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Sources of Law Are not Legal Norms[1]

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Abstract. Anglo-American authors have paid little attention to a subtle distinction that has important jurisprudential implications. It is the distinction between sources of law (e.g., statutes, precedents, customs) and the legal norms which can be derived from sources by means of interpretation. The distinction might also be rendered as a threefold one, separating sources of law from legal norms and both of these from that which mediates their relation, namely, methods of legal interpretation. This paper intends to state the "source-norm" distinction clearly and to give examples of jurisprudential insights that are missed, and mistakes that may be made if the distinction is not given its due.

1. Introduction

The purpose of this paper is to emphasize and defend a distinction whose jurisprudential significance is often ignored by Anglo-American legal philosophers. These philosophers do not entirely ignore the distinction at issue, but they do not invest much time in its study and generally fail to acknowledge its fruitfulness. Continental authors, on the other hand, may find the distinction more familiar and important, but they too should benefit from considering new and clearer ways in which it may be stated and defended.

It is perhaps to be expected that the distinction between sources of law and legal norms would not be carefully theorized in a jurisprudential culture, the Anglo-American one, where the very notion of a source of law has received little attention. This may sound odd to those who, being familiar with Joseph Raz's work, for instance, recognize "source of law" as an important element of the Anglo-American jurisprudential lexicon. But appearances can be misleading: The term is often used, but the concept associated with it remains fairly obscure. Roger Shiner has made this point as follows:

> The topic of the sources of law is a traditional one in jurisprudence. Yet, remarkably, very little attention has been paid to the topic in recent analytical jurisprudence. Much contemporary analytical legal theory does not consider the notion of a "source of law" at all. There is no

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entry for the term in the indices of such central contemporary texts as Alexy (1989); Beyleveld and Brownsword (1986); Dworkin (1978 and 1986); Finnis (1980); MacCormick (1978). Other theorists mention the term and pass on. Raz (1979), for example, characterizes his theoretical position as "the sources thesis," that every law has a social source. But he gives relatively little articulation of the concept of a source. Rather, he lays out the implications of such a thesis, leaving the term "source" intuitive and primary. (Shiner 2005, 1)[2]

Thus, discussion of the distinction that is central to this paper should be prefaced with some general remarks about the notion of a source of law. To begin with, it should be acknowledged that the phrase "source of law" is ambiguous. To some extent the ambiguity is harmless, for the different senses of the phrase are easily distinguished in context, and in any case they are so closely related that their conflation does not seem to have important jurisprudential implications. Let me indicate some of the harmless ambiguities I have in mind. First, "source of law" can be used variously to refer to certain agents or institutions (e.g., legislatures, courts of law), to the products resulting from the law-making activities of such agents or institutions (e.g., statutes, judicial decisions), or even to the processes through which such products are generated (e.g., enactment of legislation, adjudication of concrete disputes).

Another ambiguity (or at least imprecision) has to do with the fact that the objects to which "source of law" refers can be described at different levels of abstraction and generality. For instance, statutes are standard examples of sources of law, but one might also describe a particular piece of legislation (as opposed to statutes in general) as a source of law; and one might even admit that something as specific as a particular provision in a particular statute can be described as a source of law. The level of generality at which one speaks when employing the phrase "source of law" will vary according to context and purpose. The rule of recognition of a given legal system[3] (a notion which will be explained later on) normally will not make reference to very specific instances of sources of law, e.g., it normally will not direct judges to use *this* or *that* particular precedent. It also will not direct judges simply to "use precedents," for that would be quite

[2] Unfortunately, the popularity of Raz's superficial account of sources of law helps to obscure the distinction which I will defend here. By Raz's own admission, his notion of a source of law "is wider than that of 'formal sources' which are those establishing the validity of a law (one or more Acts of Parliament together with one or more precedents may be the formal source of one rule of law). 'Source' as used here includes also 'interpretative sources', namely, all the relevant interpretative materials. The sources of a law thus understood are never a single act (of legislation, etc.) alone, but a whole range of facts of a variety of kinds" (Raz 2009, 48). As I will explain later, sources of law should be distinguished not only from legal norms, but also from the methods of interpretation by which norms are derived from sources. Since different interpretive methods employ different interpretive materials, I argue in favor of a narrower notion of sources of law that highlights the possibility that interpreters may look to the same source while employing different interpretive methods (thus using different interpretive materials) and thereby often arriving at different legal norms.

[3] Similar points might be made about the *Grundnorm*, the basic legal science fiat, the master plan, and so on—in short, about any secondary rule specifying the sources of law of a given legal system. To be clear, I am just trying to illustrate how context may affect the level of generality at which the expression "source of law" is used; nothing in my argument requires that the reader accept one of the positivist accounts of legal systems associated with the concepts mentioned here.

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uninformative.[4] Instead, the rule of recognition will normally make prescriptions at an intermediate level of generality, directing judges to apply precedents more or less strictly, or with varying degrees of deference, depending on such factors as the hierarchical rank of the court issuing the decision, whether the decision is merely of a panel or by a full bench, the age of the precedent, and so on. Thus, when one speaks of "sources of law" with the intention of referring to sources as they are identified in the rule of recognition operating in a given legal system, one will normally be speaking of sources at an intermediate level of generality. On the other hand, when focusing more narrowly on the behavior of a particular court, one may refer to a judge's use of a particular document (e.g., a statute, a case report) as a use of a source of law. Finally, "source of law" will be used in its most general sense in the context of comparative legal analyses: One might say, for instance, that legal precedent (without qualification) figures as a mandatory source of law in common law systems but less often in civilian systems.

Again, these imprecisions do not seem hazardous. In what follows I will prefer to use "source of law" in the sense in which it refers to the products of certain agents' law-making activities (e.g., statutes, precedents) while the exact level of abstraction and generality at which these objects are described will vary according to context. But this is as much lack of specificity as I am willing to allow. Indeed, the purpose of the paper is to stress that sources of law should not be confused with legal norms, i.e., the normative propositions (or meaning-contents) which can be derived from sources like statutes and precedents, and by which judges are guided in arriving at their final decisions (or at least which they use in order to justify—cynics might prefer to say "rationalize"—their decisions). In other words, "source of law" is used here quite literally: Source of law is not law (in the sense of legal norm); a source of law is something, most commonly a piece of text approved by law-making officials, from which legal norms can be derived. Often a non-controversially applicable source of law will fail to yield a determinate legal norm. One of the reasons why this happens is that law-applying officials will disagree deeply about what interpretive method to employ in deriving norms from the agreed-upon source. For instance, the very same statutory provision can yield different norms in the hands of intentionalists, textualists, and purposivists.[5]

[4] I am assuming that the rule of recognition, one of whose functions is to reduce the uncertainty that plagues legal orders containing only primary rules, is supposed to provide legal officials with a certain amount of guidance. As I will suggest in section 3, it is not clear that the rule of recognition needs to go as far as guiding officials in the interpretation of valid legal sources, but it must at least let them know which sources to look at and interpret.

[5] I should emphasize that although most of the examples appearing in the article have to do with statutory interpretation, my argument concerns sources of law in general. In other words, I employ such a broad notion of interpretation—namely, the act of deriving norms from sources of law—that I can speak of the interpretation of precedents and even, although perhaps counter-intuitively, of customs. (In fact, I am not alone in this regard: see Schauer 2007.) In the case of precedent, for instance, different interpretive methods are used when a precedent's binding element is associated (i) with the material facts of a case, (ii) with the explicit ruling in a judicial opinion, (iii) with the moral principle unifying a series of cases, and so on.

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One final introductory remark is in order. There is a traditional jurisprudential distinction between formal and material sources of law.[6] Material sources include any factor which causally influences judicial decision-making. The fact that a statute was enacted by a legislature can certainly cause a judge to decide a case in a particular way (i.e., in accordance with the provisions of the legislature). But something as trivial as, say, the arrogance of an advocate can also influence a judge by leading him to regard that counsel's case with less sympathy. These two facts can both be regarded as material sources of law to the extent that they have a significant and systematic impact on the behavior of judges. What these facts usually fail to have in common, however, is that while the first is associated with a common standard of official behavior, the second is not. Even when a judge is conscious that the personality of an advocate has some influence over his opinion it is unlikely that he will regard it, let alone openly acknowledge it, as the sort of factor that can ground a standard of behavior by which he and his peers should guide their decisions. It seems unlikely that a judge would say or even think something to this effect, "Fellow judges, let us treat a counsel's arrogance as a reason for deciding against the party he represents."

"Source of law" in this paper invariably means "formal source of law." Where legislation, for instance, is a formal source of law, judges consider themselves duty-bound to use it and (in all but exceptional circumstances) enforce the norm derived from it. When it comes to non-mandatory sources of law (a notion explained later in the paper), judges do not take themselves to be *duty-bound* to use them, but still to be permitted or to have good reason to do so.

2. Why the Distinction Is often Ignored

In everyday legal practice, the role of intermediary that an interpretive method plays between source and norm is easily (and understandably) overlooked. I am of the view that in most contemporary legal systems, routine cases dealing with legislation (i.e., not the technically complicated and politically charged cases that reach the highest courts of appeal and review) are disposed of through the application of some textualist interpretive method.[7] The plain meaning of the applicable legislative text reveals a norm which determinately solves the case at issue. Things admittedly get more complicated in hard cases, where disagreement may arise as to the whether textualism is the appropriate method of interpretation[8] (or even as to whether it is at all useful in those hard cases whose "hardness" hinges precisely on the vagueness or ambiguity of legal text). But at least in routine cases, textualism is often taken for granted as the proper interpretive method and is easily applied. The text is read and the relevant legal norm is readily identified.

[6] Drawn, e.g., by Hart (1961, 246–7).

[7] This is certainly not an uncontroversial account of judicial interpretive practice in modern legal systems (Karl Llewellyn, for one, whose views will be discussed below, would likely disagree). It is favored generally by the authors contributing to MacCormick and Summers (1991); and also, but more tentatively, by Leiter (2009).

[8] This kind of disagreement and its jurisprudential significance has been emphasized by Dworkin (1986), Berman (2009), Sciaraffa (2012), and Shapiro (2009).

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The naturalness of this process may obscure the fact that interpretation is taking place and that a particular method of interpretation (one which is not invariably employed in all sorts of cases) is being used. This occurs not only among legal professionals, but also among legal theorists. Legal positivists in particular tend to take textualism for granted even when they engage in abstract jurisprudential inquiry.[9] See if this sounds familiar. There is a by-law regulating the use of vehicles in a local park. The by-law states that "vehicles are not allowed in the park." The norm issued by the by-law, on the assumption that the by-law is to be read according to its plain meaning, is simply *that vehicles are not allowed in the park*.[10] Deriving a norm from a source may seem as simple as repeating its words exactly. This does not mean that the norm thus obtained will be determinate with respect to all possible cases (e.g., bicycles are not undisputed instances of vehicles), but if it is indeterminate, then it is just as plausible to say that the by-law is indeterminate as it is plausible to say that the norm issued by the by-law is indeterminate. It seems nitpicky to suggest otherwise.

Indeed, there is no need to be pedantic and suggest that every time a positivist refers to the "no vehicles in the park" by-law he must distinguish the by-law (i.e., the source), on the one hand, from the norm that is extracted from it by means of the textualist method of interpretation, on the other. What I am suggesting is that the positivist should recognize that when he fails to make this distinction, and thus speaks interchangeably of the by-law and the norm it issues, he is speaking loosely. And I am also suggesting that he should keep this in mind when pursuing jurisprudential questions like the ones that will be discussed in the next section—for in those instances he cannot afford to speak loosely.

The concept of interpretation being employed here is broader than the concept used by some contemporary legal philosophers. Andrei Marmor, for instance, has defined legal interpretation as being "required only when the formulation of the rule leaves doubts as to its application in a given set of circumstances" (Marmor 2005, 118). Both the broader concept used here—i.e., interpretation as any attempt to derive the meaning of a source of law—and the narrower concept used by Marmor—i.e., interpretation as an attempt to derive the meaning of a legal text whose literal meaning is unclear—are partly stipulative. It may be that Marmor's use of "interpretation" serves him well in the pursuit of specific theoretical aims—in particular, the aim of making it clear that the law *can* be applied without the need for the law-applier to appeal to moral considerations of a type which Ronald Dworkin suggests are inescapable in legal reasoning (even in routine cases). But Marmor's worry can also be avoided by someone using a broader concept of interpretation, as long as a distinction is made between methods of interpretation that do not appeal to moral deliberation, such as textualism, and methods that do,

[9] This is a mere "sociological" claim. Positivists just happen to take textualism for granted. No suggestion is being made that, for conceptual or other philosophical reasons, textualism sits more comfortably with positivist legal theory. Indeed, I am a positivist myself and have no qualms about encouraging the recognition of the view that textualism is not the only possible method of legal interpretation.

[10] Alternatively, on a purposive reading of the by-law, for example, the norm issued by it might establish *that all noisy and dangerous objects, such as motorized vehicles, should be kept out of the park* (on the assumption that the by-law's underlying purpose is indeed to prevent noisy and dangerous objects from being used in the park).

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such as (arguably) purposivism. It may even be admitted, as exclusive positivists like Marmor wish for it to be, that the methods of interpretation that do involve moral deliberation are apt to enhance the discretionary or creative nature of the interpretive enterprise. Thus, one can maintain that interpretation (in my sense) is inescapable while denying the inescapability of dworkinian, discretion-enhancing interpretation.

In any case, there is a more important reason for rejecting Marmor's concept of interpretation in this context. His concept is apt to hinder my specific theoretical goals, since its use risks obscuring the idea that a plain or literal reading of a legal text is just one possibility among others, a possibility against which the alternatives sometimes compete in legal practice. Purposivism, for instance, is not a method which, *as matter of legal practice*, is used only when plain meaning is dubious. Practitioners who have a preference for purposivism will occasionally appeal to purpose *in spite of* plain meaning. That is a fact that a broader concept of interpretation helps to highlight.

Some further clarifications are in order. The major claim being made in this section is that the "source-norm" distinction is often ignored in Anglo-American jurisprudence because textualism is taken for granted. But "often" obviously does not mean "always'. Indeed, American legal realists have made and emphatically defended essentially the same distinction before, albeit in different terms than the ones used here. Karl Llewellyn (1950), for instance, is famous for having advocated the view that statutes can be read according to different canons of interpretation, thereby yielding conflicting solutions to legal cases. Llewellyn could have made the same point in my terms, claiming that from certain legislated sources, such as statutes, different norms could be derived depending on one's preferred method of interpretation. But my project should not be regarded as a mere repetition of a lesson already imparted by the American realists. Although the realists made essentially the same point I am making—roughly, that sources and norms are not to be confused with one another and that their relationship is mediated by interpretation, which in turn can be done according to different methods—they failed to show, and perhaps to realize, how useful this lesson can be for the discussion of various theoretical questions that concern the wider jurisprudential community (such as the ones described in section 3). Indeed, the realists' position with regard to legal interpretation is often associated with a narrow and fairly worn-out debate about the extent of law's indeterminacy (which the realists, by the way, are often taken to have overestimated). My ambition is to show that the lesson contained in the "source-norm" distinction is much more fruitful than that.

In this connection, it is also important explicitly to address a view that suggests an inextricable tie between the "source-norm" distinction and a deep skepticism about legal interpretation. Riccardo Guastini (1996, 366) has claimed that skeptical theories of interpretation—i.e., theories denying that interpretive statements of the form "Text T means M" have a truth-value—are alone in distinguishing between "normative sentences and rules." But that is misleading: Even if it is the case that the "source-norm" distinction is seldom asserted by non-skeptics, there is no reason to believe that only skeptics can coherently adopt it. All it takes for one to coherently reject skepticism while embracing the "source-norm" distinction is to realize that when (in Guastini's terminology) a normative sentence yields a unique

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rule (thus allowing for a true interpretive statement regarding the meaning of the sentence in question), it does so either because interpreters employ an agreed-upon method of interpretation that unequivocally determines the meaning of the normative sentence, or because the different methods used by interpreters contingently lead to the same result (e.g., it may just happen, and often does, that the literal meaning of a statute provides exactly the same solution to a legal question as the purposive meaning of the statute). In other words, the "source-norm" distinction should only lead to interpretive skepticism on the two-fold assumption that interpreters in real legal systems invariably disagree about proper interpretive methodology and that different methods invariably lead to different outcomes. But why should we so assume?

It is, thus, a mistake to present the "source-norm" distinction as if it were inconsistent with the idea that legal texts (i.e., sources) may have undisputed meanings and thus give rise to unique norms. It is equally a mistake to hold that, given the "source-norm" distinction, legislators and judges do not create determinate legal norms as they legislate or decide cases, but that such norms only come into existence once an interpreter has *imposed a meaning* (among different possible meanings) upon the text of the statute or judicial opinion in question. As indicated above, two different kinds of circumstance may make it so that interpreters do not have the ability to choose among possible meanings—in which case, for practical purposes, the statute or judicial opinion can be said to give rise to a unique legal norm as soon as it is made public. One such circumstance occurs when, as a matter of legal practice, there is a secondary rule (written or customary) to the effect that the source in question ought to be approached by interpreters with a particular method of interpretation. For instance, officials in the jurisdiction where the by-law regarding vehicles in the park is in force might maintain the practice of taking by-laws literally except when doing so would lead to very undesirable or utterly absurd results. In light of this practice, it could be said that the by-law institutes a norm to the effect that motor vehicles such as cars, trucks, and vans (all clearly falling within the scope of "vehicles," literally understood) are not to enter the park, and that the by-law creates this norm as soon as it is promulgated and before it is ever applied. For the secondary rule that demands a literal interpretation of the by-law in the routine case constrains the law-applier not to allow cars, trucks, and vans in the park; and in that sense a norm banning cars, trucks, and vans from the park exists prior to the interpretation and application of the by-law. The other relevant type of circumstance occurs when, even in the absence of a secondary rule demanding the use of a particular interpretive method, the methods available contingently lead to the same result. Imagine that the available evidence of the intentions of the creators of the by-law also suggest that they did not want cars, trucks, and vans in the park. Whatever interpretive method the law-applier uses—textualism or intentionalism, in this case—he is stuck with the norm that bans cars, trucks, and vehicles from the park.

There is one final issue that needs to be made clear. A distinction has been made that looks very much like the one discussed in this paper but which should not be confused with it. Indeed, in the context of discussing the principles governing the "individuation" of laws, Raz (1980, 71) acknowledges "that a law is not identical with a statute or a section in a statute." This is, *prima facie*, my distinction; but in fact it is motivated by considerations that are different from mine and, partly for

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that reason, is not taken by Raz to have the implications that the "source-norm" distinction has. Consider a passage in which Raz explains some of the motivation behind the distinction he has in mind:

> [. . .] by enacting statutes, making regulations, giving judgments, etc., norms are created. But the creation of norms (particularly according to Bentham's and Kelsen's account of them) differs fundamentally from the creation of statutes, by-laws, regulations, etc., in two respects: By enacting a statute, making regulations, etc., the authorities create only part of a norm, the other parts of which may have been created at other times, perhaps even hundreds of years before, and often by other bodies. According to Bentham and Kelsen, parts of the same norm may have been made by ministerial decrees, while other parts have been made by local authorities, others still by judges, and so on: E.g., a municipal by-law imposing a fine on violators of some parking regulations and the Act of Parliament setting up the courts and procedure governing such cases are both parts of the same norm. By enacting a constitution, making a statute or a regulation, etc., the legislator creates not only a part of one norm but a part of many norms, usually of a very great number of norms. Thus, for example, Kelsen thinks that a constitutional law is part of every norm created on its basis. (ibid., 70–1)

Raz's points are roughly that one should not assume the existence of a one-to-one, or an otherwise simple and uncontroversial, correlation between legal provisions and legal norms. There is controversy in jurisprudence about how to combine different provisions, or how to break down a single provision, in order to discern what legal norms they establish. But notice that this has nothing to do with the possibility of interpretive disagreement. For instance, the matter of whether the by-law about vehicles in the park is to be associated with an independent norm or rather with part of a larger norm (that, e.g., also makes reference to procedure) has no bearing on whether the by-law should be read literally or purposively as it is made to yield what may be considered, depending on one's preferred principles of individuation, either an independent norm or a part of a larger norm.

In other words, it is important but insufficient to acknowledge, as Raz does, that there is no simple and uncontroversial method for individuating legal norms. For philosophers who *agree* about how to individuate legal norms may still disagree about how to understand the provisions which establish the relevant norms. Two philosophers who agree, for instance, that the by-law about vehicles in the park establishes an independent duty-imposing norm may still disagree about whether "vehicle" should be understood literally or in the light of the underlying purposes of the by-law. That is to say, they may still disagree about the content of the independent duty-imposing norm which they take the by-law to establish.

3. The Importance of the Distinction

In what follows some examples will be given of jurisprudential debates and inquiries that should benefit from a clear understanding of the "source-norm" distinction. There is no common thread running through these examples. Indeed, various examples are used in order to show that the "source-norm" distinction is important for different jurisprudential purposes.

3.1. Understanding the Rule of Recognition

It has been claimed, most famously by Dworkin and more recently by several other scholars, that Hartian legal positivism cannot account for the argumentative nature

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of judicial practice. More precisely, it has been said that the Hartian notion of a rule of recognition is incompatible with the existence of judicial argument about proper interpretive methodology.[11] For, in Hart's own words, the rule of recognition is supposed to "specify some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of [the legal system]" (Hart 1961, 92). Hart's critics suggest that the existence of judicial disagreement about interpretive methodology in contemporary legal systems is not easily squared with Hart's claim that the rule of recognition (a rule whose existence and content depends on official consensus) *conclusively* identifies valid rules of law in those systems.

I believe this debate would greatly benefit from a clear and emphatic acknowledgement of the "source-norm" distinction, something which both sides have failed to do. Hart's talk of valid legal rules is sometimes ambiguous between the sorts of things that I have been describing as sources of law (e.g., a by-law regulating the entrance of vehicles in the park) and the norms that can be derived from such sources. It could be that Hart understood the rule of recognition as specifying only valid sources of law but as saying nothing about how exactly to derive norms from those sources (e.g., by looking at its text, by investigating authorial intent, by reflecting on its underlying rationale, and so on).[12] If that is the correct interpretation of Hart, then the critics miss the target in saying that Hart's account of the rule of recognition is incompatible with official disagreement about proper interpretive methodology: For if by "rules" Hart meant *sources*, then the rule of recognition does not have the specification of proper interpretive methods as one of its functions.

One thing should be clear about my intentions in mentioning this debate. I am not quite convinced that the most promising strategy for Hartians in their attempt to respond to the critics is indeed to deny that the rule of recognition is supposed to do anything besides identify valid sources.[13] I have no intention here of taking up the difficult task of responding to Hart's critics: My only purpose is to highlight the availability of a response which may be missed by those who do not have something like the "source-norm" distinction clearly in mind. Hart's critics, even those who demonstrate some awareness of this potential objection,[14] tend to dismiss it quickly and thereby treat the "source-norm" distinction as being of secondary importance.

Note that this is just one example of a contemporary debate that requires a proper understanding of Hart's notion of the rule of recognition. We need to get clear on Hart's account before we can invoke it in the pursuit of other jurisprudential questions. And to get clear on Hart's account we should heed the "source-norm" distinction.

[11] This is said by such authors as Dworkin (1986), Berman (2009), Shapiro (2009), and Sciaraffa (2012).
[12] This seems to be view expressed in Green (1996).
[13] Indeed, elsewhere I have defended Hartian positivism through the use of a different strategy: see Shecaira (2012).
[14] See, e.g., Berman (2009, 273, footnote 13).

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3.2. Different Kinds of Sources of Law

Consider another example of how the "source-norm" distinction can be illuminating. Legal theorists and comparative lawyers tend to make a distinction between persuasive sources of law (or persuasive authorities) and mandatory sources of law. The term "persuasive" is somewhat problematic, since it can give the misleading impression that non-mandatory sources cannot issue content-independent reasons for action. It is true that in certain jurisdictions foreign precedent (to use a standard example) will only have an influence over judicial decision-making to the extent that it is grounded on arguments which appeal to (which *persuade*) judges. But in other jurisdictions judges may take the mere fact that a foreign court has issued a ruling on a matter of law as a reason to adopt an equivalent ruling domestically. That reason will normally not be as strong as a reason issued by a mandatory source, but it will still be content-independent. Thus, I would rather use phrases like "permissive" or "optional" sources of law.

Permissive sources are often characterized as sources which may be used in legal reasoning and decision-making but which *need not* be used: "The legal system does not *require* [a judge] to use these sources, but it is accepted as perfectly proper that he should do so [. . .]. [They] are recognized as 'good reasons' for decisions" (Hart 1961, 247). Evidence that a source is a permissive one is provided by the fact that judges and lawyers are not normally criticized for failing to invoke the source in their decisions and briefs (as they inevitably would be if they failed to mention the relevant statutes or precedents) and yet it is widely acknowledged that such briefs and decisions would be more compelling were they to include reference to permissive sources in support of their claims. Usually, the importance of a permissive source varies according to the availability and conclusiveness of applicable mandatory sources. A foreign precedent would but corroborate a judicial opinion which was clearly in line with statutory or (domestic) case law. But when mandatory sources fail to yield determinate norms, permissive sources may have a more important (gap-filling) role to play.[15] Permissive and mandatory sources, I should note, are not the only possible types of sources of law: For between "may-sources" (permissive) and "must-sources" (mandatory), "should-sources" may appear.[16] The last are sources whose absence from a legal argument does not utterly condemn it but still weakens it significantly.

The distinctions that have just been presented are intuitive and useful for describing legal practice and for comparing the practices of judges and lawyers of different jurisdictions. But they have not been an object of satisfactory philosophical treatment. Whenever a philosopher attempts to study them in greater depth, potential problems readily suggest themselves. Consider, for instance, what Leslie Green has said about permissive sources:

> [. . .] in addition to the sources that courts are clearly if defeasibly bound to apply, there are sources that they are by their own customary practices expressly *permitted* to apply: practice-based "good reasons" for decision [. . .]. We need to be cautious here, for if they are permissive *sources*, then they are not, as one might think, mere permissions, for sources are prima facie reasons for courts (and others) to *act*. But being permitted to φ is not normally any sort of

[15] For discussion of this claim, see Gardner (1988, 457).
[16] The terminology is taken from Peczenik (2005).

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reason to φ (though it may be a reason for others not to interfere with one's φ-ing). Moreover, absent a source, a court is already permitted to act on any reasons that are relevant to the matter; in this way, too, judges are human. (Green 2009, 19)

Green does not distinguish clearly here between source and norm; and although he seems to have the right idea (permissive sources are indeed to be associated with prima facie reasons for action), his explanation is not as rigorous as it could be. Permissive sources, according to Green, are at once things which courts are "permitted to apply" and "prima facie reasons for courts." Of course, anything which qualifies as a source of law is something which judges are permitted to apply. Thus, I assume that when Green describes permissive sources as being *permitted* he is not making a trivial claim (one that clearly follows from the very fact that they are sources of law) but instead he is contrasting a source's being permitted with its being required. So the question is: How can the same object (the same source) be associated at once with a permission and a prima facie reason for action? In the passage above Green has essentially accepted that this double association can occur but he has not really explained how.

This is where the "source-norm" distinction comes in. A permissive source is a "may-source." The "may" in that phrase, I submit, refers exclusively to the *use of the source*. It does not refer to the enforcement of the norm which can be derived from the source. That norm is not, as Green rightly notes, a mere permission: It is a prescription to the effect that a certain course of action ought to be undertaken and implying therefore that the addressees of the norm have a reason to undertake it. In other words, a permissive source *may* be used, but once used, it generates a reason for acting as the source prescribes. The otherwise obscure combination (within the single idea of a permissive source) of the notions of permission and prima facie reason for action is rendered clearer once we separate, as I have done, the notions of *using a source* and that of *enforcing the norm derived from the source*. The permission pertains to the source; the prima facie reason for action pertains to the norm.

This account also helps in elucidating the notion of a mandatory source, that is, a "must-source." A judge cannot simply ignore a clearly applicable statute—he *must* deal with (i.e., use) it. But, as Green recognizes, even mandatory sources like statutes are only defeasibly binding. Many jurisdictions allow (sometimes only tacitly) for judges to depart from statutes when their application would lead to gravely immoral consequences or to consequences clearly incompatible with the purpose of the statutes. How to make sense then of a source that must be applied and yet can be defeated? My suggestion is that it helps to recognize that the "must" refers only to the use of the statute, not necessarily to the norm it issues. A judge cannot ignore an applicable statute, but he may be able to refuse to apply the norm it issues, as long as he has a cogent argument to give in defense of his defiant deed. Similarly, *stare decisis* leaves room for the overriding of norms based on precedent but not for ignoring (i.e., neglecting to mention) applicable precedent.

It should be clear that I am not quite disagreeing with Green. I am simply suggesting a way of conceiving of the different types of sources of law that appears to me philosophically more rigorous. "Mays" and prima facie "oughts," "musts" and weighty but defeasible "oughts" are different things. We see clearly how they can coexist (as Green rightly suggests they can) when we distinguish between (the use of a) source and (the enforcement of a) norm.

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3.3. Non-Positivisms

Legal positivism has the separation thesis as its defining tenet (Raz 2009, 319). The separation thesis states that the existence and content of the law do not depend on its moral merits, a metaphysical thesis normally taken to imply the epistemic corollary that the identification of law (i.e., that it exists and has a certain content) does not depend on moral reflection about its merits. Non-positivists, on the other hand, think that the identification of the law does depend on moral reflection. But non-positivists can reject positivism for importantly different reasons, that is, reasons that bear on the content of their own positive accounts of law. For instance, Dworkin and Mark Murphy are both non-positivists (insofar as they reject the separation thesis) but they hold positive accounts of how one is to go about identifying law that are importantly different.

That there are different kinds of non-positivism on the market should not come as news to anyone. What is suggested here is that there is a helpfully clear way of sorting these different kinds of non-positivism that appeals to the "source-norm" distinction. Murphy (2006) recently offered the illuminating distinction between a weak and a strong version of natural law (the first of which is not quite incompatible with the *letter* of legal positivism but only with its *spirit*). These versions of natural law both have something to say about the legal status of norms that are morally defective (the weak natural lawyer will say that such norms are defective *as law,* while the strong natural lawyer will go further and claim that they are not law at all). Among natural lawyers of these two types, there may also be disagreement as to how morally defective a norm must be before its legal status is compromised.

Dworkin's account of law is quite different from both weak and strong versions of natural law. Dworkin does not believe that the moral defectiveness of a norm necessarily affects its legal status but insists that the law cannot be identified without appeal to moral deliberation. How could that be? It seems that the clearest way of explaining the distinctive character of Dworkin's theory is to say that Dworkin is not interested in considering the moral merits of legal norms, but rather that he is interested in the moral aspects of the interpretive process by which those norms are derived from sources of law. He believes that the interpretation of legal sources inevitably involves moral deliberation (and that is where he departs from positivism) but he does not hold that interpretation informed by moral considerations guarantees that the end-product, i.e., the norm eventually derived from the sources of law, will be morally unobjectionable. Indeed, it will be the best it can be (while fitting conventional legal materials) but it may still be far from ideal. For Dworkin, as long as a norm is derived from proper sources of law by means of the morally informed method of interpretation which he favors, it is to be counted as a (non-defective) legal norm.

The upshot is that there are at least two major forms of non-positivism. Dworkinian non-positivism denies that law can be identified without moral deliberation by claiming that between sources and norms morally informed interpretation necessarily intervenes. Other non-positivists, especially natural lawyers, do not make claims exclusively about the moral nature of legal interpretation; they also impose moral conditions on the legal status of the norms which result from morally informed legal interpretation.

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3.4. Legal Indeterminacy

So far I have only discussed the importance of the "source-norm" distinction for analytic jurisprudence. But it is also relevant for issues pertaining to normative or critical jurisprudence. Take the question of legal indeterminacy. The law is indeterminate with respect to a certain case when it fails to provide a unique solution to it. Law's indeterminacy with respect to a case does not normally excuse a judge from deciding that case, and thus whatever verdict the judge reaches will be one that was not already prescribed by law. In a sense the judge will be making new law instead of applying existing law, a fact which prompts questions about the fairness and the political legitimacy of adjudication in the absence of determinate legal standards. For if the judge "makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event" (Dworkin 1978, 84). One may also worry that it is not for the judge, an unaccountable official, to fill in the gaps of general laws that, in a democracy, are to be authored by elected legislatures.

I will not opine about whether retroactive judicial decision-making is really something to worry about. But hopefully it will be uncontroversial that to the extent that legal indeterminacy has raised important questions of political morality, they have been questions related principally to the unfairness of waylaying citizens with norms freshly created by unaccountable officials whose proper function is that of applying the law. I submit that legal indeterminacy is a more complex phenomenon than that, and that consequently it generates more normative questions than those that have traditionally been discussed. But to see this clearly one needs, again, to heed the "source-norm" distinction.

Consider once more the question of whether a bicycle can enter the local public park. Officials charged with the task of answering that question may agree about where they should look—namely, to the by-law stating that "no vehicles are allowed in the park"—and they may also agree that the by-law should be understood according to the plain meaning of its text. They may still disagree, however, or be unsure as to whether bicycles are among the "vehicles" whose entrance in the park is prohibited. This is a case of indeterminacy in the legal norm (that has been derived from an agreed-upon source of law by means of an agreed-upon method of interpretation). This kind of indeterminacy, to the extent that it raises questions of political morality, raises only those kinds of questions mentioned earlier: Is it fair to impose a fine on a cyclist who did not have, prior to the adjudication of his case, a determinate legal duty not to cycle in the park? Should judges, as opposed to the officials who originally drafted the by-law, have the power to fill in its gaps?

But notice that there could conceivably be reasonable disagreement or doubt about whether the by-law itself was applicable, or about whether the by-law (if applicable) should be understood according to its plain meaning. These alternative kinds of disagreement (about the proper source of law and about how to derive a norm from it) can also generate indeterminacy, i.e., the lack of a unique solution to the case of the cyclist. Admittedly, all kinds of indeterminacy (whether exclusively in the norm, or also in the source or method of interpretation) will raise questions about the fairness of fining the cyclist and about whether the law-applying officials

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should be the ones to fill the gaps. But the kinds of indeterminacy that stem from disagreement or doubt about sources and interpretive methods raise additional questions that are not raised by disagreement or doubt that concerns only the norm.

When law-applying officials disagree or are in doubt about whether something falls under the factual predicate of a norm (are bicycles vehicles?) they disagree or are in doubt simply about the range of application of a norm. When they disagree or are in doubt (I will just refer to disagreement from now on for the sake of brevity) about whether something is the proper source of law to be used in a particular case, they disagree about which agents or body of agents are charged with the task of issuing general norms intended to regulate the relevant matter (who is to say what can be done in the park?). And when they disagree about how to interpret an agreed-upon source of law, they disagree about the nature of their role as law-appliers (ought they to defer to another authority's intention, or are they to stick to the text despite the authority's intention, or are they to read the authority's directive in light of their own moral understanding of the directive's purpose?).

As a result, the "source-norm" distinction (and the acknowledgement of the role of interpretation as an intermediary between source and norm) helps us to realize that there are different kinds of indeterminacy, that is to say, that indeterminacy can arise for different reasons. That is perhaps in itself an analytical gain, as it consists in a refinement of the ordinary understanding of the phenomenon of indeterminacy. But this refinement has the further consequence that it helps us to realize that different kinds of indeterminacy raise different normative questions. It is important to know that sometimes indeterminacy stems from disagreement among officials about their very role as officials and about how they are supposed to interact with other officials. It is important to know that there are gaps not only in the first-order norms themselves, but also in the meta-norms allocating law-making power and in the meta-norms determining the degree of deference with which law-appliers should treat the directives of law-makers. The questions prompted by the acknowledgement of gaps at the meta-level are not identical with and are more wide-ranging than the questions raised by the acknowledgement of gaps at the first-order level.

4. Conclusion

In a sense this paper is not very ambitious. It simply highlights a distinction which I have not invented myself and which may be deemed uncontroversial in some circles. But in another sense the paper makes some fairly bold claims. It claims basically that legal philosophers in the Anglo-American world are not paying due attention to the "source-norm" distinction and thus are missing out on an important tool of analysis.

A reader of an earlier version of this paper suggested, not entirely critically, that it is a paper in meta-jurisprudence: It does not actually do jurisprudence but rather discusses how jurisprudence is and should be done. This is correct as far as it goes: While it is true that I am recommending that jurisprudents heed a distinction whose fruitfulness they have largely ignored, a demonstration of the distinction's fruitfulness often requires stepping down from the meta-level and engaging in

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jurisprudential argument. For instance, my remarks about how to understand the notion of a permissive source of law and about the different normative questions elicited by different types of legal indeterminacy are clearly jurisprudential remarks.

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References

Alexy, R. 1989. *A Theory of Legal Argumentation*. Oxford: Clarendon.
Berman, M. 2009. Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law. In *The Rule of Recognition and the U.S. Constitution*. Ed. M. Adler and K. Himma, 269–94. New York: Oxford University Press.
Beyleveld D., and R. Brownsword. 1986. *Law as a Moral Judgement*. London: Sweet and Maxwell.
Dworkin, R. 1978. *Taking Rights Seriously*. 2nd ed. Cambridge: Harvard University Press.
Dworkin, R. 1986. *Law's Empire*. Cambridge: Harvard University Press.
Finnis, J. 1980. *Natural Law and Natural Rights*. Oxford: Clarendon.
Gardner, J. 1988. Concerning Permissive Sources and Gaps. *Oxford Journal of Legal Studies* 8: 457–61.
Green, L. 1996. The Concept of Law Revisited. *Michigan Law Review* 94: 1687–717.
Green, L. 2009. Law and the Causes of Judicial Decisions. *University of Oxford Legal Research Paper Series* 14: 2–36. Available at: http://ssrn.com/abstract=1374608.
Guastini, R. 1996. Fragments of a Theory of Legal Sources. *Ratio Juris* 9: 364–86.
Hart, H.L.A. 1961. *The Concept of* Law. Oxford: Clarendon.
Leiter, B. 2009. Explaining Theoretical Disagreement. *University of Chicago Law Review* 76: 1215–50.
Llewellyn, K. 1950. Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes Are to Be Construed. *Vanderbilt Law Review* 3: 395–406.
MacCormick, N. 1978. *Legal Reasoning and Legal Theory*. Oxford: Clarendon.
MacCormick, N., and R. Summers, eds. 1991. *Interpreting Statutes: A Comparative Study*. Dartmouth: Aldershot.
Marmor, A. 2005. *Interpretation and Legal Theory*. Portland: Hart.
Murphy, M. 2006. *Natural Law in Jurisprudence and Politics*. New York: Cambridge University Press.
Peczenik, A. 2005. *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law*. Dordrecht: Springer.
Raz, J. 1979. *The Authority of Law*. Oxford: Clarendon.
Raz, J. 1980. *The Concept of a Legal System*. 2nd ed. Oxford: Clarendon.
Raz, J. 2009. *The Authority of Law*. 2nd ed. Oxford: Oxford University.
Schauer, F. 2007. Pitfalls in the Interpretation of Customary Law. In *The Nature of Customary Law*. Ed. A. Perreau-Saussine and J. Murphy, 13–34. Cambridge: Cambridge University Press.

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Sciaraffa, S. 2012. Explaining Theoretical Disagreement and Massive Decisional Agreement: The Justificatory View. *Problema* 6: 165–89.
Shapiro, S. 2009. What Is the Rule of Recognition (and Does it Exist)? In *The Rule of Recognition and the U.S. Constitution*. Ed. M. Adler and K. Himma, 235–68. New York: Oxford University Press.
Shecaira, F. 2012. Dealing with Judicial Rhetoric: A Defence of Hartian Positivism. *Australian Journal of Legal Philosophy* 37: 131–58.
Shiner, R. 2005. *Legal Institutions and the Sources of Law*. Dordrecht: Springer.

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