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THE JURISPRUDENCE OF REASONS

Frederick Schauer*


Law’s Empire is an important book. The book’s importance, however, lies only partially in its being a sustained and powerful argument by a highly influential legal philosopher. More significantly, the book is a fitting capstone to a tradition in American law and legal theory that not only connects Dworkin in interesting ways with the work of theorists as diverse as Lon Fuller and Duncan Kennedy, but also has important points of contact with American Legal Realism and the aristotelian conception of equity. The tradition starts with an intuitively appealing goal — getting this case just right. But that goal and the tradition embracing it are in tension with the very idea of a rule, for implicit in rule-based adjudication is a tolerance for some proportion of wrong results, results other than the results that would be reached, all things other than the rule considered, for the case at hand. In many of the most important areas of American adjudication, the tolerance for the wrong answer has evaporated, often for good reason, and the current paradigm for adjudication in the American legal culture may already have departed from rule-bound decisionmaking. This new paradigm instead stresses the importance not of deciding the case according to the rule, but of tailoring the rule to fit the case. Instead of bowing to the inevitable resistance of rules, the new paradigm exalts reasons without the mediating rigidity of rules, thus avoiding the occasional embarrassment generated by rules. And because this new jurisprudence treats what look like rules as continuously subject to molding in order best to maintain the purposes behind those rules in the face of a changing world, we can say that what emerges is a jurisprudence not of rules but of reasons. Dworkin offers what is to date the best theoretical explanation of the jurisprudence of reasons, and thus Law’s Empire provides the ideal occasion for considering the implications of this changing paradigm of law.

I

Unfashionably, I start with Aristotle. For it was Aristotle, in Book V of the Ethics, who first drew the distinction between law and eq-

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uity. Aristotle recognized that rules (what he called "law") are by their nature general, and thus written rules necessarily project the generalizations of the past onto the uncertainties of the future. The inevitable by-product of this phenomenon, however, is that instances will occasionally arise in which the result generated by following the rule will differ from the result that the same decisionmaker would have reached, all things considered except the existence of this rule, in the absence of the rule. We can call these "wrong results," because they are not the results the decisionmaker would want to reach, in light of all applicable reasons other than the existence of the rule, but for the existence of the rule. Equity, not only to Aristotle but also in the original conception of the English system of courts of equity, was the mechanism by which these "wrong" results might be corrected.

The mechanism for correcting such wrong results, however, is not as important as the very identification of the phenomenon. The central idea is simply that rules, by virtue of their generality, will inevitably throw off some proportion of wrong results. Inherent in a system of rules, therefore, will be an incidence of cases in which the rule will commend results different from those that would be reached by direct application of the reasons behind a rule, or by direct application of the full array of reasons that inform the decisional apparatus of a given decisionmaker or set of decisionmakers.

1. When then the law has spoken in general terms, and there arises a case of exception to the general rule, it is proper, in so far as the lawgiver omits the case and by reason of his universality of statement is wrong, to set right the omission by ruling it as the lawgiver himself would rule were he there present, and would have provided by law had he foreseen the case would arise. And so the Equitable is Just but better than one form of Just; I do not mean the abstract Just but the error which arises out of the universality of statement: and this is the nature of the Equitable, "a correction of Law, where Law is defective by reason of its universality."

ARISTOTLE, ETHICS 127 (D. Chase trans. 1937).


3. Because it is centrally important to what I have to say, let me clarify here the idea of a "wrong result." The wrong answers to which I refer are not mistakes that any decisionmaker might make, in the sense that these mistakes would be avoided by an ideal decisionmaker applying the same factors applied by the real decisionmaker. Rather, the wrong answers to which I refer are the products of scrupulous application of a rule, which because it is a generalization (as are all rules) is both over- and under-inclusive from the perspective of the reasons underlying the rule. Generalizations oversimplify, and rules, because they incorporate generalizations and impose those generalizations on the world, will occasionally generate results in which the scrupulous and correct application of a rule diverges from its purpose. Thus, when I refer to "wrong results," I mean the cases of divergence between a rule and the reasons behind it, rather than the mistakes made by the applier of the rule. Whether the wrong results resulting from a correct application of the rule are indeed correct in a larger sense, or whether a "correct" application of a rule is the correct way that rules should be applied, is precisely the question at issue.

4. This distinction between rule and equity is commonplace for those moral philosophers who think about the respective merits of act- and rule-utilitarianism. See, e.g., R. BRANDT, ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS (1959); CONTEM-
Thus, even the best (however measured) rules of law, if truly treated as rules, will occasionally generate outcomes that would themselves not be the best (measured in the same way) outcomes for the particular cases, and would not be consistent with the "point" behind a rule. The question of how to handle these wrong results generated by the right rules has been a recurrent theme since Aristotle, and is particularly prominent in American legal thought. Part of the Realist perspective is rooted in the observation that in "wrong result" cases judges often feel moved to make the right decision for the particular case, and that this power of the particular could frequently (Llewellyn) or usually (Frank) lead to bending or disregarding those "paper rules" obstructing the path to the best result for the case at hand. Equally relevant is Fuller's example, in his response to Hart, of the immobile statue of a vehicle (a truck) in the park. The precise point of the example was to underscore Fuller's belief, derived from his commitment to the primacy of purpose, that a fundamental feature of law was a comparative unwillingness to tolerate in the particular case a

5. J. BINGHAM, Joseph Walter Bingham, in My Philosophy of Law: Credos of Sixteen American Scholars 7, 13, 20 (1941); J. FRANK, LAW AND THE MODERN MIND 100-04 (1930); Hutcheson, The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 CORNELL L.Q. 274 (1929). With reference to this last citation, however, it is important to note that particularistic adjudication need not be intuitive, where "intuitive" refers to factors neither consciously perceived nor rationally explained. Although some writers conflate the intuitive with the particularistic, see, e.g., Grey, Landell's Orthodoxy, 45 U. PITT. L. REV. 1 (1983); Lehman, Rules in Law, 72 GEO. L.J. 1571, 1575 (1984), the two are distinct. One can engage in quite rational and reason-based decisions of particular cases, exploring the full richness of the particular case without the truncations of rules and categories that are larger than those particular cases. For a sustained defense of precisely this variety of reasoned and therefore nonintuitive particularism, see Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4 (1986).


silly result generated by a not-at-all silly rule.\textsuperscript{10}

Although the Realists were responding to what they perceived to be an excessive preoccupation with paper rules, and Fuller was responding to what he perceived to be an undue reliance on even a core of acontextual literal meaning in looking at legal language, the point is not solely about the canonical language in which rules may be formulated, but indeed about the very idea of a rule. If in the application of a rule the previous formulation or conception of that rule must always yield to the purposes behind the rule, then the rule \textit{qua} rule has no prescriptive power, being instead little more than the shorthand abbreviation for reasons and purposes sufficiently sensitive in application that those applications need never frustrate the underlying reasons. If this is so, then the distinction between a rule and a reason collapses. Perhaps it should collapse. Perhaps there is no conceptual distinction between a rule and a reason. Or perhaps there \textit{is} such a conceptual distinction, but decisionmaking institutions should be designed to override that distinction by fostering decision by reason and inhibiting decision by rule. When put this way, however, the claims seem in some tension with classical views about the nature of law, and it is thus worthwhile to see how much American law has indeed departed from such classical views, and how Dworkin and others seek to justify that departure.

II

Theories are built around archetypes. At the center of most theoretical constructs is a vision of what phenomenon is most important, and other features of the relevant world are then squeezed into the model that best explains the archetype. As a result, we can often better understand a theory by examining closely which cases, or what phenomena, the theory takes to be central, and which therefore the theory seeks primarily to explain.

A look at Dworkin's central cases is quite instructive. Significantly, Dworkin's central cases are \textit{cases}, results of appellate adjudication, rather than merely instances of application of law. A theory of law that seeks primarily to explain appellate cases, almost by definition at the edges rather than at the center of decisional determinacy, will look quite different from a theory of law that tries to explain why people stop at stop signs, or file their income tax returns by April 15, or do not think of running for Congress at the age of twenty-two.\textsuperscript{11} In some

\textsuperscript{10} Fuller makes the same point in the voice of the mythical Justice Foster in Fuller, \textit{The Case of the Speluncean Explorers}, 62 HARV. L. REV. 616, 623-26 (1949). There Fuller's message is not so much that the application in the instant case would be silly, but that at least it would be outside the purpose, \textit{id.} at 624, of the statute, despite being inside the statute's literal language. And Justice Foster's position is that in such cases the decision should be according to purpose, rather than according to the language of the written rule.

systems Dworkin’s focus on the hard appellate case would seem odd, and indeed distorting, much like the description of human nature that we might get from a homicide detective, or a description of the game of bridge that thought it centrally important to explain what happens when someone is dealt the wrong number of cards. But a focus on the pathological seems quite important in explaining the operation of law in the United States, where lawyers and litigation abound, where the business of the courts is frequently front page news, and where many of our most important economic, social, moral, and political issues are likely to be decided, at least in part, in the appellate courts. Thus, Dworkin’s claim that the way in which appellate courts decide hard cases is likely substantially to influence the nature of the legal system is quite plausible in the United States, even while it might seem highly implausible in systems with more determinate sources of law and more reluctance to treat courts as centrally concerned with steering the course of moral and political life.

Within this limited universe of hard appellate cases, the particular cases Dworkin selects as archetypes are still more revealing about the nature of the theory that will explain them. Unlike his now-discarded example of the quandary of the chess referee trying to determine whether abusive smiling was a violation of the rules of chess, Dworkin’s current archetypes do not deal with the situation in which traditional legal materials furnish no answer to the particular dispute before the judge. Instead, the centerpieces of his program, and the cases he deems it necessary to explain, are those in which a moderately clear answer generated by traditional legal materials is nevertheless rejected by an appellate court, and is, furthermore, rejected in the name of the law.

For example, Dworkin once again focuses on *Riggs v. Palmer*, in which the New York Court of Appeals held that an otherwise eligible
heir could not inherit if that heir found himself in that position by virtue of having murdered the testator. Dworkin now makes it clear, quite properly, that what is important about the case is precisely the way in which it would have been, prior to the decision, considered an

_**easy case.**_14 For this purpose an easy case is one in which there appears to be, on the basis of the most directly relevant and most naturally consulted legal materials, a plain answer, as when we consult article I of the Constitution in order to answer the question whether a member of the Senate may succeed herself. But in _Riggs_ the court rejects the easy answer, and holds that despite what seems to be the clear mandate of the applicable statute of wills, the murdering grandson may not inherit. Moreover, the court does not purport to be rejecting the law, nor even to be overriding the law in the name of more compelling moral or political considerations. Rather, the court claims to be applying the law itself, the plain words of the specifically applicable statute notwithstanding.

Similarly, another of Dworkin’s archetypes is Justice Powell’s dissent in _TVA v. Hill_,15 in which the Supreme Court applied the Endangered Species Act to halt construction of a large dam in the service of the snail darter, a species of fish whose continued existence can hardly be said to have been the central concern of the Act. But Justice Powell, while conceding the linguistic appeal of the majority opinion, nevertheless would have decided the case differently, while still in the name of the law, without interpreting the specific language differently. Rather, he would have, in effect, forced the narrow and in this case embarrassing language to yield to the deeper “point” of the statute.16

Locating cases like these scarcely requires Herculean efforts — they are a fixture not only of legal process courses in American law schools, but also of the reality those courses seek to depict.17 Time and again, following what Llewellyn praised as the Grand Style of judging,18 American judges have thought it important to avoid the application of a rule that diverges from the point behind a rule. These judges have saved themselves and the system from embarrassment by directly applying the purpose of the rule, rather than the linguistic embodiment of the rule, to the facts at hand, thus reshaping the rule at

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14. Pp. 16-20. “The words of the statute of wills that figured in Elmer’s case were neither vague nor ambiguous.” P. 17.


16. That Justice Powell was in dissent in _TVA v. Hill_ should not suggest that the jurisprudential view embodied in that dissent is a minority position. For a very recent example of a majority opinion adopting more or less the same view, see California Fed. Sav. & Loan Assn. v. Guerra, 107 S.Ct. 683 (1987).


the time of application. By allowing purpose to override language whenever the language would frustrate that purpose, decisionmakers maintain some semblance of what looks like a rule while still reaching the result in the case at hand that looks best from the perspective of the point behind a rule, rather than from the perspective of the particular way in which a rule now happens to be formulated.\(^{19}\)

Thus, at least within the realm of appellate adjudication, Dworkin's archetypes are hardly epiphenomenal. Indeed, if we, with Dworkin,\(^{20}\) focus especially on common-law adjudication rather than statutory interpretation, we can see that Dworkin has trained his sights on a centrally important, perhaps even defining, feature of the common law — the way in which law-applying courts can and frequently do rework the law as they are applying it.\(^{21}\) Such a process does not, however, fit the traditional positivist distinction between law-making and law-applyin,\(^{22}\) because a system premised on such a distinction would admit to legitimate law-making by law-applying bodies only within the interstices of past decisions. It would not recognize the propriety of law-making when previous decisions do give an answer, and thus would not be able to explain a system in which courts can and frequently do reject, noninterstitially, the dictates of previous judicial decisions.

One explanation for this phenomenon — the ability of a common-law court to decide, while retaining its legitimacy, that what looks like the easy answer for this case ought nevertheless to give way for this and future cases — might be to say that courts simply make pragmatic decisions under the rubric of rules. That is, it might be said that

\(^{19}\) See, e.g., United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); State of Israel, Ministry of Defense v. Brenner, 273 F. Supp. 714 (D.D.C. 1967); Commissioner of Internal Revenue v. Bilder, 289 F.2d 291 (3d Cir. 1961); Baker v. Jacobs, 64 Vt. 197, 23 A. 588 (1891). See also the justifiably famous Regina v. Ojibway, found in Notes and Comments, 8 CRIM. L.Q. 137 (1965). The classic case on the opposing view is McBoyle v. United States, 283 U.S. 25 (1931) (Holmes, J.), although McBoyle’s preference for plain meaning may be explained by the special notice needs of the criminal law. Nevertheless, the view expounded in McBoyle has hardly, in American law generally, been restricted to criminal statutes. See, e.g., Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1 (1895); Saville v. Virginia Ry. & Power Co., 114 Va. 444, 76 S.E. 954 (1913). The question, however, is whether the general McBoyle perspective has been displaced by a new paradigm of adjudication, a paradigm that takes Holy Trinity rather than McBoyle as its lodestar. That we now operate within a changed or changing paradigm is indicated not only by Dworkin’s work, but by that of others who seek to explain or justify the same phenomenon. See, e.g., G. Calabresi, A Common Law for the Age of Statutes (1982); Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892 (1982).


courts always or at least frequently succumb to the pressure of the particular, and rework rules in the process only as a way of dressing up the result reached on other, nonlegal, grounds.

This latter thesis — most commonly associated with the American Realists — could easily explain Riggs, Justice Powell's dissent in TVA v. Hill, and many other cases. What it cannot explain, however, is why the system not only talks in the language of rights that predate the pragmatics of a particular controversy, but also why the broad path of judicial decision seems to stay more or less on course, even though that course may from time to time change. A system of common law may differ from a stereotyped codification in which the tasks of law-making and law-applying never intersect, but it also differs from a system in which judges focus only on the equities of the parties immediately before them. How are we to explain such a system in a way that thus transcends the descriptive deficiencies of classical positivism and classical Realism?

III

As an alternative both to positivism and to Realism, Dworkin offers us Law as Integrity (pp. 176-275). Law as Integrity, which Dworkin takes to be describing and justifying more an attitude than a domain (pp. 410-13), has its roots in precisely the preference for purpose, or point, that so informed the thinking of Fuller, Llewellyn, Hart and Sacks, and many others.23 Law as Integrity starts, although it does not end, with the idea that the point behind a rule or series of rules “can be stated independently of just describing the rules,” (p. 47) and that “strict rules must be understood or applied or extended or modified or qualified or limited by that point.”24

Dworkin’s differences with traditional purpose theory, embodied in the “mischief rule” of statutory interpretation25 as well as in the work of the theorists just discussed, are differences residing largely in Dworkin’s willingness to take the same idea much further than had his predecessors. If the particular point lying behind the language of a particular statute may be consulted to apply or extend or modify or qualify that particular statutory language, then is it not also permissible to consult the even deeper and more abstract points lying behind the particular points, and to consult as well the point behind the entire system? That is the question that Dworkin answers in the affirmative, and thus Dworkin’s perspective sees judges frequently and properly

23. Dworkin aside, perhaps the most sophisticated defense available for this position is Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277 (1985).
looking to make particular decisions cohere with the larger and more abstract points in the decisional system generally. In order best to accomplish this goal, the judge is charged with constantly constructing the model that best explains our existing political and legal institutions at a given time, and then deciding the case at hand in a way that best serves the "point" of the model.

Thus, Dworkin takes the central idea of point, or purpose, but then applies it more globally with respect to the entire enterprise, and not just to a particular statute. To Dworkin, the task of the judge is to construct a large theme that coherently explains as much of the past as possible. As with the participant in a chain novel who must write the next chapter in a way that best carries on the enterprise established collectively by the individual writers of previous chapters (pp. 228-32), the judge in making a particular decision comes up with the explanation that best fits the existing terrain, and then makes the decision that best fits with that explanation.

Such a method, highlighted by but not dependent upon the chain novel and related literary metaphors, views law as largely an interpretive exercise, but the idea of interpretation needs closer examination. For certainly the classical positivist — Dworkin’s conventionalist26 — would embrace rather than reject the idea of law as interpretation. To the classical positivist the decisionmaker must look at the applicable legal materials, interpret their messages, and then apply those messages to the case at hand. To conceive of law as interpretation, therefore, is, at least presumptively, to make a claim that the conventionalist is likely to applaud. Now it is true, as Dworkin points out, that the conventionalist has difficulty squaring the language of legal decision, the language of preexisting rights, with the positivist view that hard cases, conventionally conceived,27 present the judge with an occasion for discretion. But however interesting this claim may be, it is not nearly as central to understanding the explanatory difficulties of conventionalism as is the difficulty conventionalism has in explaining the way in which some legal systems, especially that of the United States, quite often refuse to follow what appears to be the clear

26. Pp. 114-50. At times Dworkin caricatures positivism, or at least some versions of it, as incorporating a "plain fact" view of what the law is. Pp. 6-11. See also Dworkin, A Reply by Ronald Dworkin, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 247-52 (M. Cohen ed. 1983). But positivism need not entail uncontroversial demonstrability any more than does Dworkin’s "right answer" thesis. See pp. viii-ix. See also R. DWORKIN, A MATTER OF PRINCIPLE 137-45 (1985). If the idea of a right answer can survive the nonexistence of any way of noncontroversially proving that one answer is better than all others, and in my view it does so survive, then positivism might also be able to survive the nonexistence of the ability to prove noncontroversially what the law is in a large number of cases. On Dworkin’s nondemonstrability thesis generally, see Moore, Metaphysics, Epistemology and Legal Theory (Book Review), 60 S. CAL. L. REV. 453, 481-83, 490-94 (1987).

27. That is, where the hardness of the case is attributable solely to either (a) the absence of legal directives applicable to the case; or (b) the presence of two or more applicable but conflicting legal directives.
messages of previous cases or other legal materials, conventionally conceived. The importance of Riggs v. Palmer,28 Hennigsen v. Bloomfield Motors,29 and other similar cases in Dworkin’s pantheon of archetypes is precisely the way in which they would have been thought by the conventionalist to have been, prior to the decision, easy cases, where easiness and hardness are defined in terms of the directives given by a discrete array of legal materials, conventionally conceived.

How, then, are we to explain the way in which courts frequently reject the specific directives of conventional legal materials in the name of something else? One version of conventionalism might say that every such instance is an example of some other factor overriding the law, and that the presence of such phenomena need not call into question a conception of law that rejects the suggestion that such events happen within the law. Such a suggestion might be logically impeccable. The dispute between Dworkin and the conventionalist might only be a linguistic one, turning on whether we would want to include within our proper use of the word “law” the legitimate practice of judges of rejecting specifically applicable legal directives in the service of less specifically applicable legal directives as well as social, political, and moral directives. Such an approach, however, seems unsatisfying, especially in a system such as ours in which events of this sort take place with great frequency.

Thus, although Dworkin purports to reject semantic theories of law — ones that focus on the compass of activities picked out by the word “law” (pp. 31-44) — his own approach is itself a semantic theory.30 That is, Dworkin properly tries to include within the idea of law much that seems important to understanding and explaining the process of appellate adjudication. Throughout the previous decade or so’s discussion of Dworkin’s ideas, a common critique has been that the phenomenon Dworkin seeks to explain need not be definitionally assimilated into the concept of law.31 The success of this logical response, however, is inversely proportional to the importance of the excluded phenomenon. Where, especially in the common law mode, judicial steering of the course of the law involves frequent rejection of what would previously have appeared to be the law in the service of larger purposes, treating such events as epiphenomenal is bound to be unsatisfying.

28. 115 N.Y. 506, 22 N.E. 188 (1889).
The explanatory success of Law as Integrity can be seen largely to turn on a series of issues embedded within Dworkin’s brief but suggestive discussion of the idea of local priority. In most of the cases Dworkin seeks to explain, some item of law, conventionally conceived, points in the direction of an answer other than the one courts sometimes give and which Dworkin sometimes applauds. If the responses of Dworkin and the courts are legitimate, then the most immediately applicable norm must have, despite its immediacy, less than absolute force. Thus, under a view of Law as Integrity, the stuff of interpretation is not restricted to the most immediately applicable norm, but includes as well the other norms that abound in the total political or moral milieu within which the judge operates.

That local priority is less than absolute is for Dworkin the explanation of why the distinction between hard and easy cases fails. Indeed, the issue of nonabsolute local priority may be central to understanding his entire enterprise. When one says that it is an “easy” case that people may no longer serve four terms as President of the United States, that driving a motor vehicle at 80 miles per hour is illegal, or that in 1987 beneficiaries may not in New York inherit if they have murdered the testator, one makes those claims precisely by consulting the most seemingly relevant, the most local, legal materials. But if in fact the locally generated answer may sometimes, often, or usually yield to the opposite answer generated by less locally applicable materials, the distinction between hard and easy cases evaporates. Or, to put the claim more accurately, the line between hard and easy does not disappear, but is no longer situated at or near the line drawn by the most locally applicable item of law.

32. Pp. 250-54, 402-03. On those pages Dworkin conceives of the issue in terms of a priority for norms existing within the traditional “department” of law within which the problem might seem most naturally to be placed. But it should be apparent that the same issues of priority and locality that bear on the priority of departments bear as well on priority and locality within departments.

33. There is, of course, nothing about the idea of Law as Integrity that commands that the relevant universe include the political and moral as well as the legal. A threshold question presented by any coherence theory is the definition of the universe within which coherence is to be sought. A system calling itself Law as Integrity might limit the aspirations of integrity to the domain of norms existing somewhere within the legal system, conventionally described. Such a view, Dworkinian but not Dworkin’s, would have more modest normative ambitions than Dworkin’s view that integrity must be sought for the universe of legal, moral, social, and political institutions in a society. And such a view might be descriptively inaccurate for systems in which nonlegal norms are frequently relied on to set aside the answer suggested by the most immediately applicable legal norm. But the important point is that these questions are distinct from the central idea of Law as Integrity — the search for coherence within a domain, however that domain might be specified.

34. The most local items of law appear to indicate that Riggs is still good law. See, e.g., Matter of Bobula, 19 N.Y.2d 818, 280 N.Y.S.2d 152, 227 N.E.2d 49 (1967); In re Estate of Lupka, 56 Misc. 2d 677, 289 N.Y.S.2d 705 (Surr. Ct. 1968); In re Byers’ Will, 208 Misc. 916, 144 N.Y.S.2d 68 (Surr. Ct. 1955).
Thus, the rejection of absolute local priority is central to the idea of Law as Integrity, for Law as Integrity aims for coherence between the local and the distant, where “distance” exists both vertically and horizontally away from the local. Dworkin is surely right in describing law as an interpretive exercise, but what distinguishes Law as Integrity from conventionalism, also an interpretive exercise, is precisely the size of the domain from which the interpreter draws the raw material of interpretation. Suppose, to adapt one of Dworkin’s examples (pp. 232-38), that a specific reference in *A Christmas Carol* referred to Scrooge as being Jewish, but that everything else in the story contradicted such an interpretation, such that even Herculean efforts could not come up with a plausible “theory” of the story that reconciled the specific mention of Scrooge’s Jewishness with the balance of the story. In such a case, are we to conclude that the one sentence should be ignored? That is the question posed by the ideal of Integrity. The plausibility of ignoring the aberrant sentence, or any aberrant item, varies with the size of the item putatively to be discarded, as well as the distance away from that item in which the alleged inconsistency resides. Suppose instead that in this hypothetical *A Christmas Carol* the inconsistency arose not between the one reference and the balance of the story, but between the story as a whole and all of the other fiction written by Dickens, or between the story and the general tenor of Victorian fiction taken as a whole, or between the story and the general tenor of Victorian culture taken as a whole? The questions now become harder, and the answers less obvious. That a specific item in *A Christmas Carol* should be ignored because it is inconsistent with the rest of Dickens, although not with anything else in that particular story, is a more difficult claim to make, as is the claim that we should forget about the entire story because it, as a whole, is inconsistent with some larger domain. Thus, it is clear that even if Integrity is taken in the abstract to be a worthy ideal for a normative system, many questions remain, especially about the size of the domain within which the norms are expected to be coherent. These, in turn, are questions inevitably about the very nature of the enterprise in which we are engaged. Thus, the question of local priority, the extent to which certain aspects of the Statute of Wills will be discarded in the service of coherence, is revealed to be a question that is linked to the question of what the enterprise is designed to achieve.

V

Implicit and at times explicit in Dworkin’s and some legal systems’ denials of absolute local priority is a normative view about the consequences of adhering too strictly in all cases to the results generated by the most locally applicable legal item. Law does not just stand there to be watched. We expect people to obey its mandates, even when they
disagree. In some systems, most notably and most extremely the United States, we also entrust to the system the power to make decisions with profound moral, political, and economic effects. Is it any wonder, then, that we would be uncomfortable with a decision, however locally justified, that seemed to betray many of the nonlocal norms that surround us? And if we wish a system in which respect and obedience are more important than certainty, predictability, and stability, then might local priority plausibly be sacrificed with some frequency to the goals of systemic coherence embodied in Law as Integrity? Dworkin does not say this in so many words, but such is the normative claim about the legal system that undergirds Dworkin’s particular conception of the nature of interpretation.35

But surely even within a system recognizing that the large and distant must occasionally trump the small and local, the more mundane virtues of the Rule of Law, including not only predictability and stability but also the recognition that Hercules is a rare breed,36 still persist. We cannot and do not expect individuals incessantly to be calculating the likelihood that 55 miles per hour may under some circumstances mean something else.37 Or maybe we do expect citizens to engage in such calculations, but we are confident that these calculations will be so intuitive and usually so coincident with the locally generated answer that the calculating citizen need not be paralyzed by uncertainty.38

This confidence exists, however, precisely because the local does have a priority. That priority is not absolute, to be sure, but it can be and is a priority nonetheless. In a similar vein, Dworkin has previously reminded us that the precedents of the past, no matter that they might be rejected in some cases, no matter that they might be rejected in some cases, still carry with them to the present


36. That is, there may be wrong results, see note 3 supra, that come from decisionmaker error rather than from the over- and under-inclusiveness of scrupulously applied rules.

37. Dworkin is unclear on the question of who is even to attempt to operate in Herculean mode. It appears as if such aspirations are only for judges, and not for presidents, legislators, citizens, and the cop on the beat. If that is so, then one can question any conception of the legal enterprise that has such an impoverished view of the legal obligations of those who are not judges. But if Dworkin does not believe that Herculean aspirations are restricted to the judiciary, then the space between Hercules as ideal and what reasonably may be expected looms as a much larger issue.

38. Pp. 350-54. Dworkin gets some credit for recognizing that the hard case/easy case problem is a problem, but it is not one to which he gives a satisfactory answer. He notes that the speed limit question is easy for a particular time and place “because we assume at once that no account of the legal record that denied that paradigm would be competent.” P. 354. Yet he still avoids confronting directly the question of how much the acontextual meaning of the most locally applicable item — the extent to which “55 miles per hour” refers to 55 miles per hour — contributes to these determinations of competency.
some gravitational force. But what is it that has priority, or gravitational force? Not a limitless universe of potentially applicable materials, but instead a manageable array of relatively identifiable signals. "Manageable array of relatively identifiable signals," however, is a bit of a mouthful, so perhaps something briefer might be preferable — "law," for example. I put it this way not to be cute, but rather to expose the strong affinity between that to which Dworkin would give priority or gravitational force, on the one hand, and that which the conventionalist would call "law," on the other.

Dworkin is surely right in objecting to the conventionalist's refusal to apply the word "law" to that which might override the locally applicable as well as to that which is contained within it, and he is also right in pointing out the impossibility of pedigreering the overriding factors in the same way that the conventionalist seeks to pedigree "the law." But in properly seeking to bring these more distant and unpiedgereeable factors within our understanding of what law-as-system in fact does and should do, Dworkin has slighted the archetypes that others might think it equally important to explain.

A theory of law with a different focus, therefore, might concentrate on precisely the force and identification of that narrower and more realistically pedigreable set of materials that even Dworkin seems to treat as presumptively but not conclusively controlling. Such a theory would seek to explain the comparative dominance in certain decision-making arenas of certain materials rather than others, of Blackstone and not the Bible, of Holmes and not Homer, of the West Publishing


40. Over the years, some scholars have urged that positivism might be compatible with a decision by a society to pedigree virtually all social, political, and moral considerations. If this is so, then Dworkin's attack on positivism fails, because the very factors Dworkin shows to be consistently at work in appellate adjudication might be factors that the rule of recognition at work in a particular system has in fact designated as legally permissible factors. In this vein, see Coleman, Negative and Positive Positivism, 11 J. LEGAL STUDIES 139 (1982); Coleman, Legal Duty and Moral Argument, 5 SOC. THEORY & PRAC. 377 (1980); Lyons, Principles, Positivism, and Legal Theory (Book Review), 87 YALE L.J. 415 (1977); Soper, Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute, 75 MICH. L. REV. 473 (1977). But these attempts to demonstrate that positivism and Dworkin are (contingently) extensionally equivalent in certain systems (see Coleman, Legal Duty and Moral Argument, supra, at 384-85), although not logically incorrect, achieve their logical neatness precisely by defining away the very force of positivism — its focus on the desirability in some contexts of being able to identify a comparatively discrete set of sources of decisional guidance — and substituting instead a particular subset of positivism that focuses instead primarily on the legitimacy of judicial decision. There are differences between positivism and Dworkin, but those differences are located not in judicial legitimacy, but instead in the ability to say of some set of norms narrower than the total universe of potentially applicable norms that this narrower set is the only set of norms that is presumptively or absolutely applicable to certain decisional occasions. This is the appeal of positivism, or strong conventionalism, and this is what Dworkin claims to be neither morally desirable nor extant in the systems with which he is most concerned. This is an important dispute, one that takes pedigreability to be a strong constraint, and it seems mistaken to blink at the important issues in the dispute by so watering down the idea of pedigreability that it no longer realistically constrains.
Company rather than *The New York Review of Books*. And when we looked for such a theory, it might look much like Dworkin's strong conventionalism, or positivism, but a positivism that explained not only law, the sources of the presumptively dominant, but also LAW, consisting of the combination of law and the sources of the potentially overriding as well.

VI

Such a theory of *presumptive positivism* could explain not only why Riggs' grandson did not inherit, but also why a host of almost but not quite as unworthy beneficiaries do inherit. It could explain not only the plausibility of Justice Powell's dissent in *TVA v. Hill*, but the plausibility of Chief Justice Burger's majority opinion as well. And it could explain not only why the document that Hennigsen and Bloomfield Motors signed did not control when Hennigsen brought suit, but also why what people sign most often does control.

The explanatory success of such a vision will of course turn on the guidance that might be provided by consulting the range of materials accorded gravitational and thus presumptive respect. We thus see the special attractiveness of Dworkin's vision not only for common law adjudication, but for constitutional adjudication in the Supreme Court as well. For when the stuff of decision is regularly drawn from history, morals, politics, science, and even from Dworkin\(^41\) as much as it is drawn from Supreme Court decisions and constitutional text, there exists little, if anything, within that domain that can be said, descriptively, to enjoy local priority.

Conversely, the admittedly nonabsolute dominance of certain comparatively identifiable and pedigreeable materials is a substantially accurate characterization when thinking about lower court adjudication under the watchful eye of a higher court,\(^42\) about the overwhelming bulk of exercises of statutory interpretation, or even about common law adjudication within areas whose common law rules have crystallized with age. In none of these situations can we expect the answer generated by this set of pedigreeable materials always to dominate, and it is Dworkin's enduring contribution to jurisprudence that he has provided a descriptively appealing and normatively congenial account of the way in which courts frequently and legitimately put aside the easy answer generated by the most locally applicable materials. What he has not provided, however, and what conventionalism does provide, is an explanation for the innumerable times in which courts follow rather than put aside this easy answer.

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In this respect, it is illuminating to note the way in which Dworkin's typically seductive example of the practice of courtesy (pp. 46-49) is an example of a practice in which none of the concrete rules have been reduced to a fixed and canonical form. When such is the case, as it is not with the practice of courtesy but is with the practice, say, of selling securities in interstate commerce, the specific and fixed verbal form operates to constrain in a particular way. The very fact of embedding our practices in substantiality less movable language differentiates the canonical rule-formulation from an unformulated practice such as courtesy. It may be that American law has reached the point at which the language of a statute exerts no more of a constraint than do the unformulated reasons of the practice of courtesy. But that is precisely the issue, and the mere citation of the example of courtesy does nothing to advance Dworkin's argument. For it would still have to be shown that the fact of reducing reasons to canonical rules did not serve to elevate the ordinary or technical meanings of those words to a place of interpretive prominence. Admittedly, this prominence is no more than presumptive,43 as Dworkin has powerfully demonstrated, but he has yet to show that the presumption does not exist, or that the presumption is not more or less coincident with the meaning of the most locally applicable and conventionally described legal materials.

To characterize adjudication in this presumptively positivistic

43. I talk of "presumptive" for want of a better word, but presumptiveness is importantly ambiguous. We say that a rule, standard, or assertion is presumptive when two conditions attach; that it is normally controlling, and that what is normally controlling is defeasible under some abnormal circumstances. With respect to a rule, however, the conditions for defeasibility are of two quite different varieties. In some circumstances, the reasons behind the rule are inapplicable in this case. This characterizes Fuller's statue of a vehicle, and other examples come readily to mind. Think, for example, of a rule outlawing the possession of pit bulls because of the dangerous tendencies of the breed. To the extent that such a generalized prohibition was applied to an old and docile pit bull that was nevertheless a pit bull and thus within the ambit of the regulation, we could say that the reasons behind the prohibition do not apply in this case. Now if in such cases the rule is held inapplicable, we can call such rules internally defeasible. The reasons for inapplicability relate only to the rule itself. By comparison, we can also imagine presumptive rules being overridden by other particularly exigent factors. When the rule against classifying on the basis of race is overcome by a "compelling interest," it is not because the reasons behind the rule do not apply, but rather because even if they do apply there are other reasons that are, in this case, even more pressing. Insofar as rules are held inapplicable (or, more accurately, noncontrolling) in such circumstances, we can say that such rules are externally defeasible. When I speak of "presumptive positivism," therefore, I say nothing about whether the norms of the system are internally or externally defeasible, or both. External defeasibility presents no particular problems. But for internally defeasible norms to remain presumptive in any strong sense, and to operate as "real" rules consistent with my discussion in the text, then some form of burden of proof allocation must ensure that the burden of proof is reasonably strongly on those who would assert the inapplicability of the rule. For without this shifting of the burden of proof, there is no real presumption in favor of the rule, and thus the rule, as opposed to the reasons behind it, exerts no independent constraint. But if the burden of proof is strongly on those who would demonstrate a rule's inapplicability, then there will be some cases in which the rule might be in fact inapplicable, but in which the burden of proof is not satisfied. In such cases it is the rule's rulelessness that will determine the result, and under such a system rules have independent force, not collapsing into their generating reasons.
manner, however, may be phenomenologically inaccurate. With some
effort, Dworkin can be interpreted as justifying his focus on the closely
contested appellate case in part by reference to the ripple effect
throughout the system of even the possibility that the expected local
priority will not dominate. This argument, powerfully made earlier by
Duncan Kennedy,44 deserves Dworkin's en passant reinforcement of
it. For it may well be that the real brooding omnipresence in the
courtroom is not so much the law as it is the possibility that the judge
may put aside the law in making her decision. And the very possibil­
ity, even if the number of times that the law is in fact set aside is
statistically rare, could dominate every case. Consider a prisoner-of-
war camp. It may be true that only two out of a thousand escape, but
the escapes of those two substantially reinforce or even create a phe­
nomenology in which the possibility of escape is the primary cognitive
experience for the remaining 998.

The extent to which this is a satisfactory phenomenology of judg­
ing or lawyering or clienting or citizening is obviously an empirical
proposition varying with the individuals involved, the type of adjud­
cation, and the nature of the system in which the adjudication occurs.
Nevertheless, the fragility of settled law, the indeterminacy of the
seemingly determinate, is so much the stock of American law schools,
where the legal attitude is substantially inculcated in the future major
players in the adjudicatory system, that it should be no surprise, espe­
cially in the courts, that ways around the answer that appears locally
generated play a critical part in what the American legal system is all
about.

VII

In some ways, Dworkin's enterprise has points of contact with per­
spectives as seemingly diverse as American Legal Realism, Law and
Economics, and Critical Legal Studies. All of these visions of law are
concerned with attacking strong versions of the autonomy of legal ar­
gument,45 focusing instead on the comparative continuity of legal and
larger decisionmaking.

Dworkin's vision bears resemblances as well to equity and to Real­
ism in its concern with avoiding those wrong answers that are the in­
evitable by-product of a system of rules, and this connection between
Dworkin and the work of others deserves close scrutiny. What is it to
say that an application of a rule diverges from the point behind the
rule? What is it to say that in such instances it is the point that should
prevail? And what does that say about rules?

44. Kennedy, Legal Formality, 2 J. LEGAL STUDIES 351 (1973).
It is in the nature of a rule, whether normative or descriptive, that it generalizes. It gathers the particulars of the world under a heading, a category. Descriptive rules use these generalizations to make useful statements about the world. Normative rules impose these generalizations about the past onto the world of the future. As a result, taking normative rules seriously invariably involves placing today's events into yesterday's category. What we think irrelevant today might have been deemed relevant when yesterday we crafted the generalization that undergirds today's normative rule. And the distinction we suppressed yesterday in gathering diverse particulars under one generalization might be the very distinction that for this case now seems critically important.

Invariably, therefore, a regime of rules, even if followed faithfully and inexorably, will generate some number of wrong answers, in the sense of applications of a rule differing from the results that would have been reached by direct application of all of the reasons now relevant to the issue without the mediating rigidity of the rule itself. And although the Realists, the founding fathers of Equity, and Dworkin all respond in quite different fashion to the phenomenon of the wrong answer thrown off by the right rule, for all of them it is nevertheless a centrally important event.

Equity responded to such events not by doing anything about the rules, but instead by constructing a parallel system within which such individual mistakes could be corrected. To the more extreme Realists, especially Jerome Frank, focusing on the individual case and deciding it optimally, and in comparative isolation, was more routine than exceptional, and Llewellyn's observations about the pressure of the particular were for some Realists the crucial insight into perceiving what in reality determined legal results.

Dworkin is no particularist. His concern is not aimed at the moral attractiveness of the parties before the court, or even at the particular equities between them. He is interested in principles and not particulars. Nonetheless, the wrong result is important for Dworkin because it signals that something is amiss with the rule itself. When faced with such an event, one in which the rule does not seem to work as the

46. On the idea of a wrong answer in this sense, see supra note 3. It is worth noting also that this feature of rules need not, and does not here, presuppose any position on the determinacy of rules. The point is a logical one not dependent on rules being imprecise. On the contrary, lack of precision — vagueness — builds into a rule the mechanism for its avoidance, and thus vagueness and rules can be seen as opposed notions. See Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976); Schauer, Authority and Indeterminacy, in AUTHORITY REVISITED: NOMOS XXIX 28 (J. Pennock & J. Chapman eds. 1987). Thus, the more precise a rule, the greater the possibility that that very precision will serve to differentiate what the rule appears to require and what the point behind the rule would require.

47. Note the extent to which Fuller sees pardons as performing this parallel system function in Fuller, supra note 10, at 619 (Truepenny, C.J.).

48. J. FRANK, supra note 5, at 100-04 (1930).
point behind it would have had it work, the Dworkinian has a remedy — the specific formulation of the rule (the local rule) gives way to the point or reason behind the rule, and the wrong answer is avoided. Dworkin recognizes that this itself is a major departure from the presuppositions of strong conventionalism (pp. 87-90), but, as I have described above, he nevertheless goes further. For Dworkin it is not only the point behind a particular rule that might dominate that rule, but the more general array of points behind other rules and behind the rule system generally. But although Dworkin thus has a strikingly more expansive view of what counts as the point behind the rule than did his predecessors, it is important to note the extent to which the most important move is to resort to the point, whether broad or narrow, in the first instance.

When the wrong result generated by a rule is inevitably put aside in favor of the "accurate" application of the point behind the rule, rules have become continuously malleable to serve the purposes underlying the rule. These purposes, the point, may not change, but they need not be frustrated if they can sensitively be applied directly to each case. But if rules thus serve merely as the endlessly defeasible servants of their underlying reasons, then what are rules? Good question. Philosophers commonly distinguish rules from their formulations, and thus it may appear as if only the specific verbal formulations and not the rules themselves are in jeopardy when the language of a rule is set aside in favor of its purpose. Yet perhaps the philosophers are wrong. Perhaps rules exist in rather than above their formulations. Or at least this possibility ought to be taken seriously.

VIII

At first blush it does appear that rules and their formulations do indeed differ. "Do not walk on the grass," "No walking on the grass," "Keep off the grass," and "Walking on the grass is prohibited" appear not to be four rules, but just four different ways of formulating only one rule. It seems, therefore, that a rule stands in the same relationship to its formulation that a proposition bears to a sentence. "The cat is on the mat" and "On the mat there is a cat" are again two different sentences, but both conveying one and the same proposition.

Things get tricky, however, when we take account of the way in which rules apply not to single items, such as that cat, but to categories, such as cats. Imagine the following set of rule-formulations: "No vehicles in the park"; "Vehicles are not permitted in the park"; "Vehicles in the park are prohibited." The rule content (the equivalent of a proposition) of this set of rule-formulations is something like "vehicles

not in the park.” But although this rule is not identical to any of the formulations from which it was derived, it nevertheless is identical in rule content with each. And if we were to make any change in the content of what counted as a vehicle for purposes of the rule, without making the very same change in the formulation, the rule and its formulation would no longer match. The conclusion that follows from this is that the distinction between rule and formulation is syntactical only. For a formulation to be a formulation of this rather than that rule, the coverage identified by the formulation must be identical with the coverage identified by the rule itself, and thus, for the purposes of the coverage question, or the rule content question, the formulation and the rule are identical.

IX

The issue now appears in clearer focus. The defeasibility of rule formulations, as advocated by Dworkin and other practitioners of the art, is in fact the defeasibility of rule content, and the defeasibility of rule content is the defeasibility of rules. And if the rules are defeasible whenever it is the case that direct application of the point behind those rules is ill-served by the rules themselves, then it is the point and not the rule that constrains. 50 In such circumstances, the rules serve only as place-markers, or rules of thumb, indicating for us what the results of direct application of the point are likely to be, rather than constituting an independent constraint on decisions. And when rules are only rules of thumb, falling by the wayside whenever their application would diverge from the result we would reach in the absence of the specific rule, the situation can best be described as decision by reason rather than decision by rule. Insofar as such an approach informs a view of law, it seems accurate to call it a jurisprudence of reasons.

Substituting a jurisprudence of reasons for a jurisprudence of rules is not only central to Law's Empire, but has been a constant theme in Dworkin's work. It was, after all, the “Model of Rules” that Dworkin first set out to attack. 51 Dworkin's jurisprudence of reasons, however,

50. Note Dworkin's use, pp. 16-17, of the idea that the “real” poem is something other than the poem appearing on a piece of paper, and that, similarly, the “real” statute is something other than the statute appearing as a series of marks on a piece of paper. One can view this as a rhetorical device to hold onto the associations suggested by interpreting this poem or statute, while not feeling conclusively constrained by what the poem or statute actually says. That, of course, is the ultimate point of controversy, and Dworkin's position is not advanced by the assertion that what he advocates is interpretation of the “real” law.

is not a jurisprudence of particulars. It is not even a rational particularism. Dworkin avoids particularism, and distinguishes his realism from Realism, partly by recognizing some degree of local priority, although somewhat opaquely. Even more importantly, Dworkin avoids extreme particularism by drawing frequently, although again opaquely, on the distinction between ultimate and intermediate principles.

Although Dworkin continues to adhere to a belief in the ultimacy of equal concern and respect, his perspective — moral, political, and legal — is riddled with the acceptance of principles more particular than that of equal concern and respect. One of those principles — no person should profit from his own wrong — was of course central to Riggs v. Palmer. What keeps Law as Integrity from collapsing into a deontological version of act-utilitarianism, say, act-equality, or act-respect, is precisely the way in which intermediate principles, or intermediate reasons, provide the focus of Dworkin’s system. As the judge radiates away from rules, these intermediate principles seem to have a sufficient degree of stickiness such that every case does not involve merely an application to that case of the general value of equal concern and respect.

It should be apparent, therefore, that ultimate moral or political principles stand in the same relationship to intermediate reasons as those intermediate reasons stand to particularized rules. One might ask, then, if particularized rules must yield to the pressure of intermediate reasons when those rules conflict with those reasons, why reasons should not similarly yield to the presence of ultimate moral principles. And again, the answer must reside in the idea of local priority. Ultimately, Law as Integrity is distinguished from particularism by its focus on the middle — the way in which the mid-level reason can transcend the rigidity of concretized rules but at the same time look back to the generalizations and goals of the past so as to maintain some of the generality and stability we associate with the Rule of Law.

52. See note 5 supra.
54. 115 N.Y. 506, 22 N.E. 188 (1889).
56. The very word “integrity” has considerable positive emotive value, and it is worth noting that other visions of law, such as ones that take rules and texts more seriously than does Dworkin, might be reluctant to yield to Dworkin the territory of “integrity.”

A great deal is at stake here: the whole notion of the integrity of the means of human
Although Dworkin's language seems to focus on the intermediate reason, in those hard cases in which intermediate reasons conflict with deeper, more ultimate, reasons, again the more particular yields to the more general. Where, for example, even the point of the Fugitive Slave Laws frustrates the point of the deeper principles embedded in the society, rejection of the more specific seems to Dworkin to be presumptively desirable (pp. 219, 438 n.27).

Even intermediate reasons, therefore, can be conceived of as instantiations of more general reasons, and it is a pervasive theme of Dworkin's program that at any level the more specific norm (the rule) that stands in the relationship of greater specificity to some more general norm (the reason) frequently yields in cases of conflict. The result is that for a particular case the judge reaches a decision that attains a desirable result for that case and simultaneously steers the rule in such a way that the decision of this case is seen to come within the newly reformulated rule.\(^7\)

To the extent that rules are thus steerable to reach the result commended by the array of reasons standing behind and around a rule, then the rule loses, pro tanto, precisely what makes it a rule — its ascription of normative force to a generalization, a generalization grouping particulars that are in some ways different. This grouping and its consequent suppression of potentially relevant differences is what causes rules to falsify some results that would otherwise have been reached. There is nothing just this specific, or this constraining, about a rule. Its rulelessness resides in its comparative constraint vis-à-vis the more general reasons that would otherwise inform the decision at hand. When this comparative constraint disappears, when rules are continually malleable so that they need never falsify any results generated by direct application of the full array of available reasons, then

\(^7\) When put in this way, the points of contact with a contemporary debate in "general philosophy" become apparent. For if a rule is whatever we now take it to be, it ceases to be a rule. This much is noncontroversial, although there is much controversy about what, if anything, prevents this from happening all the time, even to rules of language and mathematics. The inspiration for the debate is Wittgenstein, in particular L. Wittgenstein, PHILOSOPHICAL INVESTIGATIONS (G. Anscombe trans. 2d ed. 1958) (I provide no section references since where Wittgenstein first introduces the point is part of what people are debating); L. Wittgenstein, REMARKS ON THE FOUNDATIONS OF MATHEMATICS (G. von Wright, R. Rhees & G. Anscombe eds., G. Anscombe trans., rev. ed. 1978). For a sampling of the debate, see S. Kripke, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982); C. Wright, Wittgenstein on Rules and Private Language, 82 J. PHIL. 471 (1985); Goldfarb, Kripke on Wittgenstein on Rules, 82 J. PHIL. 471 (1985); Wright, Kripke's Account of the Argument Against Private Language, 81 J. PHIL. 759 (1984).
rules no longer contain the generalizations that distinguish rule-based decisionmaking from particularized decisionmaking. When this happens, rules have disappeared, and decision by reason alone is the order of the day.

There is something attractive about the jurisprudence of reasons. Few of us are comfortable with accepting wrong answers to the questions presented to us, least of all when we are in a position to make those wrong answers right. But the attractiveness of the jurisprudence of reasons does not come without cost. Insofar as rules lose the ability to resist in the face of pressures to reach the right answer, the domain within which those rules exist loses the virtues often associated with the rule of law — some degree of predictability, some degree of consistency in decision, some degree of institutionalized distrust of individual decisionmakers. These values, and others associated with them, are variations on a central theme of stability for stability’s sake. When put that way, this theme hardly seems a candidate for a value of transcendent importance. And that is precisely why, when the moral and political stakes are high, as in constitutional adjudication, or when we are uncertain of the values we wish stabilized, as with common law adjudication, we have implicitly embraced something much closer to the jurisprudence of reasons than to the model of rules.

Conversely, at times we have sufficient experience with recurring fact patterns that we can predict the ways in which the future is likely to confront us. Moreover, having a good idea of what we are likely to see, we can gauge with some confidence in advance how we wish to deal with the future. As a result, we can design rules minimizing the incidence of occasions in which rule and reason diverge. In such circumstances, we may feel sufficiently confident of the general course of adjudication that we are willing to sacrifice getting things just right in exchange for the stability that comes from the model of rules.

It should come as no surprise, therefore, that Dworkin and the jurisprudence of reasons more successfully explain the common law and constitutional adjudication than they explain the idea of law when relatively specific statutes (or crystallized common law rules) are followed relatively faithfully by citizenry and judiciary alike. In these latter cases, conventionalism, or positivism if considered as presump­tive rather than absolute, seem substantially closer to the mark.

Dworkin has focused our attention on the fact that the very idea of a rule gives argumentative force to the rule qua rule, as opposed to the reasons that have generated it. Dworkin thus compels us to question the extent to which what we happen to call “law” has, especially in this country, much to do with rules, and the extent to which it should. This latter point, Dworkin’s normative one, is simultaneously the point that the institution of law should constantly strive to be all that it can be. But perhaps that very striving for the optimal is not part of
what law is, and maybe law, more positivistically conceived, is at bottom a second-best solution, seeking to optimize in the long term in a world in which the attempt to optimize in the short-run may yield an unacceptable number of short-run errors.

Normatively, much ink could be spilled on both sides of the argument Dworkin has now usefully clarified. The “jurisprudence of reasons” is my term, and not his, and Dworkin might object even to the characterization. But that characterization seems the one that best “fits” not only Law’s Empire, but in fact much of the entire corpus of Dworkin’s work. As a descriptive enterprise, this corpus seems much more accurately to characterize the nature of much of appellate adjudication than did its positivist opponents. But whether the jurisprudence of reasons accurately characterizes the idea of law itself is something that remains to be shown.