The Problem About the Nature of Law vis-à-vis Legal Rationality Revisited: Towards an Integrative Jurisprudence

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The Problem about the Nature of Law vis-à-vis Legal Rationality Revisited:

Towards an Integrative Jurisprudence*

Imer B. Flores (UNAM)**

Jurists are still searching for their definition of law.
Immanuel Kant, *Critique of Pure Reason*.¹

Abstract

In this paper I shall argue, following Frederick Schauer, that attempting to move theoretically from-the-necessary-to-the-important may hinder our understanding of law. I shall further argue that attempting to move from-the-important-to-the-necessary may well be a more promising route for advancing our understanding of law as an interpretive practice which is not merely important or valuable but morally important or valuable and even necessary, as Ronald Dworkin has


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¹ This quote belongs to a footnote from Immanuel Kant’s *Critique of the Pure Reason*, II. Method of Trascendentalism, Chapter I The Discipline of Pure Reason, Section I The Discipline of Pure Reason in its Dogmatical Use, and has different versions (e.g. Kant 1896/1781, 587): “Jurists are without a definition of right to the present day.”
advocated. My argument also draws on the insights of Oliver Wendell Holmes Jr., who by discussing the important, but apparently neither necessary nor sufficient aspects of legal practice, integrated both logic and experience into law as well as a pluralistic methodological approach to legal rationality. I shall argue that legal rationality comprises five different levels, spheres or types that are at least important or valuable, that one of these is at least morally important or valuable, and that a complex, but still workable, legal rationality is necessary to law. The paper concludes with a brief exploration of various implications of this general conclusion regarding the nature of law *vis-à-vis* legal rationality, namely that law and legal rationality do --and even must-- integrate necessary references to morality.

§ I

Reflecting about the nature of law from a contemporary perspective is the main aim of this volume and in this paper I will be revisiting questions such as: Does law have a nature or even an essence? Can it be defined or explained? If so, which and of what type are the characteristics that define or explain it? Can they be merely descriptive, evaluative, morally evaluative or some combination of these? Does the concept of law correspond to a natural kind, or is it a criterial or an interpretive concept? Is it a moral concept that necessarily evaluates, justifies and even ascribes moral importance or value to its proper object? What is legal rationality? What are the levels, spheres or types of legal rationality, and can we integrate them into a complex legal rationality? What, if any, are the relationships between law and legal rationality? What are the lessons to be learned from the complex nature of legal rationality and do they extend to law itself?

In section II, I shall begin my exploration of these important questions by following Frederick Schauer’s (2010) lead in arguing that an exclusive focus on purportedly *sufficient* and/or *necessary* features or properties of law leads to a false or impoverished picture of its
nature. We should instead, I shall argue, direct our attention to features or properties that represent non-necessary but nevertheless important or valuable aspects of the phenomenon we seek to understand. Actually, I intend to go one step further and suggest that the concept of law --like the concept of legal rationality-- is, as Ronald Dworkin has argued, an interpretive concept that designates a practice, which is not merely important or valuable but morally important or valuable. It is a concept through which we evaluate, justify and even ascribe moral importance and value to what we identify as law (1978, 1985, 1986, 2006, and 2011). In section III, I will show how the views defended herein were anticipated by Oliver Wendell Holmes Jr. who, by discussing the at least important or valuable as opposed to the sufficient and/or necessary, successfully integrated both logic and experience into law, along with a pluralistic methodological approach to legal rationality. In so doing, Holmes was able to generate an enlightening theoretical and even practical description and explanation of various legal phenomena (1997/1897). In section IV, I will sketch an analysis of the concept of legal rationality by pointing to the different levels, spheres or types of legal rationality, and consider whether all, or some combination of them, are, if not necessary, at least important or valuable and even morally important or valuable. And, finally, in section V, I present a general, very tentative conclusion regarding the nature of law vis-à-vis legal rationality.

§ II

First, in May 2010 at a Conference in Girona (Spain) and, later, in May 2011 at a Conference in Hamilton, Ontario (Canada), Frederick Schauer presented different versions of a paper entitled “Necessity, Importance, and the Nature of Law” (2010). In his paper and presentations, Schauer argued convincingly that sometimes the nature of a phenomenon consists of those features or properties that are important but not necessary. Furthermore, he claimed that there are features or properties that are not necessary to law, but which overwhelmingly exist in actual legal systems and are more concentrated in them than in other social structures and institutions. In a nutshell, Schauer criticizes the exclusive focus on features or properties that are held to be necessary --or essential-- to law. On the contrary, he advocates for the identification of
important features or properties of law --probabilistically concentrated in law but not necessary
to it-- that can also advance our understanding of this social practice as it is lived and
experienced. By way of analogy, Schauer cites the case of birds, which form a natural kind and
necessarily have feathers and a backbone, but do not necessarily fly. Despite this, he claims,
flying is an important feature of (almost all) birds, with the exception of penguins, emus and
ostriches, to the extent that the only flying non-bird vertebrates are bats. And so any helpful
understanding of what it is to be a bird, must make some reference to the a capacity for flight.

I find Schauer’s argument not only breathtaking and challenging but also inspiring for
two main reasons: First, it moves us away from the strong tendency --perhaps even the
obsession-- with the hunt for necessary and sufficient conditions,\(^2\) usually associated with
“natural kinds” (Quine 1969, 114-38; Putnam 1975; and Kripke 1980) but that arguably can be
applied to social artifacts and constructions, such as “law” (Stavropoulos 1996). Second, it
shifts the target of our search away from the necessary --or even essential-- properties to the
important or valuable but not necessary ones. These can be profitably used not only to explain
“natural kinds”, such as birds, but “social kinds” or even “functional kinds” (Fodor 1975) as
well, including “law” (Moore 1992, 188-242; and Ehrenberg 2009, 91-113).

Let me explicit that by focusing not on the necessary or essential, but on the important
or valuable, including the morally important or valuable, we can re-build a bridge re-connecting
positivists with the rest of legal scholarship: on the one hand, with non-positivists such as
Ronald Dworkin; and, on the other hand, with legal realists and members of the critical legal
studies movement. The latter group includes those who pursue sociological jurisprudence, as
well as the legal process school, starting with Oliver Wendell Holmes Jr. and ranging from
Jerome Frank and Karl N. Llewellyn to Duncan Kennedy and Roberto M. Unger and from
Benjamin N. Cardozo and Roscoe Pound on to Lon L. Fuller, Henry Hart and Albert Sachs,

\(^2\) H. L.A. Hart --as pointed out by Schauer-- appeared to be skeptical of recourse to necessary and sufficient
conditions for law, but did refer to them at least once: “There are two minimum conditions necessary and sufficient
for the existence of a legal system.” (Hart 1961, 113; and 1994, 116)
Harold Lasswell and Myres McDougal, among others. So, instead of one side affirming fervently that something is necessary and the other side denying it fervidly, or vice versa, both sides can argue --and might even agree-- that some feature of law is at least important or valuable, including morally important or valuable, thus advancing our understanding of law rather than hindering it.

With the foregoing in mind, we will bracket discussion of whether or not certain features of law are necessary, sufficient or essential, and will instead consider whether they are at least important or valuable, including some which may well turn out to be morally important or valuable. Anyway, let me insinuate that analysis from-the-important-to-the-necessary rather than from-the-necessary-to-the-important is a more promising route towards advancing our understanding of law: if we begin sifting the necessary and later proceed to the important we might leave something vitally important --but apparently not necessary-- behind, e.g. the fact that law almost inevitably, and for very good reasons, resorts to coercion or sanction: “The fact that the sanction cannot be an account of law’s distinctive normativity does not preclude it from being the best explanation of why most individuals comply with the law’s reasons most of the time.” (Coleman 2001, 72, fn 12) Further still, if we start with something important but apparently not necessary, we might well end up with something that is in fact necessary, or at least significantly and substantively quite important, such as the justification of coercion or the institutionalization of sanction: “[L]egal argument takes place on a plateau of rough consensus that if law exists it provides a justification for the use of collective power against individual citizens or groups.” (Dworkin 1986, 108-9)

As the reader may have anticipated, I wish to defend a two-tier thesis: first, that there are features in law and legal rationality which are important or valuable, some morally important or valuable; and, second, that at least some of these features, after due deliberation on their (moral) importance and value, may turn out to be necessary as well --probably, not with respect to each and every part of law, but with respect to law as a whole. For example, the idea that law provides a justification for state coercion or represents the institutionalization of
collective sanction can be helpful in providing a tentative definition of law. It can do so by helping us draw lines between law and other normative systems such as morals, religion, social rules of etiquette or technical rules, following the *definitio fit per genus proximum et differentiam specificam* methodology. Moreover, even if we agree with Hart that a “Definition… is primarily a matter of drawing lines or distinguishing between one kind of thing and another, which language marks off by a separate word” (Hart 1961, 13; and 1994, 13), sometimes there are neither clear nor precise limits for drawing such lines or distinguishing one object from the next, as Austin admitted: “But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by resemblance, and with objects to which it is related in the way of analogy: with objects which are also signified, properly and improperly, by the large and vague expression law.” (1998, 9-10.) Since precise boundaries among these different phenomena do not seem to exist in reality ready to be discovered, but are traced by users of the concepts through which they are conceived, law appears to be indeed nothing more than a “family resemblance concept” (Wittgenstein 1953), or perhaps a “cluster concept” (Black 1954) ranging over similar but not identical phenomena, phenomena which are subject to change or variation from-time-to-time and from-place-to-place.3

Actually, the concept of law may be not only a “cluster” or “family resemblance” concept but also an “essentially contested concept” (Gallie 1965, 167-83) as Dworkin has suggested. That is, the concept of law may well be a contested concept, which essentially admits the possibility of competing conceptions or constructions (1978, 103).4 Because he views the

3 Rudolf Stammler (1856-1938), one of the most important German legal philosophers of the Weimar Republic, made an analogous claim regarding not the concept but the content of (natural) law: “natural law with a changing content” based on *a priori* social principles of just law concerning respect for and participation by all members (1925; cf. Fuller 1968, 91-110; 1969, 33-94).

4 In *Law’s Empire*, Dworkin not only confronts legal positivism with both natural law theories and legal realism. He also develops three rival conceptions, which he labels “conventionalism”, “legal pragmatism” and (his own) “law as integrity” (1986, 33-7, and 94-6). Elsewhere I have suggested not only that there are three main conceptions of law —“legal positivism”, “legal realism” and “legal idealism” (*i.e.* “natural law theory” or at least
concept of law as an essentially contested one, Dworkin has been adamant in his critique of semantic theories of law, arguing that they inevitably fall pretty to what he labels as “the semantic sting”. In short, he challenges the thesis that the concept of law is “criterial”, i.e. that the very meaning of the word ‘law’ makes the existence of law depend on satisfaction of certain necessary and sufficient “criteria” (1986, 31-44; 2006, 9-12; and 2011, 158-9); and he further challenges the thesis that the concept of law is a “natural kind concept” (2006, 10; and 2011, 159). Instead, Dworkin argues, it is important to recognize that the concept of “law” is an essentially contested “interpretive concept”, one that seeks to place legal practice in its best moral light (1985, 146-8; 1986, 45-86, 87-96; 2006, 10-2, 12; and 2011, 160-3, 403-5). In his own voice: “There is a better alternative: propositions of law are not merely descriptive of legal history, in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation but is different from both.” (1985, 147)

Regarding criterial concepts, Dworkin has accentuated that “People share some concepts only when they agree on a definition --rough or precise-- that sets out the criteria for the correct application of the associated term or phrase.” (2006, 9) For that purpose, he brings to mind some examples to point out that there are not only precise criterial concepts, such as an “equilateral triangle” (a triangle necessarily has sides of equal length) and reasonably precise criterial concepts, such as “bachelorhood”, (a bachelor is an unmarried, adult human male -- but is the Pope a bachelor?), but also much less precise or moderately imprecise criterial concepts, such as “marriage”: “[W]e call many different forms of legal and social arrangements found in different societies marriages… It is a mistake to say, for example, as many now do, that the essence of marriage is a union between a man and a woman so that gay marriage is an oxymoron.” (2006, 9)

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some form consistent with it)-- but also that these conceptions qua constructions can be integrated into a more comprehensive one, i.e. an integrative jurisprudence (Flores 1997, 1001-36).
Regarding *interpretive concepts*, Dworkin has emphasized that “Some of our concepts function differently still: they function as interpretive concepts that encourage us to reflect on and contest what some practice we have constructed requires.” (2006, 10) In explaining what he means, Dworkin cites the case of boxing (2006, 10-1):

People in the boxing world share the concept of winning a round even though they often disagree about who has won a particular round and about what concrete criteria should be used in deciding that question. Each of them understands that the answers to these questions turn on the best interpretation of the rules, conventions, expectations, and other phenomena of boxing and of how all these are best brought to bear in making that decision on a particular occasion.

He later affirms that the central concepts of political and personal morality function as interpretive concepts as well (2006, 11). In *Justice for Hedgehogs*, Dworkin writes (2011, 160-1):

People participate in social practices in which they treat certain concepts as identifying a value or disvalue but disagree about how that value should be characterized or identified. The concept of justice and other moral concepts work in that way for us. We agree --mainly-- that these are values, but we do not agree about the precise character of these values. We do not agree about what makes an act just or unjust, right or wrong, an invasion of liberty or an act of tactlessness. Nor do we agree about what response, if any, would be required or justified by a correct attribution of the concept. But we agree sufficiently about what we take to be paradigm instances of the concept, and paradigm cases of appropriate reactions to those instances, to permit us to argue, in a way intelligible to others who share the concept with us, that a particular characterization of the value or disvalue best justifies these shared paradigms.
In a few words, Dworkin rejects the thesis that the concept of law is a criterial concept that can be explicated through some neutral analysis that makes no assumption about the importance and value of its object. On the contrary, he argues, the concept of law is interpretive, identifying law as not merely important or valuable, but morally important or valuable (2011, 403-5). Following Dworkin, I reject the idea that analysis of the concept of law can be merely descriptive and morally neutral (Hart 1994, 239-44; Waluchow 1994, 19-29; Coleman 2001, 175-9; and Marmor, 2001, 153-9, 2006, 683-704). Nor do I believe that it can be in some way “evaluative” yet also morally neutral (Raz 1994, 195-209; Dickson 2001, 15-25), since analysis of the concept of law is, as Dworkin might say, a matter of interpretation.

I agree with Julie Dickson that “Jurisprudential theories must not merely tell us truths, but must tell us truths which illuminate that which is most important about and characteristic of the phenomena under investigation.” (Dickson 2001, 25) However, I disagree with Dickson on whether there is a clear-cut distinction between directly and indirectly evaluative propositions (55-7). Even though “X is good” is an example of the former and “X is important” an instance of the latter, nothing precludes the possibility of propositions taking the form “X is important because X is good” which are nothing but interpretations of its moral importance or value. In that sense, in my opinion, taking sides with Dworkin rather than with Dickson, once we engage in an evaluative and even interpretive practice there may well be no point of return. If we start discussing important or valuable things we usually end up discussing morally important or morally valuable ones. Let me clarify, the fact that we might end up with something morally important or valuable does not mean that everything we identify as important is --or has to be-- (necessarily) morally important or valuable or even morally necessary. It may instead be important or valuable for some other reason, such as a theoretical one.

To reinforce this Dworkin-inspired conception of legal theorizing, let me point briefly to Immanuel Kant’s *Critique of Pure Reason* and recall, *a propos* of definitions, that for him

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5 In a similar fashion, Dworkin suggests that democracy is not a criterial concept but an interpretive one (2011, 347-50, and 379-99; and Flores, 2010, 84-90).
“To define... means only to represent the complete concept of a thing within its limits and its primary character.” In clarifying what he means, Kant states that “Completeness means clearness and sufficiency of predicates; limits mean precision, no more predicates being given than belong to the complete concept; in its primary character means that the determination of these limits is not derived from anything else, and therefore in need of any proof, because this would render the so-called definition incapable of standing at the head of the judgments regarding its object.” And, he goes so far as to suggest that “an empirical concept cannot be defined, but can be explained only.” (1896/1781, 584) For that purpose, he further cautions that “The German language has but one word Erklärung (literally clearing up) for the terms exposition, explication, declaration, and definition; and we must not therefore be too strict in our demands, when denying to the different kinds of a philosophical clearing up the honourable name of definition.” He also draws attention to important differences between mathematical and philosophical definitions: “[P]hilosophical definitions are possible only as expositions of given concepts, mathematical definitions as constructions of concepts, originally framed by ourselves, the former therefore analytically (where completeness is never apodictically certain), [and] the latter synthetically. Mathematical definitions make the concept, philosophical definitions explain it only.” (586) And, he, finally, concludes, in a lengthy paragraph (586-7):

Hence it follows... [t]hat we must not try in philosophy to imitate mathematics by beginning with definitions, except it be by way of experiment. For as they are meant to be an analysis of given concepts, these concepts themselves, although as yet confused only, must come first, and the incomplete exposition must precede the complete one, so that we are able from some characteristics, known to us from an, as yet, incomplete analysis, to infer many things before we come to a complete exposition, that is, the definition of the concept. In philosophy, in fact, the definition in its complete clearness ought to conclude rather than begin our work...
In sum, whereas in mathematics definitions are the concept \textit{--ad esse}; in philosophy definitions explain the concept \textit{--ad melius esse} (587). If we assume that philosophical definitions not only provide explanations of concepts such as “law” and “morality” but also do not constitute the concepts themselves, such definitions cannot be merely descriptive or simply evaluative. Rather they must be interpretive providing tentative explanations, explications and explorations, \textit{i.e.} conceptions of a concept, proceeding by way of experiment, to reflect on and contest the different interpretations, to the extent that the worse ones, \textit{i.e.} those debunked or falsified, must surrender to the better ones. All this is \textit{--or at least can be--} done in a quest for the best (moral) interpretation and in so doing making its object the best it can be or alternately providing the best (moral) justification for it, as Dworkin has argued and maintained throughout all these years (1978, 134; 1985, 146-66, and 167-77; and 1986, 90-6; see Waluchow 1994, 15-9). In Dworkin’s own voice: “But for all their abstraction, [theories of law] are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.” (1986, 90) In my opinion, this is extremely significant and substantive, especially since law as a means has or serves not one but several important or valuable ends, functions, interests, principles, purposes and values, including moral ones, as we will see in the following parts.

§ III

From my perspective, it was Oliver Wendell Holmes Jr. who best captured the complexity, not only of law but also of legal rationality, and who was the first to fashion a sustained critique of legal formalism, with C.C. Langdell as his main target. It is common knowledge among legal theorists that anti-formalism in general and legal realism in particular benefited from his maxim: “The life of the law has not been logic: it has been experience.” (Holmes 1991/1881, 1) However, not everyone knows that the origin of Holmes’ maxim lies in a publication prior to \textit{The Common Law} in 1881. Contrary to common belief, the maxim appeared for the first time in January 1880, in a “Book Notice” to the Second Edition of \textit{A Selection of Cases of the Law of}
Mr. Langdell’s ideal in the law, the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is perhaps the greatest living theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together... so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which actually shaped the substance of the law. The life of the law has not been logic; it has been experience. The seed of every new growth within its sphere has been felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the newcomer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views.

To assess the extent to which Holmes is attacking logic, I would like to start by quoting a reference made by H. L. A. Hart in his famous essay “American Jurisprudence through English Eyes: The Nightmare and the Noble Dream”, regarding the relationship of Holmes with Llewellyn and Frank, whose views represented the “nightmare” (Hart 1983a, 128):

Holmes certainly never went to these extremes [represented by Llewellyn and Frank]. Though he proclaimed that judges do and must legislate at certain points, he conceded that a vast area of statutory law and many firmly established doctrines of the common law… were sufficiently determinate to make it absurd to represent the judge as primarily a law-maker. So for Holmes the judge’s law making function was ‘interstitial’. Holmes’s theory was not a philosophy of ‘full steam ahead and damn the syllogisms.’
Hart went on to add (129-30):

Perhaps the most misused quotation from any American jurist is Holmes’s observation of 1884 (sic) ‘[t]he life of the law has not been logic: it has been experience’. This in its context was a protest against the rationalist superstition (as Holmes thought it) that the historical development of the law by the courts could be explained as the unfolding of the consequences logically contained in the law in its earlier phases. Judicial change and development of the law were, Holmes insisted, the expression of judges’ ‘instinctive preferences and inarticulate convictions’ in response, as he said, to the ‘felt necessities’ of his time. And his protest was made to secure a conscious recognition by lawyers of the legislative powers of the courts so that judicial change and readjustment of the law should be made after an explicit weighing of what he termed ‘considerations of social advantage’.

Although Hart tried to minimize Holmes’ frontal attack on logic per se, it is nevertheless true that, for any anti-formalist, Holmes’ adage has become nothing short of an anthem. Certainly Holmes’ critique --as Hart acknowledges-- is part of a wider “revolt against formalism” and “is taken as an example of a great reaction against the excessive reliance on thought that is deductive, formal, abstract, or split into firmly separated distinct disciplines. The revolt was born of a wish to cross sterile, arbitrary, academic divisions and to substitute for formalism a vivid, realistic attention to experience, life, growth, process, context, and function.” (Hart 1983a, 130; see White 1949)

At this point it is imperative to consider more carefully the context in which Holmes’ dictum is to be situated. Though Holmes is indeed critical of an exclusive or excessive reliance on logic, at the expense of a wide variety of other factors that come into play in judicial reasoning, his aim is not to abolish the use of logic entirely. His aim is to make clear that logic, though necessary in legal reasoning, is not sufficient and that other factors are, if not necessary, then at least important or valuable as well. Let me call to your attention that in the preceding
lines of *The Common Law* Holmes explains: “The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all.” And, in the following lines, he adds (1991/1881, 3):

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

In his seminal address at Boston University School of Law, on January 8, 1897, which was published that same year by the *Harvard Law Review* as “The Path of the Law”, Holmes -- at that time Justice of the Supreme Judicial Court of Massachusetts-- analyzed not only the limits of law but also the forces which determine its content and its growth (1997/1897, 991-1009). In the spirit of the arguments made in § II above, in what follows I will bracket discussion of whether these various forces, including logic and morality, are or are not necessary to legal practice. Instead, I will consider whether they are at least highly important or valuable, including in some cases morally important or valuable. In furtherance of this objective, I would like to begin by drawing attention to the following Holmesian claims:

1. “[L]aw, if not a part of morality, is limited by it.” (993) In expanding upon this point, Holmes cautioned against two serious pitfalls: “the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way.” (997)
2. “The fallacy... that the only force at work in the development of law is logic.” Hence, even though Holmes recognized an important place and role for logic, he argued that it is not everything (998):

   This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.

3. “[J]udges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.” (999) “[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.” (1000-1) In addition, Holmes emphasized, “we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are going to elect.” Accordingly, he proposed “that every lawyer ought to seek an understanding of economics” (1005) and went so far as to pronounce that “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” (1001)

4. “At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all we go to tradition... The rational study of law is still to a large extent the study of history. History must be a part of
the study.” Moreover, he also warned: “Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the rôle of history more important than it is.” (1003)

5. “There is another study which sometimes is undervalued by the practical minded... I mean the study of what is called jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part.” (1005) This claim concerning the centrality of jurisprudence to law was, of course, popularized later by Dworkin in the course of developing his own distinctive theory, “law as integrity” (1986, 225-75). On one side, Holmes advanced (1007):

The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is, and finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.

On the other side, Dworkin clarified (1986, 226-7, and 227-8):

Law as integrity is… both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges deciding hard cases is essentially, not just contingently, interpretive; law as integrity asks them to continue interpreting the same material that it claims to have successfully interpreted itself. It offers itself as continuous with --the initial part of-- the more detailed interpretation it recommends...

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6 Ever since the appearance of Taking Rights Seriously, Dworkin has been making the same --or at least a very similar-- claim regarding the role of jurisprudence and its interconnection with problems that certainly “lie beyond the ordinary techniques of the practicing lawyers” (1978, 1). In short, for him: “Jurisprudence is the general part of adjudication, silent prologue to any decision at law.” (1986, 90)
Law as integrity, then, begins in the present and pursues the past only so far as and in a way its contemporary focus dictates. It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did (sometimes including… what they said) in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future.

Let me insist that Holmes considers that the wide variety of forces to which he draws our attention, forces such as language and logic, history and tradition, sociology and philosophy, economics and statistics, ethics and morals, all play, if not a necessary role, at least an important or valuable role in legal reasoning and hence in legal rationality. Following Dworkin, he might have added that a theory of law must draw upon some combination of these factors in providing an evaluation, perhaps even a justification, of legal practice. It is a real danger, according to Holmes, to present any one of these factors as being more --or alternately less-- important or valuable than it really is. It is no less dangerous to assume that one or more of them must be sufficient and/or necessary for law when experience suggests that this is clearly not the case. In a similar vein, Holmes, in his address “Law in Science and Science in Law,” (1920b, 238) offered up the following recollection:

I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results. It is a necessary method for the purpose of teaching dogma. But inasmuch as the real justification of a rule of law, if there be one, is

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7 Let me clarify that my claim is not that all of these forces are necessary to law but that only that they play at least an important or valuable role in law. I further claim that, after due deliberation, it may be the case that they (all, some or various combinations of them) turn out to be morally important or valuable --perhaps even necessary-- for an adequate explanation of the concept both of law and of legal rationality.
that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds.

It is clear that Holmes, in discussing the important or valuable but apparently neither necessary nor sufficient, attempted to integrate not only logic and experience into law but also a pluralistic methodological approach in the core of legal rationality. We are left, then, with two further questions: first, whether Holmes was suggesting that the various factors to which he draws our attention--all, some or some combination of them--are morally important or valuable aspects of legal rationality; and, second, whether an adequate theory of law must provide an account that evaluates, and perhaps even justifies, the practice of integrating logic and experience in the exercise of legal reasoning.

Holmes was not alone in embracing the idea of integrating logic and experience in law and judicial decision-making. Consider Roscoe Pound’s *Law Finding through Experience and Reason* (1960), where, in his opening remarks, he recalls that three centuries before Sir Edward Coke, Chief Justice of the Court of Common Pleas first, and of the King’s Bench later, argued that “Reason is the life of the law, nay the common law itself is nothing else but reason” and concluded that “law is an artificial reason”: “an artificial perfection of reason, gotten by long study, observation, and experience, and not of everyone’s natural reason; for *nemo nascitur artifex*.” (Pound 1960, 45) In the *Centennial History of the Harvard Law School*, in a part probably written by Dean Pound, this observation was made (Griswold 1967):

It has, however, become evident in recent years… that the scope of legal study must extend beyond printed books, certainly beyond law books. Since law is not a water-tight compartment of knowledge but a system of rules for the regulation of human life, the truth of those rules must be tested by many facts outside the past proceedings of courts and legislatures.

The idea of integrating the different methodologies into a pluralistic legal methodology is also explicit in Benjamin N. Cardozo’s *The Nature of the Judicial Process* (1921) and its
sequel *The Growth of the Law* (1924). In both books, Cardozo referred to four forces of law and their corresponding methods of legal rationality. In the first version (1921, 30-1):

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.

And, in the second, with minor stylistic changes (1924, 62):

Our fourfold division separates the force of logic or analogy, which gives us the method of philosophy; the force of history, which gives us the historical method, or the method of evolution; the force of custom, which yields the method of tradition; and the force of justice, morals and social welfare, the *mores* of the day, which its outlet or expression in the method of sociology. No doubt there is ground for criticism when logic is represented as a method in opposition to the others. In reality, it is a tool that cannot be ignored by any of them.

To reinforce the integration not only of logic and experience to law but also of a pluralistic methodological approach to legal rationality, let me call attention to the idea of experimentation and to the possibility of reconciling the two competing needs of fixity and flexibility by quoting a lengthy but admirable paragraph from Munroe Smith (1909, 21):

In their effort to give the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to
be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

Holmes, in his dissent in *Abrams v. United States*, articulated a similar view in respect of the US constitution, a view that, arguably, is equally applicable to other areas of law as well. In Holmes’ view, the US constitution “is an experiment, as all life is an experiment.” (1919, 630) And, one year later, in *Missouri v. Holland*, he emphasized that we must realize not only that it is impossible to have foreseen completely everything that will eventually occur. We must also recognize that words or more precisely their meaning and usage vary throughout time to the extent that “The case before us must be considered in the light of our whole experience and not merely of what was said a hundred years ago.” (1920a, 433)

In a similar vein, Pound advanced in his lectures at Trinity College, Cambridge University, in 1922, and reiterated later in his lectures at the School of Law, University of Georgia, in 1959, the need for fixity, *i.e.* certainty, security and stability, on the one hand, and flexibility, *i.e.* change, growth and progress, on the other (1923, 1, and 1960, 23):

Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life
which it is to govern. If we seek principles, we must seek principles of change
no less than principles of stability. Accordingly the chief problem to which
legal thinkers have addressed themselves has been how to reconcile the idea of
a fixed body of law, affording no scope for individual wilfulness, with the idea
of change and growth and making of new law.

Similarly, Cardozo announced: “The law of our day faces a twofold need. The first is
the need of some restatement that will bring certainty and order out of the wilderness of
precedent. This is the task of legal science. The second is the need of a philosophy that will
mediate between the conflicting claims of stability and progress, and supply a principle of
growth.” (1924, 1) And, finally, it was H.L.A. Hart who recapitulated these insights when he

In fact all systems, in different ways, compromise between two social
needs: the need for certain rules which can, over great areas of conduct, safely
be applied by private individuals to themselves without fresh official guidance
or weighing up of social issues, and the need to leave open, for latter settlement
by an informed, official choice, issues which can only be properly appreciated
and settled when they arise in a concrete case.

The possibility of combining through experimentation the two competing needs for
fixity and flexibility (Waluchow, 2007, 183; see Flores 2009b, 40-6), indicates in my opinion
not only that logic and experience are integrated into law but also that at least an analytical-
conceptual and a critical-functional methodological approach are integrated into legal rationality
(Jhering 1951, 678-89; Cohen 1935, 809-49; Hart 1983b, 265-77). This idea can be traced to
Holmes’ assertion that our notions shrink and at the same time grow more precise when we
wash them with “cynical acid”(1997, 995) and is implicit not only in Cardozo’s and Pound’s
sociological jurisprudence, which interprets “legal institutions as social processes... responding
to various sorts of social and personal stimuli” but also in McDougal and Lasswell, at Yale, and
Fuller, Hart and Sachs, at Harvard, who “insisted on the importance of regarding the law as an
instrument for moving society toward certain larger goals and [...] tried to settle questions about the legal process instrumentally, by asking which solutions best advanced these goals.” Yet, as Dworkin pointed out, both approaches “ended by distorting jurisprudential issues… by eliminating… issues of moral principle from their core.” (1978, 4) In that sense, I am taking seriously Dworkin’s claim throughout all these years that what a legal theory should provide is an interpretation of law that integrates --or more precisely reintegrates-- not only moral principle but also both morality and philosophy into its core. In short, I am proposing that we pursue an integrative jurisprudence.

§ IV

In this section, my aim is to provide an analysis of legal rationality that draws on the insights of Holmes and the many others whose views are sketched above. From my point of view, legal rationality comprises five different levels, spheres or types, which are, if not necessary, at least important or valuable. It is also my view that that all, some or a combination of them, may turn out to be morally important or valuable and that, after due deliberation, we may even come to discover that they are even necessary or essential. It is worth mentioning that the same legal rationality is at play both in adjudication or judicial decision-making, and in any other legal process, including the creation and modification of legislation (Flores 2005, 35-8, 2007, 264-6, 2009a, 106-9). It is also true that an adequate theory of law must provide not only a description or explanation of law but also an evaluation, justification and adscription of moral importance or value to the legal rationality which is inherent in legal practice and as such in law itself.

The five different levels, spheres or types of legal rationality are as follows:

1) *Linguistic rationality*: it is important or valuable that laws and legal decisions are clear and precise to avoid the problems of ambiguity and vagueness (*R1*);

2) *Legal-formal --or systematic-- rationality*: it is important or valuable that laws and legal decisions are not only valid but also coherent, non-redundant, non-contradictory, prospective or non-retroactive, and publicized to avoid problems of antinomies, redundancies and gaps, while promoting the completeness of law as a system (*R2*);
3) **Teleological rationality**: it is important or valuable that laws and legal decisions are efficacious in serving as a means to an end and in consequence they cannot establish something impossible or merely symbolic (R3);

4) **Pragmatic rationality**: it is important or valuable that laws and legal decisions are not only efficacious, but also socially effective and economically efficient in achieving certain goals, especially in the case of conflict between two or more competing ones and their corresponding interpretations (R4); and

5) **Ethical rationality**: it is not merely important or valuable but morally important or valuable that laws and legal decisions are fair or just and, as a result, can neither admit an injustice or the violation of basic principles and rights, including moral ones (R5).

It follows from 1) to 5) that our legal operators, including legislators and judges, ought to know or at least keep in mind: the intricacies of our language and the use or meaning of words (R1); the details of our existing legal system, its past, present and (possibilities for development in the) future (R2); the minutiae of our scheme of ends, functions, interests, principles, purposes and values (R3); the ins and outs of their possible consequences and effects (R4); and, the implications of every single principle, including moral ones that bears on whatever aspect of legal practice is of current relevance (R5). In short, my three-fold claim is: first, that these five different levels, spheres or types are at least important or valuable; second, that one of the five different levels, spheres or types is at least morally important or valuable, *i.e.* R5; and, third, that it is necessary that the five different levels, spheres or types be integrated into a complex but still workable legal rationality, as I will now attempt to show.

It is important or valuable that a legislator begins by using clear and precise language to avoid problems related to ambiguities and vagueness (R1) and it is equally important or valuable to carry on by inquiring about the coherency and completeness of the legal system to avoid antinomies and gaps (R2). Similarly, it is important or valuable that the legislator continues by drafting at least one end, function, interest, principle, purpose and value into law (R3). But it may be necessary for the legislator to aim on many occasions to fulfill or honor
more than two ends, functions, interests, principles, purposes and values, some or each of which might be subject to more than one interpretations. In such cases it is important or valuable that the legislator points out some sort of priorities \((R4)\). Finally, it is not merely important or valuable but morally important or valuable that the legislator guarantees that an overall justified principle, including a moral one, is embedded into the law or at least is not violated by it \((R5)\).

By the same token, it is important or valuable that a judge begins by asking about the clarity and precision of the language used by the drafter \((R1)\); and, only when the language is neither clear nor precise it is equally important or valuable that he or she carry on by inquiring about the coherency and completeness of the legal system \((R2)\). Analogously, when the language and/or legal system appear to be incoherent or incomplete, it is important or valuable that the judge goes on to decide in accordance with a relevant end, function, interest, principle, purpose or value \((R3)\). But in a case where there are two or more ends, functions, interests, principles, purposes or values, and/or two or more interpretations of them that are equally accessible or available, it is important or valuable that the judge resolves any resulting conflict by appealing to the better one or to the one more suitable for advancing, to some degree at least, some of the ends in play in the case at hand \((R4)\). Finally, when the consequences or effects are illegitimate, it is not merely important or valuable but morally important or valuable that the judge strive as best he or she can to secure a result that accords with some overall legitimate principle, including a moral one \((R5)\).

Let me explain. The fact that it is important or valuable that our legal operators, including legislators and judges, know and keep in mind all these levels, spheres or types of legal rationality and attempt, as best they can, to adhere to their demands, does not necessarily mean that they accomplish them all the time. Experience undoubtedly shows that legislatures fail to do so from-time-to-time and that it is such failures that sometimes open the door to the courts to intervene in an effort to bring about greater legal rationality. But experience has also undoubtedly shown that courts can and often do fail to respect the norms of legal rationality as well. In my opinion, neither the legislator nor the judge \(qua\) legal agent is demonstrably better
or more capable than the other at successfully grounding their decisions in acceptable premises. Quite the contrary: neither one seems better equipped and situated than the other to fulfill the demands imposed by the five levels, spheres or types of legal rationality.

Elsewhere I have suggested that the term “compensation” regarding the eminent domain or takings doctrine must be understood as requiring that compensation be “fair” or “just”. Regardless of the agent or agency, i.e. whether it is the legislator, the judge, or perhaps even a framer, the morally important or valuable thing is to make explicit the reason or rationality behind a decision concerning fair or just compensation. The identity of the agent who proclaims on such a question is not of the essence. In that sense, either the legislator, judge or framer can make the moral conditions implicit in the term “compensation” clear by explicitly requiring it to be “fair” or “just” if it is to be truly so. Actually, the framers of the United States Constitution did just that by explicitly requiring “just compensation” in the Fifth Amendment, while the framers of the Mexican Constitution failed by merely requiring “compensation” in Article 27. However, in interpreting such a norm and its purpose, Mexican judges have routinely relied on an understanding of “compensation” that requires it necessarily to be fair or just. To be clear, the judge in such cases is not, in fact, legislating or inventing new law. Rather he or she is interpreting the principles objectively embedded in the term “compensation”, which implies the objective criterion that what truly counts as compensation is something that is necessarily “fair” or “just” (Flores 2009a, 99-100).

Legal rationality is ideally displayed in a progression from level R1 on to level R5. This progression is not only workable in practice, but also brings into play a kind of rational --and even predictable-- order, as I shall now argue. Let’s begin by noting that what the legal realists referred to as logic corresponds to the analytical-conceptual methodological approach implicit in R1 and R2, whereas experience corresponds to the critical-functional approach implicit in R3, R4 and R5. Now consider the following example: In an airport terminal (we could easily

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8 This is a variant of a well-known example, which is presented in a slightly different form and can be traced both to Gustav Radbruch and Leon Petrasyski (Recaséns Siches 1959, 645-7).
substitute a subway or train station) we find a sign displaying the following disposition: “It is prohibited to enter with dogs”. One day someone --call him James-- intends to enter the terminal with his pet grizzly bear --call him Ben-- and is prevented from doing so by the proper (administrative or executive) authority, say a policeman. Since the rationale for extending the prohibition from dogs to grizzly bears like Ben cannot be found by merely appealing to $R1$ or $R2$ it is important or valuable to look elsewhere for a justification for widening the scope of the rule so as to cover James entering with Ben.

Let me clarify that, in my opinion, extending the prohibition from dogs to other animals, like Ben, implies neither adding nor modifying the rule prohibiting dogs. Rather it requires that the rule be interpreted in a manner such as to widen the scope of its application to include animals like Ben. I have no difficulty in agreeing that such widening of the rule is the product of a “creative judicial activity” resulting from the interpretation of a pre-existing rule. What I wish to dispute, however, is the claim that the exercise of such judicial creativity amounts either to the legislative creation of a (new) rule or the quasi-legislative change of an existing rule (Flores 2011, 168; see Hart 1961, 131, and 1994, 135).

In so arguing, I can reasonably be viewed as --invoking, as important or valuable (perhaps morally) among the rules of interpretation, what is commonly known as the “golden rule”. According to this familiar cannon of interpretation, a rule is not to be interpreted as plain meaning suggests if, applying the rule with that understanding to a given set of circumstances, would lead to an “absurdity” or “moral repugnance”. Alternatively, I might reasonably be viewed as invoking, as important or valuable (perhaps morally), what is commonly termed as the “mischief rule”, according to which if interpreting a rule as its plain meaning suggests leads to a result which frustrates eradication of the “mischief” the rule was intended to remedy (or perhaps realization of the very goal(s) the rule was intended to achieve), then the rule is not be
interpreted that way. In either case, it is important or valuable to recognize that the rule and the norms of legal rationality do not necessarily dictate the result that plain meaning suggests.\(^9\)

With the foregoing in mind, now consider this: it is absurd or perhaps even morally repugnant, to allow James to bring Ben into the terminal, when someone with a domestic animal such as a dog is prevented from doing so --simply, on the ground that bears were not expressly included in the prohibition by the proper legislative authority. In other words, it would be absurd and perhaps morally repugnant were the proper administrative or executive authority, \(i.e.\) the policeman in James’ case, bound to apply the rule as it was literally drafted and consequently refrain from preventing his entry with Ben into the terminal. It would be no less absurd or perhaps morally repugnant to require in any case where a decision to disallow entry has been challenged, that the proper adjudicative authority, say a judge, decide according to the rule interpreted strictly, \(i.e.\) in terms of plain meaning.\(^{10}\)

Let’s now examine this case with an eye towards the progression from \(R1\) to \(R5\) mentioned above. Concerning \(R1\), the species “dog” is simply not the same as the species “bear” and although both species are part of the genre “animals”, there is no way to include, linguistically, the concept of “bear” in the concept of “dog”, especially since they correspond to different natural kinds with their own genotypes and phenotypes. Regarding \(R2\), we can assume, for the sake of the argument, that there is not, or at least not yet, a prior piece of legislation or judicial decision or precedent, which has previously equated dogs, bears and other animals to the extent that the prohibition is already clearly equally applicable to them all. On the contrary, if there is such precedent the justification will be provided by appealing to \(R2\) itself. If neither

\(^9\) I am grateful to Wil Waluchow for bringing this point to my attention and asking me to be more explicit about it.

\(^{10}\) Keep in mind both the maxim of the Digest 50, 17, 1: “\textit{Non ex regula ius sumatur, sed ex iure quod est regula fiat}” and Lon L. Fuller’s distinction between “intelligent and unintelligent fidelity to law” (1999/1949, 1858; see also 1958, 630-1).
R1 nor R2 is helpful in providing the rationale to justify extending the prohibition from dogs to bears, it is at least important or valuable to look elsewhere for its justification.

Once R1 and R2 have run out, it is important or valuable to proceed to R3 and search for ends, functions, interests, principles, purposes or values that lie behind the rule. Here we might appeal, at least in some cases, to what the author of the rule intended to accomplish, i.e. his or her intentions. Alternatively, we might appeal to what the rule does, in fact, serve to accomplish in order to justify extending the prohibition from “dogs” to “bears.” By widening the scope of the rule prohibiting dogs to cover other animals such as bears we might further accomplish these objectives. However, once we cross the threshold of R3, a critic might claim, we will almost certainly end up not at stage R4 but R5. Let me address this possible objection briefly.

Suppose a critic of the view herein defended objects as follows: It is patently clear that the explicit or express intention of the author of the prohibition was directed only to dogs and not to bears. Had the drafter wanted to prohibit “bears” --or any other animals for that matter-- he or she would have included them in the prohibition next to “dogs”, i.e. he would have said that “it is prohibited to enter with bears and dogs and…”. Alternatively, he or she would have introduced a more ample or generic formula such as “animals”, “animals of/with certain size”, “dangerous animals” or “animals that may affect or threaten the users of the terminal”. In reply, I offer the following response. The fact that the author explicitly mentioned only dogs merely suggests that he or she had in mind, as the most probable or likely case, one where someone might attempt to enter with a dog, which is the domestic animal per excellence. In addition, the fact that the author expressly mentioned dogs neither excludes nor precludes the possibility of intending to prohibit or at least implicitly prohibiting by way of analogy other animals such as bears. The justification for including bears within the scope of the prohibition derives from the authentic or genuine wishes and true commitments intended for prohibiting dogs in the first place (see Waluchow 2007, 85-91, 225-6). Clearly, the prohibition is extended to a bear such as Ben, not because he is (for some reason) to be considered a dog, which he clearly is not, but because in line with the legal maxim: ubi eadem ratio iuris, ibi eadem iuris dispositio, creatures
like Ben --and pet dogs like Benji-- actually represent a danger or threat to users of the airport terminal and so should be included within the scope of the rule. In my opinion, it is very unlikely that the drafter of the prohibition, if asked, will say that he or she indeed had only dogs in mind or that the prohibition should not be extended to cover the case of bears and other animals. Rather, he or she is more likely to point to any one of the aforementioned interpretive maxims --or similar ones-- as offering a means by which the interpreter can decide in a way reflective of his or her actual intentions. Since the norms of legal rationality include more than one maxim of interpretation available to justify extending the prohibition from “dogs” to “bears”, widening the scope of the rule prohibiting dogs from the terminal so as to cover other animals such as bears is, if not necessary, at least important or valuable. It is, in other words, important or valuable to recognize that legal actors are sometimes permitted to move on from $R_1$ and $R_2$ to $R_3$, $R_4$ and even $R_5$ in the search of the better interpretation.

It might be thought that the need to move in these (and no doubt other) ways beyond levels $R_1$ and $R_2$ might be better served, had the drafter of the rules chose his terms more wisely. Perhaps, instead of using “dogs”, the drafter might have used “animals” or perhaps “animals of a certain size.” But this strategy is not necessarily as helpful as might initially appear. It will likely remain impossible to answer all questions of application by remaining at levels $R_1$ and $R_2$. After all, the expression “animals” brings its own degree of imprecision or vagueness to the extent that it will appear to be equally applicable not only to dogs and bears but also to a wide range of different animals from insects, such as ants, ladybugs and spiders, on to the largest land and sea mammals, such as elephants and whales. To the extent that it will cover not only frogs and turtles, deer and woodpeckers but also chipmunks, guinea pigs, rabbits and squirrels. Employing a term like “animals of/with certain size” or perhaps the less cumbersome expression “large animal” might help reduce the vagueness inherent in the wider term “animals”, but even they remain fairly imprecise and vague. They will appear clearly applicable to larger dogs, e.g. those that are more than 75 pounds in weight or 25 inches in height, such as Great Danes and Saint Bernards, and clearly not to very small ones, such as
Chihuahuas, Dachshunds, Scotch and Yorkshire Terriers. But there will be many borderline cases, such as Airedale Terriers, German Shepherds and Labradors where it will be far from clear whether, by the very meaning of its terms, the rule applies. By way of contrast, terms like “dangerous animals” or “animals that may affect or jeopardize the well-being of terminal users” are more likely to help solve our problem, at least to some extent. The term “dangerous animals”, even though it may be helpful in reducing vagueness is of course still quite an imprecise or vague expression. It will appear clearly applicable to certain animals, such as lions and tigers, and not applicable to some, such as frogs and turtles. But once again there will be numerous borderline cases, e.g. chipmunks, guinea pigs, hamsters, rabbits and squirrels where it will be less than clear whether the rule applies or not. Lastly, the phrase “animals that may affect or jeopardize the well-being of terminal users”, despite being itself a relatively imprecise or vague expression, is perhaps the most useful of our candidate terms. This is because it likely corresponds, in a straight-forward way, to the actual purpose behind the prohibition of dogs, which seems to be equally applicable to bears and other animals who may affect or jeopardize the users of the airport terminal by posing a real or imminent threat to them and to their well-being. In that sense, if we consider that the reasons that justify the prohibition of dogs are analogically the same --perhaps even more so-- in the case of bears and any other animals that pose a real or imminent threat, such as cats due to people’s allergies, it is clear that extending the prohibition from dogs to other animals such as bears and cats by widening the scope of the rule will be justified. This is because the prohibition is equally applicable to them to the extent that in fact that is what the rule requires all the way.

Before responding to the objection that it is necessarily the case that we must always end up in $R_5$ if the lines of reasoning sketched in the preceding few paragraphs is pursued, let me respond to another possible objection. It might be said that there is no need to consider levels $R_2 – R_5$ in an account of law and its inherent legal rationality since $R_1$ is always sufficient to determine the application of a legal norm. In other words, it is neither necessary, nor is it ever important or valuable, for a decision-maker to move to the so-called “upper
levels”, *i.e.* R2 – R5 if his objective is to determine what the law requires. In response to this objection, I have several replies.

Firstly, even if it is necessary to start with R1, it is clear that it is not always sufficient due, not only to the indeterminacy of language, e.g. the so-called “open texture” of general terms and their often ambiguous and vague nature (see Hart 1961, 124; and 1994, 128), but also to the possibility of errors and mistakes, on one side, and of oversights and even silence, on the other (see Fuller 1999/1949, 1859), including antinomies and gaps.

Secondly, even if not necessary to proceed in all cases to upper levels, it is at least important or valuable to do so in some cases, such as in the case of extending the prohibition from dogs to bears --and even cats-- by widening the scope of the rule’s application, to the extent that not doing so will amount to either an absurd or moral repugnant outcome or to an irrational result.

Thirdly, and finally, regarding the objection that it is necessarily the case that, once we permit rule-appliers to move beyond R1, they will inevitably end up appealing to R5, *i.e.* to the idea that laws and legal decisions must be fair or just and as a result can neither admit an injustice or the violation of basic principles and rights, including moral ones, let me respond by simply denying that this is necessarily so. Rather, it is at least morally important or valuable that they do so in some cases only, *i.e.* in those cases in which not doing so will amount to admitting a serious injustice or the violation of basic principles and rights, including moral ones, such as the “golden rule”.

To see why this is so, let’s reconsider our previous example: Imagine that someday a blind person --called him Louis-- attempts to enter the airport terminal not with a grizzly bear like Ben or a dog like Benji, but with an assistance dog --call him Lazarus. Let’s suppose further that the proper administrative or executive authority, *i.e.* the policeman, grants him entry. Or suppose, in the unlikely case that Louis is prevented from doing so by the policeman, that the proper adjudicative authority, *i.e.* the judge, reverses the decision and grants him the right to enter. In my opinion, this case is the *exceptio probat regulam in casibus non exceptis.*
Notwithstanding this point, someone might argue in light of \( R1 \) that an assistance dog is a dog after all, and that entering the terminal with Lazarus is expressly prohibited. Similarly, someone might argue, by appealing to \( R2 \), that the exception excluding assistance dogs --or perhaps service dogs in general-- from the prohibition has to be explicitly consigned to be applicable, following the maxim: *Ubi lex non distinguunt, non distinguere debemus*. However, deciding at level \( R1 \) or \( R2 \) will amount to a violation of \( R5 \), by constituting discrimination against the blind person’s basic rights and liberties, such as freedom of movement in conditions similar to those in which non-blind persons enjoy this freedom. Therefore, it is not merely important or valuable, but morally important or valuable and even (morally) imperative or necessary that a move be made first to \( R3 \) and \( R4 \) and perhaps later on to \( R5 \), in order to reach the following conclusion: although the prohibition is clearly directed at dogs and, analogously, bears, cats, and other animals that may seriously threaten the well-being of terminal users, it excludes from its application certain dogs, such as assistance dogs. And this is so regardless of whether or not this exclusion has been mentioned explicitly. So the relevant question is whether an assistance or service dog poses a real or imminent threat due to the fact of being intrinsically perilous and representing a risk to users of the terminal and their well-being. The answer to this question is, in my opinion, quite clearly no. All else being equal or *caeteris paribus*: a blind person’s assistance dog in no way poses a real or imminent threat to terminal users and their well-being. This claim, from my point of view, justifies letting Louis enter with Lazarus as this is what the rule actually requires, and is grounded not only in \( R3 \) and \( R4 \) but also in \( R5 \). This is because such a permission avoids a serious injustice or violation of principles, including moral ones. It serves justice and other principles, including moral ones, by legitimating the rule as applied to the case of Louis and Lazarus and might be extended as a way of precedent to other service dogs.

\[ \text{§ V} \]

In closing, let me recall that my main claim, made at the very outset, was that even if we should concede that there are no necessary and sufficient features of law, and in particular any
necessary connections with morality, the following points should be acknowledged. First, there are at least some generally recurring features of law that are important or valuable and even morally important and valuable; and second that an adequate theory of law owes us an account of these features. An adequate legal theory must provide not only a description or explanation of these important legal phenomenon, but also an evaluation and perhaps even a justification of them.

With the foregoing in mind, I suggested, in section II above that we bracket any discussion of whether certain features of law are sufficient and/or necessary and proceed to a discussion of those features we consider important or valuable. In section III, I affirmed, following Holmes, that law not only includes several features that play an important and valuable (if not necessary) role in legal reasoning, such as logic and experience, but also that morality is among them. In section IV, with the idea of figuring out whether all, some or some combination of these features is not merely important or valuable but morally important or valuable, I analyzed the concept of legal rationality and arrived at a three-part conclusion: first, legal rationality comprises five different levels, spheres or types, which are at least important or valuable; second, one of these five levels, spheres or types invokes that which is morally important or valuable, i.e. R5; and, third, it is necessary (and important and valuable) that the five different levels, spheres or types be integrated into a complex, but workable, legal rationality.

To conclude, let me draw attention to one possible implication of my interpretation of the nature of law vis-à-vis legal rationality revisited. If I am right in turning the tables to discuss the morally important or valuable aspects of law, we might end up realizing at some point that something we deem morally important or valuable in legal practice is actually necessary as well. And so we might find that law and legal rationality neither exclude necessary references to morality nor merely include important or valuable, but contingent, references to morality. What we might find, instead, is that law and legal rationality actually integrate necessary references to morality. Moreover, we might discover this additional fact: that law and legal rationality do --
and indeed must-- integrate such references does not mean that law and legal rationality exhaust them or that those references are sufficient as some versions of natural law theory appear to claim.

References


