AGES OF AMERICAN LAW 42–67 (1977); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 9 (1983); Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 276 (Dennis Patterson ed., 1996); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 124–25 (2003).

¹⁰ See, e.g., Soia Mentschikoff & Irwin P. Stotzky, *Law — The Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 698 n.5 (1986) (characterizing legal realism as a reaction to legal formalism); Horacio Spector, *Fairness and Welfare from a Comparative Law Perspective*, 79 CHI.-KENT L. REV. 521, 523 (2004) (describing legal instrumentalism as a reaction to legal formalism).

We celebrate or castigate Langdell as the founder of the case method of legal education and as the initiator, at least in the United States, of the idea that law and the study of it is a science and not simply a trade.¹¹ For Langdell, the opinions of the courts were the data, and the legal scholar — the legal scientist — would by a process of induction¹² construct or extract the legal principles that best explained the data, just as scientists seek to locate the theory that will best explain a given set of scientific observations.

Langdell is now often mocked for allegedly believing that legal principles could be extracted from decided cases in a value-free way without the introduction of external moral, political, economic, and policy considerations.¹³ But that picture is twice unfair to Langdell. First, although less germane to my principal theme here, Langdell was hardly unaware of the then-widely discussed difference between induction and deduction, and hardly oblivious to the lawmaking activities of common law courts.¹⁴ Perhaps he treated judicial lawmaking as less pervasive — more restricted to the interstitial — than is actually the case, and thus perhaps he overestimated the degree of determinacy in common law systems. But those accusations are as easily brought against the bulk of modern legal thinking as against Langdell. He may also have believed that induction was more determinate than contemporary analyses now lead us to appreciate,¹⁵ but his acceptance of

¹¹ See, e.g., BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 52 (2010) (documenting Langdell's commitment to seeing law as a science); M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 120 (1986) (same); Eugene Wambaugh, *Professor Langdell — A View of His Career*, 20 HARV. L. REV. 1, 2 (1906) (describing Langdell as desiring "to apply the inductive method of the laboratory" to law). Less sympathetically, some have seen Langdell's approach as evidencing a kind of "science envy." BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 35 n.8 (3d ed. 2003). It is worth noting that when Langdell sought to see the study of law as a science, he meant "science" in more or less modern, natural science, terms. This is in contrast to the way in which "legal science" is understood, both earlier, EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 12 (1953), and still in much of Kelsenian legal theory, HANS KELSEN, *PURE THEORY OF LAW* 70-107 (Max Knight trans., 1967), to refer simply to the academic and systematic study of legal norms (in German, *Rechtswissenschaft*), an enterprise with no necessary or close connection to the natural sciences.

¹² See COUILLETTE & KIMBALL, *supra* note 5, at 326; Wambaugh, *supra* note 11, at 2.

¹³ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 189 (1992) (claiming that Langdellian understandings of law as science saw law as "natural, neutral, and apolitical").

¹⁴ See COUILLETTE & KIMBALL, *supra* note 5, at 324-34; TAMANAHA, *supra* note 11, at 51-53; Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 347 (2007); see also Gerald J. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, in 11 A TREATISE ON LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE 49, 51 (Enrico Pattaro ed., 2011) (observing that Langdell was "a half-hearted formalist at most").

¹⁵ More specifically, it is now widely understood that no explanation — no theory or principle — is uniquely determined by the data the explanation seeks to explain. See WILLARD VAN

the lawmaking activities of courts and his awareness of the distinction between induction and deduction demonstrates that saddling Langdell with the beliefs that law is a closed system, that law is totally determinate, and that legal reasoning is an exercise in formal (or mechanical) logical deduction is to level charges at him that are simply not supported by the evidence.

More importantly, Langdell's belief that judicial judgments and their accompanying opinions are the raw material of law — the analog of scientific observations — was itself a radical advance. For Langdell's predecessors, most obviously William Blackstone and the vast number of American lawyers and scholars who followed in Blackstone's footsteps until Langdell's arrival,¹⁶ cases were not law. They were mere evidence of law,¹⁷ or pointers toward where law might be found, but the law itself — especially the common law — consisted only of those enduring principles that, once discovered, would be cataloged in legal treatises. Cases might aid in the discovery of the principles but were not the law itself and were not imbued with the authority of law.

Against this background, Langdell's willingness — indeed, eagerness — to treat the decisions of judges as a primary *source* of law — as law itself, and not just evidence of it¹⁸ — also reflected an unexpected

ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20 (2d ed. 1961); Kyle Stanford, *Underdetermination of Scientific Theory*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 16, 2013), <http://plato.stanford.edu/entries/scientific-underdetermination> [<https://perma.cc/Q9J4-DJLF>]. See generally PIERRE DUHEM, THE AIM AND STRUCTURE OF PHYSICAL THEORY (Philip P. Wiener trans., Atheneum 1964) (1914).

¹⁶ See especially 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Philadelphia, Birch & Small 1803), the dominant legal treatise in the United States in the pre-Langdellian era. See also Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1113–14 (2006).

¹⁷ And indeed "evidence" is exactly the word that Blackstone uses. 1 WILLIAM BLACKSTONE, COMMENTARIES *69. But for the view that Langdell's understanding of the status of cases had been anticipated by Story, see NEWMYER, *supra* note 5, at 258, 391.

¹⁸ Implicit in this is the view that "the law" — as in "what is the law on this subject?" — is *constituted* by its valid sources, a view close enough for present purposes to what Ronald Dworkin calls the "grounds' of law," DWORKIN, LAW'S EMPIRE, *supra* note 3, at 4. A slightly expanded but still compatible notion is the idea of "law-determining practices" offered in Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 157 (2004) (emphasis omitted). By contrast, John Chipman Gray, professor at the Harvard Law School from 1875 to 1913, famously distinguished the law from the sources of law, and treated cases, statutes, ordinances, and constitutional provisions as sources of law but not as law itself. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 123–24, 152–309 (2d ed. 1921); see Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1538–41 (2001). For Gray, only the "rules for decision which the courts lay down," GRAY, *supra*, at 121, were really the law. Gray's conclusion, however, cannot explain how law *qua* law guides the judges themselves, or how law can guide primary behavior even absent existing or potential adjudication. See H.L.A. HART, THE CONCEPT OF LAW 142–47 (Penelope A. Bulloch, Joseph Raz &

and unfashionable willingness to expand the field of legal cognition and the domain of legal authority.¹⁹ Langdell's view thus embodied an acceptance of the belief that common law was made and not discovered by judges, and an acceptance of this belief's natural consequence — that the domain of law includes not only statutes and enduring legal principles, but also the actual decisions of judges, seen as law and not simply external evidence of it.²⁰ The move from

Leslie Green eds., Oxford Univ. Press 2012) (1961); Michael Steven Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915, 1988–93 (2005). If we thus accept the idea that “the law” on some subject preexists (logically and temporally) the decisions applying it, there emerges the conclusion that “the law” is constituted by what Gray thought were merely the sources of law. The understanding of law that undergirds the analysis and argument in this Essay is therefore, to put it somewhat loosely, that “the law” is coextensive with the legally valid sources of judicial and behavioral guidance.

There remains an ambiguity as to whether “the law” should include all or only some of the permissible inputs into a legal decision. If we define law as constituted by *all* the permissible inputs into legal decisions, we emerge with the uncomfortable conclusion that the rules of language, grammar, logic, and mathematics are law, and that facts about the world are law as well. But if we understand law as consisting only of a subset of the permissible inputs into legal argument and legal decisions, as in the understanding of legal sources in JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979), we wind up with the equally uncomfortable conclusion that a great deal of what lawyers and judges do, and much of what they use in making arguments and decisions, is not law at all, a conclusion that is unfaithful to the realities of legal life. This is hardly the place to resolve this quandary, but it is worth noting that this Essay is about which inputs into legal arguments and judicial decisions are treated as acceptable by the legal community, and perhaps less directly by the larger society within which the legal community exists. The question whether we define all of the permissible inputs as “law” is, at least here, decidedly secondary. My references to “counts as law” should thus be understood as loosely referring only to the question of which inputs into legal arguments and conclusions will be accepted as (sociologically) legitimate.

¹⁹ See James Schouler, *Cases Without Treatises*, 23 AM. L. REV. 1 (1889). An alternative explanation for the complaint of some of Langdell's students that he was not teaching law, see *supra* note 2 and accompanying text, could be that the students believed the law consisted of enduring principles that were cataloged in authoritative treatises, and not the cases that might have illustrated, applied, or provided evidence of those principles.

²⁰ If cases are mere evidence of the principles of law, and if only the principles have the authority of law, then reliance on a case in a legal argument would be inferior to reliance on an accepted principle. But if cases are themselves the law, then the principles summarizing them have a lesser status, and the hierarchy of legal authority is reversed. Some of Langdell's contemporaries did understand him as seeing cases only in the former, epistemological, sense. See William A. Keener, *The Inductive Method in Legal Education*, 17 ANN. REP. A.B.A. 473, 483–84 (1894) (stating that proponents of the case method believe that a “case is simply material from which a principle is to be extracted,” *id.* at 484, as discussed in WILLIAM P. LAPIANA, *LOGIC & EXPERIENCE* (1994)); Wambaugh, *supra* note 11, at 2 (“Professor Langdell determined that the student should be trained to use those original authorities, and to derive from judicial decisions . . . the general propositions which text-writers . . . find in the same manner . . .”). This understanding of Langdell, however, not only gives him too little credit for departing from the treatise tradition, but also vastly understates the authoritative status of cases in post-Langdellian legal argument. Nowadays citing a treatise without accompanying cases implies that there are no cases to be found, but citing cases and not treatises is ubiquitous and entirely acceptable. Thus, when Professor Eugene Wambaugh observed that Langdell “knew . . . that the existence and limits of a rule of law must be proved finally, not by a text-book, but by the reported decisions of courts,” *id.*, he came closer to grasping the important anti-Blackstonian idea that it is the cases and not the

Blackstone to Langdell, too often these days seen as no move at all, is then properly understood as a significant event in the expansion of the very notion of what is to count as law.

II. “THE LIFE OF THE LAW HAS NOT BEEN LOGIC . . .”

“The life of the law has not been logic: it has been experience.”²¹ Often quoted but rarely understood, Oliver Wendell Holmes’s most famous line, written as a Boston lawyer and part-time Harvard faculty member, marks a further episode in the broadening of law’s boundaries. On the assumption that Holmes was not just attacking a phantom,²² we can suppose that at least some people actually did believe that the life of the law was logic. Possibly it was Langdell who was Holmes’s target, but even more likely it was a certain 1870s (and earlier) mindset.²³

To the extent that there actually existed some sort of 1870s legal consciousness against which Holmes was reacting, that consciousness contained (at least) two distinct elements. One was the idea that legal decisionmaking involved mechanical deduction from existing legal premises. And the other was that the domain of law was limited to a collection of more or less conventional legal sources — statutes, reported cases, constitutional text, ordinances, codified administrative regulations, and perhaps some especially authoritative treatises. But although many common descriptions of, and attacks on, so-called nineteenth-century legal formalism take the claims of logical deduction and of the existence of a closed set of available sources to be more or less part of the same idea,²⁴ the two need not be conjoined. Consider

treatises that possess primary authority. See Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1428 (1997) (maintaining that cases are “the ultimate sources of all legal knowledge” (quoting C.C. Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123, 124 (1887))); Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 610 (2010) (explaining that Langdell saw cases as providing the foundation for theories that would provide “definite answer[s]” in future cases).

²¹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

²² Perhaps too big an assumption. See COUILLETTE & KIMBALL, *supra* note 5, at 319–34; G. Edward White, *Introduction* to OLIVER WENDELL HOLMES, *THE COMMON LAW*, at vii, ix, xxiv–xxv (G. Edward White ed., 2009).

²³ In saying “1870s and earlier,” I refer principally to the middle and early nineteenth century, and only to that. If we go back to the eighteenth century, we find far more judicial reliance on seemingly unlimited principles of “natural reason,” principles that appear to have receded in legal thought in favor of formal legal doctrine by the time of Langdell and Holmes. Indeed, even Story recognized the role of natural reason and natural justice as elements of the common law, although he also accepted that natural reason and natural justice could be displaced and subjugated by court decisions and thus by formal legal doctrine. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 41–42 (2001).

²⁴ See, e.g., Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495–96 (1996) (reviewing NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995)).

chess, for example. It is an enterprise with constrained boundaries; only certain moves are permitted, and chess players are prohibited from bringing in new pieces or moving their pieces in unauthorized ways. Nevertheless, chess is importantly nondeductive, leaving room for creativity, imagination, caution, daring, and so on. And thus even if Holmes accepted that his targets did not believe that legal decisions were logical deductions from existing legal materials, he might still have taken them to believe that, just as chess is played with a restricted set of rules, legal decisions were based solely on materials from a closed set of existing sources. Putting it more directly, the claim that law is deductive differs from the claim that law is based on a limited domain of available moves and sources, and Holmes's targets might have believed the latter without believing the former. To the extent that Holmes recognized this distinction, he might have been challenging the idea of law as a limited domain while accepting that few people by 1881 believed that legal reasoning was a principally deductive undertaking.

This interpretation of Holmes requires that we take his reference to "logic" with a grain of salt. Perhaps Holmes really was concerned with challenging those who genuinely believed that one could first identify the relevant existing legal sources and then, by a strictly logical process, deduce the correct answer to any legal problem. But if we credit Holmes with a more accurate perception of the then-existing legal decisionmaking terrain, we can see him less as aiming at a target that by 1881 was already well into decline and more as attacking a then-widely accepted belief about what counts as law and what does not.

Reading Holmes in this way casts his reference to "experience" in a different light. Even if Langdell and others by this time recognized that extracting legal outcomes, or moving the common law from one place to another, was not entirely deductive, they may still have believed, as in the chess analogy, and as in literary interpretation according to some perspectives,²⁵ that legal decisionmaking took place within

²⁵ The so-called formalists of the so-called New Criticism believed that the text of a work of literature constituted, more or less, the exclusive input to literary interpretation but did not deny that interpretation left room for creativity and imagination. See, e.g., CLEANTH BROOKS, *THE WELL WROUGHT URN: STUDIES IN THE STRUCTURE OF POETRY*, at x–xi (1947); I.A. RICHARDS, *PRACTICAL CRITICISM* 6–9 (Harvest Books 1956) (1929); RENÉ WELLEK & AUSTIN WARREN, *THEORY OF LITERATURE* 38–40 (3d ed. 1977). By contrast, the critics of the New Criticism believed it both impossible and undesirable for interpretation to avoid the injection of matters external to the text, such as historical context, authorial intention, morality, and psychology. See, e.g., WESLEY MORRIS, *TOWARD A NEW HISTORICISM* 14–31 (1972); FREDERICK A. POTTLE, *THE IDIOM OF POETRY* 32, 40–41 (1946); Douglas Bush, *The New Criticism: Some Old-Fashioned Queries*, 64 *PUBLICATIONS MOD. LANGUAGE ASS'N* 13, 13–14 (1949). Without stretching the analogy too far, we might see Langdell as bearing an affinity with the limited-domain views of the New Criticism, and Holmes as gesturing in the direction of the broadening inclinations of the New Criticism's critics.

a highly limited domain of sources and permissible “moves.” In referring to “experience,” Holmes can by contrast be understood as insisting that legal reasoning was neither like chess nor like “formalist”²⁶ literary interpretation. Rather, legal reasoning, especially the legal reasoning involved in changing and not simply applying the common law, demanded the introduction of something from outside. In recognizing that many, most, or all acts of legal interpretation necessitate bringing into legal cognition something other than the material being interpreted, Holmes expanded further the model already somewhat expanded by Langdell of just what counts as law. Langdell enlarged the boundaries of law by including the decisions of judges as part of the law itself, but Holmes, both in *The Common Law* and elsewhere, argued for an even greater enlargement that would encompass the range of external factors necessary to interpret, apply, and extend the domain that Langdell had identified.²⁷

III. AN EMPIRICAL ENTERPRISE — POUND’S INSIGHTS

Holmes is often credited with being the first Legal Realist,²⁸ or at least an important precursor to Legal Realism.²⁹ But Holmes was in many ways a traditionalist and thus perhaps simply a pre-Realist. Consider, for example, his well-known apocryphal story about the Vermont justice of the peace and the churn:

There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant.³⁰

The churn story and accompanying explanation³¹ suggest that Holmes, far from having anticipated Realist views, was in fact committed to a

²⁶ See *supra* note 25.

²⁷ E.g., Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899); Holmes, *supra* note 4, at 469. For useful commentary on how to situate Holmes’s view of the value of economics, statistics, and history within the ambit of “experience,” see John C.P. Goldberg, *Style and Skepticism in The Path of the Law*, 63 BROOK. L. REV. 225, 231 n.24 (1997); David M. Rabban, *The Historiography of The Common Law*, 28 LAW & SOC. INQUIRY 1161, 1197–98 (2003).

²⁸ By, for example, some of the leading Legal Realists themselves. See JEROME FRANK, *LAW AND THE MODERN MIND* 7, 133–34, 164 (1930); cf. KARL N. LLEWELLYN, *THE THEORY OF RULES* 56 (Frederick Schauer ed., 2011) (original manuscript drafted in 1938–39).

²⁹ See AMERICAN LEGAL REALISM 3–6 (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993).

³⁰ Holmes, *supra* note 4, at 474–75.

³¹ The same state of mind is shown in all our common digests and textbooks. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as Shipping or Equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical

conventional view about the sources of judicial decision. He may have believed that some recourse to “experience” was necessary in applying legal rules and categories to concrete disputes and situations, but for him the principal determinant of legal outcomes was the field of facts picked out by standard legal rules and conventional legal categories.³² To put the point in more Holmesian terms, even if law for the lawyer and client consists of “prophesies of what courts will do,”³³ it is knowledge of legal sources and legal categories that makes such prophesy possible. If one wanted to predict what a justice would do in the churn case, one would need to predict the category into which the justice would place the facts of the case — perhaps conversion or trespass under the law of bailments. And in thus assuming that the process of predicting a judicial outcome traveled through the traditional categories of law, Holmes remained very much a pre-Realist traditionalist.

Against this background, Roscoe Pound’s self-described sociological jurisprudence,³⁴ much of it developed while (or shortly before) Pound served as the Harvard Law School’s dean, represents a substantial expansion of the raw material of law. Pound likely agreed with Holmes about the descriptive importance of law’s existing and self-directed categories, for Pound believed that legal rules, conventionally understood, played a major role in most applications of law.³⁵ But whereas Holmes found value and perhaps even beauty in the categories that law developed for its own purposes, Pound’s normative program was broader. His objections to what he labeled “mechanical jurisprudence,”³⁶ and his accompanying promotion of sociological jurisprudence, can be seen as an enthusiastic embrace of Holmes’s reference to “experience,” taking what for Holmes was hardly more than a quip to places that even Holmes might have resisted. Although Pound be-

mind, such as Mercantile Law. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy.

Id. at 475.

³² For my own analysis of the churn story from the perspective of Holmes’s seeming commitment to law-created categories rather than those of prelegal or extralegal life, see Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 775–81 (1998).

³³ Holmes, *supra* note 4, at 461.

³⁴ See generally Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence (pt. 1)*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence (pt. 2)*, 25 HARV. L. REV. 140 (1912). For more on Pound and his sociological jurisprudence generally, see N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997); PATTERSON, *supra* note 11, at 518–27; WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 22–25 (2d ed. 2012).

³⁵ See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 100–06 (1922).

³⁶ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908).

lieved in the descriptive importance of standard law-created legal categories, as a normative matter he had a broader view of what *ought* to figure in legal decisionmaking. His sociological jurisprudence accordingly had a strong prescriptive component and aimed to widen the field of legal cognition and the scope of law's domain.

Pound's plea for a sociological jurisprudence was directed to both scholars and judges. With respect to the former, he sought to expand the ambit of commentary about law, urging academics to use empirical and social science data as a way of understanding law in its larger social context,³⁷ of distinguishing between law on the books and law in action,³⁸ and of recognizing the role and diversity of the social interests that law was designed to serve.³⁹ Pound's own career and activities exemplified this goal, for his (largely postdecanal) reform efforts in criminal law,⁴⁰ and to a lesser extent in tort law,⁴¹ were ones in which he actively solicited the involvement of social scientists and prominently featured the research findings of social science.

Pound similarly urged judges to make decisions in light of law's larger goals and to use all available empirical and policy resources in making such decisions.⁴² He ultimately became skeptical of codification and what he saw as excess reliance on legislation as a means of law reform,⁴³ but he nonetheless insisted that judges could and should use the same social science data that some of his contemporaries asso-

³⁷ Thus, Pound's attraction to the historical school of jurisprudence, *see* Roscoe Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 557 (1937), was based in part on his belief that its practitioners — Henry Sumner Maine, Frederick Pollock, Rudolph von Jhering, and Karl von Savigny, most prominently — understood the “unification of jurisprudence and politics” and comprehended that law and the legal order could not be “dissociated” from the broader system of “social control.” ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 68 (1923). Perhaps surprisingly to those who see him as the prototypical formalist, Beale had a similar appreciation for the role of history in shaping and understanding law. *See, e.g.*, Joseph H. Beale, Jr., *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271, 282–83 (1905).

³⁸ *See* Roscoe Pound, *Law on the Books and Law in Action*, 41 AM. L. REV. 12 (1910).

³⁹ *See* ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 1–2 (1942); Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); *see also* Caroline Humfress, *Telling Stories About (Roman) Law: Rules and Concepts in Legal Discourse*, in LEGALISM: RULES AND CATEGORIES 79, 85 (Paul Dresch & Judith Scheele eds., 2015) (observing that Pound urged both judges and law professors “to develop legal rules and concepts to further social ends”); Richard Hyland, *Comparative Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 9, at 184.

⁴⁰ *See* ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA (1930); Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 441 (2009); Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1973–2000 (1995).

⁴¹ *See* Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 519–22 (2011).

⁴² Roscoe Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 24–26 (1914); *see* Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 521–22 (2006).

⁴³ *See* DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 89–90 (1974); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 680 n.197 (1985).

ciated solely with legislative or administrative action.⁴⁴ Indeed, although we know of no direct connection between Pound and the contemporaneous “Brandeis brief” in *Muller v. Oregon*,⁴⁵ the very idea of the Brandeis brief, and of offering social science data for use by judges in making their decisions, is of a piece with Pound’s larger goals. Pound believed that by using the social sciences in reaching decisions, judges could better enable law to serve the social good.

If all this makes Pound sound much like a Legal Realist, that is because he *was* much of a Legal Realist — and certainly more so than Holmes. It is true that Pound saw a larger role for legal rules as traditionally understood than did the most extreme of the Realists.⁴⁶ And it is true that a common view contrasts Pound with the Realists.⁴⁷ But the common view is based in part on Pound’s activities as Dean rather than as teacher and scholar,⁴⁸ even more on Pound’s famous published debate about Realism with Karl Llewellyn,⁴⁹ and to no small extent on Pound’s tendency to foment disputes with even those who largely agreed with him.⁵⁰ But if we examine the actual substance of Pound’s writings, we see that he wanted both legal scholarship and judicial practice to incorporate the full toolbox of social science and policy analysis. To understand the development of American legal thought, it may be more accurate therefore to view Pound as part of Legal Realism instead of as one of its opponents.⁵¹ And for purposes of the more specific theme of this Essay, it is best to see both Pound and the Real-

⁴⁴ Tidmarsh, *supra* note 42, at 522. Indeed, understanding administrative regulation as *law* might itself be seen as an expansion of the boundaries of law and legal consciousness. See Kevin M. Stack, *Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation*, 65 J. LEGAL EDUC. 28, 36–39 (2015); Adrian Vermeule, Essay, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017).

⁴⁵ 208 U.S. 412 (1908). On the connections, or lack thereof, see Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 93–96.

⁴⁶ Compare POUND, *supra* note 35, at 100–02, with, e.g., FRANK, *supra* note 28, and Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). By contrast, Karl Llewellyn’s description of rules as “pretty play-things,” K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 5 (1930), does not accurately represent even Llewellyn’s own views, see K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 9 (Oceana, 2d ed. 1951) (1930), nor Llewellyn’s important distinction between “paper rules” and “real rules,” see Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 444–57 (1930). See TWINING, *supra* note 34, at 32; Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013).

⁴⁷ See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 45–66 (1986).

⁴⁸ *Id.*

⁴⁹ Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); see also HULL, *supra* note 34.

⁵⁰ “Shooting at allies would, in due course, become a part of Pound’s *modus operandi* . . .” NEIL DUXBURY, *FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION* 115 (2004).

⁵¹ To the same effect, see HORWITZ, *supra* note 13, at 169–70.

ists as believing that the realm of law (part of which Pound often described as “discretion”⁵²) was broader not only than that understood by Langdell and his contemporaries, but also than that imagined even by Holmes. It is a mistake to see the broadening progression as more continuous than it actually was, and there can be little doubt that the broadening of the legal domain — the expansion of what sources are to count as legal sources, and thus simply of what is to count as law⁵³ — proceeded more by fits and starts than by linear progression. But insofar as the collection of sources that is part of the legal enterprise tended to grow over time, both Pound and the Realists were committed to the view that these sources — the inputs into legal decisionmaking and legal research — were far more varied than was understood a generation (and a century) earlier.

IV. LON FULLER’S ANTIPOSITIVISM

Jurisprudence, like most everything else, did not escape the consequences of the Second World War. Some of these consequences were more personal than intellectual, as scholars such as Hans Kelsen were forced by the onrush of Nazism to flee their homelands,⁵⁴ and many

⁵² POUND, *supra* note 35, at 112; *see id.* at 106–43.

⁵³ The connection I incorporate among law, sources of law, and what counts as law is explained in note 18, *supra*.

⁵⁴ Hans Kelsen — the leading legal positivist of the first half of the twentieth century, and, along with H.L.A. Hart, one of the two most important legal philosophers of the twentieth century — in addition to being a scholar, also served as a judge in his native Austria and as the principal architect of the 1920 Austrian constitution. Nicoletta Bersier Ladavac, *Hans Kelsen (1881–1973) Bibliographical Note and Biography*, 9 EUR. J. INT’L L. 391, 392 (1998). After having been dismissed from his judicial post in 1930 in the fallout of a political dispute, Kelsen then took up a position in Cologne, Germany. *Id.* Forced out of Germany in 1933 by virtue of being Jewish, he eventually wound up in the United States, where he was awarded an honorary LL.D. by Harvard University in 1936, delivered the Holmes Lectures at the Harvard Law School in 1941, and spent the better part of 1940 and 1942 at the Law School as a visiting research fellow supported by the Rockefeller Foundation. *See* Thomas Olechowski, *Hans Kelsen, The Second World War and the U.S. Government*, in HANS KELSEN IN AMERICA — SELECTIVE AFFINITIES AND THE MYSTERIES OF ACADEMIC INFLUENCE 101–03 (D.A. Jeremy Telman ed., 2016); Editorial Comment, *Hans Kelsen: October 11, 1886–April 15, 1973*, 67 AM. J. INT’L L. 491, 493–95 (1973). To Kelsen’s deep disappointment, he was not offered an appointment as a permanent tenured member of the faculty, allegedly because of a shortage of funds, although his lack of English fluency and apparent inability to teach basic courses in law likely also played a role. *See* Carlo Nitsch, *Holmes Lectures, 1940–41*, in HANS KELSEN, DIRITTO E PACE NELLE RELAZIONI INTERNAZIONALI, at v (Carlo Nitsch ed., 2009). As a result, Kelsen spent the remainder of his long career (he died in 1973 at the age of 91) based in the Department of Political Science at the University of California at Berkeley, where he remained academically productive almost to the end. Ladavac, *supra*, at 230–31, 234. Given the deep divide that now exists between Anglo-American legal philosophy, in which H.L.A. Hart, his successors, and his opponents remain the major figures, and legal philosophy as practiced in continental Europe and Latin America, where Kelsen occupies a similar position and Hart is scarcely more than a footnote, it is interesting to speculate about what the contemporary terrain of legal philosophy might look like had Kelsen remained at Harvard. At the very least it seems unlikely that his influence in the English-speaking jurisper-

others put aside their academic efforts to participate in the war effort. But other consequences affected the jurisprudential project itself. And nowhere are these effects more apparent than in the debate between Harvard's Lon Fuller and Oxford's H.L.A. Hart, a debate that took place in part at the Harvard Law School itself, and most prominently on the pages of the *Harvard Law Review*.⁵⁵

To some extent because of Gustav Radbruch's attempts to attribute the cooperation of German lawyers and judges (including himself) in the excesses of Nazism to a legal positivist mindset,⁵⁶ and to some extent because the Nuremberg trials focused attention on the possible existence of an unwritten law to which people could be held legally accountable,⁵⁷ it was difficult in the decade or so following the end of the war to discuss jurisprudential issues without referring to the questions that arose about Nuremberg, about law during the Third Reich, and about the postwar status and consequences of Nazi law. Thus, when Hart, having recently been appointed as Professor of Jurisprudence at Oxford,⁵⁸ was invited to give the Oliver Wendell Holmes Lecture at the Harvard Law School in 1957,⁵⁹ it was not surprising that he focused in part on Nazi law, on the relationship between law and morality more generally, and on legal positivism more generally yet.⁶⁰ And it was even less surprising that Fuller, who had already established himself as a strident opponent of legal positivism,⁶¹ felt compelled to write a response.⁶² The published debate has become a milestone in twentieth-century jurisprudence,⁶³ in large part because it provided the foundation for both the procedural version of natural law that Fuller

dential world would have been as slight as it now is, and perhaps the geographic and cultural gulf that currently exists between Hart's and Kelsen's worlds would not exist or would be much narrower.

⁵⁵ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

⁵⁶ For a description of (and challenge to) Radbruch's claims, see Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 LAW & PHIL. 313 (1994).

⁵⁷ See JUDITH N. SHKLAR, LEGALISM 157 (1964); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 629 (1992); see also MARK J. OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA'S DIRTY WAR 70 (2001) (discussing the phenomenon in the context of Adolf Eichmann's trial).

⁵⁸ See NICOLA LACEY, A LIFE OF H.L.A. HART 151 (2004).

⁵⁹ *Id.* at 196. Hart was in residence at Harvard as Visiting Professor of Law at the time the lecture was delivered. *Id.* at 179.

⁶⁰ Hart, *supra* note 55; see also *id.* at 615–21 (discussing Nazi law).

⁶¹ LON L. FULLER, THE LAW IN QUEST OF ITSELF (1940).

⁶² Fuller, *supra* note 55. An important analysis of the relationship between Fuller's thinking and the debates about Nazi law more generally is KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER 66–78 (2012).

⁶³ On Hart's Holmes Lecture, his stay at Harvard, and the debate itself, the definitive source is LACEY, *supra* note 58.

later developed in *The Morality of Law*⁶⁴ and the extraordinarily influential version (or reformulation) of legal positivism that Hart set forth in *The Concept of Law*.⁶⁵ Indeed, Hart's contribution to the debate is of enduring importance not only because it launched a theory of law whose merits have been debated for more than half a century, and not only because Hart's theory has dominated Anglo-American jurisprudence for much of that time, but also because it represented a transformation of the nature of jurisprudential inquiry from one whose principal participants were intelligent and theoretically inclined lawyers to one that was understood as a branch of philosophy to be pursued by theorists with philosophical inclinations and sophistication using more or less cutting-edge philosophical tools.⁶⁶

The Hart-Fuller debate actually has two parts. One part, often seen as the more important of the two, is its contribution to the enduring debate about positivism and natural law. In this segment of their debate, Hart and Fuller plainly and sharply disagreed about the conceptual and descriptive accuracy of positivism and natural law, but they seemed to share a jurisprudential methodology. In clashing over the question whether a positivist or a natural law understanding of the concept of law itself would better facilitate a disobedience to iniquitous official directives that both thought desirable, the two men agreed that any given society creates its own concept (or understanding, or meaning) of law. Their disagreement was then an instrumental one about which concept of law a society ought to create (or have) in order to best achieve the shared goal. Implicit in the debate, therefore, was mutual acceptance of the proposition that part of jurisprudential methodology is normative in offering arguments for how a society ought to understand its institutions and the concepts identifying them.⁶⁷

⁶⁴ LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

⁶⁵ HART, *supra* note 18.

⁶⁶ On this transformation, and on the possibility that it is a mixed blessing, see Frederick Schauer, (*Re*)*Taking Hart*, 119 HARV. L. REV. 852, 857–69 (2006) (reviewing LACEY, *supra* note 58).

⁶⁷ See Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493, 493–95 (2005); see also Frederick Schauer, *On the Nature of the Nature of Law*, 98 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 457, 460–62 (2012). An opposing view about the methodological foundations of the Hart-Fuller debate, and thus about jurisprudential conceptual analysis of the concept of law, is that theorists, including both Fuller and Hart, are seeking to identify in a nonnormative way a society's existing concept of law, even while recognizing that some concepts of law may have certain collateral virtues and vices, such as the virtue of facilitating disobedience of official directives. For this view, see JULIE DICKSON, *EVALUATION AND LEGAL THEORY* 92–93 (2001); Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1036–37 (2008). Such alternative interpretations of Hart's text are not implausible, but the instrumental interpretation I favor gains support from HART, *supra* note 18, at 207–12 (referring to the concept of law that "we adopt," *id.* at 209, and to the "practical merits" of adopting one or another concept of law, *id.* at 210).

Although one important part of the Hart-Fuller debate is thus about positivism, natural law, Fuller's version of natural law (if it is natural law at all⁶⁸), and perhaps jurisprudential methodology, the other part is about legal interpretation. And here we find the famous example of a regulation prohibiting "vehicles in the park."⁶⁹ In the debate, Hart maintained his well-known position that all rules contain a core of settled meaning surrounded by a penumbra of uncertainty.⁷⁰ Motorcars are plainly vehicles, but bicycles and roller skates present an uncertainty requiring interpreters to exercise legislative-like discretion in order to reach a decision.⁷¹ In response, Fuller offered the example of a war memorial incorporating a fully functioning vehicle, the example being designed to show that it would be absurd to apply the rule to prohibit the statue, and thus that it is impossible to determine even clear or core cases without reference to the purpose behind a law.⁷²

Although Hart later conceded that "obvious or agreed purpose" might in some legal systems also make clear cases clear,⁷³ this is but a small concession within the larger debate about the permissible inputs into legal decisions, and thus about the reach of law's boundaries. For Hart, a legal conclusion could flow without supplementation from the words of a rule or (contingently) in some systems from the words un-

Fuller's view that jurisprudence is an irreducibly normative enterprise is clear, but for Hart the issue is cloudy, and so perhaps the best we can do as a matter of Hartian exegesis is agree with Dickson's later conclusion that the inconsistency in the way he put the issue is "awkward[]." Julie Dickson, *Is Bad Law Still Law? Is Bad Law Really Law?*, in LAW AS INSTITUTIONAL NORMATIVE ORDER 161, 164 (Maksymilian Del Mar & Zenon Bankowski eds., 2009).

⁶⁸ Not an easy question, either for Fuller or his readers. See RUNDLE, *supra* note 62, at 45–46; Kristen Rundle, *Opening the Doors of Inquiry: Lon Fuller and the Natural Law Tradition*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE (George Duke & Robert P. George eds., forthcoming 2017); see also LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 334–36 (Kenneth I. Winston ed., rev. ed. 2001).

⁶⁹ For a (too) extensive discussion, see Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008).

⁷⁰ Hart, *supra* note 55, at 607–08.

⁷¹ For Hart's views on judicial discretion more broadly, see generally H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013), accompanied by Nicola Lacey, Essay, *The Path Not Taken: H.L.A. Hart's Harvard Essay on Discretion*, 127 HARV. L. REV. 636 (2013), and Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666 (2013). It is important to note, however, that Hart did recognize that judges might be subject to certain procedural and other constraints in their lawmaking function from which legislatures were free. H.L.A. Hart, Lecture, *The New Challenge to Legal Positivism (1979)*, 36 OXFORD J. LEGAL STUD. 459, 462 (2016) (translated from the Spanish lecture by Andrzej Grabowski).

⁷² Fuller, *supra* note 55, at 663. For Fuller, the absurdity of the result is sufficient to render application of the rule to such a case impermissible. Others are not so sure. See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003); Frederick Schauer, *The Practice and Problems of Plain Meaning*, 45 VAND. L. REV. 715 (1992).

⁷³ H.L.A. HART, *Introduction*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 1, 8 (1983).

derstood in light of an obvious or agreed legislative or regulatory purpose. But even the broader version is far narrower than Fuller's conception of the universe of usable legal sources. In contrast to Hart, Fuller believed that legal interpretation and decisionmaking necessarily involve taking into account all the factors that make some outcome reasonable (or not), and this expansive view of what matters in legal interpretation and thus of what counts as law can be understood as taking Holmes and then Pound a step (or many steps) further.⁷⁴ Fuller may well have described more accurately than Hart the legal decisionmaking terrain, at least in the United States,⁷⁵ and in doing so can be seen as having importantly identified and defended a substantial expansion of the boundaries of law.

In an interesting way, Fuller had foreshadowed the possibility of a capacious understanding of the sources of law in his earlier *Case of the Speluncean Explorers*.⁷⁶ In presenting a fictional case⁷⁷ designed to display with roughly equivalent sympathy the various ways that courts might approach a controversy in which literal legal language points in one direction and morality and common sense in another, the views about the importance of purpose and reasonableness that Fuller later came to defend appear through the voice of Justice Foster.⁷⁸ But in a different opinion, Justice Handy relies in part on factual information he has gleaned in a decidedly extrajudicial manner — from the Chief Executive's secretary through the Justice's wife's niece.⁷⁹ In planting this bit of information in his story, Fuller may well have intended to

⁷⁴ In his posthumous *Postscript*, HART, *supra* note 18, at 238, 244–53, Hart appears to accept what is now understood as “inclusive legal positivism.” See W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994) (explaining and defending a conception of positivism that allows morality to count as law as long as there is a social decision to do so). That is, he accepts that under his conception of an ultimate rule of recognition, HART, *supra* note 18, at 100–10, law is compatible with treating as a valid source anything that, as a factual matter, the relevant officials understand to be law. Hart could thus accept that all of the inputs that Fuller believed to be part of law could, contingently, be accepted as law by some legal system. Under this interpretation the disagreement is only over whether this is a necessary (Fuller) or contingent (Hart) feature of a legal system. Nevertheless, the debate about interpretation, as actually conducted, was plainly between broad (Fuller) and narrow (Hart) understandings of the realm of actually permissible inputs into a legal decision.

⁷⁵ See, e.g., *Yates v. United States*, 135 S. Ct. 1074 (2015) (rejecting the plain meaning of the text in favor of statutory canons of interpretation taking into account the statutory purpose); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (rejecting literal statutory language in favor of statutory purpose); *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868) (same).

⁷⁶ Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). For my own description and laudatory commentary on the article, see Frederick Schauer, *Fuller's Fairness: “The Case of the Speluncean Explorers,”* 35 U. QUEENSLAND L.J. 1 (2016).

⁷⁷ Fuller's fictional case was based on *Regina v. Dudley & Stephens* (1884) 14 QBD 273. More than anyone might want to know about the actual case is engagingly presented in A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984).

⁷⁸ Fuller, *supra* note 76, at 620–26.

⁷⁹ *Id.* at 642.

bring the Legal Realists into the picture,⁸⁰ and thus to suggest that all sorts of information — an almost unlimited panoply of sources — may be components of a judicial decision. Fuller likely intended for his readers to be more shocked by than sympathetic to information so obtained and used by judges, but the scenario indicates Fuller's keen sensitivity to the question of what sources judges may (and may not) and do (and do not) use.

V. RONALD DWORKIN'S EMPIRE OF LAW

A brief case comment published in the *Harvard Law Review* in 1889⁸¹ noted the intriguing decision of the New York Court of Appeals in *Riggs v. Palmer*.⁸² Francis B. Palmer, a well-to-do upstate New York farmer, wrote a will leaving the bulk of his estate to his grandson Elmer Palmer. Sometime thereafter, Francis, becoming increasingly critical of the sixteen-year-old Elmer's behavior, threatened to change his will to Elmer's detriment, a threat perhaps also prompted by Francis's recent remarriage.⁸³ Elmer then sought to prevent the change — and along the way to accelerate his inheritance — by fatally poisoning his grandfather with strychnine, an act for which Elmer, still a juvenile, was sentenced to a period in the state reformatory.⁸⁴

Upon his release, Elmer sought to claim the inheritance, a claim resisted by the residuary beneficiaries. The dispute wound up in New York's highest court,⁸⁵ where Elmer argued that the literal language of the New York Statute of Wills contained no exception for testator-murdering heirs, thus entitling him to the inheritance by virtue of the plain words of the statute.⁸⁶ In opposition, the residuary beneficiaries insisted that to permit Elmer to enjoy the benefits of the inheritance would allow the law to be used as an instrument of injustice, and that something beyond the literal wording of the Statute of Wills must be considered part of the law.⁸⁷

Elmer lost. Although Judge Gray's dissent maintained that following the literal language of the most directly applicable statute was compelled by conventional principles of legality and statutory interpre-

⁸⁰ And perhaps into disrepute. Cf. L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934) (criticizing legal realism).

⁸¹ Recent Case, *Wills — Murder of the Testator by Legatee*, 3 HARV. L. REV. 234 (1889).

⁸² 22 N.E. 188 (N.Y. 1889). The full doctrinal background and history of the case can be found in CALEB NELSON, *STATUTORY INTERPRETATION* 7–27 (2011).

⁸³ See Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 SMU L. REV. 31, 33 (2000). Francis was a widower when he first drafted the will. *Id.*

⁸⁴ *Id.* at 31, 33.

⁸⁵ On appeal from *Preston v. Palmer*, 42 Hun 388 (N.Y. Sup. Ct. 1887), *rev'd*, 22 N.E. 188.

⁸⁶ See 22 N.E. at 189.

⁸⁷ See Farber, *supra* note 83, at 34.

tation, and that “rigid rules of law”⁸⁸ could not be disregarded by a court (even one intent on engaging in “remedial justice”⁸⁹), the majority disagreed. Judge Earl, writing for the majority, relied on a collection of ancient treatises and legal doctrines, the law from various other American and non-American jurisdictions, and most of all on the venerable principle that “[n]o one shall be permitted to . . . take advantage of his own wrong.”⁹⁰ The majority took this as the principle that justified a decision plainly at odds with the literal words of the most seemingly relevant statute.

As was typical of case comments of the time, the *Harvard Law Review*'s comment⁹¹ was more descriptive than analytical or critical. Nevertheless, the comment helped spawn a long-running obsession with the case. Pound opined, largely negatively, on the result in 1907,⁹² Benjamin Cardozo, writing while himself a judge of the same New York Court of Appeals, applauded the outcome in *The Nature of the Judicial Process*,⁹³ and Professors Henry Hart and Albert Sacks featured the case in their Legal Process book,⁹⁴ the officially unpublished (until 1994) teaching materials that for generations introduced Harvard Law students to the focus on reasonable outcomes that was one of the hallmarks of the Legal Process School.⁹⁵

One Harvard student during the heyday of Legal Process was Ronald Dworkin,⁹⁶ who went on, as Professor at the Yale Law School and then as Professor of Jurisprudence at Oxford, to make *Riggs v. Palmer* the centerpiece of his attack on what he took to be the core claim of legal positivism.⁹⁷ As Dworkin understood legal positivism,

⁸⁸ *Riggs*, 22 N.E. at 191 (Gray, J., dissenting).

⁸⁹ *Id.* at 192.

⁹⁰ *Id.* at 190 (majority opinion). On the “no person may profit from his own wrong” maxim, see *Still v. Norfolk & Western Railway Co.*, 368 U.S. 35, 50–51 (1961) (Whittaker, J., dissenting); *Shoemaker v. Shoemaker*, 263 F.2d 931, 932 (6th Cir. 1959); *United States ex rel. Zdunic v. Uhl*, 56 F. Supp. 403, 409 (S.D.N.Y. 1943); and NELSON, *supra* note 82, at 20.

⁹¹ Recent Case, *supra* note 81.

⁹² Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382 (1907).

⁹³ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 40–41 (1921).

⁹⁴ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 80–85 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

⁹⁵ See Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 10–11 (2013).

⁹⁶ Dworkin did not actually take the Legal Process course but acknowledged the influence on him of both the Legal Process materials and the Legal Process “mystique.” See DUXBURY, *supra* note 24, at 296 n.628; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 3, at 6.

⁹⁷ See DWORKIN, *LAW'S EMPIRE*, *supra* note 3, at 15–20; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 3, at 28–43. I say “took to be” because many of Dworkin’s critics, see *infra* notes 107–108, maintain that Dworkin’s understanding of positivism was mistaken, and that he tilted at a phantom target. For my own part, I believe that Dworkin accurately identified a core component of a legal positivist tradition persisting from Jeremy Bentham to the present, but that his descriptive attack on it was somewhere between exaggerated and mistaken. See Frederick

and especially H.L.A. Hart's conception of it, the universe of acceptable legal authorities is limited to those identified by their source and not their content — their "pedigree," as Dworkin put it.⁹⁸ As a consequence, legal decisions under Dworkin's understanding of positivism would be limited, at least when the pedigreed source gives a clear answer, to the result indicated by the rule-of-recognition recognized source.⁹⁹ But because that source did not in fact produce the result in *Riggs v. Palmer*, Dworkin argued, the positivist picture turns out to be descriptively false.

Riggs may have been a poor example to support Dworkin's broader claims. As the majority opinion in *Riggs* made clear, the "no person may profit from his own wrong" principle was by then well established in positive law and thus part of the domain of valid sources of law recognized by a Hartian rule of recognition.¹⁰⁰ And so, Dworkin's critics argued, nothing in the use of broad morally tinged principles, or for that matter ancient or non-New York sources, undermined the basic Hartian picture of legal positivism, a picture in which such principles could contingently be part of the social sources recognized as valid law.¹⁰¹

Dworkin, however, had a better example at his disposal. At the same time that he first used *Riggs*, Dworkin also relied on *Henningsen v. Bloomfield Motors, Inc.*,¹⁰² a contract law staple¹⁰³ in which the

Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1951 (2004); see also Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 VA. L. REV. 957 (2015).

Unlike the other major figures in this Essay, neither Dworkin nor Judge Posner (see *infra* pp. 2457, 2459) ever served as members of the Harvard Law School faculty. Nevertheless, both were memorably outstanding Harvard Law School students, Posner having served as President of the *Harvard Law Review* and Dworkin having graduated magna cum laude before serving as law clerk to Judge Learned Hand. In addition, both frequently and prominently lectured at the Law School over many years, and both often graced the pages of the *Harvard Law Review*. Moreover, Dworkin's perspective on the nature and boundaries of law has sufficient affinity with the views of both Fuller and the Legal Process School as to make his inclusion in this story more consistent than aberrant.

⁹⁸ DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 3, at 17 (emphasis omitted).

⁹⁹ In Hartian terminology, legal rules are of two types — primary rules of conduct and secondary rules, which are the rules about rules. HART, *supra* note 18, at 100–10. One type of secondary rule is a rule of recognition, the rule that determines which primary rules are valid (and which are not). Rules of recognition are themselves validated (or not) by further rules of recognition, and the ultimate rule of recognition for a legal system, which is itself a matter of raw empirical fact, is what determines just what does and does not count as valid law in some legal system.

¹⁰⁰ See *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

¹⁰¹ See, e.g., NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 229–43 (1978).

¹⁰² 161 A.2d 69 (N.J. 1960).

¹⁰³ At least it was a staple at the time Dworkin was writing. Nowadays most of the basic contracts casebooks use *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), to make the same point about the unenforceability on grounds of unconscionability of a contract containing consumer-unfriendly boilerplate that the consumer does not have the power to modify and cannot avoid.

New Jersey Supreme Court invalidated a signed waiver of warranty in an automobile purchase agreement on the grounds that the fine-print and nonnegotiable waiver was unconscionable and thus unenforceable.¹⁰⁴ Once again, and as in *Riggs*, the most directly applicable rule of existing positive law — the general enforceability of uncoerced and nonfraudulently obtained contract provisions signed by both parties¹⁰⁵ — would have enforced the waiver of warranty. And once again, as in *Riggs*, the seemingly most directly applicable rule was set aside in order to produce a morally better result. But in *Henningsen* there was not nearly as obvious a counterpart to the preexisting and legally recognized “no man may profit from his own wrong” principle. The *Henningsen* court did mention a few somewhat relevant cases, but relied much more directly on vague references to “public policy,” “the best interests of society,” and the “spirit” of the law,¹⁰⁶ thereby providing stronger support for Dworkin’s argument that the realm of what courts can and do rely on to reach their judgments is not limited to the cluster of rules and principles plainly recognized by a Hartian rule of recognition. The bite of the *Henningsen* example thus comes not only from the fact that the court drew on broad notions of the public good, but also from the way in which the court appeared to suggest that judges could avail themselves of an unlimited universe of legal, political, and moral sources. And if the domain of legally permissible sources for decision is more or less unlimited, so Dworkin insisted, then the very idea of the rule of recognition and its positivist heritage must collapse.

Dworkin’s challenge to positivism has generated an industry of jurisprudential commentary, including a corpus of criticism that attempts to demonstrate that legal positivism is not what Dworkin claimed it to be and accordingly that positivism, if properly understood, remained standing after Dworkin’s attack. To those who subscribed to what became known as “inclusive positivism,”¹⁰⁷ the positivist picture as painted by Hart is entirely compatible with rules, principles, morality, and much else — in fact, anything else — being recognized as valid

¹⁰⁴ DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 3, at 23–25.

¹⁰⁵ See, e.g., *Faulk v. Weller K-F Cars, Inc.*, 70 So. 2d 578 (Fla. 1954); *Broaderick Haulage, Inc. v. Mack-Int’l Motor Truck Corp.*, 153 N.Y.S.2d 127 (App. Div. 1956).

¹⁰⁶ *Henningsen*, 161 A.2d at 94–95; *id.* at 94; *id.* at 95; *id.* at 94.

¹⁰⁷ The foundation for the idea was first offered in David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415 (1977) (reviewing DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 3); and E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977). Subsequent influential explications include JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001); WALUCHOW, *supra* note 74; Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); and Kenneth Einar Himma, *Inclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125 (Jules Coleman & Scott Shapiro eds., 2002).

law by the rule of recognition, so long as we understand that such recognition is a contingent social decision and not inherent in the very nature of law. And the so-called exclusive positivists¹⁰⁸ maintained that some or much of what Dworkin identified as producing the decisions in cases like *Riggs* and *Henningsen* might have contributed to the reasoning of the judges, but was still not law properly so called. For the exclusive positivists, Dworkin's mistake was in believing that law could or should be understood as coextensive with the grounds for a judicial decision. Law for the exclusive positivists was a smaller category, and for them nothing about positivism entailed the conclusion that only law is the basis for what lawyers argue and judges decide. Dworkin of course had his responses, arguing against the inclusive positivists that their claims about the contingent potentially unlimited range of legal sources was what he had been saying all along, albeit with a different label, and against the exclusive positivists that a theory of law that explained so little of the grounds for legal argument and judicial decision was scarcely a theory of law at all, or, if it was, a hopelessly inadequate one.¹⁰⁹

Little point would be served by rehearsing yet again a debate that seems already to have more than run its course. But we should not lose sight of the basic point, even apart from whether Dworkin's arguments succeed or fail against legal positivism. And that is that the "empire" of law's sources, to use Dworkin's word,¹¹⁰ and thus of law itself, is far more capacious than was perceived by theorists (and in fact was) a century earlier. Indeed, although Dworkin understood the empire as an empire of principle that excluded considerations of (largely utilitarian) policy,¹¹¹ in this, if understood as a descriptive claim, he was almost certainly mistaken.¹¹² Bracketing the question whether courts *should* engage in utilitarian policy analysis, and thus putting aside whether policy is best left to legislatures, there can be little doubt, as theorized by Professor Melvin Eisenberg¹¹³ and others,¹¹⁴

¹⁰⁸ See, e.g., RAZ, *supra* note 18; Andre Marmor, *Exclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 107, at 104; Joseph Raz, *Authority, Law, and Morality*, 68 MONIST 295 (1985); Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469 (1998).

¹⁰⁹ See generally Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655 (2002).

¹¹⁰ DWORKIN, LAW'S EMPIRE, *supra* note 3.

¹¹¹ *Id.* at 221–24; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 3, at 84–85.

¹¹² See generally Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977).

¹¹³ MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988). An interesting curiosity is that Eisenberg, who went on to a distinguished career as a scholar of contracts and legal theory, was himself involved with the editing of Hart's *Positivism and the Separation of Law and Morals*, *supra* note 55. What makes this interesting is that the intrusiveness of the *Review's* editing process caused Hart no little surprise and no little concern, ultimately requiring

that common law courts do in fact engage in policy analysis, and do consider a wide range of “social propositions” to be relevant to legal decisionmaking and thus part of what counts as the law. Consequently, if we understand Dworkin’s challenge to the idea of a rule of recognition as ultimately a challenge to understanding law as limited to the materials found in books published by the West Publishing Company,¹¹⁵ to put it metaphorically, we can understand Dworkin, Eisenberg, and others as attempting to identify, theorize, and justify a picture of law and legal decisionmaking that extends far beyond the boundaries of what might be found in the books in a typical law library, far beyond the boundaries of what Beale and Langdell would have considered law — and far beyond the boundaries of what Dworkin thought might usefully be explained by the idea of a rule of recognition.¹¹⁶

VI. THE INCREASINGLY UNLIMITED DOMAIN OF THE LAW

I have been attempting to tell the story of an important strand of jurisprudential debate, that being about the range of sources that are (descriptively and normatively) considered valid within the source-based enterprise of law. These debates have been with us for centuries, but they also have contemporary manifestations. One is the now-familiar controversy about foreign law, a controversy largely focused on the Supreme Court of the United States.¹¹⁷ Here the question is the

Fuller’s intervention in order to prevent Hart from withdrawing the article entirely. See LACEY, *supra* note 58, at 200–01.

¹¹⁴ See Greenawalt, *supra* note 112.

¹¹⁵ Professor Ruth Gavison uses the nice phrase “first-stage law” to refer to the collection of traditional legal materials as found in traditional legal libraries, and she uses the term to bracket, at least preliminarily, questions about what counts as law in a larger or deeper sense. Ruth Gavison, *Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL’Y 727, 740–41 (1991).

¹¹⁶ The rule-of-recognition account of the nature of law and of the validity (or not) of legal sources becomes even more plausible if we understand the rule of recognition not as a “rule” in any conventional sense of that word, but rather as a set of fluid social and professional practices incapable of being reduced to rule-like formulation. See Gerald J. Postema, *Positivism and the Separation of Realists from Their Skepticism*, in THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY 259, 274–75 (Peter Cane ed., 2010); Frederick Schauer, *Is the Rule of Recognition a Rule?*, 3 TRANSNAT’L LEGAL THEORY 173 (2012); A.W.B. Simpson, *The Common Law and Legal Theory*, in 2 OXFORD ESSAYS IN JURISPRUDENCE 77, 98–99 (A.W.B. Simpson ed., 1973).

¹¹⁷ Compare, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (claiming support from British law and the European Convention on Human Rights); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing a brief filed by the European Union); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (noting the many countries that have eliminated the juvenile death penalty), *with Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (describing the majority’s reliance on foreign law as “meaningless dicta”); *Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting) (objecting to references to foreign law); *id.* at 347–48 (Scalia, J., dissenting) (same); *Thompson*, 487 U.S. at 868 n.4 (Scalia, J., dissenting) (same). Compare also Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (supporting the non-conclusive reliance on foreign law), *with* Ernest A. Young, *The Supreme Court, 2004 Term — Comment: For-*

extent to which, if at all, legal argument and decisionmaking should treat nondomestic court decisions, statutes, and constitutional provisions as authoritative. Proponents of doing so, most prominently Justices Kennedy, Breyer, and Ginsburg, can be interpreted (although they would likely deny it) as maintaining that the decisions of foreign jurisdictions are legitimate sources in American courts and are thus, even if in an attenuated way, part of American law.¹¹⁸ And their adversaries, chiefly Justices Scalia and Thomas and occasionally Judge Posner,¹¹⁹ have recognized that to treat the decisions of, say, France, New Zealand, or the European Court of Human Rights as sources of authoritative guidance in American courts is to expand the scope of American law itself. Even with Justice Scalia's death, there is little doubt that the debates will continue, and that is largely because they go to the ultimate question of what counts as a valid source of law within a jurisdiction.¹²⁰

More recent and slightly less familiar are the debates about so-called nonlegal sources, recognizing, of course, that whether the sources are legal or not is exactly the point at issue.¹²¹ Scholars and practitioners of the law of evidence are familiar, for example, with the Supreme Court's 1999 decision in *Kumho Tire Co. v. Carmichael*,¹²² which refined the approach to expert evidence the Court had launched a few years earlier in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹²³ and which applied for the first time the *Daubert* principles to all ex-

eign Law and the Denominator Problem, 119 HARV. L. REV. 148 (2005) (questioning the wisdom of treating foreign law as non-conclusively authoritative). Although the foreign law debate has been most visible and most acrimonious in the United States, the topic has recently attracted important comparative scholarship. See ELAINE MAK, JUDICIAL DECISIONMAKING IN A GLOBALISED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS (2013); THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

¹¹⁸ For the argument that the typical American use treats foreign law as authoritative, even if not conclusively so, see Young, *supra* note 117, at 156. Proponents of using foreign law often claim that its use is persuasive and not authoritative, see generally Jackson, *supra* note 117, at 114–15, but it is important to recognize that treating foreign law as a reason for decision just because of its existence is still to treat it as authoritative even if the reason is not dispositive, see FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 79–80 (2009); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008). See generally Young, *supra* note 117.

¹¹⁹ See Richard Posner, *No, Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40.

¹²⁰ More broadly still, they go to the question of just what the jurisdiction is, and what the boundaries of the political community are. If French law is authoritative in American courts, even if only weakly so, then the very distinction between the French legal system and the American legal system is weakened commensurately.

¹²¹ See generally Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegation of Law*, 29 J. LEGAL STUD. 495 (2000).

¹²² 526 U.S. 137 (1999).

¹²³ 509 U.S. 579 (1993).

pert evidence, and not just to that which can be considered “scientific.”¹²⁴

Kumho Tire is hardly of broad-scale jurisprudential significance, its importance in evidence law notwithstanding. But the majority opinion, written by Harvard Law School graduate and former faculty member Justice Breyer, foreshadows an issue of genuine jurisprudential import, at least for the part of jurisprudence that focuses on what does or does not count as law. Toward the beginning of an opinion dealing with the qualifications (or not) of a purported expert in tire-failure analysis, Justice Breyer refers to a book entitled *How to Buy and Care for Tires*.¹²⁵ Although the book plainly serves only to provide background information, and although its contents did not affect the outcome, it is noteworthy that the book was neither part of the record below, nor cited in any of the briefs, nor mentioned in oral argument. Rather, Justice Breyer, presumably assisted by his law clerks, located the book on his own, and seemingly subsequent to briefing, oral argument, and the initial votes in conference.

Justice Breyer’s willingness to expand the scope of legal cognition has been manifested in cases in which the identified sources were again absent from the record, the briefs, and the oral arguments, but in which those sources appear to have played a substantially greater role than did *How to Buy and Care for Tires* in *Kumho Tire*. In *United States v. Lopez*,¹²⁶ for example, Justice Breyer ranged far beyond the record and the briefs to identify empirical research supporting his dissenting conclusion that the presence of guns in the public schools had a substantial effect on interstate commerce.¹²⁷ In *Parents Involved in Community Schools v. Seattle School District No. 1*,¹²⁸ his dissent examined — by use of his own research — the history of school integration and segregation in the very district that was involved in the litigation.¹²⁹ And in *Brown v. Entertainment Merchants Ass’n*,¹³⁰ to the consternation of Justice Scalia,¹³¹ Justice Breyer surveyed the existing social science research on video game-caused violence in order to buttress his dissenting conclusion that California had a strong basis for

¹²⁴ *Kumho Tire*, 526 U.S. at 141.

¹²⁵ *Id.* at 143 (citing ALEX MARKOVICH, *HOW TO BUY AND CARE FOR TIRES* 4 (1994)) (caption to the illustration).

¹²⁶ 514 U.S. 549 (1995).

¹²⁷ *Id.* at 615, 618–44 (Breyer, J., dissenting).

¹²⁸ 551 U.S. 701 (2007).

¹²⁹ *Id.* at 804–37, 869–76 (Breyer, J., dissenting).

¹³⁰ 564 U.S. 786 (2011).

¹³¹ *Id.* at 801 n.8.

regulating juvenile use of violent videogames, even in the face of First Amendment concerns.¹³²

Justice Breyer's strong ally in this campaign has been Judge Posner, who, in characteristically spirited fashion, has defended his practice of engaging in extrajudicial internet research in order to inform himself of the kind of information that advocates before him have been unable to provide.¹³³ The practice raises due process and related questions about the desirability or permissibility of judicial research taking place outside of the normal safeguards of the adversary process,¹³⁴ but again also implicates the nonprocess issues of the nature of permissible legal sources for (and grounds of) judicial decisions.

These practices too have generated lively debates,¹³⁵ but replaying them would take us too far afield. Completely ignoring them would be a mistake, however, because they are also about what is to count as law. We could draw a nice distinction between law and the sources of interpretive or decisional guidance, but that distinction would be too nice by half. When we (or judges) ask what the law is on some topic or with respect to some behavior, the answer includes not only legislative or judicial prescriptions about what ought to be done, but also a vast range of other authoritative sources directed to interpreting and applying the formal prescriptions. Perhaps, with Langdell's students, we should say that these other sources are not law.¹³⁶ But regardless of what we call them, they plainly influence how the legal system will reach its conclusions, what conduct the legal system will require, and what behavior the legal system will condone or empower. And if we see the boundaries of this domain of valid sources as either definitional of, or central to, the legal enterprise, then one way of understanding an important line of jurisprudential debate for the last two centuries is as an effort to scrutinize what lies within these boundaries, and, for the most part, to see those boundaries as increasingly expanding.¹³⁷

That the boundaries of law have more often tended to grow rather than shrink is a contingent and not a necessary empirical fact. There is no logical reason why these boundaries could not contract rather

¹³² *Id.* at 850–72 (Breyer, J., dissenting); see also STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

¹³³ RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 134–43 (2013).

¹³⁴ See Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51, 64 (2013).

¹³⁵ Good comprehensive treatments include Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012); and Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131 (2008).

¹³⁶ See *supra* note 1 and accompanying text.

¹³⁷ Indeed, some further support for this proposition comes from the fact that many such sources can now be found in the Harvard Law Library, which surely would not have been the case a century ago.

than expand, with sources once considered legitimate becoming less so.¹³⁸ In reality, however, the impetus to expansion has typically (even if not invariably) been stronger than that for contraction, in part because of the acceleration, for technological and economic reasons, in the availability of information. As more and more information becomes more and more available, the cost of that information decreases and the ease of accessing it increases, thereby facilitating growth in the universe of usable and thus permissible sources of law.¹³⁹ In addition, the more that law reaches into new domains of social life, the wider the range of sources that become relevant to managing those domains. These speculations — and they are no more than that — suggest that growth of the realm of legitimate legal sources will probably continue, and that the future is more likely to see expansion rather than contraction of the boundaries of law.

VII. CONCLUSION

In the 200th year of its existence, there are undoubtedly things that the Harvard Law School still needs, but another triumphalist encomium to Harvard's importance is probably not among them. Nevertheless, it should come as no surprise that the winding path of American jurisprudence passes so often through the Harvard Law School. Not much of this path has touched on questions about the essential properties of law in all possible legal systems, however central that inquiry has been to practitioners of the jurisprudential arts in other places.¹⁴⁰

¹³⁸ One prominent example might be the arguments for constitutional originalism, *see* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004), which seek to exclude from the domain of legitimate sources the contemporary social information that might be used by a proponent of a "living constitution," *e.g.*, DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1–3 (2010), or the moral facts and norms that would count for an advocate of a moral reading of the Constitution, *e.g.*, RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2–12 (1996). Another proposed (and related) contraction would be the form of textualism that sees evidence of legislative intent (or Framers' intent, in the constitutional context) as outside of the domain of legitimate legal sources. *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 16–23, 38 (Amy Gutmann ed., 1997).

¹³⁹ *See* Schauer & Wise, *supra* note 121. The effects of technology are hardly limited to modern electronic technology. Although neither the existence nor the direction of causation can be established with any confidence, it is intriguing that Langdell published his first casebook (on contracts) in 1871, that the case method of legal instruction was first used outside of Harvard in 1890, and that John B. West created the West Publishing Company in 1871 and the West Digest system in 1879 based on an 1876 precursor. *See* Ross E. Davies, *How West Law Was Made: The Company, Its Products, and Its Promotions*, 6 CHARLESTON L. REV. 231 (2012). It is hardly implausible that the rise in the use and importance of cases (as opposed to treatises) in legal training, argument, and decision was assisted by the increasing ease of access to those cases.

¹⁴⁰ One could tell a counterstory in which the development of analytic jurisprudence, from Jeremy Bentham to John Austin to Hans Kelsen to H.L.A. Hart to Joseph Raz, to name just the major figures, has taken place almost entirely outside the confines and grasp of the Harvard Law

But of at least equal importance on the jurisprudential agenda has been the enduring issue of which inputs — which sources of decision-making guidance — shall be treated as acceptable in legal arguments and judgments. This is the issue of what shall count as law, and on this question the Harvard Law School figures frequently — as a locus of education, of scholarship, and of prominent debates.

As the Harvard Law School has changed, so too has the terrain of jurisprudential interest and attention. For many practitioners of contemporary jurisprudence or philosophy of law, their enterprise is defined by a focus on the essential or necessary properties of the concept of law in all possible legal systems.¹⁴¹ That enterprise sees the philosophy of law more as a branch of philosophy than as a branch of law, and thus connects its categories, its methods, and its topics of interest predominantly with those of contemporary analytic philosophy as opposed to those that occupied most of the theorists featured here. As a result, the matters on which I have concentrated in this Article are often these days seen as no part of the jurisprudential enterprise, however interesting they might be to those who study legal reasoning or legal argument.¹⁴² On much of the modern jurisprudential landscape, jurisprudence is necessarily and perhaps even exclusively engaged in the conceptual analysis of the concept of law, relegating the examination of other theoretical aspects of law to a different and nonjurisprudential intellectual domain. But that judgment would have surprised Pound, who authored a five-volume treatise entitled *Jurisprudence*¹⁴³ and a

School. At least some of the explanation for Harvard's seeming detachment from issues that have long preoccupied others may lie in the difference between jurisprudence as written and taught in an institution devoted to training lawyers and jurisprudence as an activity taking place more separated from legal education in general, and postgraduate professional legal education in particular. And some of the explanation may relate to the particularly (and not necessarily unqualifiedly desirable) strong focus on judges and appellate decisionmaking in American legal education generally. There may be other explanations as well, but this Essay is surely not the occasion for exploring them.

¹⁴¹ See, e.g., DICKSON, *supra* note 67; RAZ, *supra* note 18; SCOTT J. SHAPIRO, LEGALITY (2011). Among the recent challenges to this understanding of the jurisprudential enterprise from those who themselves operate within the vicinity of analytic jurisprudence are FREDERICK SCHAUER, THE FORCE OF LAW (2015); Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 31 OXFORD J. LEGAL STUD. 663 (2011); and Gerald J. Postema, *Jurisprudence, the Sociable Science*, 101 VA. L. REV. 869 (2015).

¹⁴² Professor Joseph Raz, for example, distinguishes between law and legal reasoning, maintaining that legal reasoning involves the law but is never limited to it. Joseph Raz, *Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment*, 4 LEGAL THEORY 1, 4–6 (1998). Given that Raz also limits the enterprise of philosophy of law to the search for that which “all legal systems necessarily possess,” RAZ, *supra* note 18, at 105, a view echoed by Professor Julie Dickson, DICKSON, *supra* note 67, at 11–15 (equating jurisprudence with nonsystemically contingent general jurisprudence), it is easy to see why mainstream analytic jurisprudence has moved away from even theoretical or philosophical interest in the admittedly contingent features of legal reasoning.

¹⁴³ ROSCOE POUND, JURISPRUDENCE (1959).

shorter book entitled *An Introduction to the Philosophy of Law*.¹⁴⁴ It would have surprised Fuller, who plainly saw continuity among his scholarship on legal fictions,¹⁴⁵ on legal interpretation,¹⁴⁶ and on the nature of law.¹⁴⁷ It would have surprised Dworkin, the Professor of Jurisprudence at Oxford, who from the beginning trained his attention on the sources that judges used in making their decisions, and who staunchly rejected the idea that a theory of legal reasoning and judicial decisionmaking could be divorced from a theory of law.¹⁴⁸ And it would surprise Judge Posner, some of whose writings about these topics are contained in a book entitled *The Problems of Jurisprudence*.¹⁴⁹

This is not to say the contributions of contemporary analytic philosophy of law, including the contributions of conceptual analysis of the concept of law, are without interest and importance. Much of contemporary philosophy of law, with its use of the best of modern philosophy and with its meticulous analytic approach, has been profound, undoubtedly furthering our understanding of the phenomena of law and legal authority. But just as the field of legal cognition by lawyers and judges has increased, so, curiously, has the scope of mainstream jurisprudence decreased. The relationship between the broadening of law and the narrowing of jurisprudence is intriguing in its own right. But serious inquiry into the sources of law — what counts as law — is not only an offshoot of jurisprudential scholarship. It is also part of jurisprudence itself, as many of the figures highlighted in this Article have maintained. If inquiry into what counts as law and inquiry into the nature of law should once again become as connected as they were in Pound's time — or Fuller's, or Dworkin's — our understanding of the law will benefit commensurately.

¹⁴⁴ POUND, *supra* note 35.

¹⁴⁵ LON L. FULLER, *LEGAL FICTIONS* (1967).

¹⁴⁶ *See* Fuller, *supra* note 55; Fuller, *supra* note 76.

¹⁴⁷ FULLER, *supra* note 64.

¹⁴⁸ *See* RONALD DWORKIN, *JUSTICE IN ROBES* (2006).

¹⁴⁹ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).