

ACCORDING TO LAW

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What we ought to do, according to law, isn't always what we ought to do, given the existence of law. Sometimes we need to know what a legal system says we should do, under rules prevailing in a certain time and place. And sometimes we need to know what we should actually do, in the moral circumstances this legal system presents.

Many fights between positivists and natural lawyers result from muddying these two inquiries. But we have good reasons, intellectual and moral, to keep them distinct. Even if prevailing social rules have no moral force of their own, those who make claims about them still owe their audiences a moral duty of candor. And the stronger our moral commitments, the more we ought to approach existing legal systems warily.

Insisting that the law already reflects good morals can blind us to some very real flaws in our prevailing rules—and to the need for some very hard work in reforming them. To this extent, common-good-constitutionalist claims too often have all “the advantages of theft over honest toil”: they can lead us to wish away precisely those disagreements and failings that make social and political institutions so necessary.

As a legal positivist—indeed, an originalist—asked to address a symposium on common good constitutionalism, I feel somewhat like a giraffe being asked to address a meeting of the American

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Chemical Society. Despite a keen sense of being somewhat out of place, I hope I can nevertheless be useful here, offering a view from the sidelines.

As one might expect, I see common good constitutionalism as getting some important things wrong. I won't address specific disagreements with Professor Adrian Vermeule's instantiation of the theory; I've already written about those at length in a book review with Professor William Baude,¹ and I see no need to repeat them here. I also won't say much about the details of the American constitutional order—whether our system is originalist, what that might mean, and so on.²

Instead, I want to lay out some basic intuitions of those who might be critical of the common-good project, along with some of the disagreements they might have with common good constitutionalism—or, indeed, with any theory that rests partly on natural law. (I don't claim any theoretical novelty for these reflections, which are likely familiar to many of you. But they may not be familiar to everyone, and either way, we shouldn't lose sight of them.)

My most basic disagreements with the common-good project are disagreements about *is* and *ought*. Sometimes we want to know what an existing legal system, in all its complexity, *says* we should do. At other times we want to know what, in the circumstances presented by that legal system, we should *actually* do. Or, to put it another way, sometimes we ask what we ought to do *according to* a legal system, and sometimes we ask what we ought to do *given the existence of* that legal system.

The first kind of question is fundamentally about complex social and political facts—facts “about the opinions and practices of a set

1. William Baude & Stephen E. Sachs, *The “Common-Good” Manifesto*, 136 HARV. L. REV. 861 (2023) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

2. See generally Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015).

of persons at some time.”³ To know the rules that prevail in a certain society and in a particular time and place, you need to know the beliefs and behavior of the people who live there. The second kind of question is fundamentally about the “good reasons for action” we might have.⁴ To know what we should actually do, you need to know the truth about matters of morals, as applied to the circumstances under which we act.

Unfortunately, many people mix up these two questions, which has led to an epidemic of people talking past each other. The positivists who separate law and morals aren’t all ignoring morality or dismissing it as relative. They might instead be offering a burning moral *critique* of our legal rules, or just distinguishing which social rules do or don’t ask about our good reasons for action (say, granting leave to amend complaints “when justice so requires”⁵). And the natural lawyers who say things like “an unjust law is no law at all”⁶ aren’t all ignoring the Constitution, deciding cases however they like. They might instead be arguing that not all laws bind equally in conscience, or just recognizing that our good reasons for action, according to our role moralities as citizens or as officials, are partly shaped by what social rules lead everyone else to expect of us.⁷

But at their core these two inquiries, into social rules and into reasons for action, are still distinct. They ask about different things, they look to different sources, and they often generate different answers.

Given these differences, my message is partly one of peace and reconciliation. Why do positivists and natural lawyers have to fight all the time? Can’t we both declare victory and go home? Can’t we

3. John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1603 (2000). On claims (such as Ronald Dworkin’s) that even this first kind of question looks to more than social and political facts, see *infra* text accompanying notes 27–34.

4. Finnis, *supra* note 3, at 1604.

5. FED. R. CIV. P. 15(a)(2).

6. Brian Bix, *Natural Law Theory*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 209, 214 (Dennis Patterson ed., 1996).

7. *Id.* at 213–15.

be interested in social and political facts, and *also* in good reasons for action, and just keep things straight in our heads as we go?

In this peace settlement, some people could use the word “law*,” with one asterisk, to talk about rules put forward by social and political arrangements in a particular time and place. Other people could use the word “law**,” with two asterisks, to talk about the good reasons for action we’d actually have under the circumstances. If we hear the right number of asterisks in our heads whenever we hear someone talking about “law” *simpliciter*—something I hope you’ll do when I use the term here—we won’t talk past each other, and hopefully we’ll be able to agree on every question of substance.

But this effort to keep things straight—the “separation of law and morals”⁸—is something that supporters of the common-good project might contest. They might object to the idea that one can speak of law, with *any* number of asterisks, as ultimately based on social or political facts.⁹ Their objections might come in at least three different kinds.

First, looking to social and political facts might leave you unable to identify or even to *understand* the law. If you leave out the moral point of having a legal system, you’re not going to understand that system very well. Sticking to social facts means that you can’t figure out the law whenever the positive law is ambiguous, or whenever your social rules run out.

Second, even if you could derive law from social and political facts, you might have no reason to *care* about it. Social rules are morally arbitrary. Knowing that a society approves or disapproves of something, or formally licenses or prohibits it, is “normatively inert”:¹⁰ it might not give you any reason for action or tell you what

8. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958).

9. See, e.g., VERMEULE, *supra* note 1, at 179 (describing such a division of labor as a “positivist misconception”).

10. See John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 202 (2001); cf. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 114 (2016) (critiquing positivism on these grounds).

you really ought to do. And if law is all about telling you what you really ought to do, then social and political facts can't be all there is to the law.

Third, trying to reduce law to social and political facts might itself be a moral failing, evidence of a personal lack of *commitment* to morals. Only someone unswayed by moral arguments, one might say, could rest content with law's ignoring those arguments—adopting a false Stephen-Douglas-style neutrality, leaving burning questions like slavery up to the vagaries of popular sovereignty or state constitutions.¹¹ Treating law's content as a social and political matter, not a moral one, allegedly shows a deliberate indifference to morals.

Today I want to defend from each of these objections the peace settlement I sketched out earlier.

First, the advantage in *understanding* law may in fact go the other way. We may get more analytic clarity—and just make fewer intellectual errors—if we treat what's to be done *according to* a particular legal system, and what's to be done *given the existence of* that legal system, as fundamentally separate questions.

Second, if separating these questions is analytically useful, then we have plenty of reason to *care* about it. The social side of law “may not have a claim to our obedience, but it certainly has a claim to our honesty.”¹² People who make claims about the law, whether judges, lawyers, scholars, or ordinary citizens, have a moral duty to try to get them right. That sometimes means keeping law's social side and its moral side distinct. If we're going to be candid with our audience, then we ought to be careful not to deceive them, such as by referring to “law**” with two silent asterisks when our audience thinks we're using only one.

11. See *The End of Originalism*, IUS & IUSTITIUM (Dec. 7, 2021), <https://iusetiustitium.com/the-end-of-originalism/> [https://perma.cc/3V5H-UW3Q]; Pat Smith, *Little Giant Constitutionalism*, IUS & IUSTITIUM (Dec. 8, 2021), <https://iusetiustitium.com/little-giant-constitutionalism/> [https://perma.cc/5M72-57HQ].

12. Stephen E. Sachs, *The Law and Morals of Interpretation*, 13 DUKE J. CONST'L L. & PUB. POL'Y 103, 111 (2018).

Third, we should be careful not to let a debate over law's nature devolve into a strange one-upsmanship over *commitment*—that is, over who's really hardcore about morals. The strength of our moral commitments might be precisely *why* we'd approach legal systems warily, taking them to be artificial systems of norms, and perhaps not very good norms. As C.S. Lewis pointed out, there's a moral danger in "any attempt to make our intellectual inquiries work out to edifying conclusions"; "[t]hat would be, as Bacon says, to offer to the author of truth the unclean sacrifice of a lie."¹³ Insisting that the law reflect good morals can blind us to the very real flaws of our one-asterisk legal system—and to the need for some very hard work in reforming it. In this respect, common-good-constitutionalist claims too often have all "the advantages of theft over honest toil";¹⁴ they lead us to wish away precisely those disagreements and failings that make social and political institutions so necessary.

I.

A.

Let's begin with the first objection, on identifying and understanding the law. Often, contrasts between social rules and natural law tend to focus on epic conflicts of law and morals: slavery, or Nazi law, or so on.¹⁵ But consider a more pedestrian example, a literally pedestrian example, namely jaywalking:

Through no fault of your own, you find yourself running late to attend a friend's surprise birthday party. Arriving too late could mean letting down your friend, if not spoiling the surprise. You come upon a "Don't Walk" signal on an empty street in broad daylight, with no traffic to endanger anyone and no

13. C.S. LEWIS, *Learning in War-Time*, in *THE WEIGHT OF GLORY* 43, 49 (1949).

14. BERTRAND RUSSELL, *INTRODUCTION TO MATHEMATICAL PHILOSOPHY* 71 (1919).

15. See, e.g., Hart, *supra* note 8, at 619 (Nazi law); see generally Anna Lukina, *Making Sense of Evil Law* (Univ. Cambridge Faculty of Law, Research Paper No. 14/2022), <http://ssrn.com/id=4180729> [<https://perma.cc/ZS3S-3ACX>].

impressionable children to scandalize. Should you jaywalk across the street to get to the party on time?

According to the American legal system, the standard answer is no. Jaywalking is generally prohibited. The fact that it's perfectly safe in your case is generally no excuse, and neither is your running late. Every state might recognize a necessity defense, but none might extend so far as a late-for-the-party defense. No judge, no police officer, and no defense lawyer could honestly conclude that your legal duty not to jaywalk has been suspended or overridden.

At the same time, what you ought to do, *given the existence of* the American legal system, is nonetheless to go ahead and cross the street. We might owe some deference to the rational ordinance, formally promulgated by those with care of the community, that restricts jaywalking in service of the common good.¹⁶ And we might understand that the legal system has excellent reasons for narrowing the necessity defense: if we had to hear your story about being late to a party, we'd have to listen to everyone else's sob story too, and we'd never hear the end of it. But none of this outweighs *your* ordinary reasons in favor of crossing the street, the reasons that determine what *you* should actually do.¹⁷

(Maybe you disagree; maybe you'd say people should never jaywalk, because legal duties always outrank mere personal concerns like your friend's party. But then change the example slightly: say, that you're running late to appear in court to represent a client as appointed counsel. You might have a legal duty to appear in the courtroom on time; still, there's no getting out of the ticket. Or if you don't like that example, choose another. All that matters is that the necessity defense might fail to cover *every* case in which jaywalking is the moral answer.)

16. Cf. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I-II, q. 90 art. 4 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1265–1274) (defining "law" along these lines).

17. Cf. Hasan Dindjer, *The New Legal Anti-Positivism*, 26 *LEGAL THEORY* 181, 188–89 (2020) (presenting similar cases).

We can pose similar dilemmas for officials charged with enforcing the law. If police officers see you and hear your story, maybe they really *ought* to let you off with a warning. If you're brought before a judge, maybe the judge really *ought* to find some tenuous reason to dismiss your case. Or maybe not: maybe, given the role morality of police officers and judges, they ought to apply the law to you in all its exacting majesty. But either way, those moral questions about how officials should really act aren't the same as the question of what the law tells *you*, the pedestrian, to do. And they're not even the same as the question of what the law tells the *officials* to do. (Maybe the law requires ticketing every jaywalker, but this is a "jaywalking case" for police officers too.)

To be clear, this jaywalking example doesn't prove positivism true, or natural law false, or anything like that. But it does show that there's some analytic use to distinguishing what you ought to do, *according to a particular legal system*, from what you ought to do, *given the existence of that legal system*. The legal system takes a certain point of view on how people should act, and its point of view sometimes turns out to be wrong.

And once you admit a distinction like this, the first argument against the peace settlement mentioned above seems substantially weaker. Everyone can understand that the law forbids jaywalking, and also that we sometimes have good reasons to break it. In such cases it doesn't help to see "the law of a particular community precisely as . . . good reasons for action,"¹⁸ in the two-asterisk sense, because here our good reasons for action tell us not to follow the law. We can't say that the law forbids jaywalking only when jaywalking is *actually* wrong: that would make a hash of the necessity defense. And we can't say that the law forbids jaywalking only when it makes jaywalking *a little bit* wrong, or wrong all-else-being-equal: any old one-asterisk social rule can do *that*.¹⁹

18. Finnis, *supra* note 3, at 1604.

19. Cf. Emad H. Atiq, *There Are No Easy Counterexamples to Legal Anti-Positivism*, 17 J. ETHICS & SOC. PHIL. 1, 6 (2020) (arguing that "if a rule is widely accepted, then quite

Instead, if we want to tie law to good reasons for action, then we'll need to know why some of our good reasons for jaywalking provide a legal defense while other, similarly good reasons don't. The simplest explanation seems to be the one-asterisk explanation: that our system happens to select only some reasons as legal defenses, and we make our moral choices with that in mind. If we're just trying to understand what's going on, it seems simpler to say that we identify the single-asterisk rules first, and then figure out whether we should actually comply with them. By contrast, it just seems backwards to say that we can understand the scope of a jaywalking ban only once we've identified our good reasons for obeying it.²⁰

B.

If all this is right, it casts some of the objections above in a new light. Consider the claim that the *point* of a legal system is to promote human flourishing—and that, if we don't understand this goal, we can't really understand the law.²¹ That's fair enough, as far as it goes; any good social scientist ought to consider what a given social institution means to the people who live under it, what they think it's supposed to achieve.²² Maybe we can't really understand a jaywalking ban without knowing about traffic, or public safety, or the value of human life. But that wouldn't make the scope of the ban reflect whatever balance of these interests *actually* serves

plausibly there is always some moral reason for agents to follow it, albeit a very weak reason").

20. Cf. Larry Alexander, *In Defense of the Standard Picture: The Basic Challenge*, 34 *RATIO JURIS* 187, 198 (2021) (rejecting the view that "the provisions in the Constitution creating Congress, or the statutes creating administrative agencies, are laws only by virtue of their moral impacts," in favor of the view that "these norms have the moral impacts they have *because they are laws*"); Dindjer, *supra* note 17, at 200–09 (discussing failed efforts to demarcate legal obligations from moral ones).

21. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 16–17 (1980).

22. See Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 *AM. J. JURIS.* 17, 43 (2003) ("[T]o account for the extension of a [concept] . . . that figures in the *evaluations* of agents who employ the concept[,] we must attend (descriptively) to *their* evaluative practices.").

human well-being. It might just reflect whatever seemed like a good idea at the time.

The same goes for other systems of norms, each with their own point of view. We can talk sensibly about what one ought to do *according to* the law of modern Brazil or of Meiji Japan, *according to* the social mores of Regency England or ancient Rome, *according to* the standard rules of chess or dodgeball or the dress code of the Oxford-Cambridge Club, and so on.²³ Understanding these systems sometimes involves understanding the goals, beliefs, or desires of the people taking part in them. Maybe the point of Regency social mores was to help the English act rightly in a certain kind of hierarchical society; without knowing that, we couldn't get a good grasp on what Regency social mores were. Yet if you wanted to know what Regency social mores were, knowing what would *actually* have helped the English act rightly wouldn't be very useful. Instead, you'd want to know what English people back in the Regency period *thought* would help them act rightly. Maybe they were all wrong about acting rightly, and so they had lousy mores!²⁴

Each of these different norm systems gives an account of how people ought to act. But we don't have to acknowledge these accounts as true, or even plausibly true, to make truth-apt claims about what they'd recommend in particular cases—"detached" statements, as Joseph Raz put it.²⁵ Or, to repeat our formula above: to figure out what someone ought to do *according to* these systems, we don't need to know what anyone really ought to do, *given the existence of* these systems. Instead, what lets us identify a particular norm as being among the social mores *of* Regency England, or among the rules *of* chess, or *of* dodgeball, are presumably facts about how these different systems are understood in the actual communities in which they're practiced.²⁶ We might well come up

23. See Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 553 (2019).

24. Cf. Leiter, *supra* note 22, at 35–37 (making a similar argument regarding cities).

25. JOSEPH RAZ, *Legal Validity*, in THE AUTHORITY OF LAW 146, 153 (1979).

26. See William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178, 181–82 (2023).

with better norms, but not with better candidates for being *their* norms. And if that's true for games or Regency mores, then it also seems likely for (one-asterisk) American law.²⁷

Here the common good constitutionalist might offer three different responses. One response would accept these one-asterisk accounts as good enough for frivolous things like social mores or chess or dodgeball, but not for serious business like law. But that response needs a missing account of *why* legal systems are so different from other systems of norms—which can also vary from place to place, which are also used to serve important moral purposes, and which can also be of enormous moral interest, with plenty of people killed for violating them. (“[T]hink of the *code du-ello*, or ‘honor killings,’ or the bloody unwritten rules of Jim Crow.”²⁸) Insisting that some norms can be fully understood by facts about the society in which they're held, but that other norms also held there can *never* be so understood, seems unmotivated and peremptory. It also seems inconsistent with the fact that different societies use legal systems in many different ways, as just one means of regulating conduct among others.

A second, more interesting response would say that one-asterisk accounts are *always* insufficient—that *no* social system of norms, whether Regency mores or chess or dodgeball, can ever be understood without considering its actual moral aims and its actual moral standing. Even chess can give rise to hard-fought debates (say, whether formal tournament rules implicitly bar informal efforts to circumvent them), and people taking part in these debates will reliably make moral arguments.²⁹ But this response just proves how vast our “normative universe” turns out to be.³⁰ There are rules

27. See H.L.A. HART, *THE CONCEPT OF LAW* 140 (3d ed. 2012); Mitchell Berman, *Of Law and Other Artificial Normative Systems*, in *DIMENSIONS OF NORMATIVITY* 137, 138–39 (David Plunkett et al. eds., 2019).

28. Sachs, *supra* note 23, at 553.

29. See Adrian Vermeule, *Enriching Legal Theory*, *IUS & IUSTITIUM* (Nov. 4, 2022), <https://iusetiustitium.com/enriching-legal-theory/> [<https://perma.cc/FZAG-BFFX>] (discussing such a conflict in chess tournaments).

30. Berman, *supra* note 27, at 155.

of chess *tout court* (the number of pieces, the shape of the board); rules of informal or “casual, friendly chess”;³¹ house rules in particular families; rules of formal organizations that run chess tournaments; and so on, each with its own customary practices or written commands, and each giving rise to its own two-asterisk moral obligations, which players and fans have every reason to argue about. This ubiquity of moral argument over how people should act, *given* the rules, doesn’t show that the rules themselves depend on the right moral answers—much less that we need to know those right answers to act correctly *according to* the rules. Everyone in Regency England could have been all wrong about morality, but it’d be strange to argue that they could have all been wrong, all the way down, about how to act according to their own prevailing mores.³² And it’d be odd, too, to claim that chess-players, being morally fallible, could therefore all be wrong about the true number of squares.

A third response might let the social facts control in easy cases (such as the number of squares) but contend that moral facts show their influence whenever the rules are unclear. Hard cases, it’s said, show how we rely on “fit and justification”: say, seeking “reflective equilibrium among the point and purpose of all the written and unwritten rules of chess jointly and severally, and also among competing conceptions of sporting honor.”³³ But the relevant justifications needn’t always be the *right* justifications. If we needed to fill in the blanks of what to do according to Regency social mores, we might put ourselves in the shoes of a Regency-era Miss Manners—asking how *they* understood the point and purpose of their social mores, and not what the point and purpose of Regency social mores really *ought* to have been. There’s normative reasoning here, yes, but reasoning from their norms, not ours. So too for chess: the best

31. *Id.*

32. On the “all the way down” qualifier, see Stephen E. Sachs, *The ‘Constitution in Exile’ as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2268–72 (2014) (discussing global error).

33. Vermeule, *supra* note 29.

account of a particular tournament's norms (as distinct from how its players really ought to act) might involve a conception of "sporting honor" accepted within the league, not some idiosyncratic conception that we'd nonetheless defend as best. Our answer might be a better one, but it wouldn't be *their* answer, and it's *their* norms we're trying to apply.

The same response works for law. To quote H.L.A. Hart, judges facing unclear cases don't "just push away their law books and start to legislate without further guidance"; instead, they "proceed[] by analogy," invoking "principles or underpinning reasons recognized as already having a footing in the existing law."³⁴ An unclear negligence case, for example, needn't be resolved by looking for the moral principles found in "the best justification of negligence law as a whole," as Ronald Dworkin would have it.³⁵ Instead, we might seek out the best application of *conventional* principles figuring in the *accepted* justifications of negligence law—the principles that best fit our existing negligence law, whether or not they truly justify it. If, for example, the accepted theory is that negligence law provides redress for wrongs,³⁶ to call for law-and-economics reasoning as a morally better justification in hard cases would be to call for law reform, not for enforcing the rules as they stand. Rather than balancing fit with an objectively best justification, we might approach hard cases with an eye to the justifications that already fit our practices best—with apologies to Martin Luther, to "justification by fit alone."

C.

At some point, of course, the social sources run out: there won't be one-asterisk rules for everything. When this happens, moral norms arguably fill the gap. To some, this might prove that moral

34. HART, *supra* note 27, at 274.

35. RONALD DWORKIN, JUSTICE IN ROBES 14 (2008).

36. See, e.g., JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020).

norms are always part of legal reasoning, because they always come in when all other sources run out.

Yet when the social sources of law have run out, and we have to do something next, why should we assume that what we do next is done *according to* those rules, rather than merely as a decent course of action *given the existence* of those rules? If no legal rules or principles apply, or if multiple legal rules and principles apply equally, one can only choose on nonlegal grounds. Yet the morally required choice in such situations might not be legally required; the correct answer to what one ought to choose, *given* the legal sources, isn't always what one ought to choose, *according to* the legal sources.

Legal actors make all sorts of decisions that are *in* the law without being *of* it. Police officers decide which cases to pursue, judges decide how to structure their dockets or how much work to put into opinions, and so on. These are all important decisions for the life of the law. But that doesn't make them decisions *of* law, in the sense of resolving specifically legal questions according to specifically legal criteria. Sometimes the law takes a view of how a docket should be structured; sometimes not.³⁷ Sometimes a calendaring decision is just that—a decision—and neither a source nor a conclusion of law. In the same way, a judge's choice to apply principle *A* over principle *B* might just be a decision, neither legally mandatory nor legally forbidden. It might be the morally right decision, or it might not. If other legal rules treat judicial decisions as precedents, then it might turn out to have legal force for other cases. But its normative advantages didn't make it the *legally correct* decision beforehand, nor do they cause it to *become* the legally correct decision afterwards.

So this God-of-the-gaps-style argument gives moral reasoning too much role in the law. But it may also give it too little. The idea that we invoke moral reasoning as a second-best, once our other materials have run out, overlooks the fact that moral reasons are

37. See FED. R. APP. P. 45(b)(2) (giving priority to criminal appeals, but expressing no priorities within that category or among civil cases).

always operative, *always* on the job, both when our legal materials are uncertain and when they're clear.

Giving moral considerations some special role in cases of uncertainty assumes that, when our *other* materials are clear, our obligation to follow them is clear too. But that claim is false. We might just be facing another jaywalking case, in which our moral obligations tell us to depart from a clear rule. We *always* ought to do what we ought to do morally, given the circumstances in which we find ourselves. That's what "ought to do morally" means!

So we needn't see our moral reasons as filling in for legal ones; each simply proceeds on its own track. Sometimes there's an answer to what one ought to do according to the American legal system; sometimes there's an answer to what one ought to do given the existence of the legal system; occasionally one answer informs the other.

The point here, again, isn't to claim that positivism has been forever proven true and natural-law approaches proven false. The point is purely negative: that some standard arguments *against* a focus on social facts appear to fail. All I want to claim is that a one-asterisked understanding of law seems to be a perfectly legitimate concept in its own right—even if a more richly normative understanding of law would be a legitimate concept too, and even if one could in theory deploy either concept with the proper number of asterisks attached.

II.

This brings us to the second common-good objection: why we should *care* about a bunch of social facts. The lesson so far is that we get a real analytic benefit from keeping distinct two kinds of inquiries, one into social facts and another into good reasons for action. If that's right, then we already know why we should care! If the social sources teach us something true and useful, then, as thinkers, we *ought* to pay attention to them: we have a *duty* to report

them accurately, whenever we describe the norms of a particular time and place.

For example, it's true in one sense that the social mores of Regency England are "normatively inert": most of the time, no one should care what they say. But if you already have reason to talk about Regency social mores—if, say, you're teaching a social history class, or explaining *Pride and Prejudice* to the unfamiliar—then you might have reason to get them right. As the philosophers say, knowledge is the norm of assertion.³⁸ To the extent that you have reason to talk about the social sources of legal rules, you have a moral duty to get those right too.

A.

Consider the following comparison. Natural lawyers sometimes distinguish the idea of something being law in a superficial sense from its being law in a deep sense, with the latter incorporating more richly moral content. Thus, Brian Bix suggests,

we might say of some professional who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: "She's no lawyer" or "He's no doctor." This only indicates that we do not think that the title in this case carries with it all the implications it usually does. Similarly, to say that an unjust law is "not really law" may only be to point out that it does not carry the same moral force or offer the same reasons for action as laws consistent with "higher law."³⁹

Now, Bix's account may be too mild for many common good constitutionalists. If the injustice only affects our good reasons for action, and not necessarily what we should do according to the legal system, then it might be perfectly compatible with the peace settlement sketched out above.

38. See generally Timothy Williamson, *Knowing and Asserting*, 105 PHIL. REV. 489 (1996).

39. Brian Bix, *Natural Law Theory*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 209, 214 (Dennis Patterson ed., 2d ed. 2010).

But even setting this aside, there's another worry, which is that we often talk about important concepts in the superficial sense. You might be able to sue the quack who's "no doctor" for malpractice, but not for false advertising or for practicing without a license. The *problem* is that he *is* a doctor, in the only sense that's relevant here, which is why we need to get the Medical Board involved. To assert that he's "no doctor" in a false advertising suit, because he's "no doctor" in the deep sense, would violate one's duty of candor to the court.

When legal institutions talk about law, they're often talking in the superficial sense. The problem with the Yazoo Land Act in *Fletcher v. Peck*,⁴⁰ which was passed only because the members of Georgia's legislature had been bribed to pass it,⁴¹ wasn't that it failed to take part in the deep nature of law. That was certainly a problem, but it wasn't the problem facing the Court. The problem facing the Court was precisely that the Yazoo Land Act *was* a law, in the superficial sense relevant to its future repeal and to the Court's decision under the Contracts Clause.⁴²

So the duty to care about social facts is primarily a *duty of candor*. We often speak of law in the superficial sense—and when we do, we have good moral reasons not to represent to others that the law, even superficially, is anything other than it is.

B.

This duty of candor sounds obvious, but it can have real bite. I hope to illustrate this with an example drawn not from common good constitutionalism, but from the common-*law* constitutionalism of Professor David Strauss.

Professor Strauss argues that American constitutional law sometimes develops in a way

that can be squared fairly easily with the text but is plainly at odds with the Framers' intentions. . . . The Sixth Amendment gives a

40. 10 U.S. (6 Cranch) 87 (1810).

41. *See id.* at 129.

42. *See id.* at 132–36.

criminal defendant the right “to have the assistance of counsel for his defence.” There is little doubt that the original understanding of this provision was that the government may not forbid a defendant from having the assistance of retained counsel. Today, of course, *Gideon v Wainwright* and subsequent decisions have established that in serious criminal prosecutions the government must provide counsel even for defendants who cannot afford it. That rule fits comfortably with the language, and the language has been used to support it.⁴³

But, he says,

in fact it is just a coincidence—almost a matter of homonymy—that the modern right to counsel is supported by the language of the Sixth Amendment. The drafters of the Sixth Amendment might have used some other language to express their intentions, language that would have made it more difficult to find support for the modern right (for example, that the accused shall have the right “to retain counsel for his defense”). At first glance it seems odd to use the language of the Sixth Amendment to support *Gideon* when it is only a coincidence that it does so.⁴⁴

He justifies this *argumentum ad homonym* on the following grounds:

It is important to show that *Gideon* is consistent with the text because that helps preserve the overlapping consensus. So long as a judge can show that her interpretation of the Constitution can be reconciled with some plausible ordinary meaning of the text—so long as she can plausibly say that she, too, honors the text—she has maintained some common ground with her fellow citizens who might disagree vehemently about the morality or prudence of her decision. But once a judge or other actor asserts the power

43. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 919–20 (1996) (footnotes omitted); see *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963) (“The Sixth Amendment provides, ‘In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’ We have construed this to mean that in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.”).

44. Strauss, *supra* note 43, at 920 (footnotes omitted).

to act in ways inconsistent with the text, the overlapping consensus is weakened. If there is one unequivocal departure from the text, there can be others. Society's ability to use the text as common ground—to provide a basis of agreement or a limit on disagreement—will be eroded. That is why the text must be preserved, even though the Framers' intentions need not be.⁴⁵

We could imagine our society agreeing to use texts in this way, as common-ground placeholders for whatever plausible meanings might emerge.⁴⁶ Of course, we might need some exceptions for what Professor Michael Dorf calls “wacky” readings, when it'd be obvious even to contemporaries that the Constitution departs from modern usage⁴⁷: “domestic Violence”⁴⁸ doesn't mean partner abuse, “Republican Form of Government”⁴⁹ doesn't mean Republican Party control, and so on. These readings are “unequivocal departure[s] from the text,”⁵⁰ even if they parrot the Constitution's words. In cases like these, ordinary Americans can immediately recognize that the terms are very old and that their meanings have changed over time.⁵¹

The problem comes when the terms are very old and ordinary Americans *don't* know that their meanings have changed over time. Here the recommended response, in effect though not in intent, seems to be to hide the ball. Rather than “reject the text overtly,” Professor Strauss suggests, we might instead “reinterpret it, within the bounds of ordinary linguistic understandings, to reach a

45. *Id.*

46. See generally Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022) (imagining such a society).

47. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2044 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011), and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2014)).

48. U.S. CONST. art. IV, § 4.

49. *Id.*

50. Strauss, *supra* note 43, at 920.

51. See Dorf, *supra* note 47, at 2044 (“Any competent reader of modern English will understand from the context that the Guarantee Clause uses ‘domestic Violence’ to mean civil conflict and ‘Republican Form of Government’ to mean representative government.”).

morally acceptable conclusion.”⁵² So long as “the words themselves provide a focal point, something on which people can agree, whatever their moral or policy disagreements,”⁵³ we can resolve our disputes through “appeals to common premises,” maintaining “stability and bonds of mutual respect.”⁵⁴ That’s how, “in the face of widespread disagreement about criminal justice, the Court could take advantage of the fact that everyone thinks the words of the Constitution should count for something”⁵⁵:

People who might have disagreed vigorously about the merits of various reforms of the criminal justice system could all treat the specific rights acknowledged in the Bill of Rights as common ground that would limit the scope of their disagreement. A reform program that had a plausible connection to the text of the Bill of Rights was therefore more likely to be accepted than one that did not.

... The point is not that the Framers, or “we the people,” commanded the reforms that the Court undertook. The Court undertook those reforms, and the reforms lasted, because they made moral and practical sense, and because, by virtue of their connection to the text, society could reach agreement (or at least narrow the range of disagreement) on a legal outcome even in the face of deep moral disagreement. That is why the text matters even if the Framers’ intentions were to the contrary.⁵⁶

Here I think Professor Strauss goes quite wrong—quite wrong morally, in ways that should also concern the common good constitutionalist. Whether a given reform program enjoys a “*plausible* connection to the text” isn’t a fact about that text, or even about the

52. Strauss, *supra* note 43, at 914.

53. *Id.* at 921.

54. *Id.* at 915.

55. *Id.* at 923.

56. *Id.* (discussing incorporation of the Bill of Rights against the states). Strauss notes that the old “received wisdom” against incorporation “was at least too simple,” *id.* at 922; today many originalists defend incorporation.

law: it's a fact about the public's *knowledge*.⁵⁷ For if the public were to learn more about the Sixth Amendment, then what now strikes many people as a "plausible ordinary meaning"⁵⁸ might not strike them as all that plausible. It might even strike them as "almost a matter of homonymy"⁵⁹—akin, perhaps, to reading the Republican Government Clause to favor the Republican Party, which is hardly an appeal to common ground. Scholars and judges can get away with calling certain meanings "plausible" only because most other people don't know what we know.

If our legal system *openly* treated the words as mere placeholders, then maybe this extra information shouldn't make a legal difference, and the judges shouldn't feel obliged to mention it.⁶⁰ But as Professor Strauss's work suggests, his style of interpretation isn't one we "usually associate with a written constitution, or indeed with codified law of any kind."⁶¹ And if our system *doesn't* proclaim the words to be mere placeholders, then undisclosed efforts to "re-interpret" those words might seem to abuse, rather than uphold, our "common premises" and "bonds of mutual respect."⁶² Certainly the Court has never openly admitted that neither "the Framers, [n]or 'we the people,' commanded the reforms that [it] undertook."⁶³ Nor could it do so and still "take advantage"⁶⁴ of the

57. *Id.* at 923 (emphasis added); cf. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 299 (2007) (describing various post-Founding developments as "plausible constructions of constitutional principles that underlie the constitutional text"); Paul Brest, *The Misconceived Quest for the Original Understanding*, 204 B.U. L. REV. 204, 236 (1980) (portraying amendments as less necessary when "the language already in the Constitution is capable of encompassing the change").

58. Strauss, *supra* note 43, at 920.

59. *Id.*

60. See Baude & Sachs, *supra* note 26, at 5–12 (discussing the importance of public acceptance to law's content).

61. Strauss, *supra* note 43, at 885.

62. *Id.* at 914–15.

63. *Id.* at 923.

64. *Id.*

public's attachment to the text, if much of the public still looks to that text to learn who commanded which reforms.⁶⁵

In a world of full knowledge, then, a judge could no longer invoke the Sixth Amendment's language to pursue a reform program that the public hadn't endorsed, in the hopes of quieting her "fellow citizens who might disagree vehemently about the morality or prudence of her decision."⁶⁶ Nor could she blame the text for reforms that she refuses to acknowledge as her own moral and political responsibility. Her attempt to exploit her fellow citizens' ignorance would fail.

In our world, of course, the public doesn't know very much about "Assistance of Counsel."⁶⁷ But a judge who *does* know about the change in meaning (and who knows it would make a legal difference for her audience, which does *not* know) may be deceiving her audience as to a material fact. If so, she could no longer apply a "plausible" meaning *sotto voce* while telling her audience "that she, too, honors the text."⁶⁸ That would seem to be a kind of lying—something we all have moral reason to avoid.

C.

What does this mean for the common good constitutionalist? It means that, to the extent one places a thumb on the scale for a morally favorable rather than unfavorable understanding of the law, one runs the risk of misleading one's audience. Emphasizing that a given source can *plausibly* bear particular content—that a source is *susceptible* to a particular understanding, and so on—can be a form of hiding the ball. Indeed, there's a danger of implicit misrepresentation even when authors aren't hiding anything about the social

65. Cf. Kent Greenawalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 301 n.36 (Jules Coleman & Scott Shapiro eds., 2002) (discussing whether "courts consistently employ an originalist rhetoric that persuades citizens, who do not quite acknowledge that a number of decisions they like fail under originalist standards").

66. Strauss, *supra* note 43, at 923.

67. U.S. CONST. amend. VI.

68. Strauss, *supra* note 43, at 920.

sources, but merely choosing not to take the trouble to find out very much about them, resting on claims of ambiguity rather than running the social and political facts to ground.⁶⁹

Of course, there's room in scholarship for tentative conclusions as well as firm ones, and some decisions have to be reached under uncertainty: the legally necessary quantum of evidence for a decision often depends on the legal context.⁷⁰ But to the extent that we cut interpretive corners, resting substantive assertions on what *might* be the content of social sources, we're potentially engaging in the same fault as Professor Strauss's imagined judge⁷¹: implicitly offloading to the Founders, or to Congress, or to a state legislature, a political or moral decision we're really making ourselves.

To be clear, this temptation is in no way unique to common good constitutionalism. (Lord knows, adherents of other theories have cut interpretive corners before!) Yet the existence of this temptation shows that we have real moral duties relating to the social sources of law, even if those social sources are themselves "normatively inert." Insofar as we talk about them, we're obliged to meet standards of candor and accuracy, and to be up front with our readers about which of our claims rest on social sources and which on moral ones. Otherwise, the desire to "make our intellectual inquiries work out to edifying conclusions" may lead only to "the unclean sacrifice of a lie."⁷²

III.

This brings us to the third objection: that too much attention to the superficial sense of law reflects a lack of *commitment*, a culpable indifference to law's deeper concerns.

On first glance, this objection seems plainly false, and not necessarily unique to common good constitutionalism. Plenty of

69. See Baude & Sachs, *supra* note 1, at 869.

70. See Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 803–19 (2022) (discussing the law governing decisions made under uncertainty).

71. See *supra* note 45 and accompanying text.

72. LEWIS, *supra* note 13, at 49.

commentators from other traditions make similar claims. “If you have a broad reading of the Second Amendment, you must be okay with guns being used in school shootings”; “if you have a narrow reading of the Free Exercise Clause, you must be hostile to religion”; and so on.⁷³ What I’ve long regarded as the worst legal argument in the world—that “X is constitutional if and only if one should approve of X”—is a staple of political argument on both left and right.⁷⁴ But common good constitutionalism does run a particularly high risk of generating such arguments, to the extent that it encourages unannounced shifts in the use of “law” with one asterisk or two.

Consider, for example, the question whether the Fourteenth Amendment’s Equal Protection Clause includes fetuses as “person[s].”⁷⁵ There are nonfrivolous arguments for this. As Professors John Finnis and Robert George note, a fetus was traditionally capable of inheriting property from conception onward—and was referred to in a leading early nineteenth-century case as “a person *in rerum naturâ*.”⁷⁶ But there are also nonfrivolous arguments to the contrary. As Edward Whelan notes, fetuses were not included in

73. Cf. Stephen E. Sachs (@StephenESachs), TWITTER (Feb 6, 2017, 4:59 PM), <https://twitter.com/StephenESachs/status/828724779389681664> [<https://perma.cc/EGL8-NYPG>] (discussing Cass Sunstein, *Originalists Put Politics Over Principle*, BLOOMBERG (Jan. 30, 2017), <https://www.bloomberg.com/opinion/articles/2017-01-30/originalists-put-politics-over-principle-for-supreme-court> [<https://perma.cc/RZ87-69WX>]); Will Baude, *Stephen Sachs on the Wrong Way To Criticize Originalism*, WASH. POST (Feb. 7, 2017), <https://www.washingtonpost.com/news/vo-lokh-conspiracy/wp/2017/02/07/stephen-sachs-on-the-wrong-way-to-criticize-originalism/> [<https://perma.cc/2FFZ-JHWT>] (same); Andrew Koppelman, *Why Do (Some) Originalists Hate America?*, 63 ARIZ. L. REV. 1033, 1061 (2021) (arguing that, to support originalism, one needs “to feel that there is something fundamentally rotten about America as it exists today. You need to really hate it.”).

74. See generally Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (discussing this phenomenon).

75. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

76. See John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J.L. & PUB. POL’Y 927, 940 (2022) (quoting *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257–58 (1834)).

“the whole number of persons in each State” that Section Two of the same Amendment counted for apportionment.⁷⁷ And so on.

To some, treating these issues as intellectual debates about Reconstruction-era legal history may be a source of abhorrence. Why care so much about legal niceties when lives are at stake? Only someone obsessed with formal compliance, with abstract adherence to social sources, could discuss those sources so bloodlessly. As one writer asked, “If you believe, as Whelan sincerely does, that abortion is the murder of untold millions, why reject a more than plausible argument, framed in your preferred judicial philosophy, just so that you can reserve matters to the individual states?”⁷⁸

The answer, as we’ve already seen, is that “plausible” isn’t always good enough. We also want to know what’s true. There were plausible claims by abolitionists that the Constitution already forbade slavery,⁷⁹ but unfortunately those claims were false; wishing didn’t make it so.

Assume, for sake of argument, that the social sources underlying the Fourteenth Amendment—including any social cross-references to the common good, and so on—simply fail to extend to fetuses the equal protection of the laws. In that case, abortion opponents might face a situation similar to that faced by the abolitionists: what they regard as a grave moral evil might be legally restricted only through implausible state-by-state legislation, a federal statute of doubtful constitutionality, or a constitutional amendment with no real hope of success.⁸⁰ Why should committed opponents of

77. See Edward Whelan, *Doubts About Constitutional Personhood*, FIRST THINGS (Apr. 8, 2021), <https://www.firstthings.com/web-exclusives/2021/04/doubts-about-constitutional-personhood> [<https://perma.cc/Y3JQ-DYGV>] (discussing U.S. CONST. amend. XIV, § 2).

78. JAF, *The Rule that Brought Us to This Place*, IUS & IUSTITIUM (March 26, 2021), <https://iusetiustitium.com/the-rule-that-brought-us-to-this-place/> [<https://perma.cc/PN9U-BLDZ>].

79. See, e.g., Lysander Spooner, *The Unconstitutionality of Slavery* (Boston, Bela Marsh 1845).

80. See Stephen E. Sachs, *Lincoln, Douglas, and the Law*, VOLOKH CONSPIRACY (Dec. 9, 2021), <https://reason.com/volokh/2021/12/09/lincoln-douglas-and-the-law/> [<https://perma.cc/HM4B-88PP>].

abortion not then reject the Constitution? Why not regard it, as some abolitionists did, as “a covenant with death and agreement with hell”?⁸¹ How can one at the same time maintain “that abortion is a first-order evil, that the Constitution leaves abortion to the states where many will opt for unrestricted abortion, and that the Constitution is just”?⁸²

Here the only answer is the obvious one: that the Constitution has never been fully just. It may be sufficiently just to deserve our allegiance; it may provide for order and justice better than any other alternative on offer. But we should never assume that just because the law allows something, it is right, or that just because the law forbids something, it is wrong. That, indeed, is the most important lesson positivism has to teach.

Instead, some try to rescue the law’s merits by resorting to its other meanings—resorting to law in the deep sense, or to the two-asterisk sense of good reasons for action. When speaking in these senses we needn’t worry that the law permits any first-order evils. All those have been taken care of already, by our very definition of law—under which any constitution allowing slavery would be “void, and not law.”⁸³ But this is precisely why these shortcuts may have all the advantages of theft over honest toil. By moving too quickly past the social sources, by either muddling or abandoning debates about law in the superficial sense, they run the risk of distracting us from the very disagreement and lack of consensus that make legal and social institutions *necessary*.

We only really need a legal settlement, one that takes its own point of view on various matters, when people might otherwise disagree about what’s to be done. Often the reason we don’t already have a settlement of some pressing social issue is that we *lack* the necessary consensus. No matter how strong your opposition to abortion, there simply isn’t the popular demand for a constitutional amendment on the topic that there was for Prohibition or the

81. See *The Union*, LIBERATOR (Boston), Nov. 17, 1843, at 182.

82. JAF, *supra* note 78.

83. SPOONER, *supra* note 79, at 10.

income tax. (Indeed, the same is true no matter how strong your *support* for abortion.)

For the clear-eyed activist, this disagreement is part of the problem, and it's not clear why a more intense commitment to a particular side should lead one to think the disagreement any the less. In fact, those who emphasize the social sources of law may be the ones who take the situation *more* seriously. Not only do they agree on the urgent moral problem, they also recognize that the present social consensus is arrayed against them!

Admitting that the social sources of law fail to provide for the right moral outcome is admitting that there's more work yet to do, more people yet to convince. Pretending that this social disagreement can be waved away—that victory is already at hand—can be useful for rallying the troops. But what's useful isn't always what's true, and our moral commitment is also on display in how much we care about truth.

At the very least, one shouldn't attach moral opprobrium to those who read the social sources differently, "mistaking attempts at precision of thought in these matters for indifference or weakness of will."⁸⁴ The moral demand on us to describe the social sources of law accurately, and the moral demands on us to act within or even without that law, can occasionally pose a true moral quandary. But as Hart noted, "Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it."⁸⁵ That is good moral advice, even from a scholar who afforded little place for moral reasoning in the law.

84. Sachs, *supra* note 80.

85. Hart, *supra* note 8, at 619–20.