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Doing Without the Concept of Law

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Abstract

This essay argues that the doctrinal concept of law is unnecessary. Traditional accounts of the concept of law hold that public officials and citizens undertake a two-step protocol in their practical reasoning. Each first determines what the law requires and then assesses whether her other reasons for actions dictate a different decision. One can, however, replace these two-step protocols with a one-step protocol that globally assesses all reasons for action without making the intermediate determination of what the law requires.

Dworkin, in his philosophy of law, essentially takes this position with respect to judges. He reduces the two-step protocol to a one-step protocol. He may thus be viewed as a proto-elminativist.

1. Introduction

For roughly fifty years, the Hart-Dworkin debate over the concept of law has dominated the literature on the philosophy of law. It is time to stop. We can largely do without the concept that has generated so much debate.

In this essay I pursue an eliminativist approach to the doctrinal concept of law. My argument rests in part on my understanding of the more general question of governance that plays a central role in social science. Social science requires a concept of a governance

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\[\text{2Frank Henry Sommer Professor of Law, New York University. I have discussed these issues with Liam Murphy for roughly twenty years; this essay owes much to those conversations and the comments he provided on an earlier draft. Larry Sager and Moran Yahav also provided very helpful comments on an earlier draft as did participants at the conference on the Legacy of Ronald Dworkin in Buenos Aires and participants at the faculty workshop at Universitat Pompeu Fabra School of Law. The support of the Filomen d’Agostino and Max E. Greenberg Research Fund of the NYU School of Law is acknowledged.}\]

\[\text{3Section 2 distinguishes several different concepts of law. This essay argues primarily for the elimination of the doctrinal concept though it also suggests that a social scientific concept of law is unnecessary.}\]
structure; it does not so obviously require a concept of law.

   Fatigue and dissatisfaction with these debates have grown over the last few years. Roughly fifteen years ago, Brian Leiter suggested that philosophical investigations into law needed to be “naturalized,” and hinted that such naturalization might finally end the conceptual debate.4 Liam Murphy wrote a series of papers that sought to reformulate the debate as one concerning a search for the concept that would best serve us;5 he has recently concluded that the conceptual debates, though not the concept, can be abandoned as which concept we adopt has little practical consequence.6 For Murphy, however, the concept of law may have a more limited range than commonly thought; judges, he argues, can do without it.7

   Even more recently, a number of scholars have developed the late view of Ronald Dworkin, a view that I argue in section 5 is a proto-eliminativist view. Dworkin transforms the debate by arguing that law is simply a part of political morality. Jeremy Waldron further develops Dworkin’s view in directions largely consonant with the views of Mark Greenberg.8 Scott Hershovitz has argued that this tactic of assimilation allows us to avoid the debate.9

4Leiter, “Hard Positivism
5Citations
6Murphy, An Introduction to the Philosophy of Law (OUP 2014)
7This view puts him at odds with Dworkin, Greenberg and Hershovitz who seem largely to limit the concept of law to the courts.
9Hershovitz, “the End of Jurisprudence,” 124 Yale Law Journal (2015). Hershovitz, however, recharacterizes the debate as one, not over the concept of law, but over the question whether a distinct domain of legal normativity exists.
Mark Greenberg has argued for a similar conclusion though with a much stronger argument that, following the later Dworkin,\textsuperscript{10} assimilates law to morality.\textsuperscript{11} None of these authors, however, has suggested that we should abandon the concept altogether.\textsuperscript{12}

My argument shares certain features with the arguments of Murphy, and of Dworkin, Waldron and Greenberg. I agree with Murphy that judges have no need for a concept of law but I argue that neither other public officials nor citizens require one either. Dworkin restricts the concept of law to the rights and duties enforced in courts. Both he and Greenberg then seek to moralize the concept law, I want to dissolve it and relocate their moral concerns (and other moral concerns as well) in an evaluative concept of law that articulates the value of legality. Thus, on my account, we do not need to know what the law is but we need to identify the value of legality and then to identify those governance structures that, under specific conditions, realize the value of legality.\textsuperscript{13}

The argument for eliminativism rests on the recognition that governance in modern societies is distributed among a large number of complex, highly differentiated institutions. The

\textsuperscript{10}Dworkin, Justice for Hedgehogs.


\textsuperscript{12}Murphy, What Makes Law takes this eliminativist approach seriously but, ultimately, rejects it.

\textsuperscript{13}As argued in Kornhauser[2004], this strategy parallels the strategy adopted by economists in the study of resource allocation mechanisms. They have identified various values that a resource allocation might satisfy – e.g., Pareto efficiency and envy-freeness – and then identify the conditions under which a given resource allocation realizes one or more of these values.
central “legal institutions”\textsuperscript{14} – legislature, executive, and courts – and the texts they produce – statutes, regulations, and opinions – play a central coordinating function for public officials and citizens alike. But these artifacts are texts not a normative order. The obligations each official faces depend on the content of these texts but on other facts as well.

An eliminativist account may be weaker or stronger. In its weakest version, it simply states that the doctrinal concept of law can be replaced by a set of theories that make no reference to it. But a strong version of eliminativism would hold not only that we can do without the doctrinal concept but also that there is no doctrinal concept to replace. This version has dramatic implications. Without a doctrinal concept of law, there are no truth conditions for propositions of law because there are no propositions of law in the doctrinal sense. Similarly, there is no general obligation to obey the law; only individual obligations (on public officials and citizens) to decide or act in specified ways. An intermediate claim holds that we do better by doing without a concept of law. This claim is analogous to Murphy’s claim that we should evaluate concepts of law in terms of their instrumental effects.

The argument is structured as follows. In the next section, I distinguish various questions to which a concept of law might help provide an answer; it thus identifies the concept I propose to eliminate. Section 3 sketches the idea of governance which plays a central role in my argument. Section 4 sets out the argument for eliminativism. Section 5 addresses several objections to the eliminativist position. Section 6 explains how we might interpret Dworkin as a proto-eliminativist. Section 7 offers a brief conclusion.

\textsuperscript{14}“governance institutions” would be a better term.
2. The Many Faces of the Concept of Law

This article argues that we can do without a concept of law but, before I make that argument, I must identify the concept that we can do without. The debate often assumes that a single concept plays a central role in the answers to a diverse set of questions. In this section, I distinguish among these questions and suggest that it is not necessary that the answers to each question rely on a single concept of law.

Twenty years ago, Hart suggested that the Hart-Dworkin debate had never really been joined; indeed, more strongly he suggested that debate could never be joined as he and Dworkin addressed different questions. Hart described his project as “general and descriptive” while Dworkin’s project was “special and evaluative.” Hart correctly notes the different questions addressed but he does not locate the (lack of) controversy in the right spot.

Dworkin too recognized that multiple questions fall under the single label “the concept of law.” In fact, Dworkin identified four distinct concepts of law, each of which responds to a different question. But Dworkin then re-interpreted Hart’s project, arguably about either the

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15 Postscript in Hart The Concept of Law (2nd Edition) at pp

16 See Dworkin, Justice in Robes pp 2-5. Harvard University Press. The four concepts were the doctrinal concept discussed in the text, the sociological concept that corresponds roughly to the social scientific concept discussed in the text, the taxonomic concept that corresponds to the question that seeks to distinguish legal systems from other normative systems, and the aspirational concept of law that corresponds to the evaluative concept discussed in the text; it refers to the value of legality. The aspirational concept of the text is aspirational in different way; that concept, as the text uses it refers to the law as expressive of the moral and other aspirations of a society.

social science or taxonomic conception of law, as one concerning the doctrinal concept of law.

The discussion that follows distinguishes five distinct concepts of law; or, more precisely, the subsequent discussion identifies five distinct questions, each of which might rely on a concept of law.17 These questions do not on their face rely on a common concept of law.

The first question, which gives rise to the doctrinal concept, addresses the question, as Dworkin frames it: What makes a proposition of law true? The practice of law apparently requires that judges and lawyers have such a concept. For, without it, how would judges decide cases according to law and officials administer public programs? Similarly, lay citizens apparently require such a concept in order to determine what legal obligations they have.18

I shall argue below that, in fact, neither practitioners nor lay people require such a concept. The Hart-Dworkin debate has been formulated in terms of the doctrinal concept of law, perhaps because Dworkin framed the debate and only the doctrinal concept interested him.

Hart had characterized his project differently. He suggested it “might be regarded as an

17Some philosophers of law understand the central question of the debate differently. They seek to explicate the concept of law embedded in common linguistic practice. I do not understand how answering this question would help answer any of the questions above. Nor does this question correspond to either Hart’s or Dworkin’s project. Dworkin explicitly investigates the doctrinal question. Hart’s project is less clear but it does not seem to me to be one of analyzing the folk concept of law; he wants to address the questions that have puzzled legal philosophers and, again, it is not at all obvious that common usage will provide the key to the relevant answers or concept(s).

18The doctrinal concept is a technical concept not a folk concept because the truth conditions are determined by the professional practice of judges and lawyers not the ordinary usage of citizens. It remains a technical concept even though we can not articulate clearly the rules of inference that the technical concept deploys.
The Concept of Law

Preface

I have argued elsewhere that it requires not a concept of law but a concept of a governance structure. See Kornhauser, Governance Structures and the Concept of Law. Note that a social-scientific concept of law, if it is needed, and a taxonomic concept of law are also technical, not folk, concepts. Their content derives from the theoretical role that each plays in its parent discipline; the content will depend on the criteria pertinent to the relevant inquiry not to the way in which lay individuals deploy the term “law.”

A taxonomic concept of law, however, does not necessarily correspond to a social scientific concept of law. A social-scientific concept of law would constitute part of a theory of society. It would facilitate understanding of social organization, development, growth, decline, and whatever other questions we might pose about social groups. But it is an open question, however, whether the best social theory (or even a good one) would require a concept of law. Ideally, a social scientific concept of law would serve this function but, as noted above, we might not have such a social scientific concept of law.

As social science inquiry is complex and variegated, it may require many (or no) concepts of law. Hart’s descriptive sociology suggests a functional concept that social scientists

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[19] The Concept of Law I Preface

[20] I have argued elsewhere that it requires not a concept of law but a concept of a governance structure. See Kornhauser, Governance Structures and the Concept of Law.

[21] Note that a social-scientific concept of law, if it is needed, and a taxonomic concept of law are also technical, not folk, concepts. Their content derives from the theoretical role that each plays in its parent discipline; the content will depend on the criteria pertinent to the relevant inquiry not to the way in which lay individuals deploy the term “law.”
Anthropologists have long disputed the nature of law. Pirie, “Law Before Government: Ideology and Aspiration,” 30 Oxford Journal of Legal Studies 207 (2010) argues for an aspirational account of law as against functional accounts. (One might call this the “aspirational concept of law.”)\(^{22}\)

Hart’s descriptive/taxonomic concept rests on the rule of recognition from which one can also derive a doctrinal concept of law. A valid legal norm derives from the hierarchy of legal norms that has its root in the rule of recognition. Thus the truth of a proposition of law depends on its pedigree.

Fourth, we might have an evaluative concept of law. Such a concept identifies the value of legality.\(^{23}\) This value is implicit in all the currently advocated doctrinal concepts of law as everyone uses law as a term of commendation. Governance by law is understood as valuable and distinct from other forms of governance. The discussion thus suggests both that we can classify governance structures and identify which ones constitute governance according to law. Moreover, the discussions suggest that governance by law is, at least in some respects, valuable.\(^{24}\)

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\(^{23}\)Again, the evaluative concept would seem to be a technical, rather than a folk, concept. Dworkin, for example, argues that the political virtue of integrity constitutes the value of legality. He does not arrive at this conclusion through argument that lay persons understand the value of legality in this way.

\(^{24}\)Positivists, of course, admit that a legal system may be unjust or evil. Nevertheless, they would distinguish governance by law from governance by a criminal gang although it is not always clear on what grounds they make this distinction.
Finally, we might have a folk concept of law that reflects the complex usage of the term “law” by lay individuals. Hart’s methodology suggests, at least to some, that he had this concept in mind as he sometimes relied on the intricacies of usage of the term to illuminate the central questions that The Concept of Law sought to answer. Success in Hart’s endeavor, however, did not lie in clarifying common usage but in providing answers to the central questions the book sought to illuminate.

3. Governance and the Concept of Law

I begin with a discussion of what concepts of law social science might require. I do so for two reasons. First, the argument for eliminating the doctrinal concept of law rests in part on the understanding of the social science concept of governance suggested here. Second, law is often characterized as a form of governance and social science clearly requires a concept of governance or, more precisely, of a governance structure. Hart himself characterized his project in this way when he introduced the three types of secondary rules – rules of adjudication, rules change, and rules of recognition. He contrasts societies that require such rules for governance to closely knit societies that face a relatively stable environment and hence do not require these three types of secondary rules to function successfully.25

Hart’s discussion suggests one dimension along which to classify governance structures: the degree of institutional differentiation of functions that a society exhibits.26 Modern

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25See Hart, The Concept of Law pp 91-99 (second edition). For a more extended discussion of this claim, see Kornhauser, “Governance Structures and the Concept of Law”.

26Hart’s discussion also suggests a causal account of the emergence of legal systems; he identifies two “independent variables” that might explain why more complex governance structures are required: the rate of change in the environment in which the society is embedded
municipal legal systems exhibit an extraordinary degree of institutional differentiation. Secondary rules of change, for example, have given rise to multiple institutions that announce changes in the normative environment. At the federal level in the United States, for example, not only Congress but also myriad administrative agencies promulgate regulations that guide individual behavior.

We might classify governance structures along other dimensions as well. We might, again as Hart suggested, differentiate on the basis of the size of the group or some other feature of the group, for example linguistic, religious, and ethnic diversity. Or we might classify governance structures on the basis of other features of the institutions, such as their recruitment processes or their control mechanisms.

Subsequent philosophical discussion has suggested two other dimensions along which to classify governance structures. Each of these methods focuses on the norms produced by the

and the size of the social group. Of course, the causal relations may be quite complex as the nature of the governance structure might affect the size of the social group that can be successfully governed as well as the rate of change in the environment of the social group.

Hart’s discussion of these issues, however, is very cursory. He leaves many questions open. Most obviously, though contemporary municipal legal systems exhibit a very complex differentiation of functions that exemplify all three types of secondary rules, a society need not be so differentiated or have all three types of secondary rules.

Similarly, the tripartite scheme of secondary rules may not capture the full panoply of institutions and functions that many governance structures exhibit. Rules of adjudication, for example, seem to refer only to the centralization of the function of the determination of norm compliance or violation. We might centralize this function but leave decentralized the policing and sanctioning functions. Medieval Iceland, for example, had this structure; the aggrieved party both policed and sanctioned norm violations. Decentralized policing still persists for most civil claims; the aggrieved party in contract and tort disputes, for example, brings the action before the court to determine whether a norm violation occurs. Sanction, however, has been largely centralized here – the exception would be self-help remedies under contract law – with the sheriff designated to enforce judgments against recalcitrant defendants.
Natural law thus exhibits most starkly the honorific use of the term “law”; “law” is a term of commendation. A norm that fails the substantive test may or may not actually govern behavior. Whether it does or not will depend on the how the governance structure operates. “Evil” systems of governance exist.

One strand of the literature looks to the substantive content of the norms; the other looks to the formal structure of the norms.

Natural lawyers contrast governance structures on the basis of the substantive content of the norms produced by the structure. Only those norms that satisfy certain substantive moral requirements count as “law.” Those norms that fail these substantive tests are not “law,” though they nevertheless remain part of the governance system.27

Lon Fuller, by contrast, classified legal systems on the basis of formal characteristics of the norms of the governance system. He identified eight formal characteristics that a governance system must meet for it to be called “law.”

Both these further attempts at classification are motivated by normative, rather than explanatory concerns. Each classification offers a moral reason to commend a particular governance structure. But neither classification makes a claim about either the conditions under which we would expect to observe a commendable governance structure or the consequences that such a commendable governance structure would have (for such things as stability, growth, well-being, etc.)

Once one realizes that these classificatory schemes are attempts to identify commendable governance structures rather than to explain, a different strategy suggests itself. Rather than

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create a classification scheme that incorporates the commendation, clarify the nature of the commendation and then ask which governance structures, under which conditions, exhibit this commendable virtue.

One might understand Dworkin’s theory of law in this way. After all, Dworkin offers a theory of the value of legality. The value of legality for Dworkin is integrity, a political virtue akin to substantive and procedural justice. Explaining the conditions under which specified institutions realize this virtue would be a task for social science just as social science might seek to identify the conditions under which competitive markets realize efficiency or high levels of growth or whatever.

Though Hart pointed legal philosophy to secondary rules and hence to the institutions that they constitute, legal philosophers have concentrated not on the institutional features of governance structures but on the normative orders that these institutions generate. This focus has masked in part the argument for the elimination of the doctrinal concept of law. Attention to the highly differentiated institutional structures of modern municipal legal systems suggests that these governance structures do not generate a (unique) normative order. A single set of legal materials generates demands that vary with the institutional position of the individual.

The discussion thus far has considered the desirability of a functional concept of law that is parasitic on the functional concept of a governance structure. But social science need not be monolithic about the concept of law. What concept of law social science develops should depend on the question that social science is asking; if it asks multiple questions, it may require

\[28\text{Dworkin himself did not accept this characterization. (Personal communication).}\]
multiple concepts when it answers them. Moreover, there may be other concepts that resonate with ordinary usage of the term law that also facilitate and deepen our understanding of society. We might, for example, understand, the aspirational concept of law noted above as a social science concept of law that facilitates understanding in cultural anthropology.  

4. Eliminating the Doctrinal Concept

In *What Makes Law*, Liam Murphy sketched the eliminativist view and then offered several objections to it. Murphy suggests that we might replace a concept (or theory) of law with three distinct theories: a theory of legal decision making, a theory of (legal) counsel, and a theory of the value of legality that defines what values the governance structure should embody. He then rejects eliminativism largely on the basis of three primary objections that I shall call the expressiveness objection, the guidance objection, and the legislative objection.

In this section, I offer a more extended and somewhat revised account of eliminativism.

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29 On the other hand, one might argue that characterizing this concept (or any other concept) as one of law has only rhetorical (as opposed to explanatory) force. Social science strives to explain society, its structure, development, and artifacts. The aspirational concept presumably serves to explain (or perhaps simply to name) the fact that the collective aspirations of some social groups are published in codes that are not in fact implemented by that group’s governance structure. A comprehensive social theory would identify first the conditions under which the aspirations were expressed in this way and second the conditions under which the expressed aspirations were also implemented (or perhaps integrated) into governance. Calling these aspirational codes “law” does not in fact further the explanatory project. The label tries only to place the explanatory project in the reflected commendatory light that the term “law” casts.

30 At pages 88-105. Murphy attributes the view to me. Kornhauser (2004) has, I think, the seeds of the eliminativist view in it. But I am in the fortunate position of having my view eloquently restated and critiqued before setting it out clearly myself.

31 My account deviates from Murphy’s primarily in its breadth or depth. Murphy focuses on judicial behavior and a theory of adjudication but I address more explicitly its implications
The next section responds to the three objections. I argue that we need both fewer and more theories. There will not be one theory of decision making but many, differently situated decision makers face different constraints and have differing reasons for action. Each thus requires a distinct theory of decision-making. On the other hand, it is not clear that the public officials require a theory concerning the value of legality.

The doctrinal concept of law, on Dworkin’s account, identifies the truth conditions for a “proposition of law.” Dworkin and his critics disagree about the content of the doctrinal concept of law. Exclusive legal positivists hold that, necessarily, these truth conditions rest on social facts alone; they make no reference to morality. Dworkin, by contrast, holds that the truth conditions for propositions of law necessarily include moral considerations.

Superficially, the correct identification of the doctrinal concept of law seems central not only to philosophers of law but also to judges, other public officials, lawyers and citizens. After all, judges apply the law as do other public officials; lawyers advise clients about their legal obligations and citizens generally strive to obey it. How could agents perform these tasks without identifying which propositions of law are true?

Despite the superficial appeal of this argument, we can do without a doctrinal concept of law. This eliminativist claim has a weak, a semi-strong, and a strong version. The weak claim asserts only that we can do without the doctrinal concept of law in the sense that we can discuss for all public officials. Indeed, as the last section suggests, it is the differentiation of governance functions across institutions and hence among myriad public officials that provides the social underpinnings for the eliminativist view.

I thank Moran Yahav for pointing out the need to distinguish among these variants of eliminativism.
everything we need to discuss without reference to the doctrinal concept. The semi-strong version asserts somewhat more strongly that we do better by doing without. One might understand this version along the lines of what one might call political accounts of the concept of law that argue that we should choose the concept of law that best promotes our political values. So, for example, Hart contends that a positivist concept of law is superior to a natural law one because private citizens and public officials will behave better if they separate the question of the law is from the question of whether the law is a good law and carries an obligation to obey it. The strong version of the eliminativist claim asserts that, in modern, complex societies, there are no propositions of law and hence no need for truth conditions.

The argument below supports all three claims but, obviously, it has most force in favor of the weak claim. More work would be required to establish either the semi-strong or strong versions of the claim.

How can we do without a doctrinal concept of law? The answer is straightforward. In the standard model, every decision maker engages in a two-step process: first determine what the law requires; then consult other reasons for action that might weigh against doing what the law requires. In fact, however, each decision maker need only undertake an one-step decision procedure: weigh all reasons one has at that step. In this one-step procedure, the agent consults legal materials through which all agents coordinate their activity; these legal materials, however, are not legal norms in the conventional sense.

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Consider, for example, judges. The debate over the concept of law assumes that the judge first determines what the law requires and then determines whether she has other reasons that might weigh in favor of deciding contrary to what the law requires. These countervailing reasons might be moral reasons; but they might also be institutional reasons that derive from the competence of the court relative to other institutional actors or from the court’s role within the system of government. In any case, if these countervailing reasons outweigh the “legal reason”, she will decide “contrary to law.” On this account, the judge’s theory of adjudication begins with a theory of law.

But a theory of adjudication need not rest on a theory of law; it might be freestanding. After all, the task of deciding cases has priority over “finding the law.” Judges must understand their position and role in the governance structure of the society and decide appropriately. Appropriate decision requires the judge to consider how her decisions interact with decisions and actions of other public officials and citizens. Indeed, for successful governance, these decisions must, to a large extent, complement, rather than conflict with, each other. “Legal materials” – statutes, regulations, and judicial opinions – serve this coordinating function.

The judge, that is, need only consult all her reasons for a decision; she does not need to classify them as “legal” or “non-legal” reasons. “Legal practice” directs her not to the “law” but to “legal materials,” texts that we label statutes, regulations, and opinions. She decides in light of the content of these texts, the structures of the institutions that produce them, and the relation among these institutions. The judge has no need to draw an intermediate conclusion that “the law requires X.”

Notice that other public officials are situated similarly to judges. They too have occasion
to consult the “legal materials” and then to act on the basis of decisions that consider the reasons provided by these texts and the institutional position of the decision-maker. Just as judges require not a theory of law but a theory of adjudication, each of these public officials requires not a theory of law but a theory of decision sculpted to the official position that the agent occupies. Police and prosecutors require a theory of decision (or at least a decision protocol) that takes into account the legal materials but also the environment in which these decisions are taken and in which the decisions will have effect.

It is not clear that there is a single norm that we might call the law that governs the decision of each of the agents. The separation of governance tasks and the complex institutional relations make it unlikely that we can usefully distill a single norm from the web of decisions that individual public officials make. Rather, a set of interlocking institutions, texts, and expectations govern the agents’ decisions.

As a more extended example, consider the set of public officials who are implicated in the implementation of the criminal law: the police, the prosecutor, and the judge (and arguably the warden of the relevant prison). All three of these institutions “apply the law”; but each responds to the criminal code differently. The policeman on the street has vast discretion in implementing the legal materials. He can choose to arrest an individual for a criminal violation even if he knows that he has insufficient proof to convict the individual. Conversely, he can choose not to arrest an individual against whom he believes he has sufficient evidence to convict.

34Thus, we might think that less differentiated institutional structures might make it more likely that we may usefully think of “legal norms” and the “law.” In the simplest structure, a unitary, centralized system, the sole official could announce a single norm that would be the legal norm.
His decision will depend on myriad situational and institutional factors. Each of these decisions, moreover, might be justified. It is not particularly helpful to refer to some free-standing, well-defined legal norm.\footnote{But note that the policeman cannot do whatever he wants. He is constrained by the institutional environment in which he works. Moreover, some of his actions would be unjustified in the sense that they are not reasonable responses to the legal material, institutional environment, and situation in which he finds himself. He shouldn’t, for example, accept a cash payment form the individual in exchange for forbearing to arrest.}

Prosecutors too make decisions that derive from the legal materials. But again a prosecutor need not determine what “the law requires.” She must, rather, understand what the court will do. Her decision, however, is not \textit{dictated} by the theory of adjudication; it is only influenced by it. She might decide, for example, to grant an individual immunity in order to prosecute a different individual for a related offense.

It is important to understand the role that “legal materials” play in these decision protocols. The materials function not as a normative order that expresses a set of prohibitions and requirements but as guidelines for the coordination of the actions of everyone. They function more like a traffic light or a stop sign that regulates the flow of traffic by establishing the expectations and behavior of drivers.

The decisions of all these agents, and of private parties as well, are coordinated by the legal materials. For successful governance, society must identify a set of individuals (within institutions) that make collective decisions and undertake collective action. In closely knit societies, the structure of governance may be simple and straightforward; consequently it may yield a relatively simple normative structure, one which would allow the characterization of each
decision process as following the pattern presumed by the standard picture: identify a normative core, called the law, and then determine how it is modified.

The picture outlined here may suggest that eliminativism replaces a theory of law with Hart’s game of scorer’s discretion36 or Holmes’ view that law is simply the prediction of what the courts will do (and nothing more).37 Certainly, one might understand Holmes’ view as a precursor of eliminativism but it is not a fully developed form. Eliminativism after all holds that there is no law for the player’s to predict. Each agent follows a one-step decision protocol; these protocols are not equivalent to “scorer’s discretion.” Nor are they predictions about what officials will do. Each protocol serves to constrain, at least to some extent, the behavior of each agent.

The theories of decision-making that constitute eliminativism have both normative and positive elements. The theories are prescriptive to the extent that they identify the reasoning process that public officials ought to undertake; they are positive to the extent that they represent the reasoning process that public officials in fact undertake. But eliminativism does not claim that the law is simply the predictions of judicial action. Rather an eliminativist must provide both a theory of adjudication that determines how judges should decide and a theory of legal counsel that describes how citizens should respond to legal materials. The first is not predictive and the second does not necessarily imply that citizens are or ought to act self-interestedly.

5. Some objections

36 The Concept of Law at ?

37 "The Path of the Law," BU Law Review (1897)
Murphy raised four objections to the eliminativist view. First, he argued that the eliminativist could not accommodate the expressive aspects of law. Second, he argued that eliminativism eliminated not only law but its role as a guide to individual conduct. Third, he argued that eliminativism failed to make sense of legislation. Finally, he argued that eliminativism was too complex; it led to a plethora of decision protocols, one for each institutional role and one for citizens.

These objections have a common source in the apparent fragmentation of obligation that eliminativism yields. Each objection rests on the complexity that the multiplicity of decision procedures produces. My response, which has two prongs, is essentially the same for each objection: (1) the legal materials serve to coordinate and focus responses just as “the law” does and (2) many of the same problems arise for agents even if one thinks that legal obligations exist. Despite the commonality of my responses, it is useful to address the objections in turn.

I can most easily refute the complexity objection. Eliminativism requires exactly the same number of decision protocols as non-eliminativist approaches to “law.” According to eliminativism, each protocol is a one step protocol; under other approaches, each protocol is a two step protocol, in the first step of which, the agent determines her legal obligation. Consider the criminal law example from the prior section. Suppose we cannot eliminate the concept of law; each agent first determines what the law requires and then consults the other reasons for action she has to determine what she should do. Discussions of the concept of law focus on the first step of this process; but a complete normative or explanatory account must also analyze the second step to determine what the agent will or should do. A complete account of public decision making, then, requires, for each agent, a theory of decision making that integrates her
view of the law with the other reasons for action she has. If we eliminate the concept of law, we still require a theory of decision-making for each agent; but each theory will be a one-step procedure.

Murphy’s discussion of the expressive aspect of law focuses on the criminal law. Because the eliminativist focuses on the successful prosecution of crimes, the expressive harm done by criminalization of an activity disappears. As an example, he considers the passage of a statute criminalizing homosexual sex that is accompanied by a commitment not to prosecute under the statute.

This argument misunderstands how the expressive aspect of law manifests. As Murphy’s example makes clear, the expressive harm results not from prosecution or conviction under the statute but through its enactment. The enactment constitutes a collective act that condemns specified conduct.

Eliminativism has no effect on the society’s ability to make collective judgments. Legislatures still enact statutes that reflect the collective judgment of the community about the regulated conduct. The expressive force of the enactment remains; calling the enactment “law” has no effect on its communicative powers or force.

Moreover, the expressive aspect of “legal norms” rarely stems from the operative norm that courts and other public officials enforce. Statutes often have preambles or statements of purpose that have no direct normative effect – they might affect the interpretation of the statute –

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38The debates over the concept of law obscure this point because the analysts have focused only on the decisions of judges. Philosophers of law thus developed theories of adjudication but not theories of legislation, policing, administrative regulation, etc.
they merely express. Similarly, expression in judicial opinions often rests in parts of the opinion other than the holding.

In addition, the operative norm is often opaque to its purpose; it may be overbroad or too narrow. It may condemn behavior ancillary to the behavior that motivates the regulation because the ancillary behavior is more readily observed and controlled than the underlying odious conduct. The operative norm thus need not be expressive at all. Moreover, the legal form is not a necessary feature of collective expression. Some of the most expressive collective statements are not legal materials: the Declaration of Independence and the Gettysburg Address.

Some discussions seem to have a different concept of expressiveness in mind. Some condemnations of the death penalty for instance may sound in some concept of expressiveness. But this understanding too is compatible with eliminativism; after all, here we condemn the state act of killing and that same act will occur whether one thinks the US Supreme Court first finds that the law requires the death penalty in a given case or whether it finds, all things considered that the execution should go forward.

Turn now to the question of whether the eliminativist position undermines the guidance function of a governance structure. Murphy attacks eliminativism here by considering the different motivations individuals might have for “obeying the law,” from self-interest to a felt moral obligation. This formulation of the question biases the answer against eliminativism, which, after all, denies that there is any law to obey. This absence presents no problem for Holmes’ “bad man,” the narrowly self-interested agent who acts on the basis of the expected

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39For further discussion of claims of this understanding see Kornhauser, “No Best Answer?” U. Pa. L. Review
consequences of his decisions. But Murphy thinks it is problematic for what we might call “normally motivated” agents who are inclined simply to follow the rules, either because it is easy or because, taking into account the costs of calculation, it is rational simply to follow the rule.

The rule-follower’s problem, for Murphy, arises from the fragmentation of the legal obligation into the obligations facing each public official. The rule of which official ought the rule-follower take as definitive? Eliminativism, however, does not dramatically change the agent’s decision problem. In the world of free-standing legal obligations, the actual obligations of public officials (and citizens) are equally fragmented; the legal obligation might be seen as the starting point for the decision process of each official. This function now falls to the legal materials that, under eliminativism, serve to coordinate the decisions of public officials. The rule-follower should look to these materials.40

The absence of a law to obey, however, appears more problematic for the morally motivated individual. Indeed, eliminativism appear to have dissolved the general question of the citizen’s obligation to obey the law when it abandoned the concept of law. But appearances are misleading. The problem reappears in the context of governance structures more generally: under what conditions does a citizen have a general obligation to obey the governance structure?

A weak version of this question would simply identify conditions under which the citizen has an obligation to support the institutions of the governance structure. A stronger version would require “obedience.” But, the critic might ask, what does obedience mean in the fragmented normative world of the eliminativist? Again, the situation for the eliminativist does

40 Doing this is conservative when the institutional concerns of public officials restrict the reach of the legal materials.
not seem to me radically different from the situation for the adherent to the conventional picture. The normative world is fragmented for everyone because the structure of modern municipal legal systems is very complex. The citizen’s legal obligation presumably means here that she ought to do what is the law requires, unmediated by any institutional (and perhaps moral) concerns that variously refract the obligations of public officials. If that is so, the eliminativist might simply impose the same decision making protocol on the citizen; the institutional concerns of public officials should carry no weight for the citizen. Her obligation is determined by the legal materials and whatever other relevant moral concerns she faces.

As an example, consider Freddy confronted with the decision of whether to pay his taxes or not. If Freddy has purely prudential motivation, eliminativism certainly does not undermine the guidance function of the tax code. Freddy calculates, for each amount of tax he might pay, both the likelihood that he will be found to have paid too little and the expected sanction he would suffer; from this calculation he can determine the expected cost of reporting each amount of tax. He can then calculate the expected net benefit. He chooses to pay the amount that yields the highest net benefit.

But the situation is no different if Freddy is morally motivated. He now understands the tax code as a collective decision on the appropriate allocation of the burden of paying for the collective actions of the community. Freddy must assess the fairness of this allocation and perhaps the justice or fairness of public expenditures. His tax payment reflects his moral judgment about the fairness of the collective scheme.

Finally, Murphy argues that eliminativism leaves the legislator at sea. How can she reason about the constitutionality of statutes? What import should the legislator give to the prior
actions of the legislature? Murphy suggests that eliminativism provides no resources to address these issues.41

Again, it is hard to see what resources eliminativism has stripped from the legislator. Identifying some obligations as “law” does not help the legislator to resolve the questions she faces. To decide whether the legislature has the power to legislate in a given area requires each legislator to elaborate a political theory that explains the roles of each governmental institution. Identifying a normative structure called the law that serves as a common backdrop to decision making in each institution does no additional work than that done by reference to the set of legal materials that coordinate institutional (and private) decision making.

Indeed, one might argue that eliminativism makes more plausible the interlocking set of obligations that officials face. The idea of underenforcement, for example, fits naturally into the eliminativist framework.42 Underenforcement occurs when the reach of judicial power is more restricted than the reach of legislative power. Section 5 of the Fourteenth Amendment to the U.S. Constitution provides the standard example.

The explanation for underenforcement rests on the different institutional competencies and positions of the judiciary and the legislature. But these concerns are precisely those on which the eliminativist relies when focusing on the distinct decision protocols that replace the

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41He makes a similar point with respect to the executive.

42The concept of underenforcement of constitutional norms was introduced by Larry Sager in “Fair Measure: The Legal Status of Underenforced Constitutional Norms,” 91 Harvard Law Review 1212 (1978).
Murphy contends further that the fragmentation of decision-making protocols makes it difficult to frame the legislator’s decision problem when contemplating specific legislation.\textsuperscript{44} The elimination of law, however, has little, if any, effect on the legislator’s problem. Legislation is an instrumental activity; we enact statutes to influence behavior. The legislator must thus contemplate how various public officials and citizens will respond to the (text of the) enactment. These responses, of course, are mediated by the complex of concerns that constitute the decision protocols that the eliminativist points to. It is hard to see how eliminating the law has altered the calculus of the legislator.\textsuperscript{45}

In short, eliminating the concept of law has no consequence for the decision-making of any public official or any citizen.

6. Dworkin as a Proto-Eliminativist

Legal positivism rests on the view that judges, and other public officials, first determine what the law requires and then consider any countervailing reasons for deciding. But public officials need not proceed in this fashion. They can simply consider all the reasons that they have for a given decisions without identifying one reason as a legal reason. Of course, all the

\textsuperscript{43}It is worth noting that Dworkin’s theory of law rejects the idea of underenforcement. It does so because Dworkin identifies law with the output of courts. Legislators seem unbound by law. Phrased differently, legislators in Dworkin’s theory are in exactly the same position as legislators under eliminativism.

\textsuperscript{44}Murphy at 99.

\textsuperscript{45}Note that modern legislation typically highlights the eliminativist approach. Most modern statutes simply allocate decision making authority among myriad administrative agencies, executive officials, and the courts.
reasons that an individual has include those generated by the “legal materials” generated by a governance structure: the statutes, regulations, and judicial opinions. One does not, however, have to see first what these materials require and only then incorporate other reasons.

Indeed, Dworkin rejects the legal positivist description of judges. He thinks judges incorporate at least moral reasons in rendering judgment and pronouncing the law. As Dworkin further restricts law to reasoning about disputes that courts resolve, we might understand him as a proto-eliminativist. His position foreshadows the argument here in two respects.

First, Dworkin has reduced the judicial obligation from two steps to one. The judge consults at once all the reasons she has to reach an all things considered judgment about how to decide. She need not first determine what the law requires and then ask how other reasons bear on the “legally required” decision. This approach eliminates law at least in the weak sense.

Second, Dworkin’s identification of law with the norms required to resolve disputes in courts basically liberates other public officials from the doctrinal concept of law as well. Public officials have political obligations but not necessarily “legal” (or “judicial” ones). Each can act without reference to a doctrinal concept of law. Dworkin, for example, rejects the idea of underenforcement for this reason – legislatures have no legal obligations.

The position here differs from Dworkin’s in several respects. Most obviously, it makes explicit the redundancy of a doctrinal concept. Consequently, it extends the idea that a theory of adjudication need not first identify the law and then determine what to do to other social actors.

46 That is, Dworkin’s theory of adjudication incorporates in one-step all the reasons that the Dworkin thinks the judge has. The argument in the prior sections suggests that reasons that bear on the coordination of the many governing institutions within the society are ones that the judge must consider as well.
Each social role demands its own theory of decision; but no social role must first determine what the law requires and then decide whether other reasons override that concern.

More importantly, the eliminativist view presented here separates the doctrinal concept of law from the evaluative concept of law.\(^{47}\) From the eliminativist perspective, there is governance and there is good governance. One criterion of good governance is that it manifests or realizes the value of legality.

Dworkin, by contrast, collapses the doctrinal concept into the evaluative concept of law. In *Justice for Hedgehogs*, Dworkin offers a unified account of value that, in the last chapter, argues that law is an aspect of moral and political value. This argument is certainly compatible with an understanding of the evaluative concept of law.

We might understand Dworkin’s doctrinal concept of law as identifying a class of governance structures – those that resolve disputes according to the interpretive method he identifies in *Law’s Empire* – as law. Moreover, this class of governance structures, Dworkin claims, will exhibit the value of integrity.\(^{48}\) Notice, however, that Dworkin’s doctrinal concept of law is more limited in scope than one might have initially thought. First, as Dworkin himself notes, it refers only to “rights that are enforceable on demand in an adjudicative political institution such as a court.”\(^{49}\) Thus, on this account, a judge has no legal obligation to follow

\(^{47}\)Dworkin calls the evaluative concept “aspirational” in *Justice for Hedgehogs* at 402.

\(^{48}\)This claim is an empirical one; it is possible that, in actual governance structures, this judicial decision-making protocol fails to realize integrity perhaps because of great heterogeneity in the moral views of the judiciary.

\(^{49}\)Justice for Hedgehogs as 404-5.
stare decisis or a legislator any legal authorization to invoke article V to extend the enforcement of the Fourteenth Amendment beyond what a court could enforce.

Second, casual empiricism suggests that few, if any, governance structures have adopted Dworkin’s romantic account of judicial decision making. It is clearly inspired by common law practices; but Dworkin clearly idealizes actual practice. This idealization derives directly from the conflation of the evaluative and doctrinal concepts of law into one. It thus suggests that very few polities have law.

7. Concluding Remarks.

I have argued for an eliminativist view of the doctrinal concept of law. Eliminativism, as noted earlier, comes in weaker and stronger versions. The argument here most strongly supports weak eliminativism which holds, simply, that we can do without the doctrinal concept of law; we can say everything we need to say about “law” without reference to a doctrinal concept. The doctrinal concept of law is replaced by a set of decision-making protocols – a theory of adjudication, a theory of counsel, a theory of legislation, etc. In each case, a two-stage theory that requires the agent first to determine what the law requires and then to weigh that requirement against her other reasons for action can be replaced without loss by a one-stage theory that requires the agent to weigh all her reasons at the same time. Weak eliminativism is thus largely innocuous.

Some of my argument, however, supports a semi-strong version of eliminativism that claims not only that we can do without a doctrinal concept of law but that we do better without it. Reflection on the difference between Dworkin’s proto-eliminativism and the position offered here may suggest how one might develop an argument for a semi-strong version of
eliminativism.

As noted in the prior section, Dworkin, in *Justice for Hedgehogs*, assimilates law to morality. As Waldron formulates Dworkin’s position, law is that branch of public morality that addresses the morality of certain public events such as enacted policies. This characterization of Dworkin’s project sounds in an evaluative rather than a doctrinal concept of law. Dworkin transforms this evaluative project into a doctrinal project by assuming that the best way to realize the value of legality is for judges to understand them as the truth conditions for what the law requires (or, as the eliminativist might say, for what the judge ought to decide).

Phrased differently, Dworkin assumes ideal judge who, sitting in ideal institutions, engage in ideal moral reasoning both legal and extra-legal. Ideal judges in ideal institutions who pursue Dworkin’s decision protocol will realize the value of legality (or integrity).

It is unclear, however, what relevance these ideal judges and ideal institutions have for the design of adjudicatory institutions or for a theory of adjudication for non-ideal judges. Suppose the constitutional designers agree with Dworkin that judicial institutions should aim at integrity. It remains an open empirical question whether a transparent institution will best realize integrity. In a transparent institution, actors within the institution directly pursue or manifest the aims that designers and evaluators of the institution promote. In Dworkin’s context, judges adopt (legally) moral reasoning to realize the value of legality. But such transparency may not best promote the value of legality. It may be that the best way to realize the value of legality is for judges to decide in a formalistic manner. After all, judges are not moral philosophers debating in a seminar room. Nor are extant judicial procedures obviously designed to arrive at moral truth. Our institutions might perform better if judges aimed at
something else.

In an opaque institution, the truth conditions of a proposition of law might not correspond to those that Dworkin articulates. From an eliminativist perspective, one would not search for truth conditions of propositions of law but for decision protocols for each agent. Of course, one would want to assess these decisions and the protocols against political morality which would include the justice and the value of legality. Eliminativism, on this account does better by doing without because it makes clear the gap between real, functioning institutions and our evaluative criteria.