# 1966–2016: LEGAL PHILOSOPHY AS PATIENT

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John Kelly, the 50th anniversary of whose commencement of the new series of the *Irish Jurist* is celebrated in these pages, reached a memorable verdict on contemporary legal philosophy. In a comment alluded to by both Tony Honoré and Ronan Keane in their respective forewords to his posthumously published monograph, *A Brief History of Western Legal Theory*, Kelly describes today's students as being treated to a "course in mental ... athletics, sweating around the cinder-track of mid-twentieth-century linguistic analysis...".[1] On the question of the nature of law, Kelly's verdict is half right. This essay considers first what it gets wrong, and then what it gets right.

The contributions to legal philosophy of H.L.A. Hart and Ronald Dworkin were the principal targets of Kelly's disapproval. There is no question that, following their example, contemporary legal theorists have sought to apply insights from other philosophical fields. We may justifiably speak of legal philosophy's interdisciplinary turn. But both Hart and Dworkin's initial efforts effected indispensable advances. Conversely, whereas subsequent interdisciplinarity has introduced much technical sophistication, it has yet to produce a corresponding payoff in understanding. Moreover, it is to legal philosophy that the insight of the other domain is almost always applied. In the hands of sparring legal philosophers, interdisciplinarity can take on the appearance of an arms race; in the hands of philosophers from these other disciplines, it can take on that of show-stopping, but, ultimately, mark-missing, intervention. This suggests an organising theme of legal philosophy as patient. For all the benefits of the interdisciplinary turn, realised and potential, legal philosophy will remain an immature inquiry until it contributes reciprocally to cognate fields.

Part I reviews the great advance achieved by Hart and Dworkin through the application of insights from the philosophy of language. Part II reviews the subsequent technical expansion of legal philosophy in the service of theories that both distinguish and fuse law and politics. In a concluding section, I consider the prospects for the converse scenario, in which legal philosophy exerts influence on another domain, namely, the philosophy of group agency.

## I. THE GREAT ADVANCE

The foundational divide in contemporary legal philosophy concerns whether the law on a given issue is solely determined by the politics of that particular issue or is instead determined by a procedure whose content is determined by broader political forces. The former view may be described as "reductionist"

1. J.M. Kelly, *A Brief History of Western Legal Theory* (Oxford: Oxford University Press, 1992), p.xii.

legal theory because it posits, in contrast to the traditional, non-reductionist view, that law is an undifferentiated feature of politics. In the aftermath of World War II, non-reductionist legal theory confronted three principal questions. One was the age-old issue of "natural" law, namely, whether a rule's moral qualities bear on its status as a law. This issue had been given fresh impetus by the imperative of ensuring maximum resistance to any future fascist regime and by the criminal convictions of those who had helped carry out Hitler's wicked domestic policies. But the other two questions were more basic, namely, what sort of decision does a law consist in; and how might political forces actually determine a procedure that would determine the law? Any non-reductionist theory, whether or not it incorporates moral conditions on lawfulness, must answer both questions. Until H.L.A. Hart published *The Concept of Law* in 1961, the leading answers were those offered by John Austin's command theory of law and Hans Kelsen's pure theory of law, respectively.[2] Hart realised that the application of contemporary philosophical methods promised better ones.

Austin and Kelsen had both emphasised the unification achieved by a theory that characterises all laws as consisting in a single form of decision, be it a command to ordinary citizens, or an instruction to officials. Certainly, the notions of command and instruction both capture the intuition that laws establish compulsory standards of behaviour. But the theory of law's intuitiveness was regarded as secondary to its elegance. Hart's first innovation was to reverse this order of priority:

> "Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions."[3]

The intellectual support for this innovation Hart had found in the rise of linguistic analysis which, under the influence of figures such as Ludwig Wittgenstein and J.L. Austin, had become the philosophical method du jour.[4] Henceforth, if a theory of law introduced an absurd consequence, then such absurdity would be recognised as a strong reason for rejecting that theory.

Linguistic analysis holds that philosophers make progress by elucidating our shared intuition about the use of language. Applying this method, Hart consigned to history the existing theories on the sort of decisions in which laws consist. It had been no secret that Austin's reduction of all laws to commands that forbade or compelled conduct sat uneasily with the existence of laws which confer powers, such as the power to marry or to dispose of one's estate in a will. But Hart took the existence of such tension to be decisive: "Such power-conferring rules are ... spoken of ... differently from rules which

2. J. Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832); H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press 1960, first published 1934).
3. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press,1961), p.v.
4. N. Lacey, *A Life of H.L.A. Hart* (Oxford: Oxford University Press, 2006).

impose duties … What *other* tests for difference in character could there be?"[5] Similarly, there had been no question that Kelsen's reduction of all laws to conditional instructions (if $x$ happens, then enforce consequence $y$) ignored traditional distinctions between the branches of law. But Hart held that the consequent absurdity of taking a criminal fine to be identical to a tax was fatal:

> "The idea that the substantive rules of the criminal law have as their function (and, in a broad sense, their meaning) the guidance not merely of officials operating a system of penalties, but of ordinary citizens in the activities of non-official life, cannot be eliminated."[6]

Ever since, non-reductionist philosophers have acknowledged that the decisions in which laws consist will take disparate forms.

Any explanation of conduct that refers to a legal constraint will beg the question of how the pertinent constraint came to exist. Equally, any prediction about law-abiding behaviour ultimately refers to the likelihood that the conditions for the existence of an apt legal system will be satisfied. The concept of law is of explanatory value only to the extent that it enables such references. Accordingly, a non-reductionist theory of law ought to be accompanied by an ancillary explanation of how political forces might actually come to determine a procedure for determining the law. Hart's second innovation lay in his development of such an explanation.

Non-reductive theories of law characterise a legal system as depending on the existence of a procedure that determines compulsory standards of behaviour. This raises the question of how such a procedure might emerge. The only suggestion on this crucial matter had been Austin's idea that the law is determined by the decisions of an entity who is recognised as being "able and willing to harm" those who would ignore them.[7] On this approach, political forces determine the procedure that, in turn, determines the law, through the enforcement capacity of the decision-maker to which the procedure refers. Pointing to the case of monarchical succession, Hart vividly exhibited the inadequacy of this suggestion. Even granting that the deceased King had been capable himself of enforcing his decrees, there appears to be no reason, absent fresh violence, that his desired successor should now be recognised as being similarly capable. Yet, Hart observed, the passage of crown from parent to child is often an entirely peaceful affair.[8]

Hart's objection can be framed more vividly still by simplifying the example. Leave aside the question of succession: how is it that a monarchical legal system could even exist given the requirement that the monarch must be "able and willing to harm" those who would ignore his decisions? As a matter of casual observation, it is clear that no individual can hope to enforce her decisions over any sizeable group of people on her own. Accordingly,

5. Hart (1961), p.41 (emphasis added).
6. Fn.3, p.39.
7. Austin (1832), p.7.
8. Hart (1961), pp.52–55.

we remain in the dark as to how a legal system might come to consist in the decisions of an autocrat or, for that matter, in decisions of a group, such as a parliament, which comprises but a sliver of the total population.

Hart's alternative story of how political forces might determine a procedure for determining the law is not itself the product of linguistic analysis. But it may readily be traced to his confidence in that method's assumptions. Linguistic analysis supposes the existence of implicit conventions on the uses of terms. Hart suggested that, alongside linguistic conventions, there may be moral conventions on the procedures by which the policies applicable to particular territories ought to be decided, what he called, "public standards of official behaviour".[9] We shall label such a convention an "MCP". The procedure that is the subject of a given MPC might refer to the decisions of an autocrat, a politburo or a demos alike.

The notion of an MCP distinguishes the functions of policy determination and policy enforcement. The result is an explanation of how political forces determine a particular procedure for determining the law that does not rely on the enforcement capacity of any decision-maker to which the procedure refers. It allows instead that a suitably motivated group may perform the function of enforcing, on a wider population, the decisions made by an individual. Thus, Hart proposed that, if an MCP should characterise a group that is perceived to be uniquely capable of the enforcement of behavioural norms, then the procedure in question will determine the law. The procedure forming the subject of an MCP that characterizes a group such as this Hart termed a "rule of recognition". The notion of a rule of recognition offered a plausible explanation of the emergence of a procedure that could determine compulsory standards of behaviour, and, hence, the contents of a legal system.

Whereas Hart's first innovation prompted legal theory to capture our intuition about the different forms that laws might take, his second allowed legal theory to explain how laws might actually come about. While the actual application of linguistic analysis was confined to the former innovation, that method offered inspiration for his idea of a convention on the procedure by which the policies applicable to a particular territory ought to be decided. Linguistic analysis led similarly to the third and final clear advance of legal philosophy's interdisciplinary turn, namely, recognition of the need to account for legal disagreement.

The significance of legal disagreement is illuminated in Ronald Dworkin's friendly critique of non-reductionist legal theory. The relevant literature is often described as the Hart–Dworkin debate. But this title obscures two key features. First, it suggests that the challenge posed by disagreement applies solely to the invocation of a convention to explain the existence of a procedure that determines compulsory standards of behaviour. In fact, the challenge posed by disagreement applies to all theories which state criteria; it applies equally to the theories of Austin and Kelsen, as well as to natural law theories which add the criterion that (paradigmatic) legal systems consist in decisions

9. Fn.3, p.116.

that are just.[10] Secondly, the title obscures the fact that Dworkin's contribution, just like Hart's, is attributable to the rise of linguistic analysis. Both rely on the assumption that philosophers ought to attend to our shared intuition about the use of language.

In principle, our shared intuition about the use of a term might defy efforts at its elucidation as a set of necessary and jointly sufficient conditions. Traditionally, non-reductionist theories of law state that a norm is (paradigmatically) legal if, and only if, it is determined by a politically privileged procedure or, alternatively, if, and only if, it is determined by such a procedure and is, furthermore, just. Dworkin's innovation was to try to show that, as efforts to elucidate our intuition about the use of the term "law", such theories are doomed.

Whereas Hart had appealed to our intuition about the use of "law" in cases where all are agreed on the content of the law, Dworkin invoked cases where there is disagreement. Crucially, the disagreement persists even though the application of all posited criteria for the use of the term is agreed:

> "[Lawyers] might agree ... about what the statute books and past judicial decisions have to say ... but disagree about what the law ... actually is because they disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law."[11]

Consider an individual who, though fully competent in distinguishing men and women, persists in applying "bachelor" to unmarried women. We would not argue with them over whether a particular spinster/bachelorette was in fact a bachelor; we would conclude instead that we were simply using the term differently. In respect of "law", Dworkin suggested that disagreements might follow an alternative pattern. Suppose that, intuitively, both sides to a disagreement over the outcome of litigation invoke the pertinent conduct's lawfulness. If it is also the case that each side agrees on the application of all possible criteria, then no theory of law that posits criteria will be consistent with our intuition about the term's use.

Pointing to examples of legal disagreement,[12] Dworkin argued that the project of stating necessary conditions for the use of "law" ought to be abandoned because it is unable to achieve the elucidation of our intuition:

> "Our sample cases were understood by those who argued them in court cases and classrooms and law reviews as ... about what criteria they should use. So ... the project of digging out shared rules from a careful study of what lawyers say and do [is] doomed to fail."[13]

10. John Finnis is the leading contemporary advocate of this view; Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980).
11. R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), p.5. In *Law's Empire*, the argument received its current title, "the semantic sting", but was made initially in Dworkin, "Social Rules and Legal Theory" (1972) 81 Yale L.J. 855.
12. e.g. Dworkin (1986), pp.15–30.
13. Fn.12, p.43.

Let us label disagreement about the lawfulness of conduct where the application of all possible criteria for the use of "law" is agreed as "deep" disagreement. Dworkin's best-known effort to identify an example of deep disagreement concerns the nineteenth-century New York case of *Riggs v Palmer* ("Elmer's case"). In *Riggs*, a man had made a will in favour of his grandson, Elmer. Elmer was fearful that his grandfather's new marriage would result in his grandfather making a new and less favourable will. To pre-empt a change in his inheritance, Elmer murdered the grandfather. Elmer's crime was discovered, however, and he was duly convicted of the murder. The legal question concerned the distribution of the murdered testator's estate. The testator's daughters wanted the executor to exclude Elmer in light of his wrongdoing. Elmer, in contrast, insisted that the terms of his grandfather's will be honoured so as to allow him to inherit his anticipated share. The State of New York's statute of wills provided that one could create a will subject to various conditions, such as signature and witnessing. The stated conditions did not include the proviso that murdering beneficiaries would be excluded. Nevertheless, the courts decided that the law denied Elmer any inheritance.

For Dworkin's purpose, the important thing about *Riggs v Palmer* was not the result in the case but rather the disagreement over what it ought to be. Proceeding though the curial hierarchy, the case was resolved in alternative ways. In the highest court, there was a split decision. Thinking about the case today, students likewise disagree over what the outcome ought to have been. Crucially, the disagreement appears to be legal in nature; both sides seem to invoke the lawfulness of the executor's decision to award Elmer his anticipated share. We appear to agree, that is, that there is an answer to the question of whether Elmer had legally been entitled to benefit.

Notice that there is complete agreement on the moral question; nobody disputes that, morally speaking, the murderous Elmer should be denied his victim's estate. Already, then, the disagreement in *Riggs v Palmer* is sufficiently deep to throw up a problem for natural law theory. If, intuitively, an immoral requirement cannot count as lawful, then our agreement on the immorality of Elmer's benefiting should lead us to agree that there was no lawful requirement that Elmer should benefit. Yet, it seems that many do believe that there was a lawful requirement that Elmer should benefit. Dworkin insisted that the disagreement in *Riggs* was also deep enough to undermine theories that hold that a norm is legal just so long as it has been determined by a politically privileged procedure.

All agree that Elmer's inheritance is the subject of a norm determined by the politically privileged procedure, namely, a decision of the legislature of the State of New York, expressed by the statute of wills. The persistence of disagreement over the outcome therefore poses the question of what, exactly, the decision expressed by a statute comprises.[14] One possibility is that it comprises the statute's literal meaning. As it happens, the literal meaning of

14. For posing this question, *Riggs v Palmer* had been famous in legal philosophy long before Dworkin offered it as proof of the counter-intuitiveness of criterial theories of law.

New York's statute of wills was clear: all agree that, read literally, the statute implied that Elmer should receive his anticipated share. Accordingly, if the decision expressed by a statute comprised the statute's literal meaning, then Elmer is entitled to benefit. Another possibility is that the decision expressed by a statute derives from the purpose motivating its enactment. By their enactment of the statute of wills, New York legislators sought to enable individuals to ensure that, after death, their property would be distributed according to their expressed wishes. It is clear, however, that this purpose did not extend to enabling individuals to claim a testator's estate as a reward for his murder. Accordingly, if the decision expressed by a statute derives from the purpose motivating its enactment, then Elmer is equally not entitled to benefit.

Both the statute's literal meaning and its purpose are agreed, but there is nonetheless disagreement over Elmer's legal entitlement. Accordingly, if we assume that either literalism or purposivism is correct, then to hold that a norm is legal if it has been determined by a politically privileged procedure conflicts with our linguistic intuition. Alternatively, we might assume that the notion of a procedure is sufficiently vague that, on questions to which literalist and purposivist readings give divergent answers, there is no determined decision and, hence, no legal norm. In that case, however, the claim that a norm is legal *only* if it has been determined by a politically privileged procedure conflicts with our linguistic intuition. Still, the decision expressed by New York's statute of wills might consist in neither its literal meaning nor its motivating purpose. An alternative is that the decision expressed by a statute comprises the statute's intended meaning.

Consider a doctor who says to his patient, "You're not going to die".[15] We may use this example to distinguish three features of a speech scenario. The first is the speaker's literal meaning: that the patient is immortal. The second is the speaker's intended meaning: that the patient will not die from the wound in question. The third is the speaker's purpose in speaking: that the patient will calm down. In both common law and civilian traditions of statutory interpretation, lawyers justify their conclusions by reference to the legislature's intended meaning.[16] According to the intentionalist, the decision expressed by New York's statute of wills comprises its intended meaning. If, in contrast to its purpose and literal meaning, the statute's intended meaning is not a matter of agreement, then intentionalism has the distinction of not excluding the disagreement over Elmer's entitlement.

We are confident that, in enacting the statute of wills, legislators sought to enable individuals to ensure that, after death, their property would be distributed according to their expressed wishes. Equally, we are confident that, *had* legislators been presented with the *Riggs* scenario in the course of drafting, they would have taken the step of expressly prohibiting individuals

15. The example is due to Kent Bach: Bach, "Conversational Impliciture" (1994) 9 *Mind & Language* 124.

16. N. MacCormick and R. Summers, "Interpretation and Justification" in MacCormick and Summers (eds), *Interpreting Statutes: A Comparative Study* (Aldershot: Dartmouth Press, 1991), p.511.

from claiming a testator's estate as a reward for his murder. These assumptions point to two alternative policies that legislators might have intended to express: that of always distributing a deceased's property according to their expressed wishes; and that of distributing a deceased's property according to their expressed wishes unless that would benefit their murderer(s). If legislators failed to foresee the prospect of the murderous beneficiary, then the statute's intended meaning consists in the former policy. Conversely, if legislators foresaw that eventuality but then failed to commit their intended proviso to writing, then the statute's intended meaning consists in the latter. Thus, interpreters must establish whether the statute's literal meaning fails to exclude murderous beneficiaries because of a clerical error or because the intended policy was itself unconsidered in the relevant respect.

In a case such as *Riggs v Palmer*, we might expect disagreement as to which of such a pair of mistakes had been committed, and, hence, disagreement as to the statute's intended meaning. Consequently, if the legislature's decision comprises the statute's intended meaning, then the application to Elmer's inheritance of the criterion that a norm is legal if it has been determined by a politically privileged procedure is up for debate. It follows, in turn, that the disagreement over Elmer's inheritance does not prove that that criterion conflicts with our intuition about the use of "law". It seems, thus, that while the disagreement in *Riggs* is sufficiently deep to indicate the counter-intuitiveness of natural law theories, it provides no such indication in respect of criterial theories that exclude moral conditions. An argument that criterial legal theories are unable to achieve the elucidation of our linguistic intuition requires an example of deeper disagreement.

One major effect of Dworkin's critique of criterial legal theory lies in the reaction of philosophers who are inclined to persist with a criterial approach. The response with which Hart associated himself, "inclusivism", conceded that the rule of recognition might be liable to be informed by moral standards.[17] "Exclusivists", led by Joseph Raz, responded instead by seeking to explain away the appearance of legal disagreement.[18] The other major effect of Dworkin's critique was to open an alternative, non-criterial approach to non-reductionist theory. We consider this approach in Part II.

## II. THE GREAT EXPANSION

In his reform of non-reductionist legal theory, one of Hart's explicit goals was the relegation of a reductionist school of thought, "Legal Realism", which had risen to prominence in the United States in the first half of the 20th century.[19]

17. e.g. W. Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994); see Hart, "Postscript", in *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1994).
18. e.g. Raz, "Two Views of the Nature of The Theory of Law: A Partial Comparison", in J. Coleman (ed.), *Hart's Postscript* (Oxford: Oxford University Press, 2001), p.1.
19. e.g. K. Llewellyn, *The Bramble Bush* (New York: Oceana, 1930); J. Frank, *Law and the Modern Mind* (New York: Brentano, 1930).

Whereas Realism proposes to reduce law to politics, Hart believed that reflection on our linguistic intuition discloses an indispensable legal dimension to social life. Debate between reductionist and non-reductionist theories of law has endured, with both sides appealing to insights from the philosophy of language and other fields. In seeking further reform of non-reductionist theory, Ronald Dworkin drew from political philosophy the notion of reflective equilibrium. We consider, in turn, the appeal to political philosophy, and, in the service of reductionist theory, the appeals to continental philosophy of language and to Wittgenstein's famous rule following considerations. We find that, whilst the use of these insights has enriched legal philosophy's sophistication, it has not changed the terms of debate as Hart and Dworkin's earlier work did.

We begin with Dworkin's use of John Rawls' notion of reflective equilibrium.[20] Reaching reflective equilibrium involves weighing competing indications as to the nature of some domain to achieve the most reasonable general principles. Dworkin draws on reflective equilibrium to distinguish between concepts whose application can be described in terms of necessary conditions and "interpretive" concepts. Law, he argues, is an interpretive concept: the law on any particular matter is determined by potentially competing indications, each of which carries a particular weight.[21] On this approach, a politically privileged procedure determines the "pre-interpretive" legal materials.[22] Every legal norm is determined by both the relevant pre-interpretive norm and the relevant moral consideration. But, crucially, the determined legal norm may turn out to conflict with *either* its procedural *or* moral determinant.

Dworkin delineates an important distinction between substantive morality and fidelity morality. Substantive morality concerns the justice of the procedural authority's resolution of the particular question. In contrast, fidelity morality concerns the justice of assigning resolution of the question to that authority. Finally, there is the question of whether it is morally justified to adhere to the pertinent authority's decision in the light of both the decision's substantive (in) justice and the value of fidelity. Dworkin argues that this question is essential to the determination of the law in cases of conflict between the pre-interpretive materials and the relevant moral consideration. Whether a legal norm consists in the pre-interpretive norm or in some other, more substantively just rule is determined by the best overall political morality.[23]

In a given case, the morally best reconciliation of the conflicting demands of substantive and fidelity morality may itself be a matter of disagreement. Accordingly, by taking law as an interpretive concept, we allow scope for disagreement over the content of the law even where all agree on both the content of the pre-interpretive norm and on its injustice. The suggested approach may thus account for the existence of legal disagreements such as that in *Riggs*.

20. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); see Dworkin (1986), p.424.
21. Dworkin (1986), p.90.
22. Fn.21, p.91.
23. Fn.21, pp.257–258.

With *Riggs*, recall, the question is how to explain the disagreement over the murderer's legal entitlement to inherit his victim's estate. There is agreement on immorality of allowing Elmer to inherit; let us grant that the legislature had decided that the sole criterion for inheritance is a testator's expressed wishes. According to Dworkin, the law is determined by these conflicting indications according to the respective weights of fidelity and substantive morality. The correct weighting of these moral priorities in the formation of the best overall political morality is not self-evident. It is possible, thus, that lawyers, in assigning different weights to the respective substantive and fidelity components of the proposed calculation, thereby reach different views on the law. Accordingly, the disagreement over Elmer's legal entitlement may be attributable to different views on the applicable overall political morality.[24]

Having discovered a more-or-less acknowledged problem for criterial legal theory, Dworkin's proposed solution has met with considerable opposition. It has generated worries in respect of its coherence: the notion of "pre-interpretive" legal materials,[25] and the intelligibility of assigning weights to competing determinants[26] have both attracted criticism. Equally, its consistency with ordinary discourse about culpability for problematic legal outcomes has been challenged.[27] In contrast, the search for counter-examples to Dworkin's theory, the method by which Dworkin had himself originally established the need for an account of disagreement, has not been a focus. But a basic problem with an appeal to reflective equilibrium in legal theory is that our linguistic intuition suggests that, in the determination of the law, moral considerations are, at most, secondary factors.

Imagine an alternative *Riggs* case. Everything remains identical except for two features. First, instead of a democratically elected legislative assembly, the pertinent legislature is a malevolent tyrant. Secondly, the statute of wills enacted by this tyrant states, explicitly, that, "a murderer shall not, in addition to his criminal sentence, be disqualified due to his crime from any otherwise applicable inheritance". All will continue to agree that Elmer is not morally entitled to inherit. But I suggest that, in this alternative case, there will be no disagreement as to Elmer's *legal* entitlement. Rather, we would all agree that the law says that his grandfather's property is now his. Such agreement seems to pose a fundamental challenge to the notion of law as an interpretive concept. Whereas the weight of the factor that supposedly supports denial of Elmer's legal entitlement remains constant, that of the factor that supports recognition of his entitlement has diminished. Thus, the weight of substantive morality remains unchanged, but the weight of fidelity morality is reduced by the fact that we are now considering fidelity, not to the decision of a democratically elected assembly, but to an evil dictator. If our legal disagreement in the

24. Fn.21, pp.351–53.
25. e.g. J. Raz, "Dworkin: A New Link in the Chain" (1986) 74 Cal. L. Rev. 1103.
26. e.g. J. Finnis, "On Reason and Authority in Law's Empire" (1987) 6 *Law and Philosophy* 357.
27. L. Green, "Legal Positivism" in E. Zalta (ed.), *Stanford Encyclopedia of Philosophy*, Fall 2009 edn, available at: *plato.stanford.edu/entries/legal-positivism/* [Last accessed 29 August 2016].

original *Riggs* case were indeed born of the conflicting weights attributed to substantive and fidelity morality, then, in the revised scenario, we should, if anything, be more inclined to deny Elmer's legal entitlement. In fact, to the contrary, the revisions further incline us to recognise it.

Use of the notion of reflective equilibrium to better align non-reductionist legal theory with our linguistic intuition seems liable to generate new conflicts that criterial theories avoid. Interdisciplinary insights have also been called upon in the service of reductionist legal theory. These, too, have failed to inspire a convergence.

Hart famously characterised the contrast between theories of law that posit that all legal questions have determinate answers and Realist theories that reject the possibility of determinate answers as that between a dream and a nightmare.[28] The argument which Hart offered against the Realist movement was simply that the way we talk and act supposes that many legal questions do indeed have answers. Hart's persuasiveness on this point meant that future debate would concede that our linguistic intuition calls for treating law as an autonomous concept, according to which a law is determined by a procedure rather than solely by the politics of the particular issue. This concession has two implications. First, it implies that any reductionist theory of law must explain the popular tendency to acknowledge legal categories which do not in fact exist. The burden of providing this explanation cautions against abandoning non-reductionist theory unless we are confident in our reasons. Secondly, the concession implies that all ostensibly law-abiding behaviour can be explained simply by reference to the politics of the particular issue. Together, these burdens have tended to marginalise efforts to revive the Realist project.

Non-reductionist theories of law do not exclude politics from the explanation of law-abiding behaviour. On Hart's approach, for instance, politics are crucial to the establishment of a rule of recognition; to what legislation gets passed; and to at least some of the questions that reach appellate courts. Equally, however, non-reductionist theory denies that the status quo on a particular question is nothing but the distribution of political relations and interests with respect to that question alone. Two prominent post-Hartian strands of Realism (latterly, "Critical Legal Studies") cite developments in both continental and analytic philosophy of language as pointing to the impossibility of communicating decisions concerning norms of behaviour and, hence, to the impossibility of a procedure for determining the law. We first consider a reason to be sceptical about the case for the impossibility of communicating decisions about norms; then we consider an example that reveals the difficulty in explaining ostensibly law-abiding behaviour by reference solely to politics.

Continental philosophy of language overlaps with literary theory and is associated with figures such as Roland Barthes, Michel Foucault and Jacques Derrida. In Barthes' words, it pronounces "the death of the author".[29] The

28. Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream" (1977) 11 Ga. L. Rev. 969.
29. Roland Barthes, "The Death of the Author", in Barthes, *Image-Music-Text* (London: Fontana 1977), p.142.

idea that an utterance communicates a particular meaning is replaced with the idea that meaning consists in the response of the reader or audience, "deconstructionism". Applying deconstructionism to law, we arrive at the claim that law is a sham because decisions about standards of behaviour cannot be communicated:

> "[I]ndeterminacy [is] a *general* feature of *all* interpretation; no matter what constraints are supposedly in place, they will not check the interpretive will, which can always recharacterize them on the way to pursuing its own agenda ... [Accordingly] the decisions judges render do not follow from the materials (laws, precedents, evidence, etc.) they invoke, materials that could be made to yield almost any decision one wishes to reach."[30]

One difficulty with the deconstructionist tradition is that it eschews precision and step-by-step argument in favour of a discursive, enigmatic style. Accordingly, it is difficult to discern the premises that are thought to imply that authors' meanings are in fact inaccessible. As it happens, however, in Saul Kripke's reading of Wittgenstein's rule-following considerations, analytic philosophy of language has uncovered such an argument. Kripke does not avow the argument himself, nor does he attribute it to Wittgenstein; accordingly, its author is sometimes described as "Kripkenstein".[31] Since this argument, like deconstructionism, invokes the, "polysemous nature of language",[32] we will take it that it captures the deconstructionist insight.

Kripkenstein argues that all the examples one might have of behaviour that is consistent with a given linguistic rule are consistent with a countless number of other rules. Since we are unable to isolate the behaviour that following a particular linguistic rule consists in, "[t]here can be no such thing as meaning anything by any word".[33] The argument is powerful; there have been attempts to refute it, but no agreement on how to do so. While Kripkenstein may be taken to provide a clear basis for legal deconstructionism, his argument has also been invoked directly for the Realist conclusion that the law is radically indeterminate.[34] In response, non-reductionists have claimed variously that

30. S. Fish, "The Play of Surfaces: Theory and Law", in G. Leyh (ed.), *Legal Hermeneutics* (Berkeley: University of California Press, 1992), pp.297, 306–307. Similarly, Jack Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale L.J. 743; G. Leyh, "Toward a Constitutional Hermeneutics" (1988) 32 Am. J. Pol. Sci. 369.
31. S. Kripke, *Wittgenstein on Rules and Private Language* (Cambridge, MA: Harvard University Press, 1982).
32. Fish (1992), p.307.
33. Fn.32, p.55.
34. e.g. A. D'Amato, "Pragmatic Indeterminacy" (1990) 85 Nw. U.L. Rev. 148, 173–174; A.C. Hutchinson, "A Postmodern's Hart: Taking Rules Sceptically" (1995) 58 Modern L. Rev. 788; R. Charnock, "Lexical Indeterminacy: Contextualism and Rule-following in Common Law Adjudication" in A. Wagner and others (eds), *Interpretation, Law and the Construction of Meaning* (Berlin, New York: Springer, 2006), p.21.

linguistic rules are not analogous to legal rules,[35] and that legal rule-following is generated by immersion in a practice rather than by conscious reasoning about norms.[36] Neither response succeeds, however, in preserving the concept of law.

The Realist point is not that legal and linguistic rules are analogous, so that, if one is impossible, so is the other. Rather, it is that the impossibility of linguistic rules precludes communication. The existence of most legal rules depends on their communication by an authority. So, following Kripkenstein, such legal rules are equally impossible. The second response to the Realist's invocation of Kripkenstein imagines a system of customary norms that evolves without utterances communicating their content or a rule for their identification. But if this is the only system of behavioural standards that Kripkenstein permits, then there are no legal systems that include mechanisms of identification and of deliberate change, for example, statutory enactment. These are, of course, the very legal systems that non-reductionist theorists consider paradigmatic.

I suggested earlier that the burden of explaining the popular tendency to acknowledge non-existent legal categories cautions against abandoning non-reductionist theory unless we are confident in our reasons. However, there are good grounds not to invoke Kripkenstein's conclusion as a premise in any further argument outside the philosophy of language: it is crazy. As Kripke himself puts it, scepticism about communication is "insane and intolerable".[37]

Eschewing scepticism about communication does not require a theory as to why it is false.[38] Answering Kripkenstein is not remotely a "prerequisite for many things we hold dear, including law".[39] Apprised of the sceptical argument, we should simply reject its conclusion pending agreement on a solution.[40] We do just this in characterising someone as bald despite lacking a solution to the sorites paradox,[41] and in believing that we are wearing clothes despite being

35. See Brian Bix, "The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory" in D. Patterson (ed.), *Wittgenstein and Law* (Aldershot: Ashgate, 2004), p.381 at 396–97.
36. C. Zapf & E. Moglen, "Linguistic Indeterminacy and the Rule of Law" (1996) 84 Geo. L. J. 485; A. Arulanantham, "Breaking the Rules?" (1998) 107 Yale L. J. 1853; M. Stone, "Theory, Practice and Ubiquitous Interpretation" in Enrique Villanueva (ed.), *Law: Metaphysics, Meaning and Objectivity*, series Social, Political and Legal Philosophy (New York: Rodopi, 2007), Vol. 2, p.145.
37. See fn.31 above, p.60.
38. Compare B. Leiter & J. Coleman, "Determinacy, Objectivity, and Authority" (1993) 142 U. Penn. L. Rev. 549, 570–72.
39. See Michael Green, "Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us About the Law" (2003) 89 Va. L. Rev. 1897 at 1946–47.
40. In this spirit, David Lewis refers to the claim that "[o]ur language does have a have fairly determinate interpretation", as "one of those things that we know better than we know the premises of any philosophical argument to the contrary"; Lewis, *Papers in Metaphysics and Epistemology* (Cambridge: Cambridge University Press, 1999), pp.47, 418.
41. W. Sinnott-Armstrong, "Word Meaning in Legal Interpretation" (2005) 42 San Diego L. Rev. 465 at 472: "I ... cannot specify a number of years after which people become old; yet, some people are old."

unable to show that we are not simply a brain in a vat.[42] The absurdity of Kripkenstein's conclusion is reflected in the fact that one cannot assert one's belief in it without self-contradiction. Consider my quotation of Stanley Fish, above. If the question of the meaning of Fish's words has wrong answers, then it is difficult to see how the interpretation I offered—that meaning consists in the response of the reader—is a good argument.[43]

A second difficulty with reductionism lies in its implication that ostensibly law-abiding behaviour can be explained simply by reference to the politics of the particular issue. On this account, behaviour that reflects a consensus that $x$ is not legally entitled to $y$ is just a function of a political consensus that $x$ should not have $y$:

> "Where the assertedly determinate legal propositions have some bearing on the justice of present social arrangements, that sort of determinacy points to the fact that social movements aimed at rectifying injustice of the relevant sort have not (yet) been organized."[44]

Filibusters provide striking counter-examples. Absent a 60th vote to cut off debate, all may agree that no law has been passed granting $X$ an entitlement to $Y$, even though a 59-member majority believe that $X$ ought to be so entitled. Of course, there might be a political consensus that $X$ should not have $Y$ unless a norm to that effect can command 60 votes in the senate. But to invoke a political consensus about the role of the filibuster is to explain our agreement on $X$'s entitlement not simply by reference to the politics of the particular issue; rather, it is to explain our agreement by invoking the determination of the norm that $X$ should not have $Y$ by a politically privileged procedure, that is, by invoking the existence of a corresponding legal norm.

Imagine an alternative history for the recent federal health care legislation in the US, known as "Obamacare". To break the opposition's filibuster and thereby pass the Senate, the Bill had to muster 60 votes.[45] If it had succeeded in mustering only 59 votes, then, even though only a minority preferred the status quo, all would have agreed that citizens would not be legally entitled to the benefits which the Bill would provide. Had anyone tried to contest his

42. S. Cohen, "Contextualism Defended: Comments on Richard Feldman's 'Skeptical Problems, Contextualist Solutions'" (2001) 103 *Philosophical Studies* 87 at 96: "After all, in the end, [epistemic] skepticism is crazy."
43. See, e.g., Jacques Derrida's accusations of "bad translation" and "linguistic errors" regarding a translation into English of an interview he had given on the subject of the philosopher Martin Heidegger's Nazism; Derrida, *Letter to the editors of the New York Review of Books*, 14 January 1993, available at: *www.nybooks.com/articles/archives/1993/feb/11/laffaire-derrida-2/* [Last accessed 29 August 2016].
44. M. Tushnet, "Defending the Indeterminacy Thesis" in B. Bix (ed.), *Analyzing Law* (1998), p. 223 at 228. See similarly, S. Fish, "Force" (1988) 45 Wash. & Lee L. Rev. 883 at 892; D. Patterson, "Methodology and Disagreement" in U. Neergaard and others (eds), *European Legal Method: Paradoxes and Revitalisation* (Copenhagen: DJØF Press, 2011), p.130 at 145–46.
45. The Patient Protection and Affordable Care Act (2010) passed 60–39 in the Senate on foot of a 60–39 cloture vote to end the opposition's filibuster.

entitlement to these benefits in the courts, their case would have been thrown out. The idea that the consensus on the litigant's lack of legal entitlement to the benefits would be the product of a political consensus that he should go without is inadequate. Whereas the proposition that he had no legal right to those benefits would both have had considerable bearing on the justice of social arrangements and have been the subject of a powerful social movement seeking reform, it would, nevertheless, have appeared perfectly determinate.

## CONCLUSION

We noted at the outset that the field of legal philosophy would reach maturity only when it is in a position to contribute reciprocally to other philosophical domains. In relation to the theory of precedent, this reciprocal contribution has long been present. An act's creation of a special reason for performing a similar act in similar scenarios is an abstract idea that is not confined to any particular act type. In practice, of course, this idea is applied most prominently in Western traditions of legal adjudication. Accordingly, discussion of the nature of a precedent, of what it is exactly, for a later scenario to count as similar, has long been pursued almost exclusively by reference to the decisions of courts of law.[46] Strictly, then, philosophy is long indebted to lawyers for inquiry into the nature of precedent, but it remains unclear whether, its outstanding importance for law apart, such inquiry holds much interest elsewhere.

A more promising avenue for legal philosophy to contribute reciprocally concerns the phenomenon of no-single-majority court cases. Such a case is one in which a majority of judges favour a particular decision, each proposed basis for which a majority of judges reject. Labelled the "doctrinal paradox" by Lewis Kornhauser and Larry Sager,[47] such cases pose a difficulty for the application of the doctrine of precedent.[48] A broader significance was subsequently identified by Philip Pettit and Christian List, who saw in such cases a problem for group action itself.[49] The technical results of List and Pettit and others that comprise the new field of judgment aggregation are expansions on the problem of inconsistent group attitudes presented by the no-single-majority court case. These have, in turn, lent support to a new argument for the conclusion that group agents are not reducible to their member agents.[50]

46. See, e.g., G. Lamond, "Precedent and Analogy in Legal Reasoning" in E. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (2006), available at: *plato.stanford.edu/entries/legal-reas-prec/* [Last accessed 29 August 2016].
47. L. Kornhauser and L. Sager, "The One and the Many: Adjudication in Collegial Courts" (1993) 81 *California Law Review* 1.
48. See, e.g., Chicago Law Review Editors, "Supreme Court No-Clear-Majority Decisions a Study in Stare Decisis" (1956) 24 *University of Chicago Law Review* 99.
49. C. List and P. Pettit, "Aggregating Sets of Judgments: An Impossibility Result" (2002) 18 *Economics and Philosophy* 89.
50. e.g., C. List and P. Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011).

That argument is now a feature of theories of political economy,[51] institutional design[52] and moral responsibility.[53] Accordingly, through one of its topics, at least, legal philosophy is no longer just exploiting advances made elsewhere but is developing its own contribution.

51. A. Vermeule, *The System of the Constitution* (New York: Oxford University Press, 2011).
52. A. Chilton and D. Tingley, "The Doctrinal Paradox & International Law" (2012) 34 *University of Pennsylvania Journal of International Law* 67.
53. K. Hess, "The Free Will of Corporations (and other collectives)" (2014) 168 *Philosophical Studies* 241.

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