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LEGAL THEORY AND THE OBLIGATION OF A JUDGE: THE HART/DWORKIN DISPUTE

E. Philip Soper*†

Theories of law may be conceptual, descriptive, or normative. A conceptual theory aims at the identification of those features that are most important in justifying a decision to classify any social structure as a legal system. Such theories, are, in short, attempts at real definition of the concept of law or of a legal system.¹ Professor H.L.A. Hart's theory, published in book form in 1961, is a conceptual theory.² A descriptive theory aims at the more modest goal of identifying important features of one or more particular legal systems without concern for whether such features are to be found wherever the

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1. By "real definition" I mean to identify broadly those enterprises that make objective claims concerning the correlation of the preanalytic phenomenon mentioned in the definiendum with postanalytic, nonverbal phenomena mentioned in the definiens. I mean to contrast both "lexical definitions" (which correlate definiendum with actual or dictionary usage) and "stipulative definitions" (which propose correlations, but make no objective claims). Much of the dispute over whether "real definition" is possible, particularly in the present context, *see* note 2 *infra*; *cf.* R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS*, 35-37 (1975) [hereinafter cited as R. SARTORIUS, *INDIVIDUAL CONDUCT*], arises on the assumption that the term refers exclusively to the classical enterprise of classifying *per genus et differentiam*, with the aim of producing necessary and sufficient conditions for the correct use of a term. That enterprise, however, is only one of at least twelve distinct activities that have gone by the name of "real definition." R. ROBINSON, *DEFINITION* ch. 6 (1954). My use of the term "conceptual theory" does not presuppose a particular definitional theory beyond that stated above, although I am inclined to agree with those who suggest that "real definition" in the classical sense is not as promising an undertaking (if it is possible at all) as the more modest goal of analyzing a complex concept into important, distinguishing features that yield an increased insight into the nature of the concept. *See id.*; R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra*, at 37-50. For the meaning of "importance" in this context, *see* Sartorius, Book Review, 52 *ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE* 161, 163 (1966).

2. H.L.A. HART, *THE CONCEPT OF LAW* (1961) [hereinafter cited as *CONCEPT OF LAW*]. Hart's insistence that he is not providing a definition of law, *see id.* at 16, should probably be understood as referring to definition in the classical sense. *See* note 1 *supra*. Even in that sense, commentators have detected equivocation in Hart's characterization of the enterprise in which he is engaged. *See* Brown, Book Review, 72 *PHIL. REV.* 250 (1963); Singer, *Hart's Concept of Law*, 60 *J. PHIL.* 197, 200 (1963). Compare Hart, *Definition and Theory in Jurisprudence*, 70 *L.Q. REV.* 37 (1954) and *CONCEPT OF LAW*, *supra*, at 16, with *CONCEPT OF LAW*, *supra*, at 113.

phenomenon of law is encountered. A descriptive theory thus may or may not conflict with a conceptual theory. Where conflict does result, it is by way of counterexample rather than countertheory. Confronted with features identified as important in a descriptive theory but ignored in his own, a conceptual theorist may respond to the apparent counterexample in three ways: (1) he may dispute the accuracy of the description; (2) he may assume that the features have been accurately described, but deny that they are incompatible with the basic conceptual model; or (3) he may deny that the structure being described is in fact a legal system. Professor Ronald Dworkin, in a recent trilogy of articles,³ has advanced a descriptive theory⁴ of the Anglo-American legal system; he claims that the theory furnishes a counterexample to the related conceptual theories of legal positivism in general and of Professor Hart in particular. He also claims that the theory provides a normative account of law⁵ preferable to the account provided by positivism.

The conceptual core of the positivist's theory, which Dworkin attacks, is the claim that legal validity is determined by reference to a master test—a standard or set of standards external to the judge that can in theory be identified empirically and that serves as the ultimate justification of the claim that the judge's decision in any particular

3. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted in *LAW, REASON & JUSTICE* 3 (G. Hughes ed. 1969), and as *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* (R. Summers ed. 1968) [hereinafter cited as *Model of Rules*]; Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972) [hereinafter cited as *Social Rules*]; Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) [hereinafter cited as *Hard Cases*]. See also Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963).

4. I take Dworkin's theory to be descriptive rather than conceptual in part because that is how he characterizes it, see *Hard Cases*, *supra* note 3, at 1101, and in part because it has been implicitly presented from the beginning as a counterexample to positivism, rather than as an attempt to explicate the general concept of "law" or "legal system." The possibility that one can view the theory as conceptual, in which case the argument for the theory remains incomplete, is briefly considered at the conclusion of this paper. See text at note 145 *infra*.

5. A normative theory describes the essential features that a legal system ought to display. The proponent of such a theory is not an essential antagonist of either the conceptual or the descriptive theorist. The normative theorist may critically evaluate a descriptive account of law by indicating the extent to which features identified as prominent aspects of a particular legal system accord with the features that the system ought to display. But the normative theorist cannot assume a similarly critical stance toward the conceptual theorist without turning the quest for real definition into a dispute about the most appropriate stipulative definition of law. The normative theorist who finds himself at odds with the conceptual theorist must either claim that only stipulative definitions are possible in this context, or he must meet the latter on his own grounds by explaining why the conceptual theory, to the extent it is incompatible with the normative account, also proves to be an inaccurate analysis of "law." Because I am concerned only with the latter dispute in this paper, the normative aspect of Dworkin's theory will be largely ignored. But cf. note 99 *infra*.

case is in accordance with "the law."⁶ The features of the Anglo-American legal system that Dworkin claims cannot be accommodated to such a "master-test model" are described by the following three propositions, all of which Dworkin asserts and all of which I take to be different ways of expressing a similar idea:

- (1) There is a uniquely correct legal result in every judicial case;
- (2) In deciding cases, judges never have discretion to select one of two or more equally permissible results;
- (3) The legal system, at any given moment, is a system of fully determined entitlements. (That is to say, individuals never approach courts as lobbyists might a legislature, arguing for decisions claimed to further collective goals or political aims of the society. Rather, litigants approach courts armed with arguments of principle, correctly claiming that pre-existing individual or group rights determine the result a court must reach whether or not some collective goal of society or general political aim is thereby served or for that matter disserved.)

This third formulation Dworkin calls the "rights thesis."⁷ On its plausibility hinge solutions not only to questions about how judges should approach and decide cases but also, Dworkin claims, to the persistent puzzle about whether legal norms can even in theory be separated from the broader class of norms encompassing political and moral views of society.

6. I label the master-test theory the "conceptual core" of legal positivism primarily for purposes of describing Dworkin's argument. See *Model of Rules*, *supra* note 3, at 17. (For a sampling of the variety of ways in which "positivism" is used, see *CONCEPT OF LAW*, *supra* note 2, at 253-54. See also text at note 132, *infra*.) On this view of the "conceptual core of positivism," the difference between Hart and his predecessors, Austin and Kelsen, lies primarily in refinements that are made in describing the nature of the master test. In the view of both Kelsen and Hart, Austin's description of law as the "command of the sovereign" ignores the normative character of the phenomenon. The laws of a legal system are always viewed by at least some members of the system—the officials—as imposing obligations, whereas "command" and "habit," however ingeniously combined, can never produce more than the concept of "being obliged." See *CONCEPT OF LAW*, *supra* note 2, at 79-83, 243. For Kelsen, the solution is simply to build the concept of obligation into legal theory from the start as a primitive presupposition of any legal system. Austin's sovereign, the "determinate person or body," is replaced by a "norm"—the *Grundnorm*—the origin and nature of which are not further explained, but simply "hypothesized." Hart's theory resembles Kelsen's, although the "rule of recognition" replaces Kelsen's *Grundnorm* and, instead of leaving the origin of this basic rule unexplained or "hypothesized," Hart simply roots it in the empirical fact of acceptance by the officials of a system. The rule of recognition is the ultimate criterion for legal validity and is itself empirically established by inspecting the attitudes and behavior of the officials of the system. See *id.* at 97-114, 245. See generally J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed. 1954); H. Kelsen, *GENERAL THEORY OF LAW AND STATE* (1949).

7. See *Hard Cases*, *supra* note 3, at 1058-60. Although the rights thesis entails two claims—that there is a single correct answer in judicial cases and that the answer is to be extracted from "principles" rather than "policies"—I shall be concerned primarily with the former claim.

The rights thesis will no doubt strike many as naive or implausible. Not since Blackstone has the view that judges only "find" and do not "make" the law been preached with any fervor from academic pulpits, whatever the "plain man's" view of the matter might be. Indeed, under the influence of legal realism, many have suggested that the more difficult task is to demonstrate that judges ever find results required by pre-existing standards rather than continuously create new law through the unavoidable exercise of a kind of quasi-legislative discretion. Hart himself has adopted a familiar and widely accepted stance between these extremes.⁸ Legal standards can and often do determine results. It is, however, a feature of man's predicament that his relative "ignorance of fact" and "indeterminacy of aim" yield areas of "open texture" in the application of such standards that require judges to make "a fresh choice between open alternatives."⁹ The pervasiveness of this moderate view may explain why much of the discussion generated to date by Dworkin's account has taken the form of the first of the three above-mentioned responses to a descriptive theory: a challenge to the accuracy of the account.¹⁰

This article offers a review of the Hart-Dworkin dispute¹¹ and a qualified defense of the positivist's model against Dworkin's attack. The defense is cast primarily in the form of the second possible response to a descriptive theory: Dworkin's attack fails, I suggest, because it involves descriptive claims that can be accommodated to the positivist's conceptual theory regardless of one's view about the plausibility of those claims.

In reviewing the dispute, this paper also explores a secondary thesis that appears to have become an erroneous and unnecessary part of Dworkin's main argument. The secondary thesis concerns the

8. See CONCEPT OF LAW, *supra* note 2, at ch. VII.

9. *Id.* at 125.

10. See, e.g., Christie, *The Model of Principles*, 1968 DUKE L.J. 649; Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 845-46 (1972); Tapper, *A Note on Principles*, 34 MOD. L. REV. 628 (1971). Professor Sartorius is one of the few contemporary participants in the dispute, besides Dworkin, who accepts and forcefully argues for a version of the rights thesis. See note 13 *infra*. See also J. SMITH, LEGAL OBLIGATION ch. IX (1976); Coval & Smith, *Some Structural Properties of Legal Decision*, 32 CAMBRIDGE L.J. 81 (1973).

11. "Dispute," I confess, implies a less one-sided exchange than in fact has taken place. Except for a brief comment, see Hart, *Law in the Perspective of Philosophy: 1776-1976*, 51 N.Y.U.L. REV. 538, 545-51 (1976), Hart has not responded specifically to Dworkin's arguments, although he has reconfirmed views concerning judicial discretion that indicate continued disagreement with claims made by the rights thesis. See *id.*; Hart, *Problems of the Philosophy of Law* in 6 ENCYC. OF PHILOSOPHY 264, 271 (1967).

proper classification of the standards to which judges are and ought to be responsive in reaching legal decisions. Although Hart's position here is not entirely clear, Dworkin claims that such standards are fundamentally of two kinds: either authoritatively binding on a judge and hence "law," or "permissive" and hence extra-legal. I shall argue that this is too summary a way of dealing with the variety of standards that determine the specific content of the obligation of a judge *qua* judge. Some standards bind judges, not because they are law, but simply because they are part of what it means to be a judge.

The nature of my defense of positivism explains the organization of this essay. Although Dworkin's most recent article, *Hard Cases*,¹² contains the fullest elaboration of the rights thesis, that piece is exclusively concerned with the theory's descriptive and normative claims. It does not renew the argument designed to show why the thesis constitutes a counterexample to positivism. For that discussion, one must turn to Dworkin's earlier writings. Part I, then, examines the initial version of the argument and isolates the critical claim in the counterexample thesis. Part II explores the "secondary thesis"—the possibility, and the relevance for legal theory, of separating investigations into certain aspects of judicial obligation from investigations into legal validity. With these clarifications in hand, Part III returns to an evaluation of Dworkin's major argument. Although the section begins with a review of the difficulties Dworkin faces in establishing the rights thesis, the primary concern in Part III is not with the plausibility of that thesis. Dworkin may have failed to prove his claims, but he has at least succeeded, I believe, in showing that the evidence for the contrary position is equally inconclusive. In this respect Dworkin's contribution is significant, both as a counterweight to the tendency to accept uncritically realist dogma in any version, however moderate, and as a plausible explanation of what it might mean to accept a Blackstonian view of the law without also accepting some of the more cryptic natural law underpinnings of Blackstone's writings. Even assuming, however, that the rights thesis is correct, Part III suggests that it need not be seen as incompatible with a positivist model of law.¹³ Part IV offers some concluding observations on the significance of the dispute and suggests a line of inquiry

12. See note 3 *supra*.

13. The position adopted here is thus similar to that of Professor Sartorius, who defends a version of the rights thesis but also argues—on somewhat different grounds from those relied on here—that it is compatible with positivism. See R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at ch. 10; Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151 (1971).

that is more likely to pose a challenge to the positivist's model than is Dworkin's descriptive theory.

I. DWORKIN: THE ORIGINAL POSITION

The chief weapon in Dworkin's initial attack on positivism was a claimed logical distinction between two kinds of legal standards: rules and principles. Rules, like dictators, always get their way. A rule, that is to say, is either applicable to a particular situation, in which case its directions must be accepted, or it is inapplicable, in which case it contributes nothing to the decision.¹⁴ When two rules conflict, one does not supersede the other because of its greater weight, but only because, for example, another rule specifies which shall take precedence. A principle, in contrast, like a wise counselor, "states a reason that argues in one direction,"¹⁵ but does not by itself command a particular decision. When principles conflict, the conflict must be resolved by assessing the relative weights of the competing principles.¹⁶

Armed with these distinctions, Dworkin's counterexample argument proceeds through the following steps:

(1) There are cases in the Anglo-American legal system (Dworkin calls them "hard cases") where no applicable rule determines the result the judge should reach. Examples include cases that involve the creation of a new cause of action, such as one for invasion of privacy, or the creation of a new exception to an existing rule, as in *Riggs v. Palmer*,¹⁷ where the court decided that a murderer could not inherit under his victim's will despite an inheritance statute that did not literally provide for such an exception.

(2) In such cases it is a mistake to say that the judge has discretion to decide what result to reach. It is still appropriate to speak of a correct decision to which the parties are entitled and which the judge is obligated to reach by reference to principles. In *Riggs*, for example, the court justified its decision by referring to the principle that "no man should profit from his own wrong."¹⁸

(3) The principles in these cases are obligatory and binding

14. To use Dworkin's illustrations, a will is either valid or not, depending on whether it complies with the rule for making wills (which may include stated exceptions), and a baseball player is either out because the rule that three strikes constitutes an out is applicable, or he is not. See *Model of Rules*, *supra* note 3, at 25.

15. *Id.* at 26.

16. See *id.* at 25-29.

17. 115 N.Y. 506, 22 N.E. 188 (1889).

18. 115 N.Y. at 509, 22 N.E. at 190.

on the officials in the same way that a rule is and hence are "law" in the same sense that rules are. That is, they are "standards binding upon the officials of a community, controlling their decisions of legal right and obligation."¹⁹

(4) It is not possible to modify the positivist's master test (Hart's rule of recognition) to embrace principles because (a) there is no general scheme for generating such principles—like the rule of recognition they are simply accepted—and (b) we cannot list said principles exhaustively (thus simply adding them to the rule of recognition) because "[t]hey are controversial, their weight is all important, they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle."²⁰

(5) Thus, the positivists' claim that a law of the community can be distinguished from other social standards of the community by some test in the form of a master rule must be abandoned.

This section examines, first, the underlying distinction between rules and principles on which the entire argument is based and, second, the critical initial premise in the argument—namely, that cases like *Riggs* are properly described as cases in which no rule compels the judge's decision.²¹

A. Rules and Principles

1. Agreeing on Terminology

Few subjects are as notoriously vulnerable as legal philosophy to disputes that, upon examination, prove to be merely verbal. Apparently incompatible answers to what seems a single question—"what is law?"—often turn out to be answers to quite different and unrelated questions, reflecting differences in the underlying purpose of the inquiry that must be understood if one is to measure the inquiry's success.²² A comparison of Dworkin's use of "rule" with Hart's analysis of the same term illustrates how difference in purpose can lead to difference in terminology.

Hart's description of law as a system of rules is the result of an analysis intended primarily to distinguish rules from both habits and

19. *Model of Rules*, *supra* note 3, at 27.

20. *Id.* at 45.

21. Part II of this article explores the third step in the argument. Parts III(A) and III(B) examine, respectively, the second and fourth steps.

22. See S.I. BENN & R.S. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 65-67 (1959).

coercive orders.²³ Although a similar pattern of behavior may be observed in all three cases, an observer could record an additional phenomenon only in the case of rules: deviation from the pattern would become the occasion for criticism, which the group regards as legitimate. This additional characteristic evidences a "reflective critical attitude" toward the rule that is not present in the case of habits or coercive orders. As others have noted,²⁴ nothing in this account requires limiting "rules" in Hart's sense to entities that operate in all-or-nothing fashion. Given group acceptance of a set of goals that are to be achieved or maintained, behavior that disregards or accords inappropriate weight to principles reflecting such goals will evoke reactions evidencing the same "internal aspect" that distinguishes such standards from habits and from orders backed by threats.

Not all disputes, of course, dissolve at a touch of terminological clarification. This dispute in particular does not. Whatever the label, one can purport to distinguish between legal propositions that do, and those that do not, function in all-or-nothing fashion, giving the latter the special name of "principles." The clarification does serve as a warning, however, that one does not attack Hart's position simply by showing that law includes something other than all-or-nothing "rules."²⁵ The essence of Dworkin's argument is, and must be, not that some principles are law, but that no master test can capture all the principles that are law.

2. *Isolating the Relevant Distinction*

With an eye out for verbal disputes, it is easier to focus directly on the alleged functional or logical distinction between rules

23. See CONCEPT OF LAW, *supra* note 2, at 54-60, 79-88.

24. See, e.g., Raz, *supra* note 10, at 845.

25. At times, Dworkin's argument appears to be of just this sort. For example, in addition to his argument from the nature of a "hard case," Dworkin employs an argument based on the problem of precedent and the fact that courts often must and do overrule prior decisions. See *Model of Rules*, *supra* note 3, at 22-29. In attempting to account for this phenomenon, the positivist, according to Dworkin, faces a dilemma similar to that which he faces in attempting to account for judicial decision in the hard case. The positivist might admit that no judge-made rule is ever binding on the court, thus abolishing precedent altogether and conceding the field to the realist. Or, the positivist must say that judges can properly overrule precedents only in certain cases (e.g., when the prior decision was wrong, when it has not caused a great deal of reliance, or when it has evoked considerable criticism). But to limit the power to overrule to these standards is to admit that principles as well as rules are binding on courts, for that is what such standards amount to.

At most this argument establishes only that there are some legal principles, a conclusion that need not trouble Hart. Because his use of "rule" does not confine him to Dworkin's all-or-nothing meaning, Hart could admit that the tests for over-

and principles.²⁶ For purpose of clarity, let us talk of the latter as operating in "flexible," as opposed to "automatic," fashion. Given a particular legal standard, what is the key to determining which way the standard operates?

One possibility is that the key is to be discovered by inspecting the standard itself. Where the standard is vague, prohibiting, for example, "unreasonable uses of the park" or "unreasonable restraints of trade," it might be thought that the standard operates flexibly; one determines what is "unreasonable" by considering the full range of goals served or disserved by a particular activity, and by assigning weights to resolve conflicts. Dworkin, however, insists that words like "reasonable" and "unjust" make rules "more like principles," but do not turn them into principles. This is so because "even the least confining of those terms restricts the *kind* of other principles and policies on which the rule depends."²⁷ It is conceivable, for example, that "unreasonable" restraints of trade should still be permissible because of other policies—a result that is forbidden if the standard is a rule, but not if it is a principle.²⁸

This position is puzzling in part because of Dworkin's suggestion that words like "unreasonable" must always be interpreted to restrict the potential policies that bear on the determination of "unreasonableness." It may be that the actual standards that Dworkin has in mind do, in fact, reflect a prior determination that the vague antecedent conditions of the rule refer only to a limited range of policies. But that is a matter to be determined not by a priori inspection of the standard, but only by taking account of other evidence concerning how the standard is to be treated. There may, for example, be a general provision in the legal system prohibiting broad delegation or judicial exercise of legislative power. But more important than one's explanation of this particular puzzle is what this discussion reveals about the real distinction between rules and principles: One determines whether a standard is a rule or a principle by paying attention to explicit or implicit directions accompanying the standard (to which the language may be a guide) that indicate how the standard is to function. A standard is a rule, however vague, if it embraces a

ruling are "principles," and still preserve his master-test theory simply by adding them (having limited them in number to a finite class) to the rule of recognition.

26. Henceforth, I shall use "standards" to include broadly all norms of whatever kind, with "legal standards" embracing (in Dworkin's sense) both legal "rules" and legal "principles." In this respect, I follow Raz's terminology. See Raz, *supra* note 10, at 824 n.4.

27. See *Model of Rules*, *supra* note 3, at 29 (emphasis original).

28. See *id.* at 28-29; *Social Rules*, *supra* note 3, at 889-90.

limited range of principles and policies that are taken to be exclusively relevant. The rule then operates "automatically" by definition: Conduct measured by the set of principles made relevant by the rule cannot escape the resulting evaluation by appeal to non-relevant, excluded principles. Conversely, a standard whose antecedent conditions are quite specific ("any activity that results in a noise level exceeding fifty decibels") will nonetheless be a principle if accompanying directions make clear that the standard merely constitutes one consideration (set in this case at a specific threshold level) that inclines toward prohibition but that must be balanced against other considerations before legal consequences are attached to challenged conduct.

Rules, in short, exhibit the following features: (1) They do not lose their status as rules simply because one must refer to the underlying policies or purposes in order to decide how the rule is to be applied in a particular case (*e.g.*, what is an "unreasonable" restraint of trade); and (2) rules differ from principles only because they are interpreted to make legally irrelevant any other principles or purposes except those underlying the rule. If this analysis is correct, the "rule-principle" distinction seems useful at best only after the fact, as a label for the conclusion that certain standards alone are relevant in deciding a case.²⁹

This discussion may explain why commentators have found Dworkin's treatment of a case like *Riggs* misleading.³⁰ Dworkin describes the case as if the court's decision—that a murderer will not be permitted to inherit under his victim's will—cannot be explained by reference to the "rule" governing inheritance, but only by reference to a principle ("no man should profit from his own wrong"). But if the decision is correct, one can account for it in either of two ways. The first possibility is that the rule governing inheritance did not, in fact, preclude reference to the "no-profit" principle as one of the policies underlying the rule. According to this view, the court in *Riggs* did no more than a court does in deciding what is "unreasonable" under a rule employing that term. The only difference is that in *Riggs* the explicit language of the inheritance standard would not seem to leave as much room for an underlying "no-profit" principle as would a rule employing the term "unreasonable." Thus the court

29. See Tapper, *supra* note 10, at 630. Among arguments by others who have also questioned the utility of the rule-principle distinction, Professor Tapper's concise analysis in particular merits careful scrutiny.

30. See, *e.g.*, Christie, *supra* note 10, at 660-67; Note, *Understanding the Model of Rules*, 81 YALE L.J. 912, 921-34 (1972).

must rely, as it did in *Riggs*, on implicit indicia of intent to discover this particular policy-embracing qualification of the literal language. Alternatively, one may explain the result by construing the inheritance standard as a principle to be balanced against others, including the "no-profit" principle, to decide who inherits under wills. The fact that, in most cases, results coincide with what the inheritance standard seems to require would only be evidence of the standard's great weight, sufficient to overcome the weight of purportedly countervailing considerations in all but the rarest cases, with *Riggs* being one of the rarities.³¹

This potential for rationalizing any set of results under a legal standard by characterizing the standard either as a principle or a rule reenforces doubts about the functional utility of the distinction. If the only controlling question is whether standard "A" (the "no-profit" maxim) is legally relevant in determining the applicability of standard "B," (the inheritance statute), and if that question is settled by reference to implicit authorization concerning how "B" is to be treated, then one might as well dispense with the distinction and move directly to the question of authorization.³²

3. *The Relevance of the Distinction*

Whatever the real distinction between rules and principles, one may wonder what difference the difference makes. Why make the distinction in the first place? Dworkin's reason for making the distinction is to show that the positivist's master test for law is inadequate.³³ This suggests that the value of the distinction can be ascertained by asking whether the claimed inability of the positivist's model to accommodate all legal principles is in some way a consequence of the "flexibility" of principles.

It often appears that this is what Dworkin means to say—indeed, that this is the very reason for his focusing so closely on the feature of flexibility as opposed to automatic operation. In fact, however, Dworkin's argument does not depend on the distinction. Principles cannot be captured in a master test, we are told, because (1) they exhibit no unifying feature that would allow their generation

31. Neither explanation, it should be noted, is Dworkin's. The crucial question of how principles can coexist and interact with rules in a case like *Riggs*, if one accepts Dworkin's definition of these two kinds of standards, has never been adequately explained. See Tapper, *supra* note 10, at 630.

32. Dworkin continues to defend the rule-principle distinction, but claims that the distinction *could* be abandoned without giving up the attack on positivism. See *Social Rules*, *supra* note 3, at 882-90.

33. See *Model of Rules*, *supra* note 3, at 22.

from a single formula and (2) they are too controversial, numerous, and changing for an exhaustive listing. Neither characteristic is a consequence of flexibility. Theoretically, a group might accept numerous, continually changing rules that exhibit no unifying feature. In that case, too, no advance test could capture all the group's laws.³⁴ The critical premise in Dworkin's argument is simply the claim that there are a large number of unrelated legal standards that are independently accepted as law and that can be discovered only by inspecting the current practices of lawyers, judges, and the public: "The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time."³⁵ It is this fact of spontaneous, independent growth that makes it possible to deny the existence of an advance test for law; whether the standard itself is a rule or a principle is not essential to the argument.

B. *On Running Out of Rules: Hard Cases, Easy Cases and Really Hard Cases.*

The critical claim in Dworkin's argument, then, is that some legal standards, like Topsy, just grow. The rule-principle distinction is of little use in either explaining this phenomenon or in drawing the line between those standards that can and those that cannot be captured by the positivist's master test. One way to focus on the assumptions on which the critical claim is based is to examine more carefully the notion of a "hard case"—the decisional context that gives rise in the first place to the alleged counterexample to the positivist's theory. What exactly is a "hard case," and what requires the positivist in such cases to admit that his model provides no legal standards to control the judge's decision?³⁶

One possibility is that the term "hard cases" refers to real gaps or

34. The possibility that rules as well as principles can undermine the positivist's theory is illustrated by Dworkin's account of custom and customary rules. Like his principles, these rules too have simply developed into acceptance without the need for prior legislative or judicial enactment. They are binding, and hence "law," not because they are valid under some master test, but because—like the master test itself—they are simply accepted as binding. See *Model of Rules*, *supra* note 3, at 44. Because there are not as many of these customary rules, Dworkin concedes that this is only a "chip" in the master-test theory. *Id.* But the "chip" here is, in theory, the same kind of "hole" that Dworkin claims he has found in the case of principles.

35. *Id.* at 41.

36. For one of the few explorations of the notion of a "hard case" in this context, see Perry, *Judicial Method and the Concept of Reasoning*, 80 *ETHICS* 1, 3-6 & n.4 (1969). See also Gross, *Jurisprudence*, 1968/69 *ANN. SURVEY OF AM. L.* 575, 576-77; Note, *supra* note 30, at 921-34.

lacunae in a legal system, in the sense that legal standards fail to say anything at all about whether challenged conduct is permitted or prohibited.³⁷ The suggestion, however, that municipal legal systems in general, and the American legal system in particular, include "open spaces" of this sort is not at all an obvious one. Whatever the situation in international law, municipal legal systems are generally thought to have "closed" themselves by including "some kind of residual principle the effect of which is to occupy the space which would otherwise be devoid of law."³⁸ The most common such principle, dubbed the "residual negative principle" by Professor Julius Stone, provides "that everything which is not legally prohibited is deemed to be legally permitted."³⁹ This principle, of course, can easily be included in the positivist's rule of recognition. If one views the legal system as including such a standard, it might then seem wrong to describe *Riggs* and the privacy case as examples, on the positivist's model, of situations where there is no applicable law. If there really is no standard prohibiting invasions of privacy, then the law would necessarily be that such activity is legally permitted. As for *Riggs*, either the law is that testators' wishes are always respected—even in the case of the beneficiary who has murdered the testator—or the law itself provides an exception for the homicidal legatee. For reasons similar to those that cast doubt on the functional utility of the rule-principle distinction, *Riggs* is not a case for which there is "no law," but simply one in which it is difficult to discover just what the law is.

Although a variation of this argument appears in the literature,⁴⁰ it fails as an attack on Dworkin's position. Dworkin need not, and, as far as I can tell, does not claim that the positivist must run into real gaps in the sense described above. Even assuming that the American legal system is closed, the positivist's test, according to Dworkin, would not be capable of determining in some cases whether challenged conduct is in fact legally prohibited. This determination is a prerequisite to following the further closure instructions contained in the residual negative principle.⁴¹ Dworkin's concern is not with the logical ability to formulate a rule *post hoc* for every case, but with the more troublesome problem of explaining how one moves from pre-

37. It is in this sense that scholars debate whether a *non-liquet* can exist under international law. See Stone, "Non Liquet" and the Function of Law in the International Community, 35 BRIT. Y.B. OF INTL. L. 124 (1959).

38. See J. STONE, LEGAL SYSTEM AND LAWYERS REASONING 189 (1964).

39. *Id.*

40. See Note, *supra* note 30, at 924-27.

41. Cf. Stone, *supra* note 37, at 134.

existing standards ("no vehicles in the park") to the new formulation in the case to be decided ("no go-karts in the park"). In Dworkin's view the move is always by way of pre-existing legal standards. If the positivist believes that the only standards he is able to identify (the "no-vehicle" statute) will not determine the result, he should cast his net on another side to yield a catch that will.

This account suggests a second possible meaning for "hard case": *Riggs* is a hard case just because a judge must turn to something beyond the bare language of existing, formulated rules (the inheritance statute) in order to discover the result required in the case. But this definition raises doubts about whether anything remains to fill the role of an "easy case."⁴² No rule is self-applying in the sense that it relieves a judge of the need to classify the facts and to determine whether, thus classified, they fall within the scope of the rule. The only possible candidate for an "easy case" would appear to be one in which the correct decision could be determined solely by reference to the language of the rule and the meaning of its terms, making reference to other standards (purposes, policies, principles) unnecessary. Although Hart in the celebrated exchange with Professor Fuller suggests that such cases do exist,⁴³ he does not suggest that they are the only cases that yield correct decisions and that all the rest represent judicial exercises in legislative discretion. The "meanings of words," writes Hart, "may be controlled by reference to the purpose of a statutory enactment which itself may be explicitly stated or generally agreed." "[I]t is tempting [but an oversimplification] to ascribe [agreement in clear cases] simply to the fact that there are necessarily such agreements in the use of the shared conventions of language."⁴⁴

42. That the notion of an "easy case" can prove as difficult to pin down in this context as the contrary notion of a "hard case" should be evident. Hart notes that "it is a matter of some difficulty to give any exhaustive account of what makes a 'clear case' clear or makes a general rule obviously and uniquely applicable to a particular case." Hart, 6 ENCYC. OF PHILOSOPHY 264, *supra* note 11, at 270. For an example of an elaborate and otherwise intriguing thesis, the plausibility and non-triviality of which, however, depend largely on the unexamined notion of what it means for legal standards to be "perfectly clearly applicable to particular situations," see Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 354 (1973) (judges even in "easy cases" may not be able to avoid substantive input into the decision).

43. Compare Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958), with Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958). For a plausible interpretation of Hart's theory of meaning in this context that does not require excluding implicit reference to purpose even in cases appearing to fall within the "standard instance" or "core of meaning" of a term, see R. WASSERSTROM, *THE JUDICIAL DECISION* 180 n.29 (1961).

44. Hart, *Problems of the Philosophy of Law*, *supra* note 11, at 271.

If the solution of easy cases also requires reference beyond the language of the rule to the rule's purpose, then either this feature cannot by itself be the distinguishing mark of cases that purportedly cause the positivist trouble, or Dworkin's argument that the positivist cannot account for all relevant legal standards should apply to judicial decisions in all cases, easy as well as hard. Consider the second alternative. How does the fact that judges must take account of purpose as well as language in at least some, and perhaps all, easy cases affect the positivist's model? Must the positivist not be prepared to identify and count as "law" under his model both the verbal formulation of the legal standard and whatever purposes or principles determine its correct application?

On this issue, it must be admitted, writers in the positivist tradition have not always been in agreement.⁴⁵ The apparent relative ease with which the verbal formulation of a standard can be identified, in contrast to the difficulty of isolating the standard's "purpose," has tempted theorists to count as "law" only the objectively certain starting point represented by the statute itself. The transition from statute to decision in a particular case is then explained as an aspect of legal reasoning rather than of the concept of law or of legal validity.⁴⁶ But this view cannot easily escape indictment as essentially definition by fiat. Legal reasoning, deductive only in a trivial sense, is primarily a matter of determining relevant similarities and differences among fact situations that distinguish cases covered by a standard from cases that are not. If the critical question of relevance is in fact determined by the explicit or implicit purpose of the statute, it seems wholly arbitrary to designate only the statute as "legal." More importantly, there is no need for the positivist to be concerned that counting purpose as law in such cases will impair his master test model. By hypothesis, we are dealing with cases in which the same master test that picks out the rule also picks out the "explicitly stated or generally agreed"

45. Hart himself has been less than clear on this issue, although one can suggest a consistent interpretation of his writings that has Hart considering "purpose" to be law in "easy," but not in "penumbral," cases. Compare Hart, *supra* note 43, at 614, with Hart, *Problems of the Philosophy of Law*, *supra* note 11, at 271. Much depends, even under this interpretation, on just what is meant by a "penumbral case." See Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411, 416-24 (1968). It is not clear, for example, that the only cases in which Hart would agree that a uniquely correct decision exists are those that are "easy" in the literal sense. See R. WASSERSTROM, *supra* note 43, at 180 n.30. "Easy case" is thus as much a term of art for present purposes as "hard case," with neither term necessarily tied to the ordinary language meaning of "difficult." Cf. Sartorius, *The Justification of the Judicial Decision*, 78 ETHICS 171, 186 n.3 (1968).

46. See Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1326-28 (1969); cf. Bingham, *What Is the Law?*, 11 MICH. L. REV. 1, 1-25, 109-21 (1912).

purpose, in light of which the rule is to be interpreted and applied.⁴⁷

If the positivist's model can accommodate purpose in this manner, we must find additional characteristics of the "hard case" if we are to explain its distinctive and problematic character. Because the dispute is over the degree of discretion judges have, it may help to recall why Hart suggests that judges must sometimes legislate. For Hart, the explanation lies in empirical truths about the nature of language and the limits of human ability both to anticipate factual developments and to know precisely what one's aims are in creating legal standards.⁴⁸ Far from denying the reality of these limitations, Dworkin builds on them. A model of law that captures only legal standards reflected in the shared conventions of language and purpose *will* require the judge to legislate when those conventions reach the described limits. Thus the "hard case" for Dworkin is what might be called the "really hard case": the decision that must be reached on the basis of standards that, by definition, lead to results inherently unconventional, inherently controversial, and inherently incapable of producing "interpersonal checks"⁴⁹ as respects the substantive correctness of the result.

II. THE OBLIGATION OF A JUDGE

Confronted with standards beyond those obvious in purpose and rule, the positivist, says Dworkin, has two choices. He must either claim that such standards are only discretionary and hence not legally binding, or he may concede their binding status and argue that he identifies them as legal standards through reference, in some more complex way, to his theoretical master test.⁵⁰

There is, however, a third possibility. The positivist might admit that some standards bind judges but explain that they play a role in the legal system sufficiently different from that of ordinary rules and principles to justify excluding them from the class of standards encompassed by the concept of "law." This position makes irrelevant the question whether such standards could be captured in advance by a master test: Even if "capture-proof," they would constitute no defect in a theoretical model designed to capture only legal standards.

47. See Hughes, *supra* note 45, at 423-24.

48. See CONCEPT OF LAW, *supra* note 2, at 120-24, 131-32.

49. The term is used by Perry, who suggests that it is the possibility of achieving "interpersonal checks" among experts that distinguishes rationality in the formal and empirical sciences from attempts at rational justification of judicial decisions in "hard cases." See Perry, *supra* note 36, at 14-15; R. SARTORIUS, INDIVIDUAL CONDUCT, *supra* note 1, at 184.

50. See Social Rules, *supra* note 3, at 874.

Dworkin insists that arguments of this sort can only beg the question in the present context because they assume the very distinction between legal and other kinds of standards that the positivist's rule of recognition is designed to establish.⁵¹

The aim of the present section is twofold: first, to develop the suggested distinction between two kinds of standards that bind judges, and, second, to consider whether all standards that bind judges must necessarily be deemed "legal" standards. In one sense, Dworkin is correct that the controversy at this point threatens to become merely verbal. But there is another, more important sense in which the difference between these kinds of standards appears sufficiently basic to justify (as more illuminating) a model of law that preserves, rather than dissolves, the distinction.

A. *The Standards That Bind*

At least some of Dworkin's principles exhibit one feature in particular that might seem to distinguish them from other legal standards. Principles appear to function in the first instance as guides to the judge in deciding what rules require and only secondarily as guides to a citizen's conduct. They seem to guide conduct, if at all, not by directly declaring what is and is not permitted, but only in the indirect sense of informing an individual that certain principles and policies will be considered by courts in determining what a rule requires.⁵² This decision-guiding, rather than conduct-guiding, feature is most obvious in the case of principles of statutory construction. It also appears to be true, though perhaps less clearly, of such judicial maxims and principles as "no man shall profit from his own wrong." If principles are controversial, and if equally applicable principles may conflict with one another within the context of the same decision, it is somewhat strained to suggest that principles guide primary conduct in the same way that rules do.⁵³

By itself, however, this decision-guiding characteristic will not justify a refusal to call all such standards "law." We have agreed, after all, that "purposes" must and can be admitted by the positivist to be among a system's legal standards, even though such purposes may also perform a similar decision-guiding function. If a statute prohibiting vehicles in the park is known to be aimed exclusively at promoting an energy conservation ethic, rather than at the preservation of

51. See *id.* at 871, 882-90.

52. See Note, *supra* note 30, at 940. See also note 85 *infra*.

53. This conclusion receives some support from Dworkin's own description of principles. See *Model of Rules*, *supra* note 3, at 26.

peace and quiet, and if that difference in purpose leads to differences in interpretation and application, then the purpose guides conduct as well as decision for the same basic reason: It supplements the meaning of the term "vehicle" in borderline cases to indicate to judge and citizen alike just what it is that has been proscribed.

The decision-guiding function does suggest, however, a possible further refinement in the classification of standards that bind judges—one that the following rough analogy will serve to introduce. Scientists and philosophers of science devote considerable effort to the attempt to isolate acceptable "principles of induction" to serve as guides or tests for determining when one may properly claim to have discovered a "law" of science.⁵⁴ In this context it has become commonplace to distinguish the principles governing the accepted methodology from the substantive results of applying the method—that is, from the scientific "laws" that govern particular events. Would both the accepted methodological principles and the substantive rules in this case count as scientific "laws"? In one sense perhaps they would. Accepted principles of induction might be viewed as themselves stating true laws about, for example, the nature of knowledge and how it is acquired. The scientific community would expect its members to heed these principles as well as already established scientific laws in deciding whether a given hypothesis was, in fact, a "law." But more important than the fact that both types of standards are in this sense "binding" is the fact that the methodological and substantive standards apply to areas of human inquiry that in important respects are worth distinguishing.

In similar fashion, some standards in the legal context may be viewed as analogous to rules for proper scientific induction because they arise out of the investigation of a subject matter that is, in important ways, distinct from that with which typical legal standards are concerned. The subject matter of the former is not the regulation of human behavior in a particular society through the prescription of norms, but the regulation of any rational attempt to apply standards or to interpret human communications. If principles can be ascribed some such trans-legal status—in the sense that they are not peculiarly legal—then the claim that they are binding may be accepted, not because they are "law," but because they constitute minimally essential criteria for the proper conduct of certain types of rational activity. Such principles become clues, not to what "the law" requires, but to

54. See generally R. CARNAP, *LOGICAL FOUNDATIONS OF PROBABILITY* (2d ed. 1962); N. GOODMAN, *FACT, FICTION AND FORECAST* (1955); G. VON WRIGHT, *A TREATISE ON INDUCTION AND PROBABILITY* (1951).

what the concept of "rationality" or "judging" requires. To the extent that legal systems require officials to be "judges," one discovers what that role entails, not only by inspecting particular provisions of the legal system (polling the system's officials to determine what they contingently happen to accept), but also by paying attention simply to what it means to apply standards rationally in a sense that transcends the particular context in which the role is assumed.

Which standards are candidates for such translegal status and what characteristics identify them? Our description of them as standards implicit in the concept of "judging" provides a starting point for answering the second half of the question: Standards binding on a judge are to be distinguished from legal standards if they are immune from deliberate change in the sense that an instruction to an official to ignore them makes the official no longer a "judge." While the task of defining the concept of judging may not be easier than the task of defining the concept of law, my only purpose at present is to suggest that some standards fall into this category, whether or not we can identify them all. They would include those principles referring to "characteristic judicial virtues" that Hart identifies as "impartiality and neutrality in surveying the alternatives, consideration for the interest of all who will be affected, and a concern that some acceptable general principle be deployed as a reasoned basis for decision."⁵⁵ They would also include, perhaps as a particular illustration of the last-named virtue, the principle of non-contradiction, reflected in the requirement that "like cases be treated alike." Dworkin insists that judges are subject to a strong requirement of "articulate consistency."⁵⁶ The source of the obligation even for Dworkin is not apparently the law, but a "doctrine of political responsibility."⁵⁷ It is not clear, however, that Dworkin means to suggest that the obligation is only "political," and thus subject to cultural variation or normative dispute, rather than, as the writings of Professor Lon Fuller suggest, an essential aspect of the concept of adjudication itself.⁵⁸ If to instruct judges to decide cases by flipping coins is to make them no longer judges, but agents of a legislative determination that any decision, right or wrong, is better than none,⁵⁹ it is hard to see that

55. See CONCEPT OF LAW, *supra* note 2, at 200.

56. See *Hard Cases*, *supra* note 3, at 1064.

57. *Id.*

58. See L. Fuller, *The Forms and Limits of Adjudication* (1959) (unpublished paper prepared for the Roundtable on Jurisprudence, Association of American Law Schools); Fuller, *Collective Bargaining and the Arbitrator*, 1963 *Wis. L. Rev.* 3.

59. See H.M. Hart & A.M. Sacks, *The Legal Process* 666 (tent. ed. 1958) (unpublished).

one does less violence to the concept of adjudication by instructing judges to ignore the demand for articulate consistency.

The process of distinguishing these standards (let us call them judicial technique principles) from other legal standards may be illustrated by considering one particular group of such standards: the maxims of statutory construction. Despite the tendency to debunk canons of construction as effectively cancelling each other, one may agree with H. M. Hart and Sacks that they at least perform the "useful function" of indicating "linguistically permissible" meanings, with final selection left to context.⁶⁰ In this respect, such maxims perform nicely the role Dworkin assigns to principles: They point, however weakly, in one direction while still leaving final results to await a complete stocktaking of all such pointers. Dworkin, in any event, appears explicitly to include such "techniques of statutory construction" among his putatively trouble-causing principles.⁶¹ It is not necessary to canvass in depth elaborate textbook listings and discussions of these maxims in order to make the point that the source of many of them lies in "logic and common sense"⁶² rather than in the contingently accepted norms of a particular society. This is particularly evident in the case of the three most commonly cited canons: *noscitur a sociis*, *ejusdam generis*, and *expressio unius est exclusio alterius*.⁶³ The fact that standard treatises, themselves venerable, reach this conclusion about the common-sense origin of hoary Latin maxims⁶⁴ is a testament not so much to the early emergence of such principles in Anglo-American law, as to their fundamental link to the prerequisites of rational interpretation in any context and in any society. As such they are easily viewed, not as peculiarly legal principles, but as principles belonging to a "science of hermeneutics" that prescribes a methodology for interpretation in general, whether the subject be suicide notes, Dead Sea scrolls, wills or statutes:

[W]e shall find that the same rules which common sense teaches every one to use, in order to understand his neighbor in the most trivial intercourse, are necessary likewise, although not sufficient, for the interpretation of documents and texts of the highest importance, constitutions as well as treaties between the greatest nations.⁶⁵

60. *Id.* at 1221.

61. See *Model of Rules*, *supra* note 3, at 42.

62. BROOM'S LEGAL MAXIMS 453 (10th ed. 1939).

63. See H. READ, J. MACDONALD, J. FORDHAM & W.J. PIERCE, MATERIALS ON LEGISLATION 903 (1973).

64. See J. SUTHERLAND, STATUTORY CONSTRUCTION § 4916 (3d ed. Horack 1943).

65. F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17-18 (3d ed. 1880).

Not all such maxims, however, will appear to exhibit the suggested identifying feature of immunity from deliberate change. Maxims directing strict construction of criminal statutes or of statutes in derogation of the common law, for example, appear context-specific to particular legal systems in ways apparently open to cultural variation. To explain why some of these precepts might nevertheless be viewed as standards arising out of the role of judge *qua* judge rather than out of the peculiarly legal standards of the system in which one occupies that role requires a further distinction between the concrete shape a principle has assumed in a particular legal society and the abstract "principle of interpretation" it represents. The abstract principle that the common-law derogation maxim represents may be phrased in some such manner as the following: "Assume settled practices and expectations have not been radically and deliberately altered, unless . . . (the context, language, other principles so indicate)." The concrete form of the abstract principle is context-specific to a common-law jurisdiction, but the abstract principle is not. It is a common sense guide to rational interpretation that would normally be accepted in any context. Its justification lies in assumptions about human behavior that are grounded in reason and experience and that transcend particular community norms. One who intends sharply to change known, accepted patterns of behavior will normally take care to make his instructions precise; where instructions are imprecise, he probably did not intend the radical interpretation.

Having made this distinction, one may still be unpersuaded that deliberate countermand of the common-law derogation maxim, however clear its origin in common sense, would essentially undermine the concept of judging in those cases where the maxim would otherwise apply. No less eminent an authority than Holmes, for example, urged that the maxim be eliminated from American jurisprudence,⁶⁶ and numerous state legislatures have in fact enacted statutes specifically purporting to abrogate it.⁶⁷ For the most part, however, these attacks appear to have been leveled at misuse of the canon—at judicial decisions that found the canon to be more than simply the abstract principle of interpretation described above. Such decisions implicitly viewed the canon as reflecting a substantive principle of power allocation between legislature and judiciary that gave the latter institution control over development of the common law in the face of

66. See Holmes, *Common Law and Legislation*, 21 HARV. L. REV. 383, 386-88 (1908).

67. For a survey of such states and resulting court reaction, see Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 448-53 (1950).

superior, countervailing indicia of intended legislative change. But if one restricts the role of the maxim to the minimum function described by the abstract principle of interpretation, it then becomes difficult to reconcile legislative abrogation with a continued expectation that the court perform an exclusively judicial role in cases where the maxim would otherwise apply. One might even have difficulty knowing how to comply with an instruction that no presumption, however weak, should henceforth be made in favor of interpretations that more nearly accord with prior, accepted practice.⁶⁸ If the instruction is viewed as tantamount to a direction not to use common sense in interpreting communications—"do not assume the legislator in communicating directives acts as experience indicates most rational people do"—it becomes doubtful whether the "interpreting" official remains a "judge" any more than he would when acting on an instruction to resolve doubtful cases by flipping a coin.⁶⁹

Contrast the second maxim mentioned above—that "criminal statutes should be strictly construed." Here it is difficult to see how our suggested identifying feature—immunity from deliberate change—would justify assigning the maxim binding but translegal status. If the abstract principle represented is thought to reflect solely a policy of providing fair notice concerning acts that will result in criminal sanctions, then it can be discovered only by inspecting community or legal norms concerning fairness, not judicial norms concerning techniques of rule interpretation and application. If a particular community decided no longer to value fair warning in issuing and enforcing criminal statutes, the maxim could be intelligibly and deliberately countermanded. One could establish a translegal status for such a

68. Presumably, prior practice is maintained, despite the instruction, until it is overturned by statutes. Some statutes will intend "sharp" changes and some will not, with the line between the two, despite the instruction, still marked (in part) by language that avoids ambiguity. Cf. *Niblock v. Salt Lake City*, 100 Utah 573, 111 P.2d 800 (1941) (adhering to previous "strict" construction of statute in derogation of common law despite intervening legislative reversal of derogation canon). The only context in which repeal of presumptions of any kind in favor of established practices might be understandable is one in which it appears that the law-making institution thereby intends total disavowal of the relevance of existing practices as "background" against which to understand and interpret future directives, as in the case of a postrevolutionary committee. Even in that case, however, one can probably explain different interpretations of apparently identical pre- and postrevolutionary directives simply by noting, if true, that fundamental changes in societal goals have led to "other indicia" of intent or purpose that outweigh presumptions in favor of continuity. Only if one thinks it is possible "rationally" to declare irrelevant all respects in which background human behavior converges, can one strip the presumption of all weight, leaving judges to interpret on a totally clean slate.

69. Cf. H.M. Hart, & A.M. Sacks, *supra* note 59, at 1240 (a "statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably").

maxim only to the extent one views it as reflecting an abstract principle of interpretation rather than substantive community goals—for example, “communicators who intend serious consequences to attach to actions will avoid ambiguity; where they did not avoid, they probably did not intend.”

B. *Whether All That Binds Is Law*

Does a refusal to include among a society’s “legal standards” those principles that are immune from deliberate change in the sense described amount simply to a verbal dispute, a definition of law “by fiat”?⁷⁰ Dworkin rejects out-of-hand any attempt to explain the obligation to take principles into account

as a matter of judicial “craft,” or something of that sort. The question will still remain why this type of obligation (whatever we call it) is different from the obligation that rules impose upon judges, and why it entitles us to say that principles and policies are not part of the law but are merely extra-legal standards “courts characteristically use.”⁷¹

The above discussion essays an answer to this question based on differences in the source and character of judicial technique principles corresponding to the difference between standards that bind a judge *qua* judge and those that bind *qua* judge of a particular legal system.⁷²

In one sense, of course, Dworkin is correct. Because the role of judge is itself assigned by the law, principles implicit in the concept of judging become incorporated in the legal system by reference. Furthermore, if judicial technique principles are too numerous to list and too unrelated to be generated from a formula, as we have assumed for purposes of argument,⁷³ then it must be false to claim that “some

70. See *Model of Rules*, *supra* note 3, at 37.

71. *Id.* at 36.

72. By suggesting that standards can bind “*qua* judge,” I mean to imply that judging occurs in nonlegal contexts and that, in all such contexts, observance of a core of common minimal standards makes it appropriate to speak of the official engaged in the activity as a judge, whether it be of beauty contests, see Greenawalt, *supra* note 10, at 368-69, of games, compare CONCEPT OF LAW, *supra* note 2, at 138-41, with *Judicial Discretion*, *supra* note 3, at 629, or of the law. I do not mean to deny that judges in legal systems may also be obliged to heed additional standards of judging technique that are peculiar to their role as legal judges. See Hughes, *supra* note 45, at 414-16.

In its broadest sense, “judging” need not be confined to acts of officials resolving disputes but may include any attempt of an individual to reach and justify decisions (make “judgments”) under standards. See *Model of Rules*, *supra* note 3, at 33 (sergeant told to “pick the five most experienced men” for a patrol). In this sense, what the text refers to as standards implicit in the concept of judging might be characterized equally well as standards implicit in the concept of rationality. Cf. Perry, *supra* note 36.

73. If one thinks that judicial technique principles can be easily listed or other-

social rule or set of social rules exists within the community of [a nation's] judges and legal officials, which rules settle the limits of the judge's duty to recognize any other rules or principle as law."⁷⁴

If all of this is conceded, in what sense could one continue to defend a model of law that ignored judicial technique principles in the account it gave of legal validity? The answer lies in part in the characteristics implied by the shared identifying feature of immunity from deliberate change. It is the peculiar characteristic of principles identified by this feature that they can be constructed in advance by an external observer, bent on determining "the laws" of a particular legal system, without regard for empirical questions concerning the existence or content of any legal standard in the society, including the rule of recognition. It is this claimed universality and independence of judicial technique principles that justifies excluding such standards in a model designed primarily to isolate a society's particular legal norms. Exclusion is justified for much the same reasons that one would not include the rules of grammar or language of the society in a model of "law," even though these too would be "binding" on a judge responsive to his obligation to understand and apply the signs used to convey legal standards.

Another way of making the point is to note that we are doing no more than separating a judge's obligation "to apply the law" into its constituent parts: the obligation (1) "to apply" (2) "the law." The second half is what the positivist's model is designed to reflect. The first half—the realm of standards that determine acceptable methods of interpreting and applying other standards and of deciding particular cases under such standards—is not the peculiar concern of the legal theorist. It is the concern as well of the theorist in any discipline, from philosophy to science, who must deal with the perplexing problems involved in the characterization and classification of fact situations and the justification of decisions under standards.⁷⁵ One need not deny that real differences may exist in the concept of rationality as it applies to these various disciplines in order to affirm that there is a common core that conscientious judges must heed for reasons quite

wise captured, the positivist could, of course, save his model without recourse to the argument in this section. I ignore this possibility because Dworkin apparently treats these standards as among the principles that cannot be so captured and because the distinction urged in this section seems to me worth preserving even if other arguments for the positivist might also be made.

74. *Social Rules*, *supra* note 3, at 869; *see id.* at 874. That the social rule thesis quoted in the text may be a stronger claim than the positivist need make is noted below. *See* note 131 *infra* and accompanying text.

75. *Cf.* R. WASSERSTROM, *supra* note 43, at 32.

different from those that explain why judges must also heed the standards identified by a contingently accepted rule of recognition.

The plea, in short, is for a distinction, also urged by others,⁷⁶ between the concept of legal reasoning and the concept of legal validity. Dworkin suggests that the question "What, in general is a good reason for decision by a court of law?" is in every respect simply another way of asking "What is Law?"⁷⁷ The view presented here declines as misleading this invitation to collapse all questions concerning how courts ought to decide cases into questions of what the law is. This viewpoint also explains why Hart might write an entire book on the concept of law and explicitly set aside, as a matter "that cannot be attempted here," the characterization of "the varied types of reasoning which courts characteristically use"⁷⁸ It may be that of these two, the inquiry into legal reasoning is the more urgent and of more immediate, practical effect than the conceptual study of legal validity. It may even be that the perceived barrenness of conceptual theories of law in general justifies a view that finds more fertile possibilities in the American realist movement,⁷⁹ whatever the conceptual flaws of the legal theory produced by that movement.⁸⁰ But these normative evaluations are beside the point when the question concerns potential defects in the conceptual enterprise upon which Hart, after all, chose to embark.

The importance of distinguishing what are here called judicial technique principles does not, however, lie solely in the implications of the distinction for an adequate conceptual model of law. The distinction has implications as well for questions concerning the responsibility of individual judges to develop and correct such principles within an existing legal system. In the case of legal standards, individual judges who disagree with the justice or wisdom of the accepted rule of recognition do not breach—and indeed can only acquit—their duty *qua* judge by applying such standards. On the positivist's model, compliance with accepted standards *is* compliance with official duty. In contrast, official acceptance of particular judicial technique principles has no necessary connection to questions concerning the correctness of such standards and the obligation of a judge to employ them. An individual judge demonstrates compliance with official duty as respects these principles, not by pointing to the fact of convergent peer behavior, but only by pointing to the

76. See Hughes, *supra* note 45, at 433.

77. Dworkin, *Wasserstrom, The Judicial Decision*, 75 ETHICS 47 (1964).

78. CONCEPT OF LAW, *supra* note 2, at 144.

79. See Hughes, *supra* note 45, at 437-39.

80. See CONCEPT OF LAW, *supra* note 2, at 143.

correctness in fact of the judicial technique principles he employs. And in establishing such correctness, the search for guidance must ultimately be directed well beyond the community of legal officials to the wider community of rational rule-appliers.

That much needs to be done in further characterizing and identifying such principles may be conceded.⁸¹ The point of the present discussion is only to stress that, to the extent the judge's role is that of a rational rule-applier, the resulting implications for role theory should not be subsumed under legal theory in a way that obscures real differences in the nature and source of judicial obligation.⁸² Llewellyn's elaborate exploration of "rule, tool and technique"⁸³ in the process of judicial decision should not, under the rights thesis, be converted into an exploration of exclusively legal standards: rule and tool perhaps, but not technique.

C. *The Limits of the Argument*

Even if the above distinction is accepted, it will constitute a complete response to Dworkin's argument only if it can be applied to all of the principles Dworkin has in mind. Consider the principle that "no man should profit from his own wrong." On its face, this at least appears to be a standard unrelated to any independently developed methodology of rule-discovery that might be thought to transcend the realm of the peculiarly legal. Dworkin suggests that we can imagine the standard being changed or eroded "[i]f it no longer seemed unfair to allow people to profit by their wrongs."⁸⁴ Can one justify a refusal to count this standard as law by a process similar to that applied to judicial technique principles?

81. See Hughes, *supra* note 45, at 439 & n.22. It may be that there are characteristics other than those suggested in this section that more appropriately identify the full class of judicially binding standards deserving of exclusion from the class of "legal standards." My primary concern is to describe the general nature of this class of standards and to justify its separation from inquiries into legal validity.

The leading reference point for studies characterizing what is peculiar and essential to the process of adjudication is still largely found in the writings of Professor Fuller. See sources cited note 58 *supra*; H.M. Hart & A.M. Sacks, *supra* note 59, at 662-69. For a thoughtful application of Fuller's model to questions of legal theory, see Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. BAR REV. 406 (1968).

82. Philosophers and sociologists have long explored the extent to which obligations attach to, and define, roles, see, e.g., R. DAHRENDORF, *ESSAYS IN THE THEORY OF SOCIETY* 19-87 (1968), and this literature is to some extent reflected in discussions of legal theory and legal reasoning, see Weiler, *supra* note 81, at 407 n.3 (1968). See also Seidman, *The Judicial Process Reconsidered in the Light of Role-Theory*, 32 MOD. L. REV. 516 (1969).

83. See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 402 (1960).

84. *Model of Rules*, *supra* note 3, at 41.

The attempt to do so might take the following form. First, one might question whether in fact the "no-profit" principle could be disavowed as Dworkin suggests. If the principle is a concrete illustration of some more abstract principle, linking notions of right and wrong with notions of just desert ("good should be rewarded, evil punished"), the suggestion that the principle could have no weight at all in community judgments about "fairness" borders on a redefinition of the underlying normative concepts of "desert," "right," "wrong" and "profit." It will always be *prima facie* unfair to profit from one's own wrong, even though the *prima facie* case can sometimes, as in Dworkin's example of adverse possession, be overcome. Second, even if complete disavowal of the no-profit maxim is logically possible, it might be argued that the maxim (or the abstract principle it reflects) operates on such a level of generality that one could assume implicit acceptance of the principle as an empirical fact in any relevant social context. In this respect, such principles would resemble judicial technique principles: They are found not in the confines of a particular legal institution but in the essential preconditions of social intercourse in general.

If this hypothesis is correct, one should be able to discover the "no-profit" maxim and similar principles operating in nonlegal, rule-governed situations—in games, for example. Consider a referee at a basketball game played under rules that predate the introduction of specific provisions for intentional fouls. The generally applicable rule is that all bodily contact fouls "shall be called." A member of team *A*, which is losing in the closing minutes of the game, intentionally fouls the poorest shooter on team *B* with the hope that team *A* will get the rebound if the foul shot is missed. Team *B* urges that the rule be construed to allow the referee not to call the foul, thereby leaving team *B* with possession of the ball. No other relevant rules govern the situation, which has not previously arisen. One can imagine the referee deciding that, although the rules committee had not envisioned this particular situation, surely it had not intended for a team to "profit from its own wrong."⁸⁵ Whether or not that is the

85. Professor Carrio discusses a similar example involving the "advantage rule" in soccer, which allows officials to avoid penalizing a team's infraction of a rule "if, as a consequence of the penalty, the offending side would gain an advantage and the non-offending side would be adversely affected." G. CARRIO, *LEGAL PRINCIPLES AND LEGAL POSITIVISM* 6 (1971). Carrio uses the example to distinguish between second-order and first-order principles, the former characterized in part by their "topic neutrality" and in part by the fact that they are addressed to judges and indicate how other rules are to be understood and applied. But Carrio's second-order principles appear to include far more than what I have called judicial technique principles, and both sorts of principles appear for Carrio to be legal standards. See

conclusion the referee reaches, the claim that he has a duty at least to consider the "no-profit" principle rests on assumptions about how critics and players would respond to a failure "to take the measure of these principles" that are similar to the assumptions Dworkin makes in arguing for the binding nature of the principle in *Riggs*.⁸⁶ In both cases a decisionmaker is urged to construe a rule, in the absence of express contrary indications, not to do violence to implicitly accepted general social principles. Although in that sense "binding," the context-neutral nature of such principles might be thought sufficient to explain why one does not include them specifically among the "rules of basketball" or the "laws" of society.⁸⁷

I do not intend to explore this suggestion further because it seems clear that, however far one might push this process of distinguishing trans-legal from legal principles, one cannot in this manner account

id. at 7, 16, 24. Thus the distinction is different both in content and purpose from the distinction developed in this article.

86. See *Model of Rules*, *supra* note 3, at 36.

87. This attempt to extend the argument used in the case of judicial technique principles can be placed in perspective by briefly comparing the thesis of this section with classical theories of natural law and with Hart's own theory concerning the "minimum content of natural law." For Hart, natural facts of human vulnerability, desire for survival, and the like, make minimal rules respecting persons, property, and promises necessary features of all social life. See CONCEPT OF LAW, *supra* note 2, at 189-95. Legal systems must include such minimal rules, not so they may count as "legal", but because it is unlikely that such systems could otherwise come into being or survive. The link here is an empirical one between universal but contingent truths about human beings on the one hand, and the *efficacy*, not the *concept*, of a legal system on the other. One would hardly be inclined to exclude these minimally necessary legal standards (which may take various concrete forms in particular legal systems) from a model of law simply because they appeared only in this sense in all legal systems. In this respect, the difference between such standards and judicial technique principles lies in part in the difference in subject matter with which they deal. Minimal rules concerning persons, property, and promises aim directly at the control of human conduct, rather than at control of the process of reasoning from standards to decisions in particular cases. It is the thesis of this section that the former enterprise, but not the latter, is what "law," even in its broadest, preanalytic sense, could possibly be said to be "about." Cf. L. FULLER, THE MORALITY OF LAW 106 (1964). This thesis explains why a model of law that failed to reflect "the minimum content of natural law" would seem arbitrary in a way that a model that ignored judicial technique principles would not. For similar reasons, classical natural law theories, which assert conceptual links between "law" and substantive principles of justice or morality, would also require that such principles be included among the "legal standards" identified by legal theory.

The attempt in the text to provide a trans-legal account of principles such as the "no profit maxim" falls between the Hartian and the classical natural law theories. Like the latter, such principles are not limited to those based on the "natural necessity" reflected in a Hobbesian view of man's predicament, but embrace broader principles of fairness and justice generally in social contexts. Like Hart's theory, the claim that these principles would be universally accepted in any social context is only contingent, not conceptual. (Indeed the plausibility of even the contingent claim probably depends on interpreting the principles at a level so abstract that they threaten to become vacuous.) But like both theories, an attempt to exclude such substantive standards from a model of "legal standards" begins to appear arbitrary.

for all, or even most, of the principles that Dworkin has in mind. Some principles are surely not context-neutral. A principle that places "special burdens upon oligopolies that manufacture potentially dangerous machines"⁸⁸ derives its authority from standards accepted within the particular legal institution in much the same manner as other legal standards. A referee urged to apply the foul rule only to intentional fouls must consider the purpose and "spirit" of the particular game of basketball (it is not a kind of football or rugby) in order to reject the proposed interpretation. The fact that one would not include in the "rules of basketball" all the purposes and aims of the game that might become relevant to an interpretation of the rules provides no answer to Dworkin's argument that at least these principles operate functionally like other legal standards to determine results, and thus in that sense are institution-specific standards that must be included in an accurate theoretical account of the "laws" of the game or institution.

III. THE RIGHTS THESIS

What, then, should a judge do when the shared conventions of language and purpose alone do not point to a single result? Dworkin's answer is that the judge must expand his search beyond the legal standards implicit in any particular rule to those implicit in the entire legal system itself: "A principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question."⁸⁹ Professor Sartorius provides a similar but not identical account: "The correct decision in a given case is that which achieves 'the best resolution' of existing standards in terms of systematic coherence"⁹⁰

In his most recent article, Dworkin expands at length on this thesis by positing an ideal judge called Hercules.⁹¹ Faced with a hard constitutional case, Hercules must first develop a "full political theory that justifies the constitution as a whole." If several political theories satisfy this test, he must refer to other constitutional rules and settled practices under the rules to select the theory that "provides a smoother fit with the constitutional scheme as a whole." By this process, he develops a theory of the Constitution "in the shape of a

88. *Model of Rules*, *supra* note 3, at 41.

89. *Social Rules*, *supra* note 3, at 876.

90. R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 196; Sartorius, *supra* note 13, at 158.

91. *See Hard Cases*, *supra* note 3, at 1083.

complex set of principles and policies that justify that scheme of government," and by reference to which he is now able to decide the hard constitutional issue in the case before him.⁹² The same process is applicable to cases involving statutes and the common law. Hercules must "construct a scheme of abstract and concrete principles that provide a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well."⁹³

Dworkin's dual claim that this search for the "soundest" solution to a hard case not only accurately describes the Anglo-American judicial function but will also yield a single correct decision in every case faces theoretical, empirical, and practical objections. In the remainder of this article, I briefly discuss these difficulties without attempting to resolve them, and then consider whether the rights thesis, even if valid, can be accommodated to the positivist's basic model.

A. *Assessing the Thesis*

1. *Theoretical Problems*

Any attempt to assess the above claims confronts at the outset the problem of understanding just what is meant, in the present context, by "coherence" or by "a soundest theory of law." Dworkin and Sartorius, however, have done much to try to clarify these notions, and I shall not expand on their efforts here.⁹⁴ Even if one understands what is required of a judge trying to apply the rights thesis, the plausibility of the thesis would still be difficult to test because of the clear separation of the claim that there is always a single right answer from the claim that any mere mortal could be expected to know that he had found it. Only Hercules can do that, as Dworkin illustrates.⁹⁵ Indeed, Sartorius goes so far as to admit "that it is unreasonable to expect that it would be possible, even in principle, to develop some form of judicial proof procedure which would permit one to demonstrate the correctness, let alone the unique correctness, of a putatively correct decision in all cases."⁹⁶

These merely practical problems, however, prove the claim theoretically untenable only if one holds a theory of truth that makes the

92. *Id.* at 1084-85.

93. *Id.* at 1094.

94. For a further examination and critique of the notion of a "soundest theory of law," see Note, *Dworkin's Rights Thesis*, 74 MICH. L. REV. 1167 (1976).

95. See *Hard Cases*, *supra* note 3, at 1083-101.

96. R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 201.

testability of a claim a precondition of its meaningfulness. Let us assume that claims can be true though they are unprovable "even in principle."⁹⁷ We can then also agree with Sartorius that uniquely correct decisions for legal cases exist if the following conditions are met: (1) There is a unique set of exclusively relevant legal standards that bear on the issue. (2) These standards have relative weights for use in cases of conflict. (3) Some method exists for resolving ties when conflicting standards are evenly balanced.⁹⁸

Of these three conditions, Sartorius acknowledges a theoretical problem only in connection with the third: One has no guarantee that cases will not arise in which conflicting principles are evenly balanced. Sartorius' response is that this possibility is so unlikely that the theoretical model remains a viable hypothetical model for the judge and justifies his search for *the* correct answer in all cases.⁹⁹ The second condition—that unique, pre-established weights attach to the pluralistic and undoubtedly conflicting institutional standards one is likely to discover in any hard case—is more troublesome. Several commentators have argued that this aspect of the claim is unproved and implausible.¹⁰⁰ Sartorius, for example, simply asserts at this point in the argument that the same test of institutional support that isolates the relevant standards will also reveal their relative weights.¹⁰¹ Again, the problem does not seem to lie with the theoret-

97. See *id.* at 185: "[I]t is clear that, in mathematics, we have learned that truth cannot be equated with provability."

98. See *id.* at 189-99.

99. Compare Sartorius, *supra* note 13, at 158-59, with R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 199-204. This response, of course, concedes that the theoretical validity of the model cannot be established, however "rarely" one might suppose evenly balanced cases will occur. As one commentator notes, what may be "rare" in comparison to the totality of cases—easy and hard—may not be rare at all if "hard cases" alone are considered. See Note, *supra* note 94, at 1193.

At this point, the argument over whether judges should accept the model, despite the theoretical imperfections, shifts to the level of normative legal theory. See note 4 *supra*. The proponent of the rights thesis anchors his normative claims primarily in considerations drawn from the role of a judge in a democracy and from the perceived unfairness of "retroactive" resolutions of social disputes. An opponent of the thesis might agree with Llewellyn that the "single right answer" view "tends, along with pressure of work and human avoidance of sweat, to encourage taking the first seemingly workable road which [appears], thus giving the more familiar an edge up on the more wise." K. LLEWELLYN, *supra* note 83, at 25. Note that this normative dispute results from focusing on the impact of the rights thesis on judges at opposite ends of the spectrum from "easy" to "hard" cases. Judges who strike "new" ground in "hard cases" may find shelter in the thesis from accusations that judges are merely legislating their own personal views; but they do so arguably only at the cost of being too quick to decide in other cases that they are in fact dealing with an "easy" case.

100. See MacCallum, *Dworkin on Judicial Discretion*, 60 J. PHIL. 638, 640 (1963); Christie, *supra* note 10, at 656; Raz, *supra* note 10, at 846.

101. See R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 193.

ical claim that all institutional standards relevant to a decision *will* have fixed, relative weights at any point in time, but only with the likelihood that any procedure can be developed to reveal those weights. In this respect, the thesis is perhaps best viewed, as far as its theoretical validity is concerned, as a sketch of the hypothetical framework implied by judicial opinions that are written *as if* the decision in a hard case were uniquely required, much as Kelsen's theory may be viewed as an attempt to describe what must be hypothesized if one is to explain the normative aspect of law.¹⁰²

There remains, however, one problem that has been largely overlooked. In fact, the problem arises in connection with what has apparently been assumed to be the most plausible aspect of the thesis: the assumption that a unique set of pre-existing, decision-relevant legal standards exists in every case. Elaboration of the problem requires brief reference once again to Fuller's writings on the nature of adjudication, referred to earlier in this article, in a different context.¹⁰³ Fuller's view is that some kinds of disputes are inherently inappropriate for resolution through adjudicative methods. The explanation for and description of what constitutes these "limits of adjudication" is varied and sometimes obscure, with the "polycentric" nature of the issue usually serving as the predominant sign that the limits have been reached.¹⁰⁴ On one interpretation of this model, what makes some problems nonjusticiable is the absence of the pre-existing standards upon which rational, judicial decisionmaking depends.¹⁰⁵

Now Sartorius explicitly draws on Fuller's theory of adjudication in developing the rights thesis as an apparent explication of the concept of adjudication.¹⁰⁶ Dworkin explicitly characterizes the thesis in its descriptive aspect as explaining "the present structure of the institution of adjudication."¹⁰⁷ If the rights thesis indeed

102. See note 6 *supra*.

103. See sources cited note 58 *supra*.

104. "A polycentric problem is one which has many centres of stress and direction of force, only some of which are likely to be the focus of attention when a decision in the area is made . . ." Weiler, *supra* note 81, at 423.

105. *Id.* at 420-21. "Polycentricity" does not seem to mean the same thing as "lacking pre-existing decisional standards." As Fuller uses the term, polycentricity seems to imply just the opposite—namely, that there are too many inter-related and decision-relevant standards to allow a court to manage them all in the adjudicative setting. Thus, it is not clear that polycentric issues would cause Dworkin's Hercules any problem, or, correspondingly, that Dworkin would concede that *any* issues are inherently nonjusticiable. See text at notes 118-20 *infra* & note 119 *infra*.

106. R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 168 (emphasis original).

107. See *Hard Cases*, *supra* note 3, at 1101.

amounts to an explication of the concept of judging, and if it is true that some problems can arise that are inherently nonjusticiable for lack of pre-existing decisional standards, then the validity of the claim that there is a single right answer in every case depends, even in theory, on a further empirical investigation into the kind and range of jobs we have, in fact, given to courts.¹⁰⁸ One may, of course, hope that courts have themselves properly applied doctrines of justiciability to limit the cases they accept to those with pre-existing decisional standards. But neither Dworkin nor Sartorius undertakes any such investigation. Courts may, after all, have made mistakes in applying justiciability doctrines. And although mistakes made by judges about the legally required result in normal cases leave untouched the claim that there *was* a right answer, mistakes in deciding what is justiciable leave the courts dealing with "polycentric" cases as to which the claim of single right answer is, by definition, false.¹⁰⁹ Furthermore, apart from the question of mistakes, not all state courts, let alone English courts, adhere to doctrines of justiciability similar to those that have been applied in federal courts. To the extent that the single-right-answer thesis is meant to apply to all cases heard by Anglo-American courts, its validity will again depend upon empirical investigations yet to be undertaken by proponents of the thesis.

The rights thesis advocate might, of course, reply that the single right answer claim applies only to those cases in which the deciding official *is* acting *qua* judge. But this response makes the thesis considerably less interesting. One may accept the rights thesis as an explication of the ideal embraced by the concept of adjudication and still be left with the problem of determining which of the cases that come before courts are compatible with that ideal. One cannot draw the line between these two kinds of cases on the basis of "those that do and those that do not have pre-existing standards and right answers," for that is precisely what is in question.

Clearly, much depends on how broad a claim is being made for the single-right-answer ("no discretion") thesis. Dworkin at one point appeared to exclude constitutional cases from the reach of the thesis¹¹⁰ and at other times seems to have limited the common-law claim to the standard kinds of civil cases that courts customarily

108. See generally MacCallum, *supra* note 100, at 640.

109. By deciding a nonjusticiable case a court may, of course, by that very act (and the accompanying articulation of standards) make *future* such cases justiciable, although one is still left with an unavoidable instance of judicial legislation in the first decision.

110. See *Judicial Discretion*, *supra* note 3, at 634 n.6. But see *Hard Cases*, *supra* note 3, at 1083-85; Greenawalt, *supra* note 10, at 375 n.46.

handle.¹¹¹ Depending on what counts as a "typical civil case," one might support the proposition that these at least fall into the class of the justiciable. But if legislative instructions to courts to decide matters that are not justiciable (or the voluntary acceptance by courts of such matters) are automatically disqualified as counterexamples to the thesis on the ground that they are not the sort of cases to which the claim applies, then the thesis again threatens to become as interesting as a tautology.

One can, perhaps, avoid these problems by looking for the limits of the thesis in the context of the dispute out of which it arose in the first place. Dworkin, after all, is talking about "hard cases"—those for which the positivist admits there are standards that can lead to only one result in some cases, but not in all. Dworkin's claim might be that if there are any admitted standards, then the solution to the case is always determined: once justiciable, then always and thoroughly justiciable. Whether this fully restores the theoretical base of the claim depends, perhaps, on whether one agrees that justiciability can only be an all or nothing matter, and that moving beyond what can be traced to a common or general consensus in applying standards entails a problem that is significantly different, as respects "justiciability," from problems raised by cases that are standardless from the beginning.¹¹²

2. *Empirical Problems*

Empirical problems arise when one looks for evidence that the rights thesis does, in fact, accurately describe the Anglo-American system of adjudication even in cases that are theoretically justiciable. Given the difficulty of the task demanded by the thesis and the present scarcity of Herculeases, it is, after all, entirely conceivable that a society would deliberately opt, in designing its legal system, for less than the ideal. A legal system might, that is, authorize judges (through the rule of recognition) to abandon the search for the right answer in hard cases despite its theoretical existence, and to exchange the role of "judge" in such cases for that of an informed, conscientious legislator.

In this respect, Dworkin's most recent article is puzzling, for it appears designed less to argue that the thesis holds than to provide an account, in the hypothetical sense described above, of how judges could in theory operate under such a thesis *assuming* that it holds. Consider the illustration from the game of chess that Dworkin em-

111. See *Hard Cases*, *supra* note 3, at 1060.

112. Cf. *id.* at 1080.

plays.¹¹³ We are to assume that the rules of chess include a rule directing the referee to forfeit a game if one of the players "unreasonably" annoys the other in the course of play. The referee must decide whether Tal's smile is sufficiently annoying to justify a forfeit by virtue of the rule. Like Hercules, the referee must construct from the institution of chess a sufficiently precise theory of the game to yield a single correct answer in every case of annoying conduct. But we know that this is what the referee must do only because Dworkin assumes that he has been instructed to treat the rule in this fashion, despite its vagueness. If chess really did include such a rule, a referee's proper response could normally be determined only after marshalling other evidence beyond the rule and the game of chess alone. If, for example, referees decided that they should first issue warnings before declaring forfeits (in reality, the most likely possibility) one would probably conclude that the referee believes he is authorized to exercise quasi-legislative power to declare rules prospectively. One would not have a "right" to a forfeit until conduct, now specifically described, occurred for a second time. The point is that whether a system of standards is to be viewed as a system of entitlements, like the question whether any particular standard is a rule or a principle, cannot be determined solely from a priori inspection of the standard or set of standards without considering the empirically determined attitudes toward such standards of those who must administer and live under them.

The evidence on which both Dworkin and Sartorius rest their empirical claims consists almost exclusively of what they discover in the attitudes of judges and ordinary litigants. They claim that this attitude, as reflected in judicial opinions and the arguments litigants make, reveals that the relevant judicial community believes it has been instructed to treat the legal system as a system of entitlements, however vague the standard that is being applied. But surely this is rather selective evidence. If one takes into account the views of the entire legal profession, as Dworkin seems prepared to do in deciding which principles are legal principles,¹¹⁴ one would have to balance the cited empirical evidence against the contrary views of numerous scholars and judges who have claimed that judges are authorized to make fresh choices in hard cases.¹¹⁵ One would also have to account

113. *Hard Cases*, *supra* note 3, at 1078-82.

114. *See Model of Rules*, *supra* note 3, at 41.

115. Sartorius acknowledges that this is the "nearly universal view of academic lawyers and legal philosophers . . . [f]ound in journal articles too numerous to mention." R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 181, 182 n.2. In addition to H.L.A. Hart, others whom either Sartorius or Dworkin have identified as

for the increasing practice of prospective overruling in both common-law and constitutional cases.¹¹⁶ Finally, even the cited evidence would normally have to be weighed against arguments designed to explain why judges and litigants might act as if their decisions were uniquely required, even though they knew in fact that they were not.¹¹⁷

3. *Practical Problems*

The practical objection to the rights thesis, ably presented in a recent article by Professor Greenawalt,¹¹⁸ is a synthesis of both the theoretical and empirical problems. If one can transform vague standards into standards that embody entitlements simply by adding a directive to view them as such, it is not clear what practical difference the thesis makes to judges, litigants, or other participants in the system. Thus, Dworkin is prepared to accept sentencing decisions by judges as cases involving strong (legislative) discretion. Yet nothing in Dworkin's account explains why the standards to which a judge refers in determining a sentence could not, in theory, yield a single correct sentence via the Herculean route; these decisions should also become matters of right once the judges are instructed to include sentencing decisions within the ambit of the thesis.¹¹⁹ Administrative agencies determining "fair rates" or "unfair trade practices" differ from judges determining "unreasonable restraints of trade" or standards of "due care" only because the latter are instructed to treat the standards as yielding institutionally correct answers, whereas the

holding views that, in varying degrees, are inconsistent with the rights thesis include Gerald MacCallum, Benjamin Cardozo, Felix Cohen, John Dickenson, William O. Douglas, Felix Frankfurter, Paul Freund, Gidon Gottlieb, Henry M. Hart, Jr., Karl Llewellyn, Roscoe Pound, Albert M. Sacks, and A.W.B. Simpson. See Sartorius, *The Justification of the Judicial Decision*, 78 *ETHICS* 171, 172, 177, 178 (1968); R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 182 & nn. 2, 3, & 6, 190, 194; *Judicial Discretion*, *supra* note 3, at 624-25 n.1. It must be admitted that attempts to characterize writers as belonging clearly to one side or the other of this dispute can be a risky business when one considers variations in context and in the way the issue is posed. Thus, it has been argued that none of Dworkin's representative antagonists, properly interpreted, can be said to support a view of strong judicial discretion—a claim that, if true, only lends weight to the empirical evidence for the rights thesis. See Reynolds, *Dworkin as Quixote*, 123 *U. PA. L. REV.* 574 (1975).

116. See Greenawalt, *supra* note 10, at 385 n.64.

117. See K. LLEWELLYN, *supra* note 83, at 24; cf. Voltaire, *Epître à l'Auteur du Livre des Trois Imposteurs*, Nov. 10, 1770 ("If God did not exist, it would be necessary to invent him").

118. See Greenawalt, *supra* note 10.

119. Cf. *id.* at 372-74. One might resist this conclusion by suggesting that sentencing decisions are inherently nonjusticiable and thus not among the range of cases to which the rights thesis could apply. This response reintroduces the theoretical problem of explaining the scope of the thesis in a way that does not beg the question and that yields an independent test of justiciability. See text at notes 105-12 *supra*.

former are not. If we give the administrative agency's standard to the court, or, conversely, instruct the administrative agency to view the standard as incorporating institutionally correct solutions, then the distinction disappears—but only in theory. Even the legislator—the paradigmatic case of a decisionmaker with “legal discretion” to pass laws whether or not they conform to results thought to be required by moral or political theory—may lose his discretion if one incorporates in the constitution a directive to pass only legislation “in the public interest.” Such a directive will presumably transform criticisms directed at the wisdom of the law into criticisms that the law is an incorrect measure of the public interest and thus a violation of pre-existing, system-incorporated rights.

Whenever the standard is vague, as in these cases, it is difficult to see what practical difference will result from these alternative methods of describing the system. By hypothesis, reasonable men will differ about what the standard requires, and more than one solution will fall within the range of reasonable difference. In the absence of a real Hercules to resolve the dispute, one is hard pressed to explain how behavior is affected by the fact that one is instructed to seek a system-determined “right” answer instead of being told that more than one solution (within the reasonable range) is system-acceptable, even though there may be in some theoretical sense an extra-systemic “right” answer.¹²⁰

B. *Accommodating the Thesis to the Positivist's Model*

Despite the seriousness of the preceding objections, the rights thesis can at least be viewed as a plausible theoretical explication of the ideal embraced in the concept of adjudication. As such, Dworkin's writings provide a valuable check to the temptation to view controversial judicial decisions—simply because they are controversial—as nothing more than rationalizations of a judge's personal views. Even though the ideal has not been shown to be practically or empirically compatible with all the controversies that judges decide, Dworkin and Sartorius help draw attention to the unresolved questions that should be investigated before the thesis is rejected in any particular case as the model that should guide a conscientious judge. Let us assume that these questions can be resolved and that the rights thesis is correct. How might the positivist respond to the claim that the thesis provides a counterexample to his theory?

120. On the basis of similar considerations, Sartorius now acknowledges that “[t]he issue about the existence of uniquely correct decisions is to some extent a red herring.” R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 201-02 (footnote omitted).

One possibility is simply to extend the argument made earlier in this paper in accommodating purpose to the positivist's model in the easy case.¹²¹ We suggested there that the same master test that identifies the rule also identifies the commonly agreed purpose used to interpret the rule. The rights thesis asserts that legal standards beyond those implicit in language and purpose contribute to the resolution of the hard case. But the identification of these additional standards is not made through a process different in kind from that involved in the easy case. The only difference is that instead of confining one's attention to a particular rule and its purposes, the investigation now broadens to include the entire institution and all relevant rules and practices, together with their underlying purposes. In this manner, one extracts a complex set of standards for use in finding the soundest solution to the case in question. The ultimate test for whether a standard has the necessary "institutional support"¹²² and hence counts as "law" will be exceedingly complex, but simpliciter was never claimed as a feature of the positivist's theoretical model.

Professor Sartorius, who otherwise agrees with the essence of the rights thesis, argues along these lines that the thesis remains consistent with positivism:

Although the actual filling out of such an ultimate criterion would be a complex and demanding task for any mature legal system, if it is indeed a practical possibility at all, the only claim that need be made is that it is in principle possible, and that it is just this possibility which in principle underlies the identification of something as an authoritative *legal* standard. Although perhaps it is a good way from Hart's version of positivism, it is in accord with the fundamental positivistic tenet as described by Dworkin: "The law of a community . . . can be identified and distinguished by specific criteria, by tests having to do not with . . . content but with . . . pedigree"¹²³

Dworkin's response to this attempt to rescue positivism is found in the second article in his trilogy.¹²⁴ "Institutional support" cannot serve as an ultimate test for law in the positivist's sense, because the rights thesis does not require a judge, in attempting to construct the soundest theory of law, to accept as dispositive the fact that other judges accept any particular theory as the soundest. Each judge's task is to find the unique soundest theory, the content of which,

121. See text at notes 45-47 *supra*.

122. The term was employed by Dworkin in his original article and became the focus for his subsequent debate with Sartorius over the compatibility of positivism and the rights thesis. See *Model of Rules*, *supra* note 3, at 41; Sartorius, *supra* note 13, at 156; *Social Rules*, *supra* note 3, at 874-78; R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 204-10.

123. Sartorius, *supra* note 13, at 156.

124. See *Social Rules*, *supra* note 3, at 876-78.

however, is largely independent of what other judges think it to be. The distinction is between what Dworkin calls a "normative rule," which ascribes duties to individuals whether or not they accept or acknowledge them, and a "social rule," which only describes duties that are, in fact, accepted.¹²⁵ The positivist's test is a social rule. The rights thesis, in contrast, imports a test that makes relevant to the determination of legal validity normative arguments about what "ought" to be recognized as accepted practice, whether or not it is so recognized.

There are two paths one might take in evaluating this response, each corresponding to a different interpretation of what it means to say that "normative arguments" must occur in applying a test of "institutional support." The first interpretation views "normative arguments" as referring only to what is entailed by the need to provide a "consistent rationale" for accepted practices, with the latter still serving, in the positivist's sense, as the basic mark of a community's legal standards. This is the path Sartorius takes.¹²⁶ People can, after all, disagree about what consistency requires with respect to unanticipated or controversial issues, and in that sense disagree about what "ought" to be done, while still agreeing that maximum consistency with existing practices determines the correct answer. Normative arguments in this sense, although they may take into account the reasons for or the underlying purposes of existing practices, make no attempt to justify those underlying purposes or baseline practices. But Dworkin also uses "normative argument" in a sense that explicitly denies the conclusive relevance of any baseline reference to concordant practices. It is in this sense that a vegetarian might argue that it is a present duty of society to refrain from killing animals for food, even though existing practice does not conform to such a rule.¹²⁷

Let us assume that normative arguments in this second sense are properly made whenever judges decide "hard cases." One might still be able to view the resulting legal system as compatible with positivism by distinguishing between two levels at which such normative arguments about the law may be advanced: At the basic level, determined by the rule of recognition, one may find a social rule setting forth instructions phrased in normative terms for the identification of legal standards; at a secondary level, one may discover normative arguments about whether those instructions have been followed. If normative arguments are limited to the secondary level, the master

125. See *id.* at 860.

126. See R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 209.

127. See *Social Rules*, *supra* note 3, at 861-62.

rule model remains theoretically intact and basically a social rule test for law, even though all of the crucial arguments about the legally required result in particular cases occur at this secondary, normative level.

The point can be illustrated by reference to an assumed Kingdom of Rex, with the social rule of recognition that "whatever Rex enacts is law" and a single enactment by Rex: "All disputes are to be settled as justice requires." In this simplified equity system, normative disputes (in the second sense) will arise over what is required by the system's explicit incorporation of moral standards. But what makes these disputes at all relevant as a means of determining the law is the fact that the appropriate officials accept, in Hart's sense, the basic rule of recognition. Hart is the first to concede that in this respect law and morality may well overlap, as evidenced in the United States, for example, by a variety of constitutional concepts that "explicitly incorporate principles of justice or substantive moral values."¹²⁸ Far from providing a counterexample to the positivist's conceptual model, such systems reenforce the theoretical validity of that model by making the legal relevance of the normative debate dependent on the instructions contained in the master test.¹²⁹

128. CONCEPT OF LAW, *supra* note 2, at 199.

129. The simplified equity system described in the text may strike many as too indeterminate to yield the kind of guidance normally associated with the existence of a "legal system." See J. RAZ, PRACTICAL REASON AND NORMS 137-39 (1975); L. FULLER, THE MORALITY OF LAW 34, 39 (1963). The force of this objection should diminish as courts begin to accumulate a body of case law and to recognize that "doing justice" includes taking account of settled expectations under such cases, even if it is thought that some of them had initially been decided erroneously. See Sartorius, *supra* note 13, at 152. Compare R. SARTORIUS, INDIVIDUAL CONDUCT, *supra* note 1, at 176-79, with R. WASSERSTROM, *supra* note 43, at 150-52. Indeed, it has never been clear that the common law, which includes judicial power to overrule past decisions, operates differently in any essential respect from a system that might have emerged from Rex's equity system. See Simpson, *The Common Law and Legal Theory* in OXFORD ESSAYS IN JURISPRUDENCE 77, 79, 85-88 (2d ser., A.W.B. Simpson ed. 1973). But see J. RAZ, *supra*, at 140.

In any event, objections to counting such systems as "legal" do not affect the point made in the text: One who insists that such systems *are* "legal" will find that Hart's model can accommodate the system. Hart's version of positivism, in short, need not be seen as conceptually linking "law" with a requirement that legal standards be ascertainable with any specified degree of certainty. (Raz, in contrast, does insist on just such a conceptual link. See *id.* at 146 (systems of "absolute discretion are not legal systems")). Hart, it is true, claims that in cases of sufficient uncertainty the judge's decision is not determined by legal norms, but that claim can be explained as based not on what is logically entailed by Hart's definition of law or his account of social rules, but on empirical assumptions concerning what most legal systems could realistically expect, and have in fact demanded, of judges in hard cases. If Dworkin's Herculean instructions can intelligibly be given to judges and can be defended as yielding (in theory) externally determined solutions, as the rights thesis assumes, Hart's account of law can adjust to the different empirical assumption without altering the basic theoretical model. See text at notes 132-35 *infra*.

Dworkin's description of the Anglo-American legal system differs from Rex's equity system only because the instruction given to judges is of the more complex form described by the rights thesis. Normative debates about the "soundest theory of law" occur and are legally relevant (assuming the empirical claims are established) only because the underlying social rule directs judges to engage in this method of resolving hard cases. That this is the case is revealed by the fact that at critical points throughout Dworkin's argument—in deciding whether standards are rules or principles and whether the legal system is a system of entitlements—resolution of the issue, as we have seen, turns on an inspection of the actual attitudes and practices of the relevant community. Indeed, the only empirical evidence for the rights thesis itself is based on claims about what is accepted in fact by judges and litigants as the proper way to decide cases. This inevitable recourse to empirically measured attitudes to resolve critical issues in Dworkin's account supports, rather than contradicts, the thesis that the ultimate test for law is a basic rule of recognition, determined by reference to the accepted practice of the officials of the system.

Viewed in this light, the dispute between Hart and Dworkin concerning judicial discretion in hard cases emerges as a dispute over the empirical question discussed in a preceding section: It is a disagreement over what are in fact the accepted "closure instructions"¹³⁰ for the system. Hart suggests that judges have accepted closure instructions directing them to decide the hard case through the exercise of quasi-legislative discretion.¹³¹ Dworkin claims that the closure instructions in such cases require judges to perform the Herculean task described in *Hard Cases*. In either case, it remains true that how and whether a particular system is closed is an empirical question, to be determined by inspection of the directions that the judge finds in the positivist's master test—the accepted social rule of recognition.¹³²

A determined nonpositivist might respond to this final attempt at reconciliation between positivism and the rights thesis in three ways. First, he may question whether it remains meaningful to talk of a "test" of "pedigree" in systems such as Rex's where the positivist's theoretical model is preserved, but only at the cost of rendering it of little practical use in resolving critical arguments about what "the law" requires. This objection highlights the ambiguity of the term

130. See text at notes 37-38 *supra*.

131. See C.C. art. 1 (Swiss Civil Code 1972) (judge is to decide cases in which a rule is unclear as if he were a legislator); J. STONE, *supra* note 38, at 29 n.21, 189 & n.124.

132. See J. STONE, *supra* note 38, at 188-89.

"positivism" itself. It may be that we have moved some distance from the view that a "master test," capable of actually identifying with some precision all standards relevant to legal decision, forms the core of a positivist's theory. It may also be that those who believe there is a conceptual link between "legal standards" and some minimum degree of authoritative definiteness and clarity in such standards¹³³ will refuse to categorize the standards used to decide cases in Rex's system as "legal." But if the "core" of a positivist's theory is, instead, "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality,"¹³⁴ then Rex's equity system and the rights thesis are both consistent with a positivist's perspective. Moral standards become relevant to legal decisions in both cases only because they are contingently, not necessarily, made relevant by social rules. Content is crucial in deciding which standards to use, but only because pedigree makes it so. The fact that one cannot provide a proof procedure either for checking the accuracy of decisions employing such legally adopted moral standards or for demonstrating which such standards are the correct ones, does not affect the core claim that legal and moral standards are conceptually distinct.¹³⁵

A second response to the claim that the rights thesis represents a disagreement over closure instructions might try to capitalize on the very fact that such a claim concedes the existence of disagreement concerning this particular aspect of the rule of recognition. Even though the empirical evidence for the rights thesis may be inconclusive, it is, we have suggested, at least strong enough to indicate that a genuine and unresolved dispute exists over the question of how to decide hard cases. Thus, Dworkin has indeed provided a counterexample to the thesis that in every legal system there exists a social rule that settles the limits of a judge's duty *qua* judge. But this thesis is largely one of Dworkin's own making, rather than an essential aspect of positivism or a claim that Hart makes, "at least in his more careful moments."¹³⁶ Hart has never denied that the rule of recognition may itself be uncertain in some respects, and that authoritative resolution of some questions may thus depend on a court's success in getting a particular decision accepted by the rest of the

133. See note 129 *supra*; Dickinson, *The Problem of the Unprovided Case*, 81 U. PA. L. REV. 115, 126 (1932).

134. CONCEPT OF LAW, *supra* note 2, at 181.

135. Cf. R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 208-09. See also note 129 *supra*.

136. R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 210.

relevant community. "Here all that succeeds is success."¹³⁷ One may agree with Dworkin that until such success is achieved, the positivist must admit that there simply is no social rule on the issue.¹³⁸ But that admission leaves the theoretical model intact, raising at most a question of the relationship between, on the one hand, the efficacy of a legal system, and, on the other, the degree of uncertainty that can be tolerated in the rule of recognition. When an unresolved question is fundamental, the existence of the legal system may be seriously threatened.¹³⁹ But when, as here, the question concerns how judges should decide hard cases, the riots occur in the academic journals, not in the streets, and are thus "system tolerable" in the extreme.¹⁴⁰

A third possible response at once illustrates both the incompleteness of Dworkin's argument and the potential threat that the rights thesis could pose for the positivist if the argument could be completed. The analogy to Rex's equity system, it might be suggested, misses the point or assumes what is in issue. The analogy assumes that the normative dispute turns into a sociological question of fact once one reaches the claim that "whatever Rex enacts is law." But it is this basic claim itself that the rights thesis subjects to legally relevant, normative debate. A judge in Rex's system does not acquit himself of his responsibility to apply "the law" by showing only that a particular decision is "just," and that Rex has decreed that cases be decided as justice requires. The judge must also be prepared to entertain, as legally relevant, arguments concerning the ultimate justification, if any, (not merely the stated or implicit reasons for accept-

137. CONCEPT OF LAW, *supra* note 2, at 149.

138. See *Social Rules*, *supra* note 3, at 871-72.

139. See CONCEPT OF LAW, *supra* note 2, at 149.

140. Thus, it is hard to agree with Dworkin that uncertainty in this respect is somehow more fatal to positivism than uncertainty concerning a rare issue such as Parliament's power to bind future parliaments. See *Social Rules*, *supra* note 3, at 872. It is true that "hard cases" arise more frequently than cases involving Parliament's power to pass entrenching clauses; in that sense the disagreement over closure instructions is an issue judges must continually face. But unlike the case of judges in disagreement about what to do if Parliament *did* pass an entrenching clause, disputes about how one is to decide "hard cases" will largely escape detection in the actual outcome of cases given the practical difficulty of distinguishing between the exercise of weak discretion on the one hand and strong, but wise, discretion on the other. See text at notes 118-20 *supra*.

For similar reasons, the fact that judicial decisions are written as if there is a "right answer" does not prove the judges have accepted the rights thesis. Because of the practical problems of distinguishing strong from weak discretion, decisions are not likely to distinguish explicitly between the claim that a decision is "correct" as measured by pre-existing legal standards (a judicial opinion) and the claim that the decision is "correct" as measured by political or moral philosophy (a legislative opinion). Of course, in applying closure instructions applicable only to "hard cases," judges can make mistakes in deciding when they are dealing with such a case. See text at notes 49 & 98 *supra*.

ance) of the rule that "whatever Rex enacts is law." It is in this sense that the "process of justification must carry the lawyer very deep into political and moral theory, and well past the point where it would be accurate to say that any 'test' of 'pedigree' exists for deciding which of two different justifications of our political institutions is superior."¹⁴¹

Under this interpretation, the issue between Dworkin and the positivist is sharply joined in a way that admittedly does not permit reconciliation. But the interpretation raises two new problems. First, it now seems clear that one could no longer draw any distinction between legal standards, on the one hand, and extra-legal—moral or political—standards on the other;¹⁴² as a result, the rights thesis collapses into the most traditional kind of classical natural law theory. Second, one is now left without any argument to support the newly interpreted thesis; for the thesis now appears to have left the confines of descriptive theory for the larger realm of conceptual inquiry into the meaning and nature of "law." Dworkin's analysis of "social" and "normative" rules may be both conceptual and accurate. One may concede, that is, that the language of obligation can be used either to describe acknowledged duties or to assert that duties exist, whether or not they are acknowledged. But what is missing from this account is an argument that demonstrates that "law" necessarily rests on an underlying normative rather than social rule. As an empirical matter, it is difficult to deny that social structures *can* be organized in ways that fit the positivist's model—that is, in such a way as to make the fact of acceptance the final court of appeal in determining the appropriateness of applying organized sanctions to specified conduct. Insistence upon the *necessary* legal relevance of normative appeals beyond what is, in fact, accepted requires one to explain what it is about the nature of "law" that makes this newly interpreted thesis a more accurate account of the concept of a legal system. In the conclusion to this paper, I shall briefly describe the kind of investigation that might be expected to provide such an explanation.

IV. CONCLUSION

It may be helpful to place the preceding discussion into somewhat

141. See *Social Rules*, *supra* note 3, at 877.

142. Raz and Sartorius both conclude that Dworkin is driven to this position when he attempts to maintain his thesis as a counterexample to positivism. See Raz, *supra* note 10, at 844; R. SARTORIUS, *INDIVIDUAL CONDUCT*, *supra* note 1, at 208. Dworkin, on the other hand, appears steadfastly to resist the suggestion that his thesis entails the inability to distinguish legal from nonlegal standards. Compare *id.* at 206, with *Hard Cases*, *supra* note 3, at 1105-06.

broader perspective by comparing Dworkin's attack on positivism with other nonpositivist theories.

Legal positivism's traditional target was the classical natural law theorist's claim that norms otherwise identifiable as "law" would not, in fact, qualify as law if they were sufficiently unjust. Dworkin's attack belongs to a more modern version of nonpositivism. The new nonpositivist does not deny that *if* one can determine a norm is law, further reference to content is unnecessary for determining the norm's legal status. Instead, the attack is directed at the antecedent of that hypothetical. In some cases, one cannot determine whether the norm is law at all without first inspecting content; in these cases, at least, the separation of fact and value becomes blurred and the conclusion that the norm is law may entail the conclusion that the norm is not unjust (at least not egregiously so).

The common feature of both the classical and modern approach (in addition to their rejection of the more extreme versions of legal realism) is a refusal to accept the positivist's insistence on the strict separation of the "is" and the "ought"; in this respect both might be thought to represent varieties of a natural law theory. But the obvious difference between the two approaches is important and should not be glossed over by the choice of a label designed to emphasize the common feature. Faced with an unambiguously evil statute, enacted by a supremely competent legislature, the new "natural law" theorist, unlike his classical predecessor, cannot deny the norm its legal status any more than does the positivist.¹⁴³ (Both may, of course, urge that its moral worth be considered in deciding whether it should be obeyed.) It is only when we move from the "unambiguous" to the "hard case" that the new theorist discerns an essential blurring of fact and value.

This difference in approach is sufficiently sharp that the classical theorist is not likely to view the modern nonpositivist as much of an ally. The impetus for the classical approach rested in part on the desire to construct a unified theory of obligation: With the bottom line for any actor—what one ought to do—as his ultimate goal, the classical theorist needed only to restrict legal norms to those that also passed moral muster in order to preserve a sense of unqualified fidelity to law while maintaining the primacy of moral reasons among the reasons for acting. In contrast, the new approach appears at times to be making a somewhat quibbling point about the inherent

143. The accuracy of this description of Dworkin's position in comparison to classical natural law theory depends on how one resolves the confusion concerning whether Dworkin thinks legal and nonlegal standards can ever be separated. See note 142 *supra*.

limits of language and human foresight. When language and purpose fail to guide unequivocally, one must fall back on something else, and that something else might just as well be (or "must be," depending on the particular variation of the theory) the judge's sense of what best "coheres" with the aim of the entire legal system. The new approach, in short, capitalizes on the problem of uncertainty to reintroduce value judgments into descriptions of the law, but in so doing gives away most of what the classical debate was about in the first place.

From another perspective, however, the modern approach represents a much more serious challenge to positivism precisely because it never was clear just what the classical debate *was* all about. The claim that "immoral law is not law" apparently assumes that there is a subject to which the predicate "immoral" can attach and thus seems to concede that there are *formal* tests for legal validity; the question whether one should also require substantive tests appears mainly as a problem of choice on pragmatic or theoretical grounds. The positivist's choice for the wider concept, for reasons of both conceptual clarity and practical merit in moral deliberation,¹⁴⁴ has never been easy to challenge. But when the claim that there are formal tests for validity itself is challenged, the positivist will never reach the question of choice until he re-examines his model of law to determine whether the alleged defects do in fact exist and, if so, whether the model can be repaired.

I have argued that the positivist's model remains intact in the face of Dworkin's argument, primarily because the rights thesis is cloaked in empirical claims and girded by arguments peculiar to a particular legal system. The conceptual theorist can discount the thesis—even if true—as an accidental, not an essential, aspect of law, explaining that the normative debates that the thesis entails occur only because social rules make such debates relevant to determining legal validity. The theory fails, in short, precisely because, and to the extent that, it is presented and viewed as a descriptive theory. If the arguments Dworkin makes for the need to refer beyond purpose and rule to the underlying justification of the entire institution could be connected to the concept of law itself, the blow to positivism would be more serious.

One possible direction that a further inquiry along these lines might take is the following. The fundamental premise of the inquiry would be that an adequate legal theory must preserve the distinction between legal and coercive systems—the basis, after all, for Hart's

144. See CONCEPT OF LAW, *supra* note 2, at 205-07.

criticism of Austin.¹⁴⁵ From that basic premise, the inquiry would explore the extent to which a model of law that roots legal validity in the fact of acceptance of a basic social rule by a group of officials accurately preserves this distinction between "obligation" and "being obliged." If one can show that the concept of obligation is accurately reflected only in a model of law that makes legal validity dependent, not on the fact of acceptance alone, but also on a good-faith claim that the system and standards thus described are "acceptable" to those governed by the system, to that extent the positivist's model will require modification. It is in this respect—in Dworkin's insights concerning the persistence with which claims of legal validity are linked with *claims* of normative validity—that one finds in the rights thesis valuable hints for the development of an improved, conceptual theory of law.

145. See note 6 *supra*.