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On Legal Expertise

Felipe Jiménez[1,2,*,†]

[1]Associate Professor of Law and Philosophy, University of Southern California, Gould School of Law, USA
[2]Profesor Adjunto Extraordinario, Universidad Adolfo Ibáñez, Chile

*Corresponding author. Email: fjimenez@law.usc.edu.

ABSTRACT

Legal experts can reliably ascertain which legal norms are valid, and therefore which legal propositions are true. Legal experts are in this position because they have a grasp of the deep cognitive structure of law: the habits, commitments, and values that characterize the practice of legal argument in a specific jurisdiction. Legal expertise, thus understood, determines the content of the law, which is therefore not reducible to an aggregation of authoritative legal texts. Because social facts about legal experts' values and commitments can determine the content of the law, references to moral considerations and principles of justice as valid legal reasons, in legal argument, are not a problem for (at least some forms of) legal positivism. Legal expertise thus shows that non-positivists might be right about (as they would put it) the irreducibility of legal content to communicative content without being right about the claims that moral facts determine the content of the law or that the validity of legal norms turns on moral considerations. Legal expertise also plays an important causal role in legal decision-making and is not, as some of the literature on judicial decision-making might suggest, epiphenomenal. From a moral perspective, while the existence of a class of legal experts is not necessarily valuable, it does have certain benefits, particularly in conditions of moral disagreement.

KEYWORDS: Legal expertise, morality, positivism, judicial behavior

INTRODUCTION

People routinely make claims about the legal status of behaviors. Some of the propositions expressed by these claims are true; others are false; and some are just plausible.[1] One of the questions that legal philosophers focus on is, precisely, what types of facts make it the case that a legal proposition is true or at least plausible. This is the question about what some legal philosophers call "the grounds of law"[2]—about the facts that provide the explanation for the

† Associate Professor, University of Southern California Gould School of Law; Profesor Adjunto Extraordinario, Universidad Adolfo Ibáñez. Many thanks to Guilherme Almeida, Scott Altman, Aditi Bagchi, Mathieu Carpentier, Nicolas Cornell, Erik Encarnacion, Lee Epstein, John Goldberg, Alex Houghton, Greg Keating, Rocío Lorca, Erin Miller, Crescente Molina, Jeesoo Nam, Marcela Prieto, Paolo Sandro, Lawrence Solum, Nomi Stolzenberg, Kevin Tobia, Nina Varsava, Ben Zipursky, participants at the Experimental Jurisprudence Workshop at the University of Michigan Law School, at the Colloquium in Law and Philosophy at Fordham University, and at the Yale-Harvard-Stanford Junior Faculty Workshop, and two anonymous reviewers for comments on previous versions of this paper.

[1] Observing the existence of plausible legal propositions, John Bell, "The Acceptability of Legal Arguments," in *The Legal Mind. Essays for Tony Honoré*, ed. Neil MacCormick and Peter Birks (Oxford: Clarendon Press, 1986), 46; Frederick Schauer, "Judging in a Corner of the Law," *Southern California Law Review* 61 (1988): 1726–27; W. Bradley Wendel, "The Craft of Legal Interpretation," in *Interpretation of Law in the Age of Enlightenment: From the Rule of the King to the Rule of Law*, ed. Yasutomo Morigiwa, Michael Stolleis, and Jean-Louis Halperin (Dordrecht: Springer, 2011), 163.

[2] Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge: Cambridge University Press, 2014), 7.

validity of legal norms, and therefore for the truth (or plausibility) of true (or plausible) legal propositions.[3] Some theorists believe that one can explain why legal norms exist or are valid simply by alluding to social facts alone, while others think the full explanation must allude to moral propositions. This is the basic divide between legal positivism and its critics.[4]

Despite this divide, legal theorists generally agree that the actions and practices of individuals and groups, and particularly those of legal officials, play an important role in explaining the validity of legal norms. Hart, for instance, answered the question about the grounds of law by reference to what he called the "rule of recognition." The rule of recognition summarizes the complex practice of legal officials that determines what normative standards are legally binding in each legal system (or, at least, what facts count as valid sources for such standards) and allows agents to identify those standards (or sources),[5] by setting out a master test of legal validity.[6] But the fact that what makes legal norms valid and legal propositions true depends—at least partly—on the practices of people acting within legal institutions is widely recognized. Dworkin, for instance, insisted on the legal and theoretical significance of the historical record of the enactments and decisions of legal officials.[7]

The number and complexity of these practices, enactments and decisions in contemporary legal systems raises the question of who has the ability to ascertain, on their basis, which legal norms are valid, and which legal propositions are true or plausible.[8] One intuitive answer alludes to *legal experts*. This paper offers an account of the nature and value of legal expertise.

As far as I am aware, there is no body of legal philosophical work attempting to elucidate the notion of legal expertise or to systematically discuss its nature, impact, and value.[9] In this aspect, the paper's indirect aim is to persuade readers that there is something important, and worth exploring, in this notion—not directly, but by offering an account that hopefully illuminates its significance for important jurisprudential debates. On this account, legal expertise is a grasp of the deep cognitive structure of law: the habits, commitments, and values that characterize the practice of legal argument in a specific jurisdiction. Understood in this way, legal expertise is one of the set of social phenomena that explain the content of the law, which is therefore not reducible to an aggregation of authoritative legal texts.

There are multiple issues in legal theory that might be impacted by an adequate understanding of legal expertise. Five implications are particularly salient in this paper. First, the account has an impact on the debate about the grounds of law—specifically, it shows how legal experts' activities are amongst the facts that explain the content of valid law. In this regard, the account expands the agents' whose practices count for grounding valid legal norms: not just lawyers and judges acting as legal officials, but also other legal experts without any formal authority, but whose activities

[3] David Plunkett, "Robust Normativity, Morality, and Legal Positivism," in *Dimensions of Normativity*, ed. David Plunkett, Scott J. Shapiro, and Kevin Toh (Oxford: Oxford University Press, 2019), 106–7.

[4] Murphy, *What Makes Law*, 21–22.

[5] H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994), 95, 100. There is an important interpretive question about whether the rule of recognition is about sources or norms. See, e.g., Pino, Giorgio. "Farewell to the Rule of Recognition?" Problema. Anuario de Filosofía y Teoría Del Derecho 5 (2011): 265–99. My framing here is meant to be neutral about this question, but henceforth I focus on legal norms (whatever the right interpretation about the rule of recognition might be).

[6] Scott Shapiro, "What Is the Rule of Recognition (And Does It Exist)?," in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (Oxford: Oxford University Press, 2009), 238.

[7] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

[8] My focus on *contemporary* legal systems is relevant for at least two reasons. First, I make no claim about legal experts and legal expertise in other conceptually possible legal systems or in future or past legal systems. Second, and relatedly, I accept the possibility of expertise about ancient legal systems, and that this type of expertise might be significantly different from legal expertise in contemporary legal systems. Thus, for example, present-day scholars of Roman law could be deemed as experts of Roman law even though their type of expertise is quite different from the type—legal expertise within contemporary legal systems—I focus on here.

[9] Although there is some discussion of legal expertise in related bodies of work. See, e.g., William Baude and Ryan D. Doerfler, "Arguing with Friends," *Michigan Law Review* 117, no. 2 (2018): 319–48; Gary L. Blasi, "What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory," *Journal of Legal Education* 45, no. 3 (1995): 313–97; Leah M. Christensen, "The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law," *BYU Education and Law Journal* 2008, no. 1 (2008): 53–88; Andreas Glöckner, Emanuel Towfigh, and Christian Traxler, "Development of Legal Expertise," *Instructional Science* 41, no. 6 (2013): 989–1007; John Hudson, "From The Leges To Glanvill: Legal Expertise And Legal Reasoning," in *English Law Before Magna Carta*, ed. Stefan Jurasinski, Lisi Oliver, and Andrew Rabin (Leiden: Brill, 2010), 221–49; Garry Marchant and John Robinson, "Is Knowing the Tax Code All It Takes to Be a Tax Expert? On the Development of Legal Expertise," in *Tacit Knowledge in Professional Practice*, ed. Robert Sternberg and Joseph Horvath (Hillsdale, NJ: Erlbaum, 1999), 17–34; Fleurie Nievelstein et al., "Expertise-Related Differences in Conceptual and Ontological Knowledge in the Legal Domain," *European Journal of Cognitive Psychology* 20, no. 6 (2008): 1043–64; Frederick Schauer and Barbara A. Spellman, "Analogy, Expertise, and Experience," *The University of Chicago Law Review* 84, no. 1 (2017): 249–68; Kevin Tobia, "Legal Concepts and Legal Expertise" (February 10, 2020), https://doi.org/10.2139/ssrn.3536564.

contribute to determine the content of the law.[10] In the context of this debate, legal expertise also shows why references to moral considerations, principles of justice, and even to anti-positivist claims in legal argument need not be particularly problematic for a positivist view about the nature of law.[11] Second, the account shows that, in contemporary legal systems, some minimal degree of juristocracy is not a pathology but a central aspect of legal governance. An important part of law is, in fact, made by lawyers. Third, the contribution of legal experts' cultural practices and shared understandings to the content of the law provides additional fodder against, or at least complicates, some aspects of what Greenberg calls the "standard picture," according to which legal content is reducible to, and directly explained by, the communicative content of legal texts.[12] All of these implications are the subject of Part I. The fourth implication, addressed by Part II, is the following: legal expertise complicates familiar pictures about the distinction between legal and extra-legal considerations—particularly in the empirical study of judicial decision-making. Finally, the fifth salient implication of the argument—the focus of Part III—is that legal expertise is morally valuable, even if it comes with certain costs. Highlighting the value of legal expertise is relevant in light of recent arguments that deemphasize its significance.[13]

Here is a brief roadmap. Part I explicates the notion of legal expertise, identifies its content, and elucidates its significance for jurisprudential debates. Part II discusses the relevance of legal expertise as an empirical matter—and argues against the idea that legal expertise plays no causal role in judicial decision-making and (more broadly) legal reasoning. Part III explores questions about the value of legal expertise. While whether legal expertise is all things considered valuable is a contextual question, I will suggest two benefits—what I call *practical learning* and the channeling of disagreement—that must be part of the evaluation in specific cases.

I. FROM LEGAL REASONING TO LEGAL EXPERTISE

The assumption that drives most of legal education, as Schauer explains, is that learning to think like a lawyer requires more than acquiring knowledge of formally authoritative legal materials. Nevertheless, pinning down exactly what this *more* is does not seem straightforward.[14] In Schauer's view, the distinctive features of legal reasoning are connected to its mechanics:

[10] Here and throughout the paper, I use "determine" in a constitutive sense. This constitutive sense might be taken in a metaphysically *ambitious* way, as in: X determines the legal norm Y if X is the fundamental reason or the basic explanation for why the law has content Y. There is a relatively recent literature on whether this relation of determination should be understood in terms of rational explanation, metaphysical grounding, or something else. See, e.g., Samuele Chilovi and George Pavlakos, "Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence," *Legal Theory* 25, no. 1 (2019): 53–76; Mark Greenberg, "How Facts Make Law," *Legal Theory* 10, no. 3 (2004): 157–98; Bosko Tripkovic and Dennis Patterson, "The Promise and Limits of Grounding in Law," *Legal Theory* 29, no. 3 (2023): 202–28. This technical debate exceeds the purposes of this paper, and thus I don't take any position on how we should understand the relationship between the facts in virtue of which law contains certain norms (and not others) and such norms. But this constitutive sense of "determine" could also be taken in a more metaphysically *modest* way that makes no reference to grounding or cognate metaphysical ideas, as in: X is among the facts that explain why a certain norm Y is a valid legal norm in a legal system Z. I make this clarification about the two possible ways of understanding what I mean by "determine" in a constitutive sense, because reliance on the ideas of grounding and metaphysical determination as means to frame and understand debates in general jurisprudence—which traditionally are understood as debates about legal validity—is relatively recent. This framework has been used, among others, by Mark Greenberg, David Plunkett, and Scott Shapiro. See, e.g., Greenberg, "How Facts Make Law"; Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011); David Plunkett, "A Positivist Route for Explaining How Facts Make Law," *Legal Theory* 18, no. 2 (2012): 139–207. This turn has been criticized by Brian Leiter on both historical and substantive grounds. See Brian Leiter, "Critical Remarks on Shapiro's Legality and the 'Grounding Turn' in Recent Jurisprudence," September 16, 2020, https://doi.org/10.2139/ssrn.3700513. My main concern here is the nature of legal expertise and its contribution to the content of law, and thus resolving this debate is not necessary for my purposes. I use "determine" simply to convey the idea that legal expertise is among the facts that explain why a legal system includes this or that set of legal norms. And, precisely, this idea I am interested in can be read in a metaphysically ambitious way—as in *legal expertise is a determinant or amongst the metaphysical grounds of the content of the law*—or in a modest way, more consistent with the traditional understanding of debates in general jurisprudence—as in *legal expertise is among the social facts that make it the case that some norms are legally valid*. I should also note that, while I use the language of "grounds of law" (which predates the literature on grounding in metaphysics), I take no position on (and my focus here is not) whether we should, must, or may speak in terms of metaphysical grounding when we discuss issues of general jurisprudence. For further discussion of the metaphysical turn in recent American jurisprudence from a critical perspective, see—along with the paper by Tripkovic and Paterson cited above—Mathieu Carpentier, "Against 'Legal Facts'" (2024), https://papers.ssrn.com/abstract=4790880.

[11] Against Emad H. Atiq, "Legal Positivism and the Moral Origins of Legal Systems," *Canadian Journal of Law & Jurisprudence* 36, no. 1 (2023): 37–64.

[12] See generally Mark Greenberg, "The Standard Picture and Its Discontents," in *Oxford Studies in Philosophy of Law*, ed. Leslie Green and Brian Leiter (Oxford: Oxford University Press, 2011).

[13] See, e.g., Amna A. Akbar, Sameer M. Ashar, and Jocelyn Simonson, "Movement Law," *Stanford Law Review* 73, no. 4 (2021): 821–84.

[14] Frederick Schauer, *Thinking Like a Lawyer* (Cambridge, MA: Harvard University Press, 2009), 2–3.

application of rules, identification of precedents, use of analogies, and deference to formal authority. These features, as Schauer suggests, seem to be comparatively more prevalent—and more highly concentrated—within the legal domain than elsewhere.[15] Legal reasoning is, characteristically, a form of second-order reasoning that does not aim at achieving the optimal first-order result in every case.[16] Second-order reasoning is reasoning *about reasons*. For example, the existence of a statute or a binding precedent provides a second-order reason that directs us to ignore the otherwise relevant first-order reasons that would militate in favor of a decision inconsistent with said statute or precedent.[17]

I find this account of legal reasoning persuasive. At least in contemporary Western legal systems, the ability to engage in second-order reasoning is an important part of "thinking like a lawyer." But the notions of legal expertise and second-order reasoning are distinct. First, as a general matter, mastery over second-order reasoning is not conceptually necessary to be a legal expert. Whether and—more significantly—to what extent legal expertise involves second-order reasoning will depend on the practice of legal argument in specific jurisdictions. Second, even when the practice of legal argument does require second-order reasoning, as it commonly does in our cultural context, legal expertise requires more than the ability to engage in these forms of reasoning.

Similarly, knowledge of enacted legal materials is not sufficient to make someone a legal expert. First, someone with a detailed knowledge about the enactment of specific texts and their formal incorporation into the legal *corpus*, but nothing else, would be like a legal version of Borges's *Funes the Memorious*.[18] They would possess detailed information about factual minutiae, but would lack an understanding of the practice within which legal materials are inserted and rendered legally meaningful. Second, as I will argue below, what might count as a relevant legal material is itself in part an upshot of the practices and commitments of the class of legal experts.

Thus, mastery over specific forms of reasoning and knowledge about the *corpus* of legal texts are not irrelevant. In fact, proficiency in second-order reasoning and at least a minimal knowledge about enacted legal materials might be necessary conditions for becoming a legal expert in many contemporary legal systems. But, in my view, the relevance of second-order reasoning and knowledge of legal materials are at least sometimes explained by the legal commitments and values of legal experts that determine the content of the law. On this view, whether mastery over specific forms of reasoning and knowledge of authoritative legal texts are part of legal expertise will be, at least in part, an upshot of the relevant commitments and practices of legal experts—their significance is explained by the content of those commitments.[19] Even when second-order reasoning and knowledge of enacted legal materials are relevant, legal expertise requires a grasp of certain values and commitments that are not reducible to said reasoning and knowledge—a grasp of substantive norms, models, linguistic practices, ways of speaking and inhabiting the world that legal experts adopt as their own perspective towards the world and its evaluation.[20]

On this view, legal reasoning involves reliance on norms and values that do not derive from legal texts like constitutions or statutes, and that do not consist in second-order reasons about first-order considerations (as in Schauer's view). For example, the fact that a cost-benefit analysis of two possible remedies for breach of contract is a relevant consideration to decide a contractual dispute in the United States—as illustrated in a case like *Walgreen Co. v. Sara Creek Property Co.*[21]—is not grounded in the content of statutes like the Uniform Commercial Code or the holding of

[15] Frederick Schauer, "Is There a Psychology of Judging?," in *The Psychology of Judicial Decision Making*, ed. David Klein and Gregory Mitchell (Oxford: Oxford University Press, 2010), 107.

[16] Ibid., 107–8.

[17] Schauer, *Thinking Like a Lawyer*, 63 note 8.

[18] Jorge Luis Borges, "Funes, the Memorious," in *Fictions* (London: J. Calder, 1985).

[19] Some readers might disagree and might believe that this paper is merely pointing to a necessary condition of legal expertise—that sits, so to speak, alongside proficiency in certain forms of reasoning and knowledge of authoritative legal texts (and perhaps alongside additional necessary conditions). Even for these readers, though, a focus on this less explored aspect of legal expertise would be valuable, and everything I say here about legal expertise *simpliciter* can be reinterpreted as referring to just one necessary condition of legal expertise.

[20] Martin Krygier, "Law as Tradition," *Law and Philosophy* 5, no. 2 (1986): 244. See also Charles Fried, "The Artificial Reason of the Law or: What Lawyers Know," *Texas Law Review* 60 (1981): 37; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975), 263.

[21] 966 F.2d 273, 1992 U.S. App. In this case, the court made the decision about whether to affirm an order for injunctive relief on the basis of a cost-benefit comparison between expectation damages and specific performance.

any binding precedents. Nor is it determined by the second-order force of any such legal sources. It is merely determined by a fact about the values and commitments that characterize American legal culture—in this case, the legal significance lawyers and judges give to economic considerations and, more broadly, pragmatic policy concerns regarding the consequences of judicial decisions.[22]

The relevance of these commitments and norms is not restricted to legal decision-making, but also extends to legal criticism. Consider, for instance, the memoranda issued by the Department of Justice's Office of Legal Counsel in the aftermath of the U.S. invasion of Afghanistan in 2001, regarding the interrogation of persons with suspected ties to Al-Qaeda. These memoranda concluded that degrading interrogation methods might not legally constitute torture; that, even if they constituted torture, such methods might be nevertheless legally justified; and that, even if these methods were unjustified, the President still had authority to exempt U.S. officials from the applicable legal restrictions.[23] These memos generated a justified negative reaction from lawyers, law professors, and the general public.[24] A distinctive reaction from some legal professionals was that the memoranda made implausible—and, in fact, absurd—legal arguments, and that the advice they contained was "incompetent."[25] In order to make sense of this reaction, we cannot treat it as a claim that the memos evinced an ignorance about legal sources or deficient second-order reasoning. The problem with the memos was not just that they ignored certain legal texts that would have led to a different result, or that the conclusions they reached were an inadequate application of particular legal rules or a deficient form of analogical reasoning. The memos perhaps—and arguably do—evince some problems in these two regards. But there is a big difference between arguments that are merely incorrect and arguments that are absurd and incompetent. The underlying explanation for this latter type of argument must have resided elsewhere. One possibility is that, according to the critics, the memos contained incompetent legal advice because that advice was inconsistent with the commitments and values underlying the practice of legal argument in American legal culture. Of course, the claim that this advice is incompetent can be contested—presumably, at least the lawyers involved in the drafting of the advice would contest that characterization. But what the example shows is that one common ground of legal criticism—whether ultimately correct or not—goes beyond second-order reasoning and knowledge of enacted legal materials.[26]

A. The Content of Legal Expertise

My claim, precisely, is that legal expertise involves a grasp of the underlying habits, commitments, and values regarding law and legal discourse that characterize the collective practices of the community of legal experts—judges, lawyers, and law professors—in a particular legal culture and that determine the content of the law in force. This grasp is not a mere ability to use technical legal language. It is a matter of cultural competence: of participating in a practice and adopting certain habits, values, and standards that contribute to determining what is a good legal argument within a specific legal culture. This cultural competence turns on an understanding of the content of these habits, values, and standards, of how they evolve over time, and of how they might change on the basis of different reconstructions and narratives legal participants might be able to develop.[27] This explains why an argument that identifies the relevant sources of law and derives conclusions from them through formally valid reasoning might still be a bad legal argument.

On this view, what legal expertise requires as a substantive matter turns on jurisdiction-specific facts. Thus, most of what can be said at a general level about legal expertise is relatively abstract and content-neutral: it is a grasp of the underlying substantive commitments, practices, and habits

[22] On this issue, see generally Robert S. Summers, "Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use," *Cornell Law Review* 66 (1980): 861.

[23] The description here paraphrases W. Bradley Wendel, "Legal Ethics and the Separation of Law and Morals," *Cornell Law Review* 91, no. 1 (2005): 67–68.

[24] Ibid., 68–69.

[25] Ibid., 68.

[26] For related discussion about the relationship between this case and (a broader notion of) expertise, see Elizabeth Fisher and Sidney A. Shapiro, *Administrative Competence: Reimagining Administrative Law*, Cambridge Studies in Constitutional Law (Cambridge: Cambridge University Press, 2020), 45–48.

[27] On legal argument as an ongoing practice, Dennis M. Patterson, "Law's Pragmatism: Law as Practice & Narrative," *Virginia Law Review* 76, no. 5 (1990): 940, 987–88.

that characterize the specific legal culture and contribute to determine its law. These aspects are unlikely to remain constant across jurisdictions.

Legal cultures, for instance, might value different forms of reasoning—some more formal, some more substantive. For example, as Atiyah and Summers note in their influential study of legal reasoning in the United States and England, these two legal systems approach the binding and exclusionary force of precedents very differently—with *stare decisis* having a much stronger force in the English legal system, and therefore excluding from consideration a larger set of otherwise substantively relevant considerations.[28] When explaining these differences, Atiyah and Summers turn to factors like the volume of case law, the proportion of dissenting opinions, and the relative prevalence of plurality opinions.[29] These potential explanations strike me as plausible, but it seems to me that a deeper explanation is provided by Atiyah and Summers themselves at the beginning of their book: the differences between the legal reasoning of American and English lawyers reflect deep differences "in legal style, legal culture and, more generally, the vision of law which prevails in the two countries."[30] Atiyah himself makes a similar point elsewhere: the scope and weight of formal reasons, including reasons generated by the doctrine of *stare decisis*, turn on the trends of legal culture.[31] As Atria puts the point in his discussion of Atiyah and Summers's work, the difference between American and English lawyers—or between contemporary and earlier lawyers, for that matter—results from differing visions of law, and of what counts as *legal*.[32]

Similarly, different legal cultures might be more or less receptive to arguments from comparative law;[33] from other disciplines, such as economics;[34] from academic scholarship;[35] etc. These aspects of legal reasoning are not generally settled by formal legal materials, but are instead determined by the ongoing practices, habits, and explicit and implicit commitments of legal experts like lawyers and judges engaged in legal argument. Take the example of economic arguments. A decision like *Walgreen Co. v. Sara Creek Property Co.*—again, a case where the court determined the appropriate remedy for breach of contract on the basis of economic considerations—was legally acceptable, if it was, not because of any particular precedent or statutory norm, but because of a contingent fact about American legal culture. By the same token, that such an approach would be less plausible as a legal argument in a civil law jurisdiction is not just an effect of enacted legal norms. It is also driven by what Scalise calls *cultural hurdles*: "attitudes, beliefs, and ways of thinking about law that exist in various legal traditions."[36]

The content of legal expertise is also likely to vary over time. At different points in time, the same jurisdiction might be open to very different types of arguments. For instance, arguments based on natural law and immutable principles of justice—which would be unlikely to count as successful arguments today—were once common in the United States and common law jurisdictions more generally.[37] Whether moral considerations and principles of justice count as relevant legal reasons in any given legal system is not necessarily settled by enacted legal materials. It might, instead, turn on lawyers and judges' conceptions about the nature of law, the limits of legal reasoning, or the ethics of legal argument. The content of legal expertise is thus variable and

[28] P. S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1987), 118–27.

[29] Ibid., 127–32.

[30] Ibid., 1.

[31] See P. S. Atiyah, "Form and Substance in Contract Law," in *Essays on Contract* (Oxford: Oxford University Press, 1990), 116–20.

[32] Fernando Atria, "The Powers of Application," *Ratio Juris* 15, no. 4 (2002): 362.

[33] Jeremy Waldron, "Foreign Law and the Modern Ius Gentium," *Harvard Law Review* 119, no. 1 (2005): 129–47.

[34] Kristoffel Grechenig and Martin Gelter, "The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism," *Hastings International and Comparative Law Review* 31 (2008): 295; Ronald J. Scalise Jr., "Why No Efficient Breach in the Civil Law: A Comparative Assessment of the Doctrine of Efficient Breach of Contract," *American Journal of Comparative Law* 55 (2007): 721.

[35] Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Oxford: Hart Publishing, 2001); Nils Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective*, *The Making of Legal Authority* (Oxford: Oxford University Press, 2010); Frederick Schauer, "The Authority of Legal Scholarship," *University of Pennsylvania Law Review* 139, no. 4 (1991): 1003–17; Fábio P. Shecaira, "Legal Arguments from Scholarly Authority," *Ratio Juris* 30, no. 3 (2017): 305–21.

[36] Scalise Jr., "Why No Efficient Breach in the Civil Law," 755.

[37] Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (Oxford: Oxford University Press, 2021). See also Atiq, "Legal Positivism and the Moral Origins of Legal Systems," 43–50; R. H. Helmholz, "Continental Law and Common Law: Historical Strangers or Companions?," *Duke Law Journal* 1990, no. 6 (1990): 1207–28.

dynamic.[38] It is also likely to vary on the basis of changing and contingent commitments—including commitments regarding the nature of law.

Thus understood, legal expertise is a grasp of what legal discourse "around here" (and now) is about.[39] A legal expert is someone who masters the *canon* or "modalities" of acceptable legal arguments in the specific jurisdiction.[40] That *canon* summarizes the conventions determining which considerations are legally acceptable reasons.[41] Certainly, what arguments are acceptable can turn, in part, on formally authoritative legal sources.[42] But here we should note that even what counts as a legal source will itself be determined in part by the convergent practices and understandings of legal experts. A familiar explanation for why any given fact or object counts as a source of law relies on widespread accepted use by legal experts.[43]

Moreover, the *canon* will also depend on the arguments, normative considerations, linguistic and conceptual tools, and specific commitments that are internal to legal practice.[44] Legal expertise requires a grasp of these cultural elements underlying legal reasoning, which allows the expert to distinguish between good and bad legal arguments.[45] A good constitutional lawyer in the United States, for example, must have a grasp of the relative significance of historical arguments (as well as of what types of historical arguments, regarding which periods, and so on), prudential considerations, evolving positive social morality, principles of justice, empirical evidence about linguistic usage, and many other inputs into constitutional interpretation and decision-making. As this very example suggests, the content of legal expertise is prone to change over time, and sometimes rapidly.

As theorists of comparative jurisprudence have long emphasized, legal argument involves a set of cognitive and cultural commitments and practices.[46] Because of this, understanding a legal system requires going beyond the surface level of legal texts, towards the implicit norms and assumptions that characterize legal culture.[47]

In our cultural context, making sound legal arguments certainly requires mastery over specific forms of reasoning like rule-application and analogy.[48] Yet it also involves an ability to draw inferences that are substantively correct.[49] A legal expert has this ability. They are able to derive norms from authoritative legal materials and apply them to particular cases, identifying their legally relevant aspects by considering a vast set of norms and concepts, and to justify these operations on the basis of reasons that other participants in legal discourse recognize as substantively adequate.[50] In this activity, legal experts rely on their grasp of the material content of legal concepts and of the inferences that they warrant. This explains why legal education is not just aimed at the

[38] It can also be more or less univocal. At least sometimes, not all legal experts will *see* the law in exactly the same way, as a homogeneous and monolithic group. In fact, in moments of legal crisis, it is quite likely that the culture of legal experts and the relevant standards of legal argument will themselves be fractured and in crisis.

[39] Atria, "The Powers of Application," 348.

[40] Fernando Atria, *On Law and Legal Reasoning* (Oxford: Hart Publishing, 2002), 352; Bell, "The Acceptability of Legal Arguments"; A. M. Honoré, "Legal Reasoning in Rome and Today," *Cambrian Law Review* 4 (1973): 58–67. On modalities (and "anti-modalities") of legal argument in American constitutional law, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford: Oxford University Press, 1982); David E. Pozen and Adam M. Samaha, "Anti-Modalities," *Michigan Law Review* 119, no. 4 (2021): 729–96.

[41] Honoré, "Legal Reasoning in Rome and Today," 65.

[42] On sources of law, see Mathieu Carpentier, "Sources and Validity," in *Legal Validity and Soft Law*, ed. Pauline Westerman et al. (Cham: Springer International Publishing, 2018), 75–97; Giorgio Pino, "Sources of Law," in *Oxford Studies in Philosophy of Law Volume 4*, ed. John Gardner, Leslie Green, and Brian Leiter (Oxford: Oxford University Press, 2021).

[43] See Frederick Schauer, "The Restatements as Law" (August 23, 2022), 11, https://papers.ssrn.com/abstract=4198224.

[44] Bell, "The Acceptability of Legal Arguments," 48.

[45] Brett G. Scharffs, "The Character of Legal Reasoning," *Washington and Lee Law Review* 61, no. 2 (2004): 737.

[46] See William Ewald, "Comparative Jurisprudence (I): What Was It like to Try a Rat?," *University of Pennsylvania Law Review* 143, no. 6 (1995): 1889–2149,; Mark Van Hoecke and Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law," *International & Comparative Law Quarterly* 47, no. 03 (1998): 496.

[47] Catherine Valcke, "Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems," *The American Journal of Comparative Law* 52, no. 3 (2004): 713; Van Hoecke and Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law."

[48] Fried, "Artificial Reason of the Law Or," 57.

[49] That is, correct on grounds beyond mere formal validity. On substantive correctness in legal reasoning, *see* Robert Brandom, "A Hegelian Model of Legal Concept Determination," in *Pragmatism, Law, and Language*, ed. Graham Hubbs and Douglas Lind (London: Routledge, 2014), 20. For remarks in a similar vein, highlighting how the rational soundness of a decision might not be reducible to logical deduction in "penumbral" cases, see H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958): 607–8.

[50] Marchant and Robinson, "Is Knowing the Tax Code All It Takes to Be a Tax Expert? On the Development of Legal Expertise," 4; Chaim Perelman, *Justice, Law, and Argument. Essays on Moral and Legal Reasoning* (Dordrecht: Reidel Publishing, 1980), 129.

transmission of knowledge or the development of professional skills, but also at acculturation into the practice of legal argument.[51]

Here, the notion of a *practice*—understood as a complex, cooperative social activity that aims at certain goals and has its own internal standards of excellence—is central.[52] Legal argument is a practice in precisely this sense: it requires internalizing internal standards and norms.[53] Being a legal expert is thus a matter of craft,[54] of familiarizing oneself with the standards governing legal argument in a specific jurisdiction.[55] These standards include ideals, justifications, principles, techniques, and reasons that are internal to the specific legal culture.[56] A practice is formed, maintained, and engaged in according to a certain conception of what the practice is about, the goods it realizes, and the dispositions that it requires and cherishes.[57]

One potential reaction to the argument so far is the following. Perhaps, commitments regarding the significance of economic considerations or comparative law, or regarding the relevance of formal as opposed to substantive reasons, are only relevant in legally indeterminate cases. On this view, these considerations are aspects of lawyerly ability that allow jurists to fill gaps in the law—they are simply ways (some better and some worse) in which lawyers resolve cases of legal indeterminacy.[58]

The objection correctly captures that cases of legal indeterminacy might still be resolved in better or worse ways, from the perspective of legal expertise, even if the law has run out. There are thus *legally* better ways to resolve cases of legal indeterminacy. Even if the law runs out, judges can still engage in judicial law-making *legally*, acting not as deputy legislators but rather as judges.[59] The idea here is that, when the facially applicable legal materials run out, decision-making can still be guided by legal categories, legal concepts, and doctrinal tools.[60] These categories and concepts arise out of legal thought and practice,[61] and knowledge of them can help judges navigate the complexity of concrete cases even when the outcome of the case is not easily derivable from legal materials.[62] In this respect, a judge engaging in the development of law is not bound to act like a "conscientious legislator;"[63] they are bound to act as a conscientious judicial lawmaker. The creative aspect of adjudication is still a form of legal adjudication, and legal expertise provides an explanation of this fact.

Still, the norms and commitments that constitute legal expertise play a role not just when the law runs out, but also in determining what the law is. For instance, efficiency considerations about contract remedies in American contract law are not just gap-filling criteria that allow judges to make new law about contract remedies. They are also constituent parts of the law—in the example of *Walgreen*, the case mentioned above, the costs and benefits of remedies are not meant to come to the rescue because the law is unsettled or unclear. They are meant to govern what remedies are appropriate, as a matter of law.[64]

Finally, and as we will see in more detail below, sometimes law itself allows for discretionary judgment and for more open-ended reasoning than the syllogistic application of pre-existing legal

[51] Schauer, "Is There a Psychology of Judging?," 106. See also Tobia, "Legal Concepts and Legal Expertise," 8–9.

[52] Alasdair MacIntyre, *After Virtue*, 3rd ed. (Notre Dame, IN: University of Notre Dame Press, 2007), 187.

[53] Ibid., 190.

[54] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960), 214.

[55] Wendel, "The Craft of Legal Interpretation," 162. Wendel goes further and argues that excellence in legal argument requires a certain fidelity to law. I am less certain and note that there is disagreement about whether this fidelity is in fact required, as well as about its tensions with lawyers' commitments to the public good and democratic citizenship. *See* Etienne C. Toussaint, "The Miseducation of Public Citizens," *Georgetown Journal on Poverty Law and Policy* 29, no. 3 (2022): 305–6.

[56] Ewald, "Comparative Jurisprudence (I)," 1947–48.

[57] My talk about goods, dispositions, and ideals might invite the suspicion that this is a too rosy picture of legal expertise. But I am treating these notions as content-independent. A legal culture's commitments might be to the rule of law, objectivity, or democracy. But they might also be to racial hierarchy, a totalitarian ideology, patriarchal ordering, or some such.

[58] I thank an anonymous reviewer for suggesting this response.

[59] As Balkin puts it, "Courts must think and act and in terms of legal forms and practices; they must make legal arguments and write legal opinions." Jack M. Balkin, "Framework Originalism and the Living Constitution," *Northwestern University Law Review* 103, no. 2 (2009): 608. In my view, however, Balkin goes too far when he thinks this correct claim is the same as the claim that all judges should do is "interpret and construct law." Ibid., 609. For my own view of the relevance of legal expertise in the development of constitutional law, see Felipe Jiménez, "Tradition in Constitutional Adjudication" (forthcoming, Yale Journal of Law and the Humanities).

[60] This is why Francisco Urbina is right when he argues that the usual supposition that legally constrained decision-making and morally optimal decision-making are at odds is unwarranted. Francisco J. Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017), 154.

[61] Ibid., 161.

[62] Ibid., 162.

[63] Hart, *The Concept of Law*, 273.

[64] More particularly, as a specification of when the plaintiff's damage remedy is inadequate. See *Restatement (Second of Contracts)* 1981 § 359.

rules. These forms of discretionary judgment are still forms of legal judgment—and they are significantly causally impacted, as I will note below, by legal expertise.[65]

B. Legal Expertise, Legal Culture, and the Grounds of Law

The fact that legal expertise is a grasp (and, as we will see, constitutive) of some aspects of what we could call the professional or internal *legal culture* suggests that there is a quite tight connection between these two notions.[66] The object of legal expertise is legal culture. But it's important to note that legal expertise refers only to a subset of legal culture—even of the internal legal culture of judges and lawyers. It refers to the aspects of legal culture that partly determine the content of the law. Indeed, as I will explain in the next two sub-sections, some aspects of legal expertise determine the content of the law in force in the relevant jurisdiction. They are, in other words, amongst the grounds of law.

i. Legal Expertise and Legal Content

The relationship between legal expertise and the content of the law is not unidirectional. Legal expertise is both a grasp of the deep structure of legal culture and legal argument *and* partly constitutive of them—and, in this way, of the content of law. The content of law in any legal system is thus not just an independent object to be apprehended by legal experts. It is also partly determined by the activities of those experts.[67]

Certainly, many of the elements that characterize the internal legal culture are extra-legal social conventions, mere customs *in foro*. Not everything legal experts—including judges—do is, merely because of that fact, part of the law. Some normative standards that govern how legal practitioners ought to behave—such as standards of professional etiquette or attire in court, for example—are ultimately just practices of the legal community that do not change the content of the law. Whether an individual has a grasp of these extra-legal standards might determine whether they are a successful lawyer or their standing in a particular community of legal practitioners, but it seems far-fetched to think that such a grasp would determine whether they are a legal expert. On the other hand, many aspects of legal culture that are an upshot of the activities of legal experts determine the content of the law in force. Whether someone has a grasp of these aspects will, in fact, be determinative of whether they possess legal expertise.

For instance, theories of statutory interpretation and canons of construction might start as customary standards that legal experts like lawyers and judges use to determine the legal impact of legal materials. But once legal practitioners start believing these standards are not just mere social regularities but normative standards that govern how they ought to behave—without any formal enactment by judges acting *qua* legal officials—they become directly relevant for the determination of the legal implications of legal texts. Something similar will happen with the aspects of legal culture that contribute to determining what counts as a valid legal norm or a source of law—i.e., to the rule of recognition. Some of the social practices of legal experts will directly change what counts as a valid legal norm, because they refer directly to the criteria of validity.[68]

Some legal experts are also legal officials—i.e., agents with formal legal powers. The most obvious example is that of judges sitting in apex courts. But my focus here is how legal experts' activities make it the case that law has a certain content, when they act as legal experts—as opposed to when they also make law directly, *qua* legal officials.[69]

[65] See below, Part II.C.

[66] On the notion of legal culture, see Lawrence M. Friedman, "Is There a Modern Legal Culture?," *Ratio Juris* 7, no. 2 (1994): 117–31; Sally Engle Merry, "What Is Legal Culture? An Anthropological Perspective," *Journal of Comparative Law* 5, no. 2 (2010): 40–58; David Nelken, "Using the Concept of Legal Culture," *Australian Journal of Legal Philosophy* 29 (2004): 1–26; David Nelken, "Defining and Using the Concept of Legal Culture," in *Comparative Law: A Handbook*, ed. Esin Örücü and David Nelken (Oxford: Hart Publishing, 2007).

[67] In this aspect, legal expertise and the content of law have a partially interactive relationship. See Arie Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law," *Canadian Journal of Law & Jurisprudence* 31, no. 1 (2018): 125–49.

[68] See Honoré, "Legal Reasoning in Rome and Today," 64–65.

[69] Baude and Sachs explore a similar issue from the perspective of the "recognitional community" required by Hart's rule of recognition in William Baude and Stephen E Sachs, "The Official Story of the Law," *Oxford Journal of Legal Studies* 43, no. 1 (2023): 178–201.

Consider the case of legal academics.[70] Legal reasoning relies on legal scholarship.[71] Legal scholars' written work, their "intellectual output,"[72] has a form of legal authority—even when it has not been formally adopted by authoritative sources.[73] This reliance on the work of legal scholars has a relatively long history in civil law jurisdictions.[74] Yet the phenomenon also exists in the common law. When legal reasoning treats legal scholarship as an authoritative source, legal scholarship directly contributes to determining the content of the law. There are multiple examples of how legal scholars' work determines the content of the law. In contract law, for instance, the distinction between the expectation, reliance, and restitution interests[75] and the notion of "efficient breach"[76] are ideas that come from legal scholarship yet are, in an important sense, part of our law. Catharine MacKinnon's argument that sexual harassment is a form of sex discrimination is a similarly good example of a scholarly argument that successfully changed the content of American law.[77] Even in civil law systems that do not place a premium on judicial justification, such as France, and in common law systems with a traditional reluctance towards citing living scholars, such as England, legal scholarship can also be treated as an authoritative legal source in adjudication.[78] As these and other examples suggest, the content of the law turns in part on what legal experts (in this case, legal academics) do, even when they do not occupy the role of legal officials.

ii. Legal Experts, the Grounds of Law, and Legal Positivism

The argument so far has important jurisprudential implications. Both positivists and non-positivists agree that the norms of any legal system depend on social facts. If I am right about legal expertise, then these social facts include at least some of the habits, commitments, and values that characterize legal argument in each specific jurisdiction. The content of the law in force in any such jurisdiction depends, at least in part, on the *canon* of acceptable legal arguments and the values, assumptions, and commitments of legal experts, including judges, lawyers, and legal scholars.[79] More precisely, which legal norms are part of any legal system depends on some aspects of the internal legal culture that are determined by these values, assumptions and commitments. From this perspective, even when we see law as grounded in social facts, we can realize that its content is determined not just by the *lex* posited by formal political authority but also by the *ius* elaborated by jurists.[80] At least to some extent, then, law is the upshot of the activities of legal experts.[81] This means that a minimal form of juristocracy might not be a pathology but an unavoidable aspect of contemporary legal systems.[82]

Let me note one important implication of legal expertise's role in determining the content of law. The degree to which the law in force in any jurisdiction is determinate will depend in part on

[70] Here I am paraphrasing Felipe Jiménez, "Legal Principles, Law, and Tradition," *Yale Journal of Law & the Humanities* 33, no. 1 (2022): 73–78.

[71] Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)," *The American Journal of Comparative Law* 39, no. 2 (1991): 344. As Nils Jansen notes in the European context, "European private law has long been developed on the basis of texts that were largely independent of any political domination." Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective*, 138.

[72] Fernanda Pirie, *The Anthropology of Law* (Oxford: Oxford University Press, 2013), 103.

[73] James Bernard Murphy, "The Lawyer and the Layman: Two Perspectives on the Rule of Law," *The Review of Politics* 68, no. 1 (February 2006): 125.

[74] In France, for instance, at least since Domat and Pothier students were expected to learn law not by studying naked legal rules (or, in Domat and Pothier's case, Roman texts), but rather by learning scholarly principles systematizing them. James Gordley, *The Jurists: A Critical History* (Oxford: Oxford University Press, 2013), 145.

[75] Lon Fuller and William R. Perdue, "The Reliance Interest in Contract Damages: 1," *The Yale Law Journal* 46, no. 1 (1936): 52. For discussion, see Patterson, "Law's Pragmatism," 988–89.

[76] Robert L. Birmingham, "Breach of Contract, Damage Measures, and Economic Efficiency," *Rutgers Law Review* 24 (1969): 273.

[77] Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, CT: Yale University Press, 1979). See also Charles Barzun, *Catharine MacKinnon and the Common Law* (unpublished manuscript).

[78] Duxbury, *Jurists and Judges*, 47–59, 61–115.

[79] The partial dependence of the law in force on the practices of legal experts need not be fully transparent within legal argument. It might also be the case that direct reference to the practices of experts is not an appropriate legal argument within a certain jurisdiction—even if those practices, as I am arguing, partly determine what the law is.

[80] Paolo Sandro, *The Making of Constitutional Democracy: From Creation to Application of Law* (Oxford: Hart Publishing, 2021), 50–55; Aldo Schiavone, *The Invention of Law in the West* (Cambridge, MA: Harvard University Press, 2012).

[81] See Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 1982), 347. The "to some extent" marks a significant difference between my account and Fish's.

[82] On juristocracy, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2009). My understanding of juristocracy here is broader than Hirschl's.

legal experts' consensus and on the relative stability of their commitments.[83] Again, legal expertise is dynamic and subject to change over time—and the law in force might change as a consequence of changes in the content of legal culture. Because of this, a crucial difficulty will be that of distinguishing between legal arguments that are implausible because they fail to grasp the content of the culture of legal experts, and legal arguments that push the boundaries of plausibility and successfully achieve a change in the content of legal culture. Prospectively, the distinction will be hard to make. Retrospectively, the distinction will be made possible by the force of facts—more particularly, of facts regarding the changes in views and commitments of the class of legal experts. From this retrospective view, there isn't much more to say—at least as a theoretical matter—than, as Hart once put it, what counts as success turns on what in fact succeeds.[84]

A second—and perhaps more jurisprudentially important—implication is the following. It is common for some legal theorists to argue against legal positivism on the basis of certain observations about the phenomenology of legal argument. Judges and lawyers sometimes appeal to moral considerations and "principles of natural justice" in the context of deciding or arguing particular cases.[85] These types of arguments have been prevalent at least in some legal systems at certain times. Stuart Banner, for instance, has traced the rise and decline of appeals to "natural law" in American judicial reasoning.[86] According to Atiq, this fact suggests that legal positivism faces an important problem: it seems to go against the recognition by legal experts of morally valid rules that are treated as valid sources for legal decision-making simply because of their moral validity.[87]

The account of legal expertise offered so far can deflate this challenge.[88] Indeed, the legal positivist can acknowledge that legal reasoning in a particular legal system requires moral judgment and appeals to moral considerations without the mediation of an habilitating legal text, and that these moral considerations can be meaningfully thought of as part of the law, *given* the views and commitments of legal experts (including their views and commitments about the nature of law and legal reasoning). But the legal positivist can also show how, to the extent this is the case, it is a contingent feature of particular legal systems that turns on questions of social fact (namely, on whatever the commitments and views of legal experts happen to be). The views legal experts might have about the nature of law and about the legal significance of moral judgment are themselves a contingent aspect of legal practice that partly determines the content of law in that legal system and can be explained by reference to social facts.[89]

Whether the positivist view is ultimately right about the grounds of legal validity and the nature of law is, of course, a separate question. All that I mean to suggest here is that an adequate grasp of legal expertise offers legal positivists an easy way to defuse this particular challenge from the practice of legal argument. Indeed, on this view, references to moral considerations as part of the law do not change the nature of law; they are merely features of legal culture and legal expertise, which themselves can be explained exclusively by reference to social facts.[90] This approach would also have an important virtue: it does not need to suggest that lawyers and judges are collectively

[83] From this perspective, Dworkin was right when he noted—in criticizing Stanley Fish—that, in cases of fundamental disagreement, the mere consensus of interpretive communities will not help us adjudicate between competing interpretations within that community. Dworkin, *Law's Empire*, 425–26 fn 23.

[84] Hart, *The Concept of Law*, 153.

[85] A classical example is Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978). For more recent discussion, see Atiq, "Legal Positivism and the Moral Origins of Legal Systems"; David Plunkett and Tim Sundell, "Antipositivist Arguments from Legal Thought and Talk," in *Pragmatism, Law, and Language*, ed. Graham Hubbs and Douglas Lind (London: Routledge, 2014), 56–75.

[86] Banner, *The Decline of Natural Law*. See also Atiq, "Legal Positivism and the Moral Origins of Legal Systems," 43–50; Helmholz, "Continental Law and Common Law."

[87] Emad H. Atiq, "There Are No Easy Counterexamples to Legal Anti-Positivism," *Journal of Ethics and Social Philosophy* 17, no. 1 (2020): 18.

[88] There are, of course, other possible ways of deflating it, such as Plunkett and Sundell's reinterpretation of these instances as cases of metalinguistic negotiation. For this account (along with discussion of other positivist responses), see Plunkett and Sundell, "Antipositivist Arguments from Legal Thought and Talk."

[89] This thesis can be read, in a way, as taking up Plunkett and Wodak's suggestion that different theories of law might be discussing different aspects of legal reality. David Plunkett and Daniel Wodak, "The Disunity of Legal Reality," *Legal Theory* 28, no. 3 (2022): 235–67.

[90] On this explanatory reductivism, *see* Andrei Marmor, "Farewell to Conceptual Analysis (in Jurisprudence)," in *Philosophical Foundations of the Nature of Law*, ed. Wilfrid J. Waluchow and Stefan Sciaraffa (Oxford: Oxford University Press, 2013), 209.

mistaken about what it is they are doing when they decide cases by treating moral considerations as legally relevant.[91]

C. Beyond Text

As I have argued, legal expertise involves a grasp of certain habits, commitments, and values that determine what is and what is not a good legal argument.[92] It is primarily a grasp of the deep structure of a particular legal culture.[93] Because they have this grasp, legal experts can identify the sources of law in their legal system and know how to derive legal norms from them.[94] Law in contemporary societies characterized by the presence of legal experts is thus, at least to some extent, a form of what Coke called "artificial reason."[95]

Part of this artificial reason involves the development and use of techniques, conceptual taxonomies, and argumentative tools that go beyond—and sometimes are simply inconsistent with—the mere ascertainment of the communicative content of legal texts.[96] Legal expertise involves the acquisition of concepts and tools that are learned in the practice of legal reasoning.[97] Legal concepts are not merely technical terms, but inferential links in chains of argument the content of which is partly determined by the internal legal culture.[98] By the same token, legal expertise is not just a facility in the use of technical legal language. The critique of the torture memos cannot be reduced to a claim of linguistic incompetence.

This observation does not deny that legal norms are closely connected to language. Legal interpretation usually begins with linguistic entities—words and sentences contained in authoritative legal texts, which are usually the object of legal interpretation.[99] But the outputs of legal interpretation are legal norms. The movement from authoritative legal texts to legal norms is a complex process of cultural construction thar goes beyond the ascertainment of communicative content.[100] Legal norms are certainly expressed and articulated through language. Language is therefore the medium of legal argument. But, at the most basic level, while legal norms are in many situations derived from written texts and can be expressed linguistically, they are not linguistic entities.[101] In fact, some law is simply unwritten,[102] and part of the explanation for this phenomenon is that many aspects of legal culture that impact the content of law are independent from the ascertainment of the communicative content of legal texts.[103] At least in complex legal systems, facts about the communicative content of legal texts are not sufficient to exclusively and fully determine the content of the law.[104] Legal norms can thus diverge from the communicative content of legal texts, and this divergence is partly explained by legal experts' commitments, views, and values.[105]

On what we could loosely call an *originalist* view, the communicative content of legal materials like constitutions and statutes is fixed at the moment of enactment.[106] But, as we know from experience, legal norms derived from legal materials are not equally fixed at the moment of enactment.

[91] See Atiq, "Legal Positivism and the Moral Origins of Legal Systems," 53.

[92] Following James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press, 1985), xiii.

[93] See Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990), 5.

[94] Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), 36.

[95] See Fried, "Artificial Reason of the Law Or"; Schauer, *Thinking Like a Lawyer*, 2.

[96] See Benjamin Eidelson and Matthew Stephenson, "The Incompatibility of Substantive Canons and Textualism," *Harvard Law Review* 137, no. 2 (2023): 515–87. Regarding the rule of lenity, see Jeesoo Nam, "Lenity and the Meaning of Statutes," *Southern California Law Review* 96 (2022): 397.

[97] Lawrence B. Solum, "The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection," *Southern California Law Review* 61, no. 6 (1988): 1737.

[98] Brandom, "A Hegelian Model of Legal Concept Determination."

[99] Riccardo Guastini, *Interpretar y argumentar* (Madrid: Centro de Estudios Políticos y Constitucionales, 2021), 78. Similarly (although within a different theoretical picture), Sandro, *The Making of Constitutional Democracy*, 186–87.

[100] Alan Watson, "Legal Change: Sources of Law and Legal Culture," *University of Pennsylvania Law Review* 131, no. 5 (1983): 1153.

[101] Erik Encarnacion, "Text Is Not Law," *Iowa Law Review* 107 (2022): 2027. See also Greenberg, "The Standard Picture and Its Discontents."

[102] Stephen E. Sachs, "Finding Law," *California Law Review* 107, no. 2 (2019): 527–82.

[103] Llewellyn, *The Common Law Tradition: Deciding Appeals*, 214.

[104] See Greenberg, "The Standard Picture and Its Discontents."

[105] This and the following paragraphs owe much to conversations with Jeesoo Nam2.

[106] For an example of such a view, *see* Lawrence B. Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning," *Notre Dame Law Review* 91, no. 1 (2015): 1–78.

Instead, legal norms will be ascertained and determined by successive generations of legal experts, at different points in time, in different ways that can diverge from their original meaning. Legal norms might thus change without any variation in the text of formal legal materials.[107] Changes in the practices and understandings of legal experts help explain this form of legal change in the absence of formal amendment.

Of course, the *originalist* view might be wrong. On an alternative *dynamic* view, the communicative content of legal texts is not fixed at the moment of enactment but is partly a function of the (current) interpreter's context.[108] Still, even on this view, we can observe situations where the legal norms derived from authoritative texts diverge from (dynamically understood) communicative content. This happens when the majority of legal experts adopts an "originalist" approach towards the relevant text—ignoring relevant changes in context that (under this view) have modified the communicative content of the text. It also happens when a novel substantive or doctrinal argument that becomes widely accepted by legal interpreters suggests a change in legal norms even though the relevant context (outside of the change in legal experts' views) has not changed. Finally, it also happens when a judge must authoritatively determine the legal implications of an ambiguous statutory text.[109] That determination will be sensitive to, and guided by, the judges' grasp of the standards of legal culture that govern judicial decision-making.

Thus, whether we treat it as fixed or dynamic, the communicative content of legal texts is simply insufficient to fully determine, in and of itself, which legal norms will be deemed as part of the legal system by legal experts.[110] Of course, the practices and habits that constitute legal culture will themselves be reflected in texts—for instance, in judicial opinions or scholarly articles. But even at this stage, how all of these texts interact with each other to produce legal norms will be determined by considerations beyond those that pertain to communication. Texts and communicative acts are always important, but never sufficient as a conceptual matter for determining the content of law. Because of this, we should certainly accept that communicative and legal content might coincide, contingently, in a specific jurisdiction and time, given the methods used by legal experts to ascertain legal norms. And there might be very powerful normative considerations in favor of such coincidence.[111] Moreover, on any plausible view, the communicative content of legal texts makes a very significant contribution to the content of the law in force.[112] But, in the context of contemporary legal systems, legal norms can change even when facts about communicative content do not. The explanation for these changes in legal norms is at least partly provided by changes in the attitudes, commitments, and values of legal experts, and by the role these play in determining legal content.

II. IS LEGAL EXPERTISE EPIPHENOMENAL?

A. A Potential Concern

One potential concern with the argument so far might be that, by characterizing legal expertise as a grasp of the deep cognitive structure of the law and treating that structure as one characterized by the presence of principles and standards, I have obviated a real possibility. Acculturation into legal practice might help legal experts anticipate decisional patterns that are not driven by any underlying set of specifically legal reasons—including the aspects of legal culture that contribute to determine the content of the law. Instead, the relevant patterns might be better explained and anticipated by predictable cognitive biases, ideological commitments, or historical path dependencies.

This concern captures something important. Participation in legal practice can make legal experts aware of aspects of the practice that might be explained by factors that go beyond the

[107] Encarnacion, "Text Is Not Law"; Maris Köpcke, *Legal Validity: The Fabric of Justice* (Oxford: Hart Publishing, 2019).

[108] This view can be seen as a reconstruction of William N. Eskridge Jr., "Dynamic Statutory Interpretation," *University of Pennsylvania Law Review* 135, no. 6 (1987): 1479.

[109] On this issue, see Jeesoo Nam, The Separation of Powers, Metaphysically (unpublished manuscript).

[110] Lawrence B. Solum, "The Interpretation-Construction Distinction," *Constitutional Commentary* 27, no. 1 (2010): 95–118.

[111] As the extensive literature arguing for textualism on normative grounds suggests.

[112] As recognized by Greenberg, "The Standard Picture and Its Discontents."

public and official narratives and justifications offered by participants in the practice at any given point in time. In simple terms, participating in legal argument can make one aware of the extra-legal drivers of legal decision-making.

Here, though, we must bear in mind the prevalence of reason-giving in contemporary legal systems, and particularly one manifestation of it: criticism on the basis of legal reasons is a common way of engaging in the practice of legal argument. It is certainly plausible that effective litigators, for instance, will have a sense of the non-legal drivers of legal decision-making. But, at any given point in time, the legal culture will have its own "official story" of what counts as an acceptable legal reason.[113] A good litigator, for instance, can both anticipate legal outcomes driven by non-legal factors *and* legally evaluate and criticize these outcomes based on distinctively legal considerations, *qua* legal expert.

B. Empirically Grounded Doubts

In and of itself, though, this response is insufficient, because the concern is premised on a previous and more damaging worry. That worry is that legal expertise is causally irrelevant in legal decision-making. The fact that lawyers and judges have a grasp of the deep structure of the law—along with their knowledge of legal sources and mastery of certain forms of reasoning—would not matter for how they resolve or decide particular cases. The concern, thus, leads us directly into questions about the causal impact of legal expertise on legal decision-making—i.e., how much legal expertise can causally impact the decision of actual cases in the real world.

It is important not to exaggerate the skepticism driving this concern. The claim is not that, as a metaphysical matter, legal reasons grasped by legal experts never warrant a specific outcome in particular cases. It is, thus, not a radical indeterminacy claim.[114] It could very well be the case that there are legally correct answers for many questions. And it could also be the case that, at least in many instances, legal experts can identify those answers. The concern I have in mind does not focus on these questions, but rather on whether legal expertise can causally impact decision-making and lead to legally correct decisions. The question is whether legal expertise has an impact on how legal experts think about and decide legal disputes—not whether there are legally correct decisions that experts could be justified in identifying as such by relying on their expertise.[115]

The concern is not implausible. There is a long tradition in the empirical study of judicial behavior suggesting that, at least in appellate litigation in the United States, the decisions of judges are better explained by extra-legal factors—particularly political ideology—than by legal reasons.[116] The claim is not that judges do not use their legal expertise, but rather that they merely use it to provide *ex post* justifications for decisions that are better explained, causally, by ideology or other extra-legal factors. The most plausible strand of this literature acknowledges that there are legal and institutional constraints on judicial decision-making. It simply observes that factors like labor incentives, panel composition, and particularly political preferences might play an even stronger causal role.[117]

This work raises important questions about the causal impact of legal expertise, at least within judicial decision-making. There are familiar reasons, however, not to be too pessimistic. First, studies focusing on litigated disputes tell us something about those disputes—but litigated disputes are not a representative sample of *all* legal disputes (much less of *all* instances of law-application).[118] Legal expertise might have an impact on legal advice and the extra-judicial settlement of

[113] Baude and Sachs, "The Official Story of the Law."

[114] For a critical overview, see Jules L. Coleman and Brian Leiter, "Determinacy, Objectivity, and Authority," *University of Pennsylvania Law Review* 142, no. 2 (1993): 549–637.

[115] For a similar distinction, see Brian Leiter, "Legal Indeterminacy," *Legal Theory* 1, no. 3 (1995): 482.

[116] See, e.g., Jeffrey A. Segal et al., "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited," *The Journal of Politics* 57, no. 3 (1995): 812–23; Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002); Jeffrey A. Segal, Harold J. Spaeth, and Sara C. Benesh, *The Supreme Court in the American Legal System* (Cambridge: Cambridge University Press, 2005).

[117] See Tracey E. George and Lee Epstein, "On the Nature of Supreme Court Decision Making," *The American Political Science Review* 86, no. 2 (1992): 323–37; Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, MA: Harvard University Press, 2013); Cass R. Sunstein et al., *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Washington, DC: Brookings Institution Press, 2007).

[118] George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," *The Journal of Legal Studies* 13, no. 1 (1984): 4.

disputes, even if its impact on judicial decision-making is limited.[119] Second, even within judicial decision-making, results associated to federal appellate courts and to the Supreme Court might involve particularly unsettled and indeterminate legal questions.[120] Legal expertise might have a larger impact on the more ordinary disputes decided by lower courts.[121]

C. Legal and Extra-Legal Reasons

But the most important reason to be cautious about discounting the significance of legal expertise is the following. A particularly powerful motivation for skepticism about the impact of legal expertise seems to be the existing evidence about the impact of political views on judicial decision-making. But this motivation, it seems to me, rests on a too crude distinction between legal and moral/political reasons. Some forms of moral and political reasoning are, in fact, part of legal reasoning.[122] Not every political or moral consideration is necessarily an extra-legal consideration.[123] Law sometimes requires interpreters, explicitly or implicitly, to engage in moral reasoning.[124] In these cases, decision-making based on moral and political concerns is, in fact, allowed by law correctly interpreted.[125] Law allows for discretionary judgment, and only excludes certain answers.[126]

More importantly for our purposes, the very fact that the culture of legal experts makes a contribution to the content of the law, as we have seen, can explain why moral and political considerations might count as appropriate arguments in legal reasoning. In other words, the very practices of legal experts might make engaging in moral and political reasoning legally appropriate. As a general matter, moreover, which questions require moral reasoning and what answers are barred, when legal reasons run out and discretion kicks in, etc., are all questions that turn on legal interpretation and the *canon* of acceptable legal arguments—and therefore, on expert legal judgment. But when discretionary judgment is indeed legally appropriate, different lawyers and judges can reach different conclusions that are, at least *prima facie*, equally consistent with the law.[127] As I noted at the outset, some legal propositions are simply plausible. In these situations, legal disagreements about the correct outcome will legitimately turn on different views about the merits, which might themselves be correlated with different political and moral views.[128] Not every correlation between ideology and case outcomes undermines the causal role of legal expertise. The latter

[119] A potential objection here would be that, if legal expertise fails to significantly affect judicial decision making, then it would also fail to impact legal advice and settlement in the shadow of the law. I believe there is some merit to this objection. Note, however, that even if we assume that other extra-legal factors are driving judicial decision-making, those factors typically remain opaque in the public articulation of judicial reasoning. Thus, a lawyer trying to give legal advice would have no access to the extra-legal factors. The typical lawyer offers their legal advice starting from the official portrayal of judicial reasoning. That lawyer would then have to rely on their understanding of the content of the law and the relevant norms and standards as they appear in the official record of legal and judicial institutions, even if judges don't as a matter of fact decide on the basis of those reasons, or those reasons alone. Now, of course, and as I acknowledged above, a good lawyer might also be able to anticipate the non-legal factors driving judicial reasons and offer their advice on the basis of that and their understanding of the causal mechanisms involved in judicial reasoning. I don't exclude that possibility. My point here is merely that even if legal expertise played no role in judicial decision-making, it could still play a role in other forms of legal reasoning that lawyers routinely engage in (perhaps alongside with their engagement in prediction on the basis of extra-legal factors).

[120] Schauer, "Judging in a Corner of the Law," 1726–27.

[121] There can be additional degrees of selection bias when the focus is on the U.S. Supreme Court's decision-making, given the practice of *certiorari*. Jonathan P. Kastellec and Jeffrey R. Lax, "Case Selection and the Study of Judicial Politics," *Journal of Empirical Legal Studies* 5, no. 3 (2008): 409.

[122] Harry T. Edwards and Michael A. Livermore, "Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking," *Duke Law Journal* 58, no. 8 (2009): 1905–6.

[123] Michael A. Livermore, "Realist Lawyers and Realistic Legalists: A Brief Rebuttal to Judge Posner," *Duke Law Journal* 59, no. 6 (2010): 1192.

[124] To be clear, the observation that legal sources and legal practice might require moral reasoning is independent from the question about whether moral considerations are, metaphysically, part of the grounds of law. See Thomas Adams, *Criteria of Validity* (unpublished manuscript). This latter question is the subject of the Hart-Dworkin debate and the discussion between inclusive and exclusive legal positivism, and I remain neutral about it here. See Jules L. Coleman, "Negative and Positive Positivism," *The Journal of Legal Studies* 11, no. 1 (1982): 139–64; Dworkin, *Taking Rights Seriously*; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1983), 37–52; W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

[125] Dan M. Kahan, "'Ideology in' or 'Cultural Cognition of' Judging: What Difference Does It Make?," *Marquette Law Review* 92, no. 3 (2009): 416; Dan M. Kahan et al., "Ideology or Situation Sense: An Experimental Investigation of Motivated Reasoning and Professional Judgment," *University of Pennsylvania Law Review* 164, no. 2 (2016): 362; Raz, *The Authority of Law*, 195.

[126] See generally H.L.A. Hart, "Discretion," *Harvard Law Review* 127 (2013): 652–65.

[127] Charles M. Cameron and Lewis A. Kornhauser, "Rational Choice Attitudinalism?," *European Journal of Law and Economics* 43, no. 3 (June 1, 2017): 548; Kahan et al., "Ideology or Situation Sense: An Experimental Investigation of Motivated Reasoning and Professional Judgment," 360.

[128] Kahan et al., "Ideology or Situation Sense: An Experimental Investigation of Motivated Reasoning and Professional Judgment," 361.

might sometimes be legitimately connected to moral and political judgment, and the very conditions under which such connections are legitimate will turn in part on the views of legal experts.

This is particularly true in American law, which as a legal culture has been characterized for a long time by the view that law is an instrument to achieve social and political ends.[129] And it is particularly true in American constitutional law (the context in which skepticism arises, and where it might seem particularly compelling), which requires judges to directly interpret evaluative standards—like "equal" and "cruel"—contained in a sparse and relatively old text, to resolve cases with massive political implications. It is not surprising that legal reasoning in this area—which seems to showcase significant degrees of legal indeterminacy—is correlated with ideology.[130] In fact, according to at least some plausible views, resort to considerations of political morality might be precisely what's legally appropriate in this context.[131] Many disagree with such views, and think that putting judges in charge of deciding morally divisive constitutional issues is generally a bad idea.[132] And perhaps correlations between legal outcomes and ideology in this domain provide an additional reason to question judicial review and the position in which it puts judges to decide fundamental political questions. But it is not a reason to think that, across the board, legal expertise plays an irrelevant role in legal decision-making.

D. The Significance of Legal Expertise

As a more general matter, empirical inquiry is usually concerned with the impact of legal materials on decision-making. But legal materials always impact the *justification* of legal decisions.[133] This is particularly important in law because of the crucial role that reason-giving plays in this domain, at least in the context of complex contemporary legal systems. Thus, even if it were the case that judges only used their legal expertise to justify their decisions,[134] this would not entail that legal expertise is irrelevant.[135]

However, there is reason to think that the significance of legal expertise goes well beyond justification. For instance, it is plausible to think that sometimes legal expertise might override intuitive decisions;[136] and that engagement with legal doctrine[137] or the need to provide legal justifications[138] might dampen the effects of some biases. In line with these possibilities, recent experimental work suggests that judges and lawyers with diverse political views can converge on case outcomes and that expert legal judgment can counteract motivated reasoning.[139]

At a more general level, aspects of legal expertise can causally impact the overall legal outlook of any given legal decision-maker. Recall here that legal academics are an important part of the class of legal experts. When we learn what the legal rule or standard governing a certain situation is, we rely on legal scholars. The civil lawyer might say that the rule is found in the Code, and the common lawyer might say that the rule is stated in a certain case. But both will first learn the rule from legal scholars.[140] In American legal culture, judicial opinions are processed and simplified

[129] See generally Summers, "Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use."

[130] See Brian Leiter, "Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature," *Hastings Law Journal* 66, no. 6 (2015): 1601–16.

[131] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1999).

[132] See, e.g., Ryan D. Doerfler and Samuel Moyn, "The Ghost of John Hart Ely," *Vanderbilt Law Review* 75, no. 3 (2022): 769–822; Jeremy Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115, no. 6 (2006): 1346–1406.

[133] On the distinction between decision and justification, Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Palo Alto, CA: Stanford University Press, 1961), 16–17. See also Sandro, *The Making of Constitutional Democracy*, 110–15.

[134] Jerome Frank, "Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave like Human Beings," *University of Pennsylvania Law Review and American Law Register* 80, no. 1 (1931): 17–53.

[135] Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification*, 26–27.

[136] Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases," *Cornell Law Review* 93, no. 1 (2007): 3.

[137] Jessie Allen, "Doctrinal Reasoning as a Disruptive Practice," *Journal of Law and Courts* 6, no. 2 (September 2018): 215–36.

[138] Zhuang Liu, "Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China," *The Journal of Legal Studies* 47, no. 1 (2018): 83–118.

[139] Kahan et al., "Ideology or Situation Sense: An Experimental Investigation of Motivated Reasoning and Professional Judgment," 354–55.

[140] Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)," *The American Journal of Comparative Law* 39, no. 1 (1991): 22.

into a principle or rule in law school classrooms,[141] edited in casebooks,[142] and further manipulated by professors and students in articles and outlines.[143] This is basically the law that law professors teach, and that their students are expected to learn as part of their education. Today's lawyers and judges are yesterday's law students.[144] The shared practices, habits, commitments, and conventions of the community of legal scholars will be part of the unwritten but nevertheless legally significant commitments and norms that inform legal reasoning and decision-making, and that might play a causal role in the latter.

Of course, all of this is compatible with legal expertise not being able to play these roles in particularly contentious, politically significant, and ideologically charged cases.[145] But the more we move away from apex adjudication in highly contested constitutional cases, and the closer we get to the bread-and-butter activities of legal advice and ordinary adjudication, the more plausible these effects become.

As most strands of legal realism have been keen to highlight, there is much more than the content of the law and legal expertise that causally impacts legal reasoning and judicial decision-making.[146] And this, as we saw above, is precisely what the empirical study of judicial behavior shows. My aim in this section has not been to offer a complete rebuke of these claims. My more modest aim has merely been to argue that the assumption that legal expertise makes no difference at all is unwarranted—particularly for the types of cases most legal experts analyze and decide. This does not mean that legal expertise is the only driver of decision-making in the legal domain—an obviously implausible claim. The claim is merely that legal expertise is not causally irrelevant.

III. IS LEGAL EXPERTISE VALUABLE?

Let me turn now to questions of value. It's not obvious that, as a general matter, the existence of legal experts is morally valuable for every society.[147] In fact, it could be the case that, all things considered, a particular society would be morally better off without legal experts. It all depends on the particular circumstances. Nevertheless, I will argue in this section that, while contingent, our evaluation should consider at least two important moral benefits that generally come with legal expertise. I start, however, by motivating the claim that we shouldn't assume that legal expertise is generally and always valuable. I do so by considering, and rejecting, what might seem like an intuitive argument in favor of its value.

A. Expertise and Moral Judgment

One strategy for arguing that legal expertise is valuable would be to defend the claim that it is necessarily connected to moral expertise, or that it is just a type of moral expertise. Against this view, I believe there is no necessary connection between legal and moral expertise and that the former is not a type of the latter. Having a class of legal experts is not the same as having a class of moral experts.

To see why, consider the debate about philosophical expertise brought about by experimental philosophy, which uses empirical methods to investigate philosophical intuitions and the factors and mechanisms that underlie them.[148] Some experimental work suggests that intuitions about

[141] Thomas McSweeney, "English Judges and Roman Jurists: The Civilian Learning behind England's First Case Law," *Temple Law Review* 84, no. 4 (2012): 858.

[142] Frederick Schauer, "Opinions As Rules," *University of Chicago Law Review* 62, no. 4 (1995): 1472.

[143] McSweeney, "English Judges and Roman Jurists: The Civilian Learning behind England's First Case Law," 860.

[144] Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)," 349. See also Fábio Shecaira, *Legal Scholarship as a Source of Law* (Heidelberg: Springer, 2013), 44.

[145] Or in ordinary, low-stakes cases decided in the context of situations of radical political conflict and violence. *See, e.g.*, Moses Shayo and Asaf Zussman, "Judicial Ingroup Bias in the Shadow of Terrorism," *The Quarterly Journal of Economics* 126, no. 3 (2011): 1447–84.

[146] See, e.g., Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930).

[147] In this paper, I ignore the question of whether the acquisition of legal expertise is morally valuable for the individual agent.

[148] Stephen Stich and Kevin P. Tobia, "Experimental Philosophy and the Philosophical Tradition," in *A Companion to Experimental Philosophy*, ed. Justin Sytsma and Wesley Buckwalter (New York: John Wiley & Sons, Ltd, 2016), 5. See also Joshua Knobe, "Experimental Philosophy," *Philosophy Compass* 2, no. 1 (2007): 81–92.

philosophically important questions may be affected by multiple biases, and may thus be unreliable.[149] One response to this work argues that findings about non-experts' intuitions might not apply to professional philosophers, who possess professional skills that would allow them to apply general concepts appropriately,[150] avoiding the problems that affect lay intuitions.[151] Just like we would trust the scientific intuitions of professional scientists over those of lay individuals, the argument goes, we should trust the philosophical intuitions of professional philosophers even if we don't trust those of lay populations.[152] In the moral domain, for example, philosophical expertise might warrant our confidence in philosophers' moral intuitions.[153]

The parallel argument in the legal domain would be that legal expertise is somehow correlated with moral expertise, and therefore that legal expertise might warrant our confidence in legal experts' moral intuitions. In this aspect, though, empirical evidence suggests that legal experts are generally prone, just like laypeople, to be affected by cognitive biases.[154] Legal experts also seem to be as affected by their emotional responses to parties as non-experts.[155] More importantly, even if legal expertise could diminish or eliminate biases, the fact that a judgment is not affected by biases does not entail that it is morally correct.

It is of course true that legal expertise can make experts better at offering legal justifications or at thinking about legal questions. But this is a qualified sense of *better*, distinct from *morally better*. In fact, if the content of the law and the values of legal practice are morally unsound, legal expertise might hinder moral judgment. Being a legal expert involves a grasp of certain values.[156] But whether this brings legal experts' judgments closer to moral correctness will depend on the content of the law and the values of the specific legal culture,[157] as well as on what counts as morally correct (itself a difficult question). Thus, legal experts' *legal* intuitions might be more reliable than non-experts'. Whether legal experts' intuitions are morally better because of their legal expertise is an open moral question that can only be answered affirmatively in specific cases. There is no reason to think that legal expertise is conceptually or necessarily connected to moral expertise. This gives us at least a first reason to doubt that the presence of a class of legal experts is generally and always morally good for every society.

There is a potential non-positivist objection to this claim. If, as Greenberg argues, the content of law is grounded in moral facts and legal norms are a special class of moral norms, then legal expertise would be expertise regarding the content of the law *thus understood*—and would therefore just be knowledge about certain moral facts.[158] On this view, there would be a clear conceptual connection between legal and moral expertise.

[149] Jennifer Nado, "Philosophical Expertise," *Philosophy Compass* 9, no. 9 (2014): 631. See also Jonathan M. Weinberg, Shaun Nichols, and Stephen Stich, "Normativity and Epistemic Intuitions," *Philosophical Topics* 29, no. 1 (2001): 429–60; Joshua Alexander and Jonathan M. Weinberg, "Analytic Epistemology and Experimental Philosophy," *Philosophy Compass* 2, no. 1 (2007): 56–80.

[150] Timothy Williamson, *The Philosophy of Philosophy* (Wiley, 2007), 191. Similarly, Joachim Horvath, "How (Not) to React to Experimental Philosophy," *Philosophical Psychology* 23, no. 4 (2010): 464.

[151] Nado, "Philosophical Expertise," 632. See also Steve Clarke, "Intuitions as Evidence, Philosophical Expertise and the Developmental Challenge," *Philosophical Papers* 42, no. 2 (2013): 181–82. In principle, for this expertise defense to succeed, philosophers' intuitions would have to be, as a matter of fact, substantively more reliable than folk judgments. Jonathan M. Weinberg et al., "Are Philosophers Expert Intuiters?," *Philosophical Psychology* 23, no. 3 (2010): 333. But see Timothy Williamson, "Philosophical Expertise and the Burden of Proof," *Metaphilosophy* 42, no. 3 (2011): 221. However, the available evidence suggests that the intuitive judgments of philosophers are subject to similar issues to those affecting lay judgments, and therefore that the expertise defense lacks empirical support. Moti Mizrahi, "Three Arguments Against the Expertise Defense," *Metaphilosophy* 46, no. 1 (2015): 54.

[152] Steven D. Hales, *Relativism and the Foundations of Philosophy* (Cambridge, MA: MIT Press, 2009), 171–72.

[153] For an argument in favor of the moral expertise of moral philosophers, see Peter Singer, "Moral Experts," *Analysis* 32, no. 4 (1972): 115–17.

[154] See, e.g., Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Inside the Judicial Mind," *Cornell Law Review* 86, no. 4 (2001): 777–830. On framing effects, for instance, see Piotr Bystranowski et al., "Do Formalist Judges Abide By Their Abstract Principles? A Two-Country Study in Adjudication," *International Journal for the Semiotics of Law—Revue Internationale de Sémiotique Juridique* 35, no. 5 (2022): 1903–35.

[155] See Andrew J. Wistrich, Jeffrey J. Rachlinski, and Chris Guthrie, "Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?," *Texas Law Review* 93, no. 4 (2015): 855–924.

[156] Wendel, "The Craft of Legal Interpretation," 162.

[157] See Kimberley Brownlee and Richard Child, "Can the Law Help Us to Be Moral?," *Jurisprudence* 9, no. 1 (2018): 31.

[158] See Greenberg, "How Facts Make Law." For a related non-positivist view that might have a similar implication, see Scott Hershovitz, "The End of Jurisprudence," *The Yale Law Journal* 124, no. 4 (2015): 1160–1204. For Hershovitz's own account of the relationship between legal and moral expertise, see Scott Hershovitz, *Law is a Moral Practice* (Cambridge, MA: Harvard University Press, 2023), and particularly Chapter 7. Because I was only able to read Hershovitz's book manuscript after this paper was submitted for review and the completion of the peer review process, I cannot devote to his argument the attention it deserves here. But I engage

Even assuming the correctness of this type of jurisprudential view, under which the law is the set of moral rights, obligations, and privileges created by the actions of legal institutions, the claim that legal expertise is not necessarily connected to moral expertise can still be plausibly defended.[159] Under this non-positivist picture, the rights, obligations, and privileges that we have as a consequence of the actions of legal institutions are sensitive, precisely, to what those actions have been.[160] And the actions might be such that "any particular law, or legal system, might be wholly devoid of moral merit, or worse than that, morally repugnant."[161] In these conditions, it seems quite appropriate to deny the proposition that, as matter of conceptual necessity, experts in the analysis, interpretation, and systematic application of legal enactments that might be morally repugnant will therefore be moral experts. Even those who believe that legal norms are grounded in moral facts also accept they are grounded in social facts. Those social facts might be sufficiently bad that legal expertise does not lead to moral expertise in that particular case. In general, whether the social facts are bad enough to undermine any connection between legal and moral expertise will itself be a contingent question—and, at least conceptually, they could be bad enough.[162] This means that, even on this jurisprudential picture, there is no necessary connection between legal and moral expertise.[163]

B. The Limited Value of Legal Expertise

Now the claim that there is no necessary conceptual connection between legal and moral expertise is very different from the more ambitious claim that legal expertise is never morally valuable. At a general level, there are plenty of reasons to think that legal expertise might be valuable. For instance, a clear sense of what legal institutions require of us might be valuable even when those requirements are unjust. Similarly, the existence of legal experts might also make some of the formal *desiderata* of the rule of law easier to achieve in complex societies.[164]

But, at a similarly general level, there are also reasons to think that legal expertise might be morally costly or at least ambiguous. For instance, legal expertise can have a gate-keeping effect, excluding some arguments from consideration because they are, according to the class of legal experts, legally beyond the pale.[165] This might have salutary effects, but might also have costs, both in terms of excluding potentially valuable insights and in terms of descriptive legitimacy. Moreover, the existence of a specialized group of experts brings with it important moral risks of alienation and lack of social cohesion.[166]

The question of whether it's a good thing to have a class of legal experts is thus quite complex. But the contingent moral evaluation of legal expertise in specific legal systems must incorporate its benefits. And there is no reason to deny that some of these benefits might be present in many, and perhaps most, cases. Here I will mention two *pro tanto* moral goods that the existence of legal experts can generally contribute to societies. These *pro tanto* goods do not vindicate legal expertise in every possible context. They do not amount to a conceptual claim about the moral value, across the board, of legal expertise. But we should be careful not to overlook them.

with it in more detail in Felipe Jiménez, "Lawyers as Moral Experts? A Comment on Scott Hershovitz, *Law is a Moral Practice*" (unpublished manuscript).

[159] For a general account of Greenberg's view, see Mark Greenberg, "The Moral Impact Theory of Law," *The Yale Law Journal* 123 (2014): 1288.

[160] Greenberg, "How Facts Make Law," 1337.

[161] Hershovitz, "The End of Jurisprudence," 1194.

[162] A small wrinkle to this argument is the following. Greenberg believes that the rights and obligations generated by the actions of legal institutions are only part of the content of the law if they come about "in the legally proper way." This is meant to exclude cases in which the moral obligations generated by the actions of say, oppressive legal institutions, are obligations to resist that run in the opposite direction of the obligations generated in legally proper ways. Greenberg, "The Moral Impact Theory of Law," 1321–23. I find the idea of "legally proper way" somewhat mysterious (to be fair, Greenberg himself acknowledges that further work is needed to offer a complete account of what it means). But it would be implausible to think that the content of the law is just the set of rights and obligations generated by the actions of legal institutions that change things for the better. That would make Greenberg's theory unable to fit a lot of what we ordinarily take to be the (morally suboptimal) legal content of otherwise reasonably tolerable legal systems.

[163] There are other non-positivist views that could be brought to bear on this question, too, such as a more traditional natural law view. See, e.g., John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011). But it seems to me that those adopting traditional natural law views would be less inclined to deny the distinction between legal and moral expertise.

[164] On the rule of law, see Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964); Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law*.

[165] See Pozen and Samaha, "Anti-Modalities," 783–87.

[166] Ibid., 786.

i. Practical Learning

Participants in legal practice must face and deliberate about a great number of human interactions and conflicts. They do so with the aid of legal materials (statutes, precedents, codes, restatements, casebooks, treatises, and the like), legal concepts (like CONTRACT, CONSIDERATION, OFFER, ACCEPTANCE), and the values, standards, and commitments that constitute legal culture. The idea of *practical learning* suggests that, because of these repeated encounters with these conflicts with the aid of their expertise, legal experts might develop a certain ability to think about the practical questions involved. This phenomenon is not a guarantee that legal experts will get things morally right. But it could allow experts to develop an ability to grasp the significance of specific facts in particular situations, and to think about them in a way that can lead to forms of resolution that are at least workable and acceptable.

The idea is closely aligned to what Llewellyn once called "situation-sense,"[167] and to a thin and relatively formal version of the Aristotelian virtue of *phronesis* or practical wisdom.[168] Legal experts might just have more opportunities to exercise their ability to perceive the significance of particulars and to situate them within a larger systematic framework than most people—and this might help them to think about the issues involved in these particular cases.[169]

The idea so far might sound somewhat impressionistic. So let me give it some structure. Legal reasoning is, while distinct, a special case of practical reasoning.[170] More importantly, it is a type of practical reasoning embedded within a peculiar institutional framework, typically oriented towards forms of dispute resolution that give the affected parties a say (in the case of litigated disputes)[171] and towards practices of reason-giving and justification (both within and outside of litigation).[172] There is something important, according to this line of thought, about how legal reasoning fosters attention to particulars by reference to generally applicable concepts, reasons and standards, which themselves arise out of an incremental process of decision of similar types of cases—an observation that is particularly apt in the context of common law traditions.[173]

This idea of practical learning emphasizes how legal concepts and categories work as tools for practical reasoning, helping legal interpreters think about and decide specific cases.[174] They point interpreters towards the relevant aspects of concrete situations, helping them navigate their complexity.[175] Legal expertise is, from this perspective, a form of practical expertise that is useful for resolving complex questions under time and cost constraints.[176] On this view, legal categories and concepts are a tool for reducing and navigating the complexity of decision-making.[177] Moreover, these tools reflect decades, and sometimes centuries, of reflection about these problems.[178] Legal experts can see practically significant connections, premised on legal concepts and categories, between disparate situations that would be less obvious to the non-expert.[179]

Now the very features that give rise to practical learning might come with important moral costs. The legal materials and the history of the legal tradition might be such that participation in legal practice detracts from clear moral thinking. The institutional constraints on adjudication might in fact underplay or hide from view morally important questions that do not lend themselves to the bilateral, adversarial structure of litigation.[180] And the time and cost constraints

[167] Llewellyn, *The Common Law Tradition: Deciding Appeals*, 121–57.

[168] Aristotle, *Nicomachean Ethics*, ed. Robert C. Bartlett and Susan D. Collins (Chicago: The University of Chicago Press, 2011), 1140b5. For discussion of this analogy in the context of judicial craft, see Brett G. Scharffs, "Law as Craft," *Vanderbilt Law Review* 54, no. 6 (2001): 2263–69.

[169] Similarly, Pozen and Samaha, "Anti-Modalities," 783.

[170] Robert Alexy, "The Special Case Thesis," *Ratio Juris* 12, no. 4 (1999): 375. Similarly, Manuel Atienza, *El derecho como argumentación* (Barcelona: Ariel, 2006), 197.

[171] Lon Fuller, "The Forms and Limits of Adjudication," ed. Kenneth I. Winston, *Harvard Law Review* 92, no. 2 (1978): 364.

[172] Ibid., 366–67.

[173] Kwame Anthony Appiah, "Philosophy, the Humanities & the Life of Freedom," *Daedalus* 151, no. 3 (August 22, 2022): 187.

[174] Urbina, *A Critique of Proportionality and Balancing*, 154.

[175] Ibid., 156–57.

[176] Ibid., 163.

[177] Ibid., 164.

[178] Ibid., 169.

[179] Schauer and Spellman, "Analogy, Expertise, and Experience," 265.

[180] For reflection along these lines, see Jeremy Waldron, "Judges as Moral Reasoners," *International Journal of Constitutional Law* 7, no. 1 (January 1, 2009): 2–24.

that characterize legal decision-making today have also characterized it in the past. More importantly, as a matter of fact we know that the ideas and values of legal culture can have morally dubious histories: the doctrines of property are connected to slavery;[181] the central principles of international law, to colonialism;[182] etc. This is not to deny that these legal traditions might contain important insights; nor does it mean we should treat them as inevitably morally bankrupt. It simply suggests that practical learning is just one moral benefit of legal expertise, and that it might come entangled with important moral costs that are not severable from the rest of legal culture.

Still, it does seem plausible to think that the existence of a group of agents who repeatedly encounter practical problems of a certain type and resolve them by reference to a long tradition of systematic thought and reflection generates a *pro tanto* benefit.[183] This is the *pro tanto* benefit of workable and time-tested solutions to recurrent practical problems. While the solutions might miss the mark as a matter of morality, their existence is still morally valuable. This *pro tanto* benefit, again, must be weighed against other costs that come along with legal expertise and that might be entangled with legal experts' practical learning. But the benefit should not be discounted. It should always be one of the considerations in the moral evaluation of legal expertise in specific legal systems.

ii. Channeling Disagreement

Another limited, yet significant, moral benefit of legal expertise is connected to the channeling of disagreement. By this, I mean the value of having a set of publicly available and ascertainable legal reasons that can be used to govern, guide, or at least publicly justify the resolution of disputes, without replicating the language of fundamental moral and political disagreements. Societies need to preserve peaceful social life in the face of that disagreement, which means we need institutional mechanisms for channeling it. For that purpose, the shared language of law is morally valuable.[184]

On a quick glance, it might seem like this is not a feature of legal expertise but simply of law. Nevertheless, in any complex legal system, the norms and vocabulary of law will not be readily ascertainable by everyone. This means that the availability of and access to legal reasons and standards, and therefore to their use as a device for defusing conflict and channeling disagreement, will be somewhat restricted. In these conditions, the existence of a group of experts in ascertaining these reasons and standards will be a useful tool to allow law to fulfil this role and to mediate between laypeople and the complex body of legal norms. The fact that we possess publicly available, authoritative legal rules that will govern or at least justify the resolution of a dispute in any jurisdiction is an important moral benefit. But for that benefit to obtain, we will commonly require the existence of a group of agents with expert abilities to identify and apply those rules.

Some conflict is certainly necessary, and societies progress in part through social conflict.[185] But legal experts do not eliminate conflict—they simply help societies process conflict by deflating and channeling it, smoothing its rougher edges. Legal expertise does this by transforming fundamental moral and political conflicts into more manageable questions about the application of legal norms.

Again, just like in the previous case, this benefit is merely a *pro tanto* consideration in favor of legal expertise. The argument, thus, is limited: legal expertise serves an important moral function in the circumstances of moral and political disagreement. The full moral evaluation of legal expertise is inseparable from the moral evaluation of the substantive content of the law, the legitimacy of the state, and a host of other moral questions that depend on the specific circumstances.

[181] In the American context, Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106, no. 8 (1993): 1707–91.
[182] See James Thuo Gathii, "Imperialism, Colonialism, and International Law," *Buffalo Law Review* 54, no. 4 (2007): 1013–66.
[183] Urbina, *A Critique of Proportionality and Balancing*, 162.
[184] John M. Finnis, "Law as Co-Ordination," *Ratio Juris* 2, no. 1 (1989): 101.
[185] Nils Christie, "Conflicts as Property," *The British Journal of Criminology* 17, no. 1 (1977): 1-15.

CONCLUSION

Human beings are "animals suspended in webs of significance."[186] This is also true of legal experts and of the legal culture they are a part of. Legal argument takes place against a thick set of presuppositions, values, commitments, and conceptual tools.

Variations across legal systems, from this perspective, are not reducible to variations in legal texts. They are also variations in the structures of meaning that underlie law and that respond, in contemporary legal systems, to the differences in the commitments, values, and beliefs of different populations of legal experts.[187] Understanding legal norms requires situating them against the backdrop of specific historical and cultural practices.[188] What counts as a plausible legal argument within each of these settings is determined, in part, by the practices of lawyers, judges, and other agents involved in legal reasoning. So is the content of the law in force.

[186] Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures*, 1973, 5. This section paraphrases and builds upon Felipe Jiménez, "Understanding Private Law," in Methodology in Private Law Theory: Between New Private Law and Rechtsdogmatik, ed. Thilo Kuntz and Paul Miller (Oxford: Oxford University Press), 92.

[187] Perelman, *Justice, Law, and Argument. Essays on Moral and Legal Reasoning*, 131.

[188] Pierre Legrand, "The Impossibility of Legal Transplants," *Maastricht Journal of European and Comparative Law* 4, no. 2 (1997): 116. See also Van Hoecke and Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law," 498.

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