Legal Theory From the Regulative Point of View

Alani Golanski
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By Alani Golanski*

I. INTRODUCTION

Legal theorists sometimes debate which aims and features of discrete legal institutions, such as tort or criminal law, are most important.¹ With occasional exception,² their arguments have not typically started on a broader legal theoretical footing. Arguing about a civil recourse theory of tort law, efficient breach in the contract realm, criminal law’s rehabilitative motivations, and so forth, is not usually informed by one’s general jurisprudential philosophy. For one thing, different aims usually motivate the investigations into the concept of law and the theory of a discrete legal area.³

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Nor is it true that if one sort of explanation is best for the concept of law – perhaps a non-instrumentalist one such as natural law theory paradigmatically advances – it must also be best for tort, contract, or criminal law theory. It may, however, be the case that the broader conceptual project can inform the narrower explanatory one. This article takes the position that a focus on law’s regulative role is well suited for unifying theories about law’s discrete practice areas with concepts about law itself.

While harmonizing the study of discrete institutions or fields is a worthy pursuit, there are also substantive reasons why the theory of law should assign primacy to law’s regulative role. Conceptually prior to their structuring of a legal system, individuals interact, hence transact. This in turn gives rise to obligations, commitments, resentments and, generally, the group’s “deontic” authority over what is right or wrong, and what “ought” to be done or not be done. Authority organizes, coordinates and prioritizes those obligations, resentments and powers; and, more abstractly, balances group members’ security and liberty and other interests. A legal system emerges as the society-wide normative institution, in the form of regulative and constitutive rules and principles, the latter being self-constraining hence regulative in the larger sense.4

discrete areas of the law is, for Coleman, different from the methodology of jurisprudence. In the former case, the aim is to uncover underlying explanatory principles, whereas in the latter case, the aim is to explain the possibility conditions and the normativity of law considered as a general social phenomenon”) (reviewing JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (Oxford U. Press 2001) (hereinafter COLEMAN, THE PRACTICE OF PRINCIPLE).

This article addresses the concept of a legal system from the regulative point of view. Because the late Professor Ronald Dworkin’s vision of the judge as practical philosopher is central to the regulative perspective outlined here, and because Dworkin’s approach increasingly informs explanatory projects tackling discrete legal practice areas, the article pays special attention to Dworkin’s nonpositivist construction of the role of political morality in adjudication. Within the regulative program as understood herein, however, the theoretical exercise characterizing judicial work is seen as nonmoral labor, and the article offers ideas about how certain of Dworkin’s commitments may be critiqued differently.

Part II reacquaints us with aspects of Dworkin’s theory of constructive interpretation as refined in *Law’s Empire*. Although the interpretive approach is backward-looking, the Dworkinian endeavor to make the legal system coherent in principle is instrumental and forward-
looking. Law’s regulative goals are therefore critical for Dworkin, at least to the extent that these include shaping the legal system in a way that furthers equality and equality of concern, promotes principles of due process and justice, and justifies official coercion.

Part III more generally concerns the structure of a concept of law, and reviews which factors must constrain such a concept. Dworkin’s theoretical objections to the possibility of a conceptual analysis of law do not mean that his own theory cannot usefully be evaluated on the basis of the constraints on such a concept. In this respect, Part IV pinpoints a few logical strains in Dworkin’s anti-conceptual approach that may merit more attention, notwithstanding the vast body of Dworkin-related literature.

Part V develops the argument favoring the regulative perspective, and addresses a few controversial issues in the jurisprudential debate to the extent these may be relevant to the regulative point of view. Participating in the regulative elaboration of norms, judges unwind their embodied, or practical, philosophy of the court’s institutional role. At the same time, the legal system’s articulation of norms are subject to principles that constrain institutions more generally; and this has implications for the concept of law. We take the position, for instance, that it is by virtue of the “intentionality” and “exactness” constraints on institutional deontic power that rules and principles not sufficiently specified by legal officials should be deemed extralegal. Courts exercise discretion when they build authority by relying on extralegal factors and sources that play a role in legitimizing law’s dominion. While the new “planning” theory of

law championed by Scott Shapiro may seem somewhat preemptive of the regulative perspective, we find it to be an unsatisfactory, albeit compelling, alternative view.

Part VI shows that the regulative understanding of law connects well to theories explaining discrete areas within law. Tort law is illustrative. The community’s construction of innumerable rights and obligations balancing security and liberty interests is deontically prior to law’s prescriptions, and courts advance their practical philosophy by determining which rights and obligations tort law should enforce.

II. REVISITING DWORKIN’S THESIS IN LAW’S EMPIRE

For Dworkin, judges disagree about what the law is. Suggestive of Thomas Kuhn’s reading of science, the disagreements tend toward interpretative solutions, and these are “the paradigms and quasi-paradigms of their day.” In a Dworkinian world, the right answer to legal cases should follow from our best interpretation of data using standards of theory construction


10 See generally COLEMAN, THE PRACTICE OF PRINCIPLE, supra note 3, at 38-40 (discussing “the theoretical norm of consilience,” particularly with regard to the manner by which a theory of tort law should also “illuminate a broader domain of our social practice . . . and of our political institutions more generally”) (emphasis in original).

11 DWORKIN, LAW’S EMPIRE, supra note 7, at 5.


13 Id., at 89. Although the scientific interpretive method provided Dworkin with an analogue to legal practice, he should not be misunderstood to take the theory of law to describe “some structure that is open to discovery by some wholly scientific, descriptive, nonnormative process.” RONALD DWORKIN, JUSTICE IN ROBES 152 (Harvard U. Press 2006).
such as elegance, simplicity and verifiability.\textsuperscript{14} It is just that recourse is to moral rather than abductive argument.

If positivism is correct, however, said Dworkin, then the criteria of legality are a matter of convention, hence agreement.\textsuperscript{15} Because judges disagree, law must rest on different grounds.\textsuperscript{16} These seem to be moral grounds, in the main, morality being controversial and hence the likely root of theoretical disagreement in law. The right answers to legal cases thereby flow from our best construction of morally justified principles that are legally binding in virtue of their content.\textsuperscript{17} Although lawyers and judges concern themselves mostly with legal outcomes in

\textsuperscript{14} DWORKIN, LAW’S EMPIRE, supra note 7, at 53.

\textsuperscript{15} DWORKIN, LAW’S EMPIRE, supra note 7, at 44. We omit discussion of Dworkin’s specific “semantic sting” argument alleging that H.L.A. Hart and the legal positivists share a linguistic criterial view for judging propositions of law, based on the fairly settled and conventional meaning of ‘law.’ The dilemma, in the view held by Dworkin, is that either lawyers accept roughly the same criteria for deciding the truth of claims about law “or there can be no genuine agreement or disagreement about law at all, but only the idiocy of people thinking they disagree because they attach different meanings to the same sound.” \textit{Id.}, at 45. In his “Postscript” to \textit{The Concept of Law}, Hart responded concerning the semantic sting argument that “nothing in my book or in anything else I have written supports such an account of my theory,” and that the argument “confuse[s] the meaning of ‘law’ with the meaning of propositions of law.” H.L.A. HART, THE CONCEPT OF LAW 246-47 (2d ed. Oxford: Clarendon Press 1994) (1961). Others have noted that the semantic sting claim has been subjected to withering criticism. Brian Leiter, \textit{Beyond the Hart/Dworkin Debate}, 48 AM. J. JURIS. 17, 31 n.49 (2003).


\textsuperscript{17} DWORKIN, LAW’S EMPIRE, supra note 7, at 225; \textit{see} COLEMAN, \textit{THE PRACTICE OF PRINCIPLE, supra} note 3, at 157. Notwithstanding his theory’s affinity with natural law, in \textit{Law’s Empire} Dworkin allows that compromises must sometimes be made and “fairness or justice must sometimes be sacrificed to integrity.” DWORKIN, LAW’S EMPIRE, supra note 7, at 178; \textit{cf.} Lewis A. Kornhauser, \textit{Governance Structures, Legal Systems, and the Concept of Law}, 79 CHI.-KENT L. REV. 355, 378 (2004) (“Natural law may be understood similarly to the understanding of
particular controversies, their theoretical disagreements may reach the nature of “law” in general, and Dworkin toggled between the two levels of discourse.\textsuperscript{18}

The interpretive attitude asks how things are. Obligations, for example, are everywhere by virtue of our social relationships and commitments. We might argue sensibly about whether to help a co-worker, whether we owe this much to her or to our common employer. We sometimes wonder what we owe friends and what we have a right to expect from them. Dworkin called these associative obligations, and explained that the many forms of association are “pregnant of obligation.”\textsuperscript{19} He continued that the duty to obey the law is itself an associative, political obligation.\textsuperscript{20}

This immediacy of obligation informs the interpretive project, in which \textit{ought} implies \textit{is},\textsuperscript{21} and for this reason the enterprise is constructive. If the call is a close one, and the obligation near equally one or the other, then my moral view of what ought to be the case “will influence my convictions about whether the institution . . . really has that feature.”\textsuperscript{22} This seems a

\textsuperscript{18} DWORKIN, LAW’S EMPIRE, supra note 7, at 31-33.

\textsuperscript{19} \textit{Id.}, at 206.

\textsuperscript{20} \textit{Id.}


\textsuperscript{22} DWORKIN, LAW’S EMPIRE, supra note 7, at 203.
psychological point that may or may not empirically be so. Applied in the legal context, it may ring truer, hence better fit our actual practice to recall that we typically say, “the law is undecided on this point,” perhaps because the issue is one of first impression. Yet there is always a background of general principles from which to engage in some level of analogic reasoning. Courts find principles that fit and justify the new outcome in furtherance of the coherence of the ongoing scheme framed by the existing legal materials. Judges discern law’s content and apply it to the controversy. They lack discretion – in the strong sense of being unbound by standards embedded within existing legal materials – to build authority from extralegal sources.

Dworkin allowed, though, that the feature, or the institution as a whole consisting in the network of associations, may be unjust, incapable of being interpreted in a morally acceptable way. In these cases, the best interpretation may be a deeply skeptical one, and if so we may conclude that the institution should be abandoned. But “[s]omeone who reaches that

23 Buirkle v. Hanover Ins. Cos., 832 F. Supp. 469, 484 (D. Mass. 1993) (“In between these zones of clarity is a large zone in which a court must determine an issue of first impression – that is, decide a case the outcome of which depends upon an issue of law as yet undecided”).

24 DWORKIN, LAW’S EMPIRE, supra note 7, at 19.

25 Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057, 1084, 1096 (1975); DWORKIN, LAW’S EMPIRE, supra note 7, at 285 (“A successful interpretation must not only fit but also justify the practice it interprets”).

26 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 34 (Harvard U. Press. 1978) (hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY); but cf. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 162 (Foundation Press, 1958) (defining judicial discretion as “the power to choose between two or more courses of action each of which is thought of as permissible”); Engquist v. Oregon Dep’t of Agr., 553 U.S. 591, 612 (2008) (“there is a clear distinction between an exercise of discretion and an arbitrary decision”).

27 DWORKIN, LAW’S EMPIRE, supra note 7, at 203.
conclusion will deny that the practice can impose genuine obligations at all.”28 If the polis is irreparably unjust, we may have just cause for civil disobedience.29

In the Dworkinian world, law’s “most abstract and fundamental” point is to guide and constrain governmental coercion.30 Individual rights and responsibilities flow from past political decisions about when collective force is justified, and define the proper application of such force.31 It is “the right sort” of past decision – that based on a constructive interpretation that aims at placing the practice to be interpreted in its best light – that engenders legal rights and responsibilities.32 However, “preinterpretive” institutional facts – rules and standards included – do not at the outset qualify as legal in a full and rich sense.33 If legal practices are rooted in the wrong sorts of decisions and if the corresponding system lacks features crucial to a flourishing legal structure that authentically justifies state coercion, then such a system may be deemed legal only skeptically, in the tentative sense that characterizes the preinterpretive stage.34

To put this more clearly, the interpretive project manifests in three stages, each involving

28 Id.


30 DWORKIN, LAW’S EMPIRE, supra note 7, at 93.

31 Id.


33 DWORKIN, LAW’S EMPIRE, supra note 7, at 103.

34 Id., at 103-04.
a “different degree[] of consensus” within the community. The first stage is preinterpretive, in which we identify the rules and standards, perhaps the statutory words, taken to provide the tentative content of the practice, but “a very great degree of consensus is needed.” In the second stage, the interpreter connects the preinterpretive data to the case; she settles on the point of, and general justification for, the standing practice, sufficient to permit an interpretive outcome to fit “as an interpretation of it rather than the invention of something new.” Less community consensus is needed at this stage. Finally, at the third, “postinterpretive” stage, there need not be much consensus at all, and theoretical disagreement may be endemic. For here the interpreter is most concerned with “reforming” or adjusting her sense of the underlying purpose of the practice in a way that best serves its justification recognized at the second stage.

It is important to appreciate that, as Dworkin framed it, the preinterpretive stage consists in an epistemic component. The “equivalent” stage in literary interpretation, he says, is the one at which individual texts are discretely identified as such and we can distinguish Moby Dick from Jane Eyre. So at the preinterpretive stage interpreters demarcate law’s raw materials capable of justifying the state’s collective force. Legal rules and standards are accessible, and can and

35 Id., at 65.
36 Id., at 65-66.
37 Id., at 66-67.
38 Id.
39 Id., at 66.
40 This reminds one of Wilfrid Sellers’ notion, in the philosophy of science, of the pre-theoretical and pre-reflective “manifest image.” WILFRID SCIENCE, PERCEPTION AND REALITY 20, 99 (The Humanities Press, 1963).
must be known, at the preinterpretive stage. For Dworkin, members of a hypothetical, conventionalist “rulebook” community “assume that the content of these rules exhausts their obligation,” and “have no sense that the rules were negotiated out of common commitment to underlying principles that are themselves a source of further obligation.”

But as the interpretive process unfolds, there is less that we know, and more to disagree about. It would take a mythic Judge Hercules “of superhuman intellectual power and patience” to discern all of the relevant principles and assign justified weight to competing arguments within “the complex structure of legal interpretation.” More generously aligning with our philosophy of government is the notion of a “genuine political community” that freely debates the comprehensive scheme of principles rooted in justice, fairness, due process, as well as integrity. This genuine community satisfies at least four conditions that must pertain to its members’ attitudes: (1) they must regard the group’s obligations as special, distinct from “general duties its members owe equally to persons outside it”; (2) they must accept that responsibilities within the group are personal, running directly to each individual member rather than to the group collectively; (3) they must internalize a sense of concern for the well-being of group members; and (4) this concern must be one of equal concern for all members.

Although it remains possible that an associative community constructed as genuine in this way may engender obligations that conflict with, and need to yield to, the demands of justice, any

41 DWORKIN, LAW’S EMPIRE, supra note 7, at 209-10.

42 Id., at 239.

43 Id., at 211, 217.

44 Id., at 199-200.
other form of community, whose officials rejected a commitment to the four conditions just marshaled, “would from the outset forfeit any claim to legitimacy under a fraternal ideal.” 45 Those conditions would be violated, for example, by “checkerboard statutes” that fail to treat like issues equally, and that integrity thereby forbids; 46 a legislative compromise is arbitrary that imposes “strict” liability on manufacturers of automobiles but not on makers of washing machines. 47 Integrity condemns this compromise because the state has thereby endorsed principles “to justify part of what it has done that it must reject to justify the rest.” 48

There seems little that could be worse for the constructive interpretivist who must derive legal principles from past decisions to arrive at the right answer. But we now see that the scheme of principles that would, as an ideal, comprise a coherent whole cannot be limited to past judicial decisions. The legislative focus of some of Law’s Empire leads us to take note of Dworkin’s single moral agent thesis. 49 While integrity in adjudication and integrity in legislation are distinguished, 50 they tightly parallel one another; we are concerned, after all, with the legal system. The community’s public standards should “be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation.” 51

45 Id., at 214; see supra note 17.
46 DWORKIN, LAW’S EMPIRE, supra note 7, at 213-14.
47 Id., at 178, 218.
48 Id., at 184.
49 Id., at 167-68 (“Political integrity assumes a particularly deep personification of the community or state [and] attributes moral agency and responsibility to this distinct entity”).
50 Id., at 217.
51 Id., at 219, 404.
There must be horizontal consistency – rather than vertical, historical consistency – of principle “across the range of legal standards the community now enforces.”  

Discerning principles permits the court, and the legislature, to interpret the new issue in a way that fits, as much as possible, what has gone before, and that justifies the outcome, and the institutional legal history in progress, from the standpoint of political morality. So the interpretive approach is backward-looking. But the endeavor to make the legal system coherent in principle is instrumental and forward-looking. Law’s goals include shaping the legal system by enacting statutes that justify coercion, further equality and equality of concern, and promote principles of due process and justice. Policy engenders standards that set out the goals, and these usually concern a desired improvement in one of the community’s economic, political or social features.

The analysis from law as integrity attaches legislation to policy as well as principle, but pulls in the direction of referring adjudication exclusively to principle. “[L]egislation invites

52 Id., at 227.

53 Id., at 239.

54 Id., at 221-24, 310-11; see supra notes 30-34 and accompanying text.

judgments of policy that adjudication does not . . . ”56 Judges are not and must not be deputy legislators,57 and indeed the judicial system protects individuals by treating their rights as “trumps” over the legislature’s collective strategies.58 Hence Dworkin said: “Once the legislature has made its choice, however, then individuals do have legal rights to what they have been assigned, and under law as integrity these rights extend not only to the explicit assignments but to the principled extension of these into cases not expressly decided.”59

Dworkin’s nonpositivist construction of the role of political morality in adjudication increasingly influences legal theorists, especially those addressing discrete legal practice areas. Although his work does not easily abide a conceptual analysis of law, it can both be evaluated on the basis of the constraints on such a concept and inform the conceptual project.

III. STRUCTURING A CONCEPT OF LAW

A. A General Theory Invokes the External Point of View

Nation states, unless perhaps broken by civil war or other chaos, claim to have a legal system. Those looking on from the outside typically acquiesce in the claim. A regime may change to one adjudged evil by observers, and yet provoke discussion that seems reasonable about its “new civil laws” and legal principles the “people gradually are being prepared [to]

56 DworKIN, LAW’S EMPIRE, supra note 7, at 410.
57 DworKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 82.
58 DworKIN, LAW’S EMPIRE, supra note 7, at 381.
59 Id., at 312.
accept[].”  Even just considering the stable governments most would ordinarily recognize as at least minimally “legitimate,” a great variety of legal institutions flourish making generalization problematic.61

Taking the “internal” point of view – the perspective of a participant – in formulating a theory of law, the theorist need not herself be limited to features characterizing the home setting. She can peck out the internal point of view from an external perch. Law’s Empire takes up the internal, participant’s point of view. It tries to grasp the argumentative character of our legal practice, however, “by joining that practice and struggling with the issues of soundness and truth participants face.”62 If we argue about what is the law, and seek out the principle that will lend itself to the morally best solution of the controversy, then the picture that emerges may tend to pattern our liberal democratic practice. It does not follow that law is naturally this way.

H.L.A. Hart tried to articulate a theory of law “not tied to any particular legal system or legal culture.”63 It was not enough to say, as he did at the threshold, that legal systems include rules enjoining certain kinds of behavior under penalty, rules requiring injurers to compensate victims, rules specifying how to create instruments conferring rights and creating obligations,

Nazis Will Alter Property Concept, N.Y. TIMES, Apr. 1, 1937, available at http://www.nytimes.com/mem/archive (“The Nazi government is preparing to give to the German people a new conception of property rights . . . . New civil laws are in process of codification . . . . The new laws . . . in many respects already are in full operation . . . . The German people gradually are being prepared for acceptance of the Nazi principles of property”).

RAZ, supra note 29, at 180.

DWORKIN, LAW’S EMPIRE, supra note 7, at 14.

HART, supra note 15, at 239.
courts to oversee all this, and a rule-making legislature.\textsuperscript{64} We speak, for instance, of international law and primitive law, as Hart recognized, yet their features do not align with those requirements.\textsuperscript{65}

Hart wanted his concept of law, rather than being taxonomical, to rest on a concept of the structure of any society’s governing rules. These consist in the primary rules that guide behavior by dictating rights and imposing obligations, and the secondary rules that identify the primary rules, including “rules of change” – to remedy the static quality of the scheme of primary rules – and “rules of adjudication” – to remedy the inefficiencies arising from conflict and disagreement in the operation of the primary rules.\textsuperscript{66} The master secondary rule is the “rule of recognition,” occurring in every legal system as a practice for conclusively identifying the primary rules of obligation, and thereby for giving the ultimate criteria of legal validity, by determining which acts create law.\textsuperscript{67} For the most part, for Hart, the criteria of validity refer to the ways by which law is created or adopted (“pedigree”) rather than to the content of the rules, although by his “soft” or “inclusive” positivism Hart allows that a legal rule may be deemed valid partially by virtue of its conformity to a moral standard.\textsuperscript{68}

The rule of recognition is a social rule constituted by the consistent practice of the courts,

\begin{itemize}
\item \textsuperscript{64} Id., at 3.
\item \textsuperscript{65} Id., at 3-4.
\item \textsuperscript{66} Id., at 94-97.
\item \textsuperscript{67} Id.; Leslie Green, \textit{The Concept of Law Revisited}, 94 Mich. L. Rev. 1687, 1693 (1996).
\item \textsuperscript{68} HART, supra note 15, at 250, 258.
\end{itemize}
or other key legal officials, in accepting it as a guide by which they apply and enforce the law, a practice by which the pre-legal complex of customary primary rules is converted to a legal system. Hart did not precisely specify the kind of thing the rule of recognition is, not necessarily a shortcoming when framing a concept. At a general level, legal systems include a practice that serves this purpose, although it may be a matter of dispute whether the rule of recognition adds much to the validity analysis given more readily discernible rules of change. Nor did Hart intend the idea of the rule of recognition to ensure certainty, although one of its principal functions is to minimize inefficient uncertainty. Yet the legal system not only tolerates but welcomes a margin of uncertainty, and enough room remains for courts to exercise judgment in difficult or unforeseen cases.

Although his argument in favor of positivism was initially instrumental, claiming it to be a jurisprudence advancing the theoretical and moral project, Hart’s enterprise is ultimately primarily a descriptive one that makes claims about the internal and external points of view.

69 Id., at 258.
70 Id., at 91, 94.
73 HART, supra note 15, at 93.
74 Id., at 251-52.
75 Id., at 209.
Favoring Hart’s approach, the sociological perspective – an engaged external point of view – is likely better suited than an analysis from the participant’s point of view for setting up the formulation of a general concept of law, and for assessing law’s features as a social institution. A general theory of law must enable those holding the theory to identify what social practices count as legal in any particular setting.\textsuperscript{76}

From the Dworkinian point of view, if “[g]eneral theories of law, for us, are general interpretations of our own judicial practice,”\textsuperscript{77} and if lawyers and judges may disagree theoretically about law’s nature, not just about particular propositions of law,\textsuperscript{78} then in conceptualizing law they must turn to their political morality and convictions about what ought to be the case in determining what is the correct concept of law.\textsuperscript{79} The concept, however, then skews toward the home legal system. The moral assessment does not merely account for the internal point of view, but reflects \emph{internalized} norms and attitudes, expressing an obligation to act and to view things in a certain way, in a certain setting.\textsuperscript{80} Then the agent’s own abilities and capabilities count, what is morally so is constrained by what is practically possible, and \emph{ought}

\begin{footnotesize}
\begin{enumerate}
\item DWORKIN, LAW’S EMPIRE, supra note 7, at 410.
\item \textit{Id.}, at 31-33; see supra notes 15-18 and accompanying text.
\item DWORKIN, LAW’S EMPIRE, supra note 7, at 203; see supra note 22 and accompanying text.
\end{enumerate}
\end{footnotesize}
implies can. This approach to legal theory is intelligible, for we tend to understand what others do by projecting to them the way we understand what we do.

B. **Constraints On A Concept of Law**

If a general, not nation- or culture-centric, concept of law is possible, however, the general concept should abide by certain constraints. This section next says what these seem to be. It then makes a few observations about why Professor Dworkin’s interpretive theory is in tension with those constraints. Although Dworkin, as said, did not profess to offer a concept of law, the constraints on the formulation of such a concept may nevertheless inform an evaluation of his own theory.

The first constraint is that a concept of law, as it pertains to legal systems and legal institutions, must be possible. The concept must be a general one reaching across borders and jurisdictions. The possibility condition would be violated, for instance, if law in nation state A held no common measure with that in nation state B. It is also important to note that the sort of possibility at issue here concerns the concept, not the legal system. We presuppose that at least

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81 Id.; IMMANUEL KANT, CRITIQUE OF PURE REASON A807/B835 (Paul Geyer & Allen Wood trans., Cambridge U. Press, 1998) (1781) (“[S]ince pure reason commands that such actions ought to occur, they must be able to occur”).


83 Cf. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 17 (2d ed., Oxford U. Press, 2011) (1980) (“[T]here is no escaping the theoretical requirement that a judgment of significance and importance must be made if theory is to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies”) (emphasis in original).
one nation state has a legal system and therefore that this can exist.

The second constraint is that the concept should be meaningful. We are not contrasting the *meaningful* sentence with the sort Carnap tabbed as violating rules of logical syntax, such as "Caesar is a prime number." Rather, a concept of law will be meaningful in relation to our purpose of understanding the legal institution and its structures, and preferably describes elements or a combination of elements unique to law. This constraint does not rule out a semantic approach, for ‘law’ has a particular meaning in the context of the societal-legal institution, as opposed to, say, the practice of statistical inference. But most legal philosophers prefer to take a robust metaphysical approach rather than a thin semantic one.

The third constraint may be labeled the necessity condition. Conceptual necessity – as


85 Cf. Caitlin E. Buck et al., *Combining archeological and radiocarbon information: a Bayesian approach to calibration*, 65 ANTIQUITY 808, 808 (1991) (“the most archaeologically meaningful radiocarbon determinations arise when multiple dates are available from a number of contexts within a well-stratified sequence”).


87 Nicos Stravropoulos, *Hart’s Semantics*, in *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 59, 68 n.19 (Jules Coleman ed., Oxford U. Press, 2001) (“it could still be possible to study the special concept that designates the political institution by studying the meaning, not of ‘law’ *simpliciter*, but of ‘law’ as applied to the institution”).

88 See generally Shapiro, supra note 9, at 7-8; Green, supra note 76, at 1483 (“linguistic meanings rarely correspond to the contents of concepts with which philosophers are concerned”). Even as he formulated a jurisprudence rooted in ordinary language philosophy, Hart, for one, claimed about the semantic theory that “there is no trace of such a doctrine in my work.” HART, supra note 15, at 247. The issue to be explored is not what ‘law’ is but what the *law* is, and the meaning of the word ‘law’ does not delimit law’s specific criteria. *Id.*
well as sufficiency – has been an elusive notion, and will have to be applied in an approximate and pragmatic, rather than a strictly modal, way. An analytic legal theory may try to home in on minimal elements a legal system cannot do without, but there is no need to articulate all of law’s necessary properties. Some are not enlightening, such as the characteristic that law is expressed in the language of the home nation state. \(^{89}\)

The fourth constraint, then, is the sufficiency condition, and the question is which combination of properties or characteristics suffices together to give us a system of law. \(^{90}\) The question can be approached from two angles. The analytic (intensional) issue is whether an institution, in the large sense, has the property of being a legal system. It is also critical, however, to keep the other angle in mind; the inductive (extensional) inquiry is to which class of institutions do we want to apply the label ‘legal system’. \(^{91}\)

We also may encounter an insufficient but necessary part of an overall condition that is sufficient but not necessary for the outcome, in this case the existence of a legal system. \(^{92}\) In the original causal sense articulated by Mackie, a short-circuit may have been the insufficient yet

\(^{89}\) Some features may be unique to law but also not enlightening, hence excluded. For instance, for every property of law \(P\) it is necessarily the case \(de\ dicto\) that we can say “\(P\) is a property of law.”

\(^{90}\) \textit{HART, supra} note 15, at 116 (reciting two minimum conditions necessary and sufficient for the existence of a legal system, being, approximately, that its valid primary rules are generally obeyed, and its secondary rules accepted).


\(^{92}\) \textit{See John L. Mackie, Causes and Conditions, 2 AM. PHIL. Q. 245, 245-47 (1965) (in the context of causation theory involving singular causal statements and individual events, what Mackie called, famously, an “INUS condition”).}
necessary component in a complex condition that was itself unnecessary yet sufficient for the building to catch fire. A conceptual account dependent on features having a quality analogous to this “INUS” status may arise from the participant’s internal point of view, but this should not adequately deliver our concept.

The fifth and final constraint this article suggests is the explanation condition. In logic, irrelevant premises may waste our time, but do not undermine the validity of the argument. Explanation is more demanding, however, and requires that only considerations relevant to the explanandum be contained in the explanans. Joseph Raz shows that a good explanation may depart from the expression of necessary and sufficient conditions. He says, “An explanation is a good one if it consists of true propositions that meet the concerns and the puzzles that led to it, and that are within the grasp of the people to whom it is (implicitly or explicitly) addressed.” Hence the explanation constraint should spare a concept of law from being too rigidly confined within the traditional essentialist parameters of necessity and sufficiency.

IV. CRITICAL REFLECTIONS ON DWORKIN’S VIEW

For Dworkin, law was a practice of constructive interpretation. The grounds of law lie in

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93 Id., at 245.
94 See infra notes 155-56, and accompanying text.
96 Id., at 97.
integrity, and thereby in the best constructive interpretation of past legal decisions.98 Someone who interprets a practice “needs” convictions about how to show the practice in the best light.99 So all interpretation is constructive interpretation.100 Legal interpretation interprets legal principles and, although often not explicit in legal texts, legal principles are law’s core component engendering legal obligations.

Dworkin began, in his The Model of Rules paper,101 with the position that a candidate principle may be weighted by the degree to which it has been expressed and applied in prior cases and hence received “institutional support.”102 This is problematic for him, however, because it must threaten his view that judges lack discretion to apply extralegal factors; lower- or conceivably non-weighted principles may have to be applied in lesser developed areas of the law. So in his later essay The Model of Rules II,103 Dworkin concluded that “a principle is a principle

98 DWORKIN, LAW’S EMPIRE, supra note 7, at 262.

99 Id., at 67.

100 Accord Brian Leiter, The End of Empire: Dworkin and Jurisprudence in the 21st Century, 36 Rutgers L. J. 165, 173 (2004) (“Dworkin argued in Law’s Empire that all interpretation is ‘constructive interpretation,’ that is, interpretation which aims to show the object interpreted in its ‘best light’”).

101 See supra note 75.

102 Dworkin, The Model of Rules, reprinted in DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 40; see Eric Dorkin, Debunking Integrity’s ‘Equality Advantage’: The Absence of Coordination in Ronald Dworkin’s Law’s Empire, 83 Iowa L. Rev. 1071, 1081 n.78 (1999) (“Although the principle does not have to be explicit, the degree to which a principle is expressed and applied will most likely increase its weight in competition with other legal principles”).

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.”

As Professor Greenawalt then explained, this understanding leaves open the possibility that a principle may be a principle of law even if it has not previously appeared in any legal decisions or texts.

Paradoxically, by this understanding, legal principles are identified at the latter end of the second, interpretive, or third, postinterpretive, stages addressing justification. Yet the fit component of the second interpretive stage is epistemically prior. Principles must both fit and justify the legal practice. In the Dworkinian scheme we are more knowledgeable, and there is less controversy, about whether a principle fits the existing materials, and then we are left to ask more controversially whether the principle justifies the practice. If, however, legal principles can only be demarcated at the latter stages involving justification, how can these be known to us during the epistemically prior exercise gauging fit?

Dworkin seemed clear in The Model of Rules II that his soundest-theory view aimed at a demarcation of law. In the same subsection of that essay he addresses possible positivist claims that “these principles are not part of the law,” says that what is at stake is jurisprudence’s

104 DWORKIN, TAKING RIGHTS SERIously, supra note 26, at 66. For ease of reference, this definition will be referred to as Dworkin’s “soundest-theory” approach.

105 Kent Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges, 75 COLUM. L. REV. 359, 367 (1975); see DWORKIN, TAKING RIGHTS SERiOUSLY, supra note 26, at 65 (some cases are resolved by application of “principles that had not in fact been formulated before”).

106 See supra note 38, and accompanying text.

107 DWORKIN, LAW’S EMPiRE, supra note 7, at 228.

108 DWORKIN, TAKING RIGHTS SERiOUSLY, supra note 26, at 64.
question, “what is law?” and, most significantly, introduces the soundest-theory definition by saying, “We might formulate the test for law . . . in this way . . . .” The epistemic paradox just identified appears to undermine that project. And if our theory is that the set of all social norms is co-extensive with the set of all legal norms, the meaningfulness condition for a concept of law has not been met.

If law will include principles not previously formulated, then perhaps the fit criterion is not a critical ingredient in the identification of legal principles; or the failure to have previously identified the new principle, or the application of countervailing ones, is rightly cabined as a mistake. At the interpretive stage, the principle at issue will either fit and thus be established, or be newly formulated and thus provide a reason to deem the principle holding sway to have been mistaken. However, the soundest-theory approach wants to give a general standard for demarcating law, whereas a theory of mistakes by its nature applies at the margin and in few cases. The epistemic paradox threatens to render the fit dimension in Dworkin’s interpretive model superfluous, and leaves us asking (paradoxically): why not bypass the interpretive stage gauging fit, along with the preinterpretive stage for that matter, and undertake solely the justification and postinterpretive analysis?

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109 Id., at 68.
110 Id., at 66.
111 Id., at 68 (the lawyer’s theory of law “will usually include almost the full set of political and moral principles to which he subscribes”).
112 See supra note 105, and accompanying text.
Apart from the paradox, it also appears that Dworkin’s central notion demarcating legal principles threatens to resolve tautologically. The idea that a principle is a principle of law if it figures in a certain soundest theory of law is tautological because it entails that any principle, once recruited into legal service, now by definition counts as a legal principle. If a proposed concept of law rests on a tautological core component, the proposal should violate conditions constraining such a concept.

If constructive interpretation is ultimately an analytic concept, Dworkin’s solution to the question of what sort of concept law is – namely, that “law is an interpretive concept” such that a “jurisprudence worth having must be built on” constructive interpretation – is undermined. This is because the tautology on which constructive interpretation rests can have no informative content, and hence can be neither necessary nor explanatory in relation to our purpose of understanding law.

As Karl Popper responded to critics construing Darwinism as a tautology, however, if Dworkinians can show that Dworkin’s soundest-theory conception of legal principles has “an enormous power of explanation,” then, given that “the explanatory power of a tautology is obviously zero, something must be wrong here.” Admittedly, Dworkin’s soundest-theory articulation may be ambiguous on the issue of whether it is ultimately a tautology; it may instead be a descriptive analysis, from the internal point of view, of a legal universe broad enough to


115 DWORKIN, LAW’S EMPIRE, supra note 7, at 50.

116 Karl Popper, Natural Selection and the Emergence of Mind, 32 DIALECTICA 339, 344 (1978).
envelope nearly everything. Against the positivists’ closure principle, Dworkin explained that, rather than a mechanical or morally neutral basis for establishing one theory of law as soundest, the interpretive

[t]est of institutional support . . . does not allow even a single lawyer to distinguish a set of legal principles from his broader moral or political principles. His theory of law will usually include almost the full set of political and moral principles to which he subscribes, indeed it is hard to think of a single principle or social or political morality that has currency in his community and that he personally accepts, except those excluded by constitutional considerations, that would not find some place and have some weight in the elaborate scheme of justification required to justify the body of laws.

Seeking to preserve the interpreter’s commitment to an objectively true political morality, constructive interpretation is grounded on an idea that at the least approaches

117 Cf. Maxwell O. Chibundu, Structure and Structuralism in the Interpretation of Statutes, 62 U. CIN. L. REV. 1439, 1479 (1994) (“Putting aside the correctness of the underlying substantive philosophical preferences that undergird Professor Dworkin’s work, his approach might be criticized on the ground that despite the elaborateness of the theory, it remains essentially vague because it seeks to offer everything to everyone”).

118 DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 68.

119 RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 274-75 (Harvard U. Press, 2011) (hereinafter “DWORKIN, HEDGEHOGS”). Of course, apart from the interpreter’s individual commitments, apprising what is soundest may often appear fairly equally to warrant one result or the other, depending on which sometimes incommensurable interests are privileged. See generally Frederick Schauer, Commensurability and Its Constitutional Consequences, 45 HASTINGS L. J. 785, 785 (1994). Close calls in law are not unusual, and from the perspective of law as a social practice, we might take exception with Dworkin’s view that deadlocking, at least in a practical adjudicatory sense, is “so rare as to be exotic.” RONALD DWORKIN, A MATTER OF PRINCIPLE 143 (Oxford U. Press, 1985). Dworkin’s reason for asserting that ties are extremely unlikely was also a bit circular: “I do not mean that it will be rare that lawyers disagree about which theory provides . . . a better justification. It will be rare, I think, that many lawyers will agree that neither provides a better fit than the other.” Id. We can suppose that some disagreeing lawyers will agree that one theory provides a better fit, while others will agree that the other does. See Edward S. Corwin, The Supreme Court and the Fourteenth Amendment, 7 MICH. L. REV. 643, 660, 668 (1909) (“why was the statute in this particular litigation overturned by the Supreme Court of the United States by a vote of five to four after having been sustained by
tautological truth. If so, it concomitantly entails a gradual diminution of informative content.\textsuperscript{120}

With specific respect to our starting inquiry – what is law and what are its grounds – the explanation afforded by constructive interpretation may consist of true propositions but, if tautological, or approaching this, not ones that “meet the concerns and the puzzles that led to it . . .”\textsuperscript{121}

The tautology concern also implicates the meaningfulness constraint on a conception of law. Unless capable of conveying new information, a core proposition will not meaningfully advance the substantive project. Absent some significant informative content, the necessary truth characterizing a tautological perspective will not provide information identifying a unique feature of law. Nor will the soundest-theory thesis, if ambiguous, meaningfully guide our understanding of properties unique to any legal system. Hilary Putnam has said that “‘meanings’, whatever they may be, must have the right powers of \textit{disambiguation}.”\textsuperscript{122} To be meaningful, a proposition serving a concept should be able to shoulder a similar burden.

Next we consider a feature that should constitute a secondary rule available in any functioning legal system. The proposed rule should not, therefore, be inconsistent with any well-

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120 See CARLOS E. GARCÍA, POPPER’S THEORY OF SCIENCE: AN APOLOGIA 127 (Continuum Int’l Publishing Group, 2006) (critiquing Popper’s conflation of the notions of verisimilitude and probability, noting that logical probability represents the idea of approaching logical certainty, hence tautological truth, through a gradual diminution of informative content).

121 Raz, \textit{supra} note 97, at 8.

formulated concept of law. It is an open question whether the principle underlying the rule may be an inevitable feature of any functioning legal system, even if not a necessary component of the concept of law. Constructive interpretation, however, the key conceptual device sustaining Dworkin’s idea of law as an interpretive concept, not only fails to disambiguate the principle underlying the rule, but renders it derelict.

First, recall that by his approach right answers to legal cases flow from our best constructive interpretation of the community’s legal practice, built on morally justified principles that are legally binding in virtue of their content. In his latest work Justice For Hedgehogs, Dworkin counted law and morality as components of a single system, resurrecting his view in The Model of Rules I treating “law as a part of political morality.” Next, relatedly, recall that the constructive interpreter is someone who necessarily has convictions about how to show the practice at issue in the best light, and that all interpretation must be constructive interpretation.

In Law’s Empire Dworkin departed from any strong natural law thesis and allowed that compromises must sometimes be made and “fairness or justice must sometimes be sacrificed to integrity.” Now, though, notwithstanding his otherwise subtle appreciation of law’s institutional nature, Dworkin realized a “fatal flaw” in the “two-systems picture,” because treating law and morality as separate systems of norms deprives judges of a neutral standpoint

123 See supra note 17, and accompanying text.

124 DWORKIN, HEDGEHOGS, supra note 119, at 405; DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 14.

125 See supra note 99 and accompanying text.

126 DWORKIN, LAW’S EMPIRE, supra note 7, at 178; see supra note 17.
from which to adjudicate overlapping considerations.\textsuperscript{127} By Dworkin’s one-system picture, a legal system’s “structuring principles” – implicating process and constitutional procedure – must themselves be treated as “political principles that need a moral reading.”\textsuperscript{128}

We will call our hypothetical rule the Rule of Compromise (“Rule C”): \textit{When compelling prudential reasons so counsel, accept as one option compromise of the morally best outcome.} Rule C is a secondary, adjudicative rule that elevates prudential considerations in certain circumstances.\textsuperscript{129} A premise is that any legal system requires prudential rules or principles. We will assume, but leave open for later argument, that legal systems cannot likely organize all of their practical requirements around the \textit{oughts} of moral theory, and that prudential rules and principles motivated mostly by non-moral pressures must account for at least some.

Generally, policy preferences encouraging compromise capture a legal system’s prudential assessment of its own limited capabilities to extend each case or controversy (even if limited to the many “hard” ones) to its principled conclusion. Principles underlying Rule C permeate our American legal system and may be inevitable, if not a necessary component, in the functioning of any legal regime. Though most directly aimed at justifying a separation of powers, Madison’s elevated language in \textit{The Federalist} No. 51 speaks to the compromise that must inhere naturally in the functioning of human institutions, including law: “This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through

\begin{itemize}
\item \textsuperscript{127} \textit{DWORKIN, HEDGEHOGS, supra} note 119, at 402-03.
\item \textsuperscript{128} \textit{Id.}, at 413.
\end{itemize}
the whole system of human affairs, private as well as public.”

Less reliant on the invisible hand’s paving the way to compromise, our system continually touts principles of settlement and compromise as the desired route to resolving legal disputes. This is not exclusively American or liberal democratic. For example, what we term “alternative” dispute resolution has been traditional in Pacific societies, where “[s]ocial and family pressures of any and every kind are brought to bear on the disputing parties to shift ground, to accept, to compromise and to settle the dispute.” Prudential rules are systemic in any actual legal system and may be theoretically required.

But we should not equivocate on compromise. Rules and policies encouraging settlements in cases typically do not address or entail substantive compromise of principles. Rather, settlements usually permit the litigants to avoid reaching the merits, and arise from a calculation of the risk of an adverse outcome either in the court of first instance or in the


appellate forum. What is compromised is the remedy not the reasoning.

Rules or principles approximating a substantive Rule C do exist, however, and perhaps necessarily so. These occur when the judge believes that she must or ought to compromise her convictions in order to reach the most practicable outcome. Moreover, the convictions referenced are not the sort of personal convictions that the judge may sometimes be required to put aside because the law is otherwise. Rather, prudential rules and principles exist that summon the court to compromise legal principles supported in the home jurisdiction. Substantive compromise is possible, but an unwanted and occasional exception exemplified by the checkerboard statute paradigm. For Dworkin, principles could not be compromised in the way that policies could. So while the principles underlying Rule C are embedded in legal systems, they appear to conflict with the Dworkinian theory of legal rights, pointedly the “right” to win.

Significantly, Raz has offered a methodological version of Rule C. He argues that law is

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133 Salmeron v. United States, 724 F.2d 1357, 1362 (9th Cir. 1983)

134 Aguinda v. Texaco, Inc. (In re Aguinda), 241 F.3d 194, 204 (2d Cir. 2001).

135 Cf. Barone v. Dep’t of Human Servs., 526 A.2d 1055, 1063 (N.J. 1987) (“As long as the classification chosen by the Legislature rationally advances a legitimate governmental objective, it need not be the wisest, the fairest, or the one we would choose”).

136 See supra notes 46-48, and accompanying text.


138 DWORKIN, LAW’S EMPIRE, supra note 7, at 152 (“A person has a legal right . . . if he has a right, flowing from past political decisions, to win a lawsuit”).

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either a system of “absolute discretion” or has limits. If judges do not have absolute discretion, and we can be certain they don’t, then they are not free to implement any standard they think is best, and instead “are bound to follow some standards even if they do not regard them as best.” So courts will be bound to follow certain standards and principles in preference to those they consider to be best. This also entails that law cannot be a system exclusively of moral rights and duties, the interpretation of which, rooted in individual convictions each compressing to a single normative system, can be boundless.

Raz’s argument motivates a different one rooted in the limits of judging. In his discussion of statutes, Dworkin reflected that Hercules will treat Congress as an author earlier than himself in the chain of law, and will see his own role as a creative partner continuing to develop, “in what he believes is the best way, the statutory scheme Congress began.” The legislative task is representative before it is moral, and negotiates competing interests, and so outcomes can rarely be accepted as best from any vantage point. Perhaps an immoral xenophobia informs a statute, yet not in a way that renders the statute unconstitutional. Authoring the continuing legal narrative, the judge has to accept moral compromise at every

139 RAZ, supra note 29, at 115.
140 Id.
141 Id.
142 Id., at 115, 139.
143 DWORKIN, LAW’S EMPIRE, supra note 7, at 313.
Indeed, judges often struggle not with how to impose their best moral interpretation upon a piece of positive law, but rather with how to effectuate the less-than-best compromise constitutive of the legislation or regulation.\textsuperscript{145}

The Dworkinian view privileges private moral convictions, “because no one can properly answer any question except by relying at the deepest level on what he himself believes.”\textsuperscript{146} But the judge may well believe the other party does not legislate well. The judge’s convictions are that his party’s convictions are best, that the other party’s convictions entail that its enactments compromise principles hence lack integrity,\textsuperscript{147} that judges in a democratic society act best when they defer to the legislators’ intentions, and that the only way to interpret the enactment such that the interpretation fits and explains the other party’s agenda is to compromise principles hence also lack integrity.\textsuperscript{148} The paradoxical outcome is that, if the judge judges with integrity, his judgments may lack integrity.

\textsuperscript{144} Cf., Soskin v. Reinertson, 353 F.3d 1242, 1265 (10th Cir. 2004) (Henry, J., dissenting) (“Whether it is founded on economic protectionism, xenophobia, or other motivations, aliens frequently have been denied benefits and privileges accorded to citizens”) (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.5.1, at 738 (2d ed. 2002)).

\textsuperscript{145} See Reginald C. Govan, Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991, 46 Rutgers L. Rev. 1, 6 (1993) (“[I]n the nation’s capital, the line between honorable compromise and defeat is sometimes difficult to locate, the moral high ground always muddier than expected”) (quoting Erica B. Goode, Boss of a $1 Trillion World, U.S. NEWS & WORLD REP., Apr. 27, 1992, at 44).

\textsuperscript{146} DWORKIN, LAW’S EMPIRE, supra note 7, at 314.

\textsuperscript{147} See id., at 179.

\textsuperscript{148} See generally id., at 314.
Consider another implication of both the Dworkinian and inclusive legal positivist approaches. From those perspectives, a moral norm N may count as a necessary or sufficient condition of legal validity.\(^{149}\) But let’s presuppose that the regime constitutes a legal system. If so, courts act validly when they adjudicate. But if so, courts have a choice, and if so, their adjudicating either way is valid. So they can rule in a way that conflicts with N. If so, N cannot count as a necessary or sufficient condition of legal validity. Himma writes similarly that “a moral norm N cannot function as a necessary or sufficient condition of legality if the rule of recognition grants a court general legal authority to bind officials with either of two conflicting decisions on whether a proposition is law in virtue of satisfying N.”\(^{150}\)

What, then, is the place of constructive interpretation in a theory of the legal system? To the extent we accept that a legal system may contain Rule C, we have a reason to qualify constructive interpretation as a feature of legal systems comparable to the INUS condition in the philosophy of causation.\(^{151}\) That is, analogous to the noted short-circuit, constructive interpretation may be an insufficient but necessary part of an overall condition – namely, *some particular* legal system – that is sufficient but not necessary for the outcome, in this case the existence of *a* legal system.\(^{152}\) From the internal point of view generating the Dworkinian theory of adjudication, constructive interpretation is necessary to the law that we have.

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151 See supra notes 92-94, and accompanying text.

152 Cf. Mackie, supra note 92, at 245-47.
V. NOTES IN SUPPORT OF THE REGULATIVE CONCEPT

A. The Embodied Philosophy of Judges

One feature Dworkin embeds in his constructive interpretation theory plays a central role in the regulative approach articulated in this article. In the Dworkinian analysis, adjudication is a philosophical practice by virtue of the best-light criteria for assessing the best moral justification of legal practices. If legal argument is mostly argument of moral principle, the judge must mine her convictions for the kernel of perceived objective moral truth capable of providing an internally correct answer. In the legal interpretive enterprise,

[a]ny practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge’s opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.

Dworkin’s interpretive theory of law led him to a particular description of what the judge does when adjudicating. Unresolved after fifty years of dialogue, though, the conceptual issue is elusive at best, and some legal philosophers are beginning to resolve that the concept of law is inherently ambiguous and hence the debate is “in the end purely verbal.” What judges do

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153 DWORKIN, LAW’S EMPIRE, supra note 7, at 90.


155 DWORKIN, LAW’S EMPIRE, supra note 7, at 90; see also id., at 380 (“Lawyers are always philosophers, because jurisprudence is part of any lawyer’s account of what the law is, even when the jurisprudence is undistinguished and mechanical”).

156 E.g., Liam Murphy, Better to See Law This Way, 83 N.Y.U. L. REV. 1088, 1094 (2008).
when they adjudicate, however, is a fact about the world, although also open to interpretation. As such, what judges do (e.g., philosophize, however implicitly) should be better known, or at least believed to be known, than why they do this (e.g., to arrive at the best moral justification). As Jaegwon Kim says, “[t]ypically, when we seek an explanation of why \( p \) we already know, or at least believe that we know, that \( p \) is the case.”

So the idea that the court engages some jurisprudence when resolving cases and controversies (even if not typically *engaging in* this) is epistemically prior to any positivist or nonpositivist conclusion we might draw. The philosophy may be “hidden” and the visible argument devoted to facts and sources of authority. But there should be manifest signs that judges think and struggle over questions that in some way transcend the most stripped-down version of the black-letter issue raised by the litigants. Although they do not seem to reach the central jurisprudential issue of “what is law?” (as distinguished from “what is the law?”), they grapple with the role of the court, its institutional capabilities and competencies, and the impact decisions will make on the larger society.


158 DWORKIN, LAW’S EMPIRE, supra note 7, at 90.

159 *E.g.*, Ex Parte Cranman, 792 So.2d 392, 410 ( Ala. 2000) (Cook, J. concurring) (regarding of physician’s immunity for discretionary actions at state facility, reiterating that “courts must not intrude into realms of policy exceeding their institutional competence. . . . [T]here are certain ‘realms of policy’ beyond the judiciary’s sphere of ‘institutional competence,’ realms into which ‘courts must not intrude’”) (omitting citations) (court’s emphasis).
We may, and likely will, continue to divide over the interpretive question of whether courts, when deciding, ask “what is the law?” or “what should the law be?” This article takes the position, however, that judicial practice, both generally and specifically in discrete legal areas, better supports the latter view in difficult cases and at epoch-shifting moments, pace Dworkin. Either way, though, at some level there is a philosophical investigation. This investigation is sometimes reflective; judges, that is, sometimes reflect aloud on where the court should go as an institution in the larger society. But whether reflective or not, judicial decisionmaking sustains and legitimizes an institution that asks primarily not what it will do, but what it should do. Legal deciding may be termed “self-reflexive” because, however much it appears only to reach out performatively and didactically to the parties, the profession and the public, it automatically counts as a refinement of the court’s own regulative position. And this regulative position represents the court’s “embodied” or “practical” philosophy, as evidenced, in empiricist fashion, by the observable practice of judges.

B. Judges Have Discretion

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160 E.g., State ex rel. Angela M.W. v. Kruzicki, 541 N.W.2d 482, 503 (Wis. 1995) (Anderson, P.J., dissenting) (“Even if we were to take judicial notice of the treatises in these areas, we still would know very little of the short-term and long-term impact of our decision on society as a whole and on child-bearing women specifically”).

161 See generally Jan Fook, Reflexivity as Method, 9 ANN. REV. HEALTH SOC. SCI. 11, 11 (1999) (“my more glib response has been to distinguish between reflexivity as a position, and reflectivity as a general process. At the heart of this differentiation is the thinking that a position of reflexivity, of an ability to locate yourself in the picture, is complemented by a process of reflectivity”) (emphasis in original).

This article also agrees with the view that, in resolving hard or novel cases, especially at epoch- and norm-shifting moments, courts build authority by exercising a discretion that permits and encourages them to rely upon extralegal factors and considerations. Extralegal sources may, and sometimes do, play a role in legitimizing law’s institutional dominion. Nonpositivist views reject this idea, but we will shortly suggest a new, institution-based argument for why judges have discretion.

We use the sense of discretion Dworkin attributed to positivism, venturing beyond standards embedded within existing legal materials. Developing their practical philosophy, judges do not merely passively receive societal norms, but actively participate in norm elaboration. The alternative accepted version of discretion, being able to choose between permissible outcomes, is not controversial, but also hardly trivial. That law includes competing principles renders weak discretion both critical and inevitable.

The Dworkinian sense of discretion is a hybrid one. It addresses mainly the judge’s freedom to decide beyond what relevant standards may appear to require. But it also speaks to

\[\text{See, e.g., Dan M. Kahan, The Secret Ambition of Deterrence, 113 HARV. L. REV. 413, 486 (1999) (“Social norms are not static. Indeed, the transformation of norms is a familiar phenomenon in contemporary political and social life. The once pervasive and unquestioned norms that underwrote white supremacy have now been disavowed, if not extinguished, by the cultural mainstream. The same is true in the domains of gender and sexuality, where traditional, hierarchical norms are today highly contested and in some cases completely discredited”).}\]

\[\text{DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 34.}\]


\[\text{HART & SACKS, supra note 26, at 162.}\]
the judge’s license to seek authority beyond that conveyed by the existing legal standards.\textsuperscript{167} Most positivists deny the view that emphasizes the judge’s freedom, and hold that the judge is bound to decide in accordance with principles, and in particular moral principles. The central positivist claim is that these principles are extralegal.\textsuperscript{168}

Somewhat ironically, from the observer’s point of view, it is the Dworkinian approach that appears to involve unfettered discretion. Even as this approach may rest on the individual judge’s commitment to an objective morality, the individuation of moral sensibilities, seen externally, evokes an overall and free-wheeling subjectivity.\textsuperscript{169} The standard positivist claim denies this sort of discretion, which resort to extralegal sources does not entail.

Now if our theoretical commitment is that a principle that has not previously appeared in an authoritative legal material counts as a legal principle because it is best suited for the present case, as under Dworkin’s soundest-theory approach,\textsuperscript{170} then the question is begged whether courts resort to extralegal authority. And more to the point, the separation between law and morality is conceptually eliminated because moral norms are analytically transformed into law by virtue of

\textsuperscript{167} See generally DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 34.

\textsuperscript{168} See Jules Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 1, 124 n.40 (Jules Coleman ed., Oxford U. Press, 2001). If the positivists claim those extralegal principles nevertheless to be binding, though, their position vis-à-vis the Dworkinians will indeed seem to rest on semantics.

\textsuperscript{169} FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE 198 (Oxford: Clarendon Press 1991) (arguing that failing to separate a community’s law from its morality would consign law to consisting in “the \textit{ad hoc} decisions of one person”).

\textsuperscript{170} DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 66.
the legal outcomes that adopt them. But as shown, such a tautological route to a collapse of the separation thesis, and to the argument against discretion, also undermines the theory of law sought to be advanced against positivism.\footnote{See supra notes 104-22, and accompanying text.}

It is next important to note that the question of whether judges exercise strong discretion should not be seen as a function of whether law consists of principles as well as rules. At least as of his Postscript, Hart’s concept of law included principles and discretion.\footnote{HART, supra note 15, at 250-54.} If all potential legal rules and all potential legal principles are actual ones, then there is small space for discretion. But it is difficult to accept the thesis that all potential legal rules and all potential legal principles are actually legal.

Of course, customary or institutional rules are not necessarily legal ones.\footnote{David Lefkowitz, (Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach, 21 CAN. J. L. & JURIS. 129, 134 (2008) (“it does not follow necessarily that the customary rules in question are legal ones”).} A rule may by its nature be hard and fast, applied strictly and hence “all or nothing,”\footnote{DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 24.} but not fall within the category of legal rules. Take, for instance, Hart’s classic example of an imagined rule of law that might pertain in a certain jurisdiction: “Vehicles prohibited in the park” (\textquotedblright R1\textquotedblright).\footnote{Herbert L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 607 (1958). For Hart, our world is characterized by an “indeterminacy of aim” unfit for mechanical jurisprudence. HART, supra note 15, at 128-29. If the question unforeseeably arises whether a bicycle or an ambulance qualifies as a prohibited vehicle, the court’s settling this, in the exercise of its sometimes “very wide” discretion; \textit{id.}, at 127; renders “more determinate our initial aim.” \textit{Id.}, at 129. The vehicle-in-the-park type of interpretive scenario plays out from time to time. \textit{E.g.}, \textit{State ex rel. Miller v. Claiborne}, 505 P.2d 732, 735 (Kan.}
instead exist a social norm or a customary rule in play for the park, not codified or enforced by
the controlling authority, let’s say R1\textsuperscript{NL} (also “Vehicles prohibited in the park”). More to the
point, the highest court may have expressly denied R1\textsuperscript{NL}’s validity as a legal rule. The
community’s view may nevertheless converge regarding R1\textsuperscript{NL}’s status as a social norm. It seems
intuitively the case that a customary rule is not necessarily a legal one. Yet members of the
community may abide by the rule, mostly agree that it should be heeded, feel compelled to heed
it even if they don’t agree, and severely criticize those who deviate.

At some point, the controlling authority may decide to enforce the community’s custom
or practice, and at least from that point the social norm is a legal one.\textsuperscript{176} Until then, however, if
R1\textsuperscript{NL} is not a legal rule, then it is extralegal. Principles animating a community’s adherence over
time to the nonlegal rule R1\textsuperscript{NL} might include enhancing parkgoers’ safety, maximizing individual
liberty (to use the roads for non-vehicular activities), minimizing noise in public spaces,
protecting endangered species (indigenous to the park), limiting teenagers’ opportunities to
engage in certain activities, and so forth. Some of these may also be legal principles, but some
may not.

Courts sometimes hold that legal duty is measured by customary practice.\textsuperscript{177} A hard case
may be whether an ambulance or bicycle counts as a vehicle for purpose of legal R1\textsuperscript{L}, but also
whether driving into the park counts as a negligent act \textit{per se} because violative of nonlegal

\textsuperscript{176} United States v. McNab, 331 F.3d 1228, 1237 (11\textsuperscript{th} Cir. 2003).

\textsuperscript{177} Fuller v. Starnes, 597 S.W.2d 88, 89 (Ark. 1980).
R1 NL. The court’s ruling would not necessarily be invalid if it answered “yes” to the latter question, and such a ruling would impose a duty based on R1 NL and the possibly nonlegal principle upon which it rests. The proposition may be correct that until then the law does not impose such a duty, only to use reasonable caution if you do so drive.

If a judicial decision adopts R1 NL’s norm as the legal rule going forward, it does so because this reflects the judge’s convictions about how best to regulate this aspect of the community. Robert Alexy, largely in the Dworkinian mode, has argued that a legal decision necessarily claims “correctness,” and if so the court has an obligation to satisfy this claim.179 And if this is so, this establishes a “necessary relation” between law and the norm.180 Law’s claim to correctness requires the inclusion of principles, here those undergirding R1 NL, and it will have been by virtue of its claim to correctness that the decision has adopted or perhaps implemented the rule. Raz seems right, though, in pointing out that Alexy’s general argument is not valid, “for it concludes that the law of a country includes principles from the sole premise that the courts are required, by law, to apply principles.”181 Why can’t norms that a legal system is required to apply not be a part of that legal system, as with the choice of law doctrine?


181 RAZ, supra note 29, at 334.
If $R_1^{NL}$ is not a legal rule when the controversy reaches the court, then the court has reached beyond legal sources. It is not that the judge has run out of legal rules and hence exercises discretion, a claim Dworkin attributed to positivism.\textsuperscript{182} The judge may face a legal principle in conflict with a nonlegal one, and may validly choose the latter. For instance, a previously articulated legal principle might be that courts should defer to legislative bodies in prescribing rules of the road, yet the court may choose to adopt $R_1^{NL}$ anyway, so that it is thereafter recognized as $R_1^{L}$. In other words, principles may conflict and will have to be balanced and ordered in a certain way; that is what it means to be a principle.\textsuperscript{183} Does anything prevent adjudication from weighing a legal principle against a nonlegal one?

Moreover, operations such as retroactivity or norms such as due process might sometimes depend upon the distinction whether the court has made a new law or merely clarified or further developed existing law.\textsuperscript{184} If judges only disagree about what the law is, not what it should be, as per Dworkin’s thesis, this distinction cannot really exist and judges saying otherwise are mistaken. For Dworkin, though, the views and instincts of thoughtful lawyers and judges were

\textsuperscript{182} DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 34.

\textsuperscript{183} DWORKIN, LAW’S EMPIRE, supra note 7, at 183.

\textsuperscript{184} \textit{E.g.}, \textit{Johns v. Bowersox}, 203 F.3d 538, 544-45 (8th Cir. 2000) (“The Constitution does not require states to give retroactive effect to state court decisions announcing new rules of law. . . . On the other hand, states must give retroactive effect to decisions that are not ‘new law’ but rather are dictated by precedent”); \textit{Cundiff v. State Farm Mut. Auto Ins. Co.}, 174 P.3d 270, 274 (Ariz. 2008) (“To determine whether an opinion should apply only prospectively, we balance three factors[, including] whether we establish a new legal principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed”) (omitting citations).
prime data,\textsuperscript{185} and therefore his method privileging the practitioner’s point of view counts against his conclusions in some respects.

We are now ready to suggest a further argument for why judges have discretion, an argument rooted in the nature of institutional power. Very much simplified, institutions by their nature impose status functions on participating or affected individuals. These functions carry “deontic” powers, by virtue of which they ascribe rights, grant permissions and entitlements, and impose duties and obligations.\textsuperscript{186} Institutions are capable of legitimately imposing the authority underwriting these deontic powers only to the extent that the content of this authority satisfies intentionality and exactness constraints.\textsuperscript{187} To be legitimate and efficacious, in other words, this exercise of power must be collectively intentional and fairly well defined.

The propositions of collective intentionality hold intentional content. In relation to legal theory, the intentionality constraint as defined by John Searle accommodates what Hart described as the internal perspective.\textsuperscript{188} An institution satisfies this constraint when the members – in a legal system, legal officials – mostly believe they share a collective goal and view their exercise of institutional power as being “directed at,” or helping to effectuate, that goal.\textsuperscript{189} For Searle, the attendant constraint on any acceptable discussion of institutional power is that one should be at

\textsuperscript{185} DWORKIN, LAW’S EMPIRE, supra note 7, at 10-11.
\textsuperscript{186} See SEARLE, supra note 8, at 8-9.
\textsuperscript{187} Id., at 152-55.
\textsuperscript{188} HART, supra note 15, at 242.
\textsuperscript{189} See SEARLE, supra note 8, at 45.
least capable of discerning the power structure and relationship at issue.\textsuperscript{190} This articulation of the exactness constraint is packed full of challenges for the student of the legal system as institution. We cannot do much more here than state, without showing why, we can instantiate its terms even if in a pragmatically relaxed way.

Upon this assumption, our argument would be that, as an institution, the legal system necessarily wields power, but fulfillment of the epistemic exactness constraint is requisite to the attribution of power. When the legal system adopts R1\textsuperscript{L}, the intentionality and exactness constraints are not satisfied when it comes to certain things, perhaps bicycles, perhaps ambulances. If, therefore, law’s power does not reach the use of those things, they do not exist within R1\textsuperscript{L}’s collective intentional content. Not, that is, until sufficiently exact social facts exist by which citizens may be able to delimit ‘vehicle’.

Law is institutionally able to guide conduct, prescribe duties and obligations, confer powers and restricts freedoms if it does so with some sufficient level of specificity. In criminal law, for instance, a statute will be deemed void for vagueness if not written with sufficient definiteness and specificity to give a fair warning of the conduct intended to be proscribed and to restrict the potential for arbitrary enforcement.\textsuperscript{191} In contract law, the court will not enforce a promise unless it is specific enough to reveal what was promised and to prevent the court from

\textsuperscript{190} \textit{Id.}, at 152-54.

\textsuperscript{191} \textit{Grayned v. City of Rockford}, 408 U.S. 104, 108-109 (1972) (“we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly”); \textit{In re D.}, 557 P.2d 687, 689 (Or. App. 1976) (“void-for-vagueness doctrine [mediates] between the organs of public coercion of a state and the protection of the individual’s private interests”).
imposing its own conception of what the parties should or might have undertaken.  

C. The Regulative Turn

There are certain dimensions of an evolving concept of law that should inform explanatory theories of specific legal areas. Law includes a web of primary rules directed at citizens and secondary rules addressing officials, the latter including rules of change and, perhaps, recognition. If these are necessary constituents of a concept of law, they are not uniquely so. Other sorts of institutions may also include primary and secondary rules, as well as a web of revisable and disputable principles. Legal decisions justify the state’s coercive power, but this, too, might be true of other institutions, such as think tanks and political parties.

It is, however, the synergy of these features with law’s regulatory self-consciousness that, we suggest, sets law apart. The legal system is “self-reflexive” in the simple sense that, by their moves in regulating the community’s rights and obligations, courts speak of themselves, usually implicitly, and normatively develop an embodied or “practical” institutional philosophy.

Questions of what law should be thereby go hand in hand with the issue courts implicitly pose of

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193 See generally Philip Mendes, Australian Neoliberal Think Tanks and the Backlash Against the Welfare State, 51 J. AUSTRALIAN POLITICAL ECON. 29, 30 (1968) (saying the role of “neoliberal think tanks . . . appears to have been significant in terms of offering accessible policy options which are publicised in the mass media, and consequently help to influence the climate of opinion – whether that of the general public or the leaders of political parties”).


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themselves in particular cases, namely, what they should do as regulative entities.\textsuperscript{195}

Incentivizing certain conduct while discouraging other, fixing on a conduct-regulating and loss-allocating commitment,\textsuperscript{196} courts speak of the legal apparatus when they act. The self-reflexive inquiries embedded at least implicitly in adjudication include, “what will taking this action say about our institution?” and “what will be the impact of our action both on the subjects of primary rules and on the officials obligated to follow secondary rules?”\textsuperscript{197}

Other institutions and individuals may ask what effect on society their conduct will have. People choosing to recycle materials, for instance, or to refrain from eating meat, often point out that, were most to choose similarly, the society would benefit in various ways. They may even believe that their path will influence secondary rules, persuading legal officials to declare certain laws or regulations invalid. But in the case of nonlegal actors, this sort of self-examination flows in exactly the opposite direction from that of law’s self-reflexive inquiry. In those circumstances, the ordinary citizen seeks legal and political power to justify the assertion of personal authority. The legal institution, by contrast, seeks to build authority to justify its assertion of legal and political power.


\textsuperscript{197} \textit{E.g., In re Aguinda}, 241 F.3d 194, 205 (2d Cir. 2001) (“We cannot make intelligent fact decisions or evaluate the effect of our legal decisions on society unless we have some understanding of that society”) (quoting Jack B. Weinstein, \textit{Limits on Judges Learning, Speaking and Acting – Part I – Tentative First Thoughts: How Many Judges Learn?}, 36 ARIZ. L. REV. 539, 541 (1994)).
This notion of legal self-reflexivity maintains the separation between law and morality. Officials in an evil system speak about their institution when they act officially, and ask what impact their actions will have on citizens and other officials.\textsuperscript{198} Of course, individual jurists developing their embodied philosophy may well take theirs to be a moral mission, and this phenomenon may even characterize a large sector of the system. But if so, these are facts we learn empirically, not by virtue of moral discourse. Nor does the phenomenon entail that law’s validity criteria, or the theoretical concept of a legal system, consist in moral requirements. Kenneth Ehrenberg seems exactly right in saying:

Those within the perspective say, ‘The law is a good thing because it does good things.’ The theorist says, ‘The law is an important thing to study and understand because people believe it does good things.’ The second claim on the part of the theorist is not a moral claim while the first claim is.\textsuperscript{199}

The self-reflexive nature of the regulative legal enterprise also comports with Hume’s Law by not deriving normative conclusions from descriptive premises.\textsuperscript{200} An argument could be

\textsuperscript{198} See, e.g., Nazis Oust Jews From Law Courts, N.Y. Times, Apr. 1, 1933 (“Popular excitement over the presumptuous conduct of Jewish attorneys and Jewish physicians has reached dimensions that make it necessary to reckon with the possibility that the German people – especially in this time of a just defensive fight against Jewish atrocity propaganda – may proceed to measures of self-help. This would involve danger for the authority of the administration of justice’”) (quoting Hans Kerrl, Commissar, Prussian Ministry of Justice).


\textsuperscript{200} See 3 David Hume, A Treatise of Human Nature 469 (L.A. Selby-Bigge ed., Oxford: Clarendon Press, 1896) (1739) (“In every system of morality, which I have hitherto met with, I have always re-mark’d, that the author proceeds for some time in the ordinary way of reasoning ... when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence.”). Hume’s larger project, however, was to criticize “ethical rationalism,” and his point was that reason cannot discover moral principles or distinctions, but morality is instead founded on nonrational
along the lines that legal systems function by virtue of an organic exchange among legal officials and between those officials and citizens, an exchange aimed at describing and weighing regulative norms and their impacts. Acceptance of a moral obligation to act legally is a contingent by-product of the legal system. In accord with Raz’s analysis, norms issued by legal authorities instead provide citizens with exclusionary reasons preempting those, even if good, they may otherwise have.201 For those not accepting law’s authority from the internal point of view, a “perspectival” alternative is available, as in the Hartian approach, from which the non-accepter determines, descriptively, that subjects are bound from the legal point of view:202

We can say a bit more about how what we are calling law’s self-reflexive inquiry differs from that which might occur in other institutions. Consider the regulative set of beliefs embodied in a dress code. This might constrain us either explicitly within a larger institution or as a background norm in everyday life. As a sub-institution within a larger one, the dress code may include secondary as well as primary rules, such as a decision rule permitting management to relax dress requirements the day before holiday weekends. And a dress code may be received

sentiment. Id., at 466 (“the question only arises among philosophers, whether the guilt or moral deformity of this action be discover’d by demonstrative reasoning, or be felt by an internal sense, and by means of some sentiment . . . . The question will soon be decided against the former opinion”).


202 See SHAPIRO, supra note 9, at 185-86; Stefan Sciaraffa, The Ineliminability of Hartian Social Rules, 31 OXFORD J. LEGAL STUD. 603, 612-13 (2011) (“I should add that there is nothing unique about such perspectival practical reasoning and statements of obligation”).
as a moral obligation, as typically occurs within a religious culture,\textsuperscript{203} although this likely began prudentially, or as a non-moral obligation, as when we decide what to wear when we go out to dinner.\textsuperscript{204} But whatever the context, the question how our decision of what to wear will or ought to impact the dress code as an institution is not embedded in our ordinary routines.

The regulative and self-reflexive nature of adjudication explains why theoretical disagreements may be endemic in law but not so much in other institutions. Answering “how should I dress for the wedding?” involves solely an awareness of a few of the facts, perhaps what is the person’s gender, what role that person will play at the wedding, what are the wishes of the wedding party, and some ostensive behavior.\textsuperscript{205} Notwithstanding Dworkin’s affinity for viewing legal constructive interpretation through the lens of artistic interpretation,\textsuperscript{206} the artist’s responding to “how should I paint this portrait?” does not typically involve a debate about the grounds of painting, whether, for example, the portrait ought to be done in the cubist or the realist style.

\textsuperscript{203} HYAM MACCOBY, THE PHILOSOPHY OF THE TALMUD 103 (Routledge 2002) (finding confirmation of the Talmudic tradition considering the Israelites “a nation in which every individual is both a kind and a priest” in the biblical prescription that every Israelite must wear on his garment “a thread of blue (\textit{tekhelet})”) (citing Numbers 15:38); Beth Graybill & Linda B. Arthur, \textit{The Social Control of Women’s Bodies in Two Mennonite Communities}, in RELIGION, DRESS AND THE BODY 9, 20 (Linda B. Arthur ed., Berg: Oxford Int’l Publishers, 1999) (“Through intense scrutiny of rigid behavioral and dress norms, women’s external bodies are controlled by Mennonite social bodies. . . . Loyalty to the group is evidenced by the wearing of a uniform type of attire”).

\textsuperscript{204} It is difficult to understand the frequently expressed \textit{a priori} argument that, “[b]ecause obligation is inherently moral, any kind of obligation is also a moral obligation.” Ian P. Farrell, \textit{On the Value of Jurisprudence}, 90 TEx. L. Rev. 187, 207 (2011).

\textsuperscript{205} OLEG CASSINI, THE WEDDING DRESS (Rizzoli, 2011).

\textsuperscript{206} DWORKIN, LAW’S EMPIRE, supra note 7, at 57.
Legal cases, however, raise questions of how to interpret existing legislation, constitutional provisions, even prior case holdings, and therefore concerning what the court should or must do. Theoretical disagreements of this sort are prolific in law, and this has been the source of perhaps the most potent Dworkinian objection to positivism.\(^{207}\) The fact of the disagreement need not be seen as establishing a continual debate over which moral principles best construct what the law presently is; it is as well to construe the disagreement as being over which legal outcome should be adopted to further the system’s regulative purposes, from the point of view of the official’s evolving, practical philosophy. This reflection brings into the mix views about how past outcomes have fared, standards by which to determine whether those outcomes are sufficiently “directed at” (per the intentionality constraint) the present case, the extent to which prior rulings should be given a measure of entrenched weight under *stare decisis*,\(^{208}\) what the court’s analysis, methodology and ruling may say about the court as an institution, and what impact this will all have on other legal officials and the society.

The regulative point of view also impairs Dworkin’s allusion to the scientific method as a similarly interpretive paradigm.\(^{209}\) The theoretical issue in the scientific setting is not resolved by asking which outcome would best serve the scientific community’s interests going forward.\(^{210}\)

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\(^{207}\) DWORKIN, LAW’S EMPIRE, supra note 7, at 45.


\(^{209}\) See supra notes 12-14, and accompanying text.

\(^{210}\) DWORKIN, LAW’S EMPIRE, supra note 7, at 226.
nor does the scientist have discretion to summon extra-scientific authority, a relic of the pre-scientific world. The scientist is not normally charged with the reflexive tasks of asking in which direction she should take the institution, what science should become or, certainly, how she should formulate her conclusions so as to maximize her discipline’s desired impact upon society.

There is another higher-order, and similarly non-moral, sort of theoretical disagreement pervasive in adjudication. The court’s philosophical reckoning over the normative engine driving the legal system, or a discrete doctrinal area, can be outcome-determinative. Is law’s main point to justify political coercion and collective force, as Dworkin said? Is it, alternatively, a search for truth? Does the legal system rest on ritual aimed at the peaceful settlements of social conflicts? Is law primarily a mechanism for promoting fairness, justice, and efficiency, a means for projecting desirable norms and legal rules to society, or chiefly a

211 Gilbert Harman, Knowledge, Inference, and Explanation, 5 AM. PHIL. Q. 164, 168 (1968); see DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26, at 69.
213 DWORKIN, LAW’S EMPIRE, supra note 7, at 93.
214 See FED. R. EVID. 102.
vehicle for producing stable outcomes? 218 Many of these questions address law’s moral aim, but
are themselves functional and regulative, not moral. And the disagreements these questions may
engender are, in turn, functional and regulative, not moral.

The self-reflexive nature of adjudication also leads us to re-examine Dworkin’s single
moral agent thesis. 219 The Dworkinian view is that law as integrity demands that the
community’s public standards should “be both made and seen, so far as this is possible, to
express a single, coherent scheme of justice and fairness in the right relation.” 220 The single,
coherent scheme extends to the court and legislature alike, and is violated, for example, by
“checkerboard statutes” that fail to treat like issues equally, and that integrity thereby forbids. 221

A difficulty with the single moral agent thesis, however, is that legislative and judicial
entities respond to different, and sometimes competing, forces. The primary force animating
legislation is representational. The reflection underlying legislation is not, in the main, self-
reflexive, but instead evaluative of constituent and interest-group values and influence. “Who is
it that wants me to do what?” is the legislator’s principle inquiry, rather than “what will taking
this action say about our institution?,” although the legislator is free to ask the latter question as
well. The legislature always implicitly asks the second self-reflexive question: “what will be the
enactment’s impact on citizens and officials?,” but even this self-reflexion is partially, or largely,

218 Aharon Barak, Foreward: A Judge on Judging: The Role of a Supreme Court in a

219 See supra notes 49-52, and accompanying text.

220 DWORKIN, LAW’S EMPIRE, supra note 7, at 219, 404.

221 Id., at 213-14; see supra notes 46-48, and accompanying text.
This view of statutory law no doubt seems skeptical. But it is reinforced by a finding that
the sort of phenomenon Dworkin labeled checkerboard legislation is the rule, not the
disagreeable exception. Typically, it is not that the state has endorsed principles as to some
rejected as to others, but that it has differently balanced a complex of principles. Beyond this,

to varying interests and lobbying efforts might press legislation as to the one but not the other.
Laws may require clinics performing mammograms to inform patients about findings of dense
breast tissue, but there may be no comparable statutory requirement about a host of other
symptoms linked with equivalent statistical or epidemiological strength to cancer or other
diseases.

The bargaining inherent in the legislative scheme does not strike one as a lapse in
integrity, but rather as the normal operation of a mechanism rooted in ongoing resolution of
competing interests. Compromise is the legislative branch’s public face, and its unequal
treatment of similarly situated circumstances is more often than not a stabilizing measure that
corrects what has manifest as an imbalance in the representation of conflicting policy goals.

\footnote{Denise Grady, Laws Add Dimension, and Questions, to Breast Cancer Screening, N.Y. TIMES, Oct. 25, 2012, at A1.}

\footnote{Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1712 (1975) (under the interest-representation model, administrative rules
implement regulatory statutes that arise from “compromises struck between competing interest
that the Bankruptcy Code “is the child of the ‘give and take’ of the political process,” and that
“[w]hat may appear to be latent ambiguity, when removed in time and viewed from afar, is likely
the result of legislative judgments intended to compromise competing interests or appease
particular constituencies”).}
Reform favoring an interest group that has been able to organize its demands grants the legislature legitimacy in the eyes of that group, but also satisfies the larger society by diminishing unrest, and leaves open the opportunity for further corrective measures should other constituents vocalize a policy imbalance.\textsuperscript{224}

Adjudication, by contrast, does not principally serve a representational function.\textsuperscript{225} Judges weigh competing rationale for the act of judging,\textsuperscript{226} as well as competing principles connected to the particular case. Far from seeking the right moral answer to a controversy in the first instance, their impulse, rooted in the structure and limitations of the judicial function, is to promote resolution of the matter. Even when the judge’s philosophical commitment as an official in the legal institution may privilege the seeking of truth over the promotion of peaceful settlement, for instance, the judge will likely conclude that the overall interest in truth-seeking would probably be sacrificed were the docket not efficiently cleared of most cases by means of

\textsuperscript{224} See, e.g., Ron M. Rosenberg, \textit{When Sovereigns Negotiate in the Shadow of the Law: The 1998 Arizona-PIMA Maricopa Gaming Compact}, 4 HARV. NEGOTIATION L. REV. 283, 288 (1999) (“Unhappy with their inability to require tribes to adopt regulations that would address states’ interests, states lobbied Congress for legislation that would readjust the power imbalance. Congress acceded and, in 1988, enacted the Indian Gaming Regulatory Act[,] which reflects a political compromise that codifies the tribes’ gaming entitlement . . . yet establishes an elaborate process through which state, tribe, and federal government interests may be addressed in the development of a ‘compact’”).

\textsuperscript{225} But cf. Christopher M. Larkins, \textit{Judicial Independence and Democratization: A Theoretical and Conceptual Analysis}, 44 AM. J. COMP. L. 605, 614 (1996) (“the courts do not exist or operate in a vacuum. A number of exogenous factors, some political and some social, will influence judges’ opinions and will have varying impacts on their impartiality, insularity, and scope of authority”).

\textsuperscript{226} See supra notes 213-18, and accompanying text.
the court’s special ability to encourage and supervise pre-trial resolution. And even when the judge may preside within an authoritarian regime, settlement unless unabashedly coerced should promote a level of legitimacy from the internal point of view of the system’s subjects and participants.

Perhaps it is possible to summarize that for any legal system, as a descriptive matter, legislatures both represent and embody power in making regulative prescriptions, and courts build and exercise authority via both rationale about the case and implicit or explicit reflection about the institution. The legislator need not advance the face value of the dominant group’s interest, but is able, however rarely, to create conscience-based law. The adjudicator need not be limited by rules or principles already having institutional support, but may reach extralegal sources to build authority.

Nor is it true, pace Dworkin, that by virtue of these different regulative methodologies

See generally W. Bradley Wendel, Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection, 34 HOFSTRA L. REV. 987, 1014 (2006) (“Considerable limitations on the exercise of moral discretion may be necessary to avoid undermining the institutional settlement of normative conflict which is the central achievement of the law”).

Nonuse of an authoritarian legal system, by taking grievances to alternative forums such as extended families and community and workplace groups, facilitates positive public attitudes toward the legal system, even as heavier use of a democratic system may engender negative attitudes. See Ethan Michelson & Benjamin L. Read, Public Attitudes Toward Official Justice in Beijing and Rural China, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 169, 193 (Margaret Y.K. Woo & Mary E. Gallagher eds., Cambridge U. Press 2011).

legislatures make law and courts do not. The exactness constraint on institutional deontic power suggests that adjudicators make law not only in some hard cases but more broadly. And in practical law it is not that unusual to see the court in one jurisdiction decree a rule that has been left to the legislature in other jurisdictions.

D. The Planning Theory in Relation to the Regulative Approach

Before concluding this Part, it should be worthwhile to take note of a recent development in positivist jurisprudence rooted in Scott Shapiro’s “planning theory” of law. Influenced by the writings of Stanford University philosopher Michael Bratman, Shapiro likens laws to plans, and law to a planning mechanism aimed at settling society’s moral disputes. This paves the way for the view that law’s existence, like that of any plan, depends on social fact not moral

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230 DWORKIN, LAW’S EMPIRE, supra note 7, at 410; DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 14, at 82.

231 E.g., Khan v. Deutsche Bank AG, No 112219, et al., 2012 Ill. 112219, 2012 Ill. LEXIS 1504, at *18 (Oct. 18, 2012) (“To ameliorate the potentially harsh results of such an application, this court has adopted the ‘discovery rule,’ the effect of which is to postpone the start of the period of limitations until the injured party knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused”); Federal Ins. Co. v. Southwest Fla. Ret. Ctr., Inc., 707 So. 2d 1119, 1122 (Fla. 1998) (holding that the court would not write into a statute of limitations a delayed discovery rule when the legislature itself had not done so explicitly, and that the legislature could make the necessary statutory change if that were its intent).


233 SHAPIRO, supra note 9, at 213, 309 (“the fundamental aim of all legal systems is to rectify the moral deficiencies of the circumstances of legality”).
content or suasion.\textsuperscript{234} It is beyond the scope of this article to talk much about Shapiro’s project; philosophers of law have begun to publish sophisticated analyses of the intriguing suggestion that laws are plans.\textsuperscript{235} Because it may appear that the regulative approach initiated here should complement the planning view, though, it should be helpful to say just a few things about why the planning view, unlike the regulative one, seems counterintuitive.

A plan might be a plan for anything, and undertaken by anyone. The plan need not be for a social practice itself consisting in planning, but could paradoxically call for a realm of anarchy or illegality and hence the avoidance of a rule of law.\textsuperscript{236} By a planning concept of law, the notion of planning must include such decisions as one striking down a law that plans, as much as settling on a duty for the community. A ruling directing the clerk to enter judgment and to dismiss an action without prejudice influences the future conduct of the litigants and the judicial system, and so must also be a plan. “If so, the concept of planning becomes so diluted as to be devoid of any real meaning.”\textsuperscript{237} And if so, the planning concept violates the meaningfulness constraint delimiting the concept of law.

The same dilemma does not impair the view of law from the regulative perspective, although at first blush it may seem to. We do not define a law as a regulation, or the legal system

\textsuperscript{234} Id., at 119, 178.


\textsuperscript{236} Cf. SHAPIRO, supra note 9, at 160 (“planning for spontaneous order”).

\textsuperscript{237} Ernest R. Alexander, If Planning Isn’t Everything, Maybe It’s Something, 52 Town Planning Rev. 131, 136 (1981).
as a system of regulations. Rather than making this somewhat Austinian metaphysical
commitment, the theorist can seek to understand law from the regulative point of view. Dilution
is not an issue when we select the point of view from which to view law, as when we see law
from the internal or external perspective. Shapiro does hedge his thesis in this way to some
extent, as when he concedes that customary norms that are laws are not plans, though “they are
highly planlike in nature.”238 But his main line is that laws are plans.

In a similar vein, because it may be for anything, the plan may be one for moral thinking
or decision-making, which should raise problems for the exclusive positivist.239 On the other
hand, plans relate to specified future objectives, and design actions or strategies for actions to
achieve them.240 Being able one day to ask whether the plan succeeded, even in bringing about
anarchy, for example, is a core feature of the idea of planning. The plan is for tomorrow, and
today is for the planning. But once the question “a plan to do what?” is built into the notion of
what it is to have law, it is difficult to understand how the separation of law and morals is
maintained.

Because planning is necessarily subject to evaluation on the basis of outcomes, it may
also be that things are not rightly considered planned that do not turn out the right way. If
officials devise rules for implementing safety precautions aimed at keeping injurious outcomes

238 SHAPIRO, supra note 9, at 225.

239 Waldron, supra note 235, at 896.

240 See Aaron Wildavsky, If Planning is Everything, Maybe It’s Nothing, 4 POLICY
SCIENCES 127, 131 (1973); see also Michael Bratman, Taking Plans Seriously, in VARIETIES OF
equal, my plans should also be means-end coherent”) (emphasis in original).
below five percent, and yet there is widespread injury at a rate of thirty percent, then opinions may converge that a plan was attempted but failed.

In a more macro-societal sense, legal systems may converge while the “plan” for them, the outcomes they intend to generate, dramatically diverge. The legal system in Nation B may pattern that in Nation A, such that if Nation A is said to have a legal system, so must Nation B, but the plan may fail in one but not the other. As Raz said, for example, there is a case for thinking that the post-colonial legal system was the legal system existing in Rhodesia in 1968. Therefore, “the act of governing need not necessarily involve planning: intentions in actions may be unrealized.” Nor is it inconsistent to hold a nonpositivist view of planning – whereby a failed or defective plan is no plan at all – while at the same time adopting a positivist concept of law.

If the existence conditions of planning are wrapped solely into initial intentions rather

\[241\] Cf. Janet L. McDavid, Proposed Reform of the EU Merger Regulation: A U.S. Perspective, 17 ANTITRUST ABA 52, 54 (2002) (“There is no guarantee that the EC’s [European Commission] interpretation of the substantial lessening of competition test would be guided by U.S. precedent; the United States and European Union might come to different results faced with the same set of facts and the same legal standard”); Robert R. M. Verchick, Critical Space Theory: Keeping Local Geography in American and European Environmental Law, 73 TUL. L. REV. 739, 742-43 (1999) (“Especially fascinating is that the American and European high courts, when deciding similar cases under similar legal principles, often reach different results”).

\[242\] See Wildavsky, supra note 240, at 129 (“Achievement and not the plan must be the final arbiter of planning. Otherwise, planning exists because there is a plan, no matter what fate has in store for it”).

\[243\] RAZ, supra note 7, at 205.

\[244\] Wildavsky, supra note 240, at 133.

than capability and success in controlling future outcomes, then the defining feature of planning, its element of direction, is impaired in the equation. “Such a definition might be appropriate for those interested in different styles of decision for their own sake but not for people concerned with appraising purposeful social action.” Shapiro is clearly such a person, viewing law’s plan as targeting moral problems. So the planning theory at the least links planning, if not with any particularized action, with strategies for future action designed to achieve desired goals.

Because they develop strategies for achieving outcomes, plans inherently must be capable of evaluation. Evaluation breeds disagreement, however, both on the merits and regarding the appropriate standard of evaluation. Plans are thereby set down in contemplation of at least some corrective revision. Bratman explains that the general plan, to qualify as a plan, will tend to be fairly stable and hence resist reconsideration. Entanglements may arise, however, in its execution, and these typically arise at a more specific level, and call for deliberative sub-planning.

This non-final quality of planning seems out of sync with the legal system’s commitment

246 Id., at 130.
247 Alexander, supra note 237, at 137.
249 Bratman, supra note 240, at 209.
250 Id., at 210-11.
to finality in decision-making.251 The court says what the law is,252 and this settles the issue that review in hindsight based on an evaluation of the execution of a plan – were this constitutive of the ruling – would open for review. Put differently, where the law says “do this,” the decree in a planning regime, wherein laws are plans, is effectively “the plan is to do this,” weakening law’s authority and its preemptive status. Indeed, Shapiro builds his planning thesis upon an argument that legal systems such as the American one lack trust in judging.253 Were the effort made, on the other hand, to conceptualize law as planning but in a way that avoided hindsight evaluation of outcomes, the concept would likely collapse to the Holmesian prediction view of law,254 well criticized by Hart for, inter alia, discounting the guidance function of legal norms as experienced from the internal point of view.255

The planning concept also seems counterintuitive because, as much as anything, it is simply difficult to envision legal actors speaking in those terms when engaged in the legal enterprise. Planning is a discipline separate from law, a discrete expertise that involves a different way of thinking. It is unlikely that a law is necessarily a “conduct-controlling pro-

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251 E.g., Panzino v. City of Phoenix, 999 P.2d 198, 200-01 (Ariz. 2000) (saying that rule permitting relief from order or judgment “applies only when our systemic commitment to finality of judgments is outweighed by ‘extraordinary circumstances of hardship or injustice’”) (omitting citation).


253 SHAPIRO, supra note 9, at 198-99, 371-77.

254 Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 462 (1897).

255 See HART, supra note 15, at 82-88.
attitude,” Bratman’s definition both of a plan\textsuperscript{256} and an intention.\textsuperscript{257} As just stated, law as an intention – the plan is to do this – strips the institution of its claim to authority. Law may well exist to preempt our pro-attitudes, or motivations to act in certain ways.\textsuperscript{258} The instrumental notion of a conduct-controlling pro-attitude also does not readily encompass the moral aspiration with which Shapiro seeks to imbue his concept of law. Due process commitments, for instance, may hold less sway within a truth-seeking adjudicative plan. Nor does the planning concept necessarily link legal decision-making, and adjudication in particular, with the philosophical reflection, or self-reflexivity, capable of sorting out the legal institution’s regulative function in terms that advance its societal legitimacy.

Moreover, litigants operating in a plan-determinative system, even if disagreeing over which resolution follows and by which standard, could tend toward convergence that the court’s role, either way, is ministerial. It will always be in each litigant’s best interest, in other words, to convince the court that it need engage solely in nondeliberative plan-execution.\textsuperscript{259} The opposite tendency inheres in the regulative view, by which the court is expected, however implicitly, to churn over its institutional role and societal impact in its decision-making. At the same time, however, the court’s ministerial function in the planning regime would not be devoid of high-

\textsuperscript{256} Bratman, supra note 240, at 205.

\textsuperscript{257} BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON, supra note 232, at 20.

\textsuperscript{258} See Gordon C. Young, Justifying Motive Analysis in Judicial Review, 17 WM. & MARY BILL OF RTS. J. 207 n.66 (2008) (“What constitutional law describes as illegitimate motives are what Bratman would call pro-attitudes (or favorable attitudes) toward action of a certain sort that, by an act of mental volition, have turned into a commitment to action and, if uninterrupted, into the favored action itself”).

\textsuperscript{259} Bratman, supra note 240, at 210.
level expertise. Intuitively, the planning theory’s demand on judges – to fulfill or be cognizant of future objectives, to display some understanding of the plan’s design in achieving them, and to exhibit fairly sophisticated causal knowledge of how decision X may lead to societal outcome R – should be tantamount to the moral theoretical understanding possessed by a Dworkinian Hercules. 260

But Shapiro’s central premise, rooted in the intractable puzzle that drives his work, is that the planning theory best solves law’s most elemental chicken-egg problem. 261 In the jurisprudential context, the puzzle is how a legal system can begin; legal authority presupposes a legal norm, but the existence of such a norm presupposes legal authority. 262 Hart demonstrated that the ideas of habitual obedience and brute force summoned by Austin and Bentham as a solution to this origination problem, or “possibility puzzle,” overlook important features of law, particularly its persistence beyond the life of the particular sovereign habitually obeyed, as well as its capability of conferring powers and guiding conduct without resort to threat of sanctions. 263

For Shapiro, law’s social planning function flows from norms of instrumental rationality that are not themselves plans, and legal authority is possible because certain kinds of agents are capable of creating plans for planning, and motivating others to accept those plans. 264 In this way, certain states of affairs are achievable that underwrite the existence of a legal system’s

260 DWORKIN, LAW’S EMPIRE, supra note 7 at 239.

261 SHAPIRO, supra note 9, at 39-40.

262 Id., at 179.

263 Id., at 51-78.

264 Id., at 181.
“master plan.” We are planning creatures, and as a planning regime develops capable of organizing the society’s needs and coordinating its activities via plans that provide content-independent reasons for action, a legal system emerges.

It should now be evident that, apart from the disconnect that may otherwise exist between legality and planning, the planning theory provides a conceptually rich resource for approaching jurisprudential issues. Especially interesting is Shapiro’s argument that the Hartian approach failed to resolve the possibility puzzle, because Hart made a “category mistake” when he reduced social rules, and in particular the legal rule of recognition, to social practices. This is because abstract objects, such as rules, cannot be reduced to concrete events, such as social practices, although they can “structure,” “embody,” “exemplify” or otherwise relate to them.

The project here, again, is not to flesh out a critique of the planning theory. Briefly stated, however, it is less than fully clear that Shapiro’s articulation of the theory significantly advances the ball from where Hart positioned it. For Hart, the legal system’s rule of recognition is not itself validated “but is simply accepted as appropriate for use in this way.” If rule and practice are metaphysically distinct, the same cannot be said for recognition and practice. Nor do the content of an official practice and the content of a rule occupy different metaphysical

\[\text{Id.}\]

\[\text{Id., at 169.}\]

\[\text{Id., at 103.}\]

\[\text{Id.}\]

\[\text{HART, supra note 15, at 108-09.}\]
And the internal attitude of acceptance defining the rule of recognition is as abstract an entity as the rule itself.

In other respects, looked at logically or genealogically, a community may recognize deontic power prior to organizing a formal institution around that power. Shapiro has not really established that recognition of a certain de facto power cannot carry on as a rule in the institutional setting, as the rules of a game might coalesce in the street by virtue of the playing of the game. The community’s acceptance and following of the practice within the institutionalized legal system may be constitutive of the de facto rule’s logical form whereby customary practice X counts as having status Y in the context of legal system L.\(^{271}\) A constitutive rule declares, “If you do X, Y.” The institution can create a rule by absorbing, adopting and formally enforcing a deontic power. This is what happens in our scenario that begins with non-legal R1 (“Vehicles prohibited in the park”).\(^{272}\)

VI. THE REGULATIVE CONCEPT LINKS TO DISCRETE AREAS OF LAW

It is true that we are planning creatures. But more so, we are transactional. We plan when we plan, but we transact when we plan and at other times, too. And when we plan, we transact first; transacting is behaviorally and metaphysically prior. If we adopt a planning

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\(^{270}\) Shapiro, supra note 9, at 103.

\(^{271}\) See generally SEARLE, supra note 8, at 19-22; Stefan Sciaraffa, The Ineliminability of Hartian Social Rules, 31 OXFORD J. LEGAL STUD. 603, 608-09 (2011) (“De facto systems of power-constituting norms and, accordingly, the de facto powers they constitute, enjoy a kind of existence that mere abstract systems of norms and powers do not by virtue of the fact that the system of power-constituting norms is accepted and followed”).

\(^{272}\) See supra notes 175-82, and accompanying text.
concept of law, the master plan is fleshed out in the legal system’s discrete areas, and these, too, are part of the plan and explainable in those terms. The same is true if we adopt a regulative concept of law, for which the relevant behavioral unit is the transaction; a regulative analysis best permits us to explain the structures of, and outcomes generated within, discrete legal areas.

It is conceptually coherent to say that people interact prior to, and without the necessity of, a legal system. People interacting transact in various ways. Planning is intentional, but transacting occurs both intentionally and accidentally. Interacting, people injure one another, sometimes intentionally, sometimes accidentally. They promise, too. They carve out territory and spaces for living and for more transacting, and also plan for lots of things, including death.

Something happens between us once and then twice. We become motivated, by our psychology and nature, to structure the next interaction efficiently, because the alternative is waste. The downside to structuring things is the tendency to plot out potential transactions too rigidly. Although Shapiro takes social planning as a default position applicable to “all political

\[\text{Cf. John M. Hinson, Seeking the Natural Lines of Fracture: A Review of Thompson and Zeiler’s Analysis and Integration of Behavioral Units, 47 J. EXPERIMENTAL ANALYSIS BEHAV. 133 (1987).}\]

\[\text{See, e.g., Coleman v. Twin Coast Newspaper, Inc., 346 P.2d 488, 490 (Cal. 1959) ("a right to relief arising out of the same transaction or series of transactions exists where several plaintiffs sue for personal injuries suffered in the same accident").}\]

\[\text{See, e.g., Siegfried Ludwig Sporer, Recognizing Faces of Other Ethnic Groups, 7 PSYCHOL. PUB. POL’Y & L. 36, 64 (2001) (describing how certain face recognition schema “allows for quicker and more effective processing, just as other types of recurring patterns are processed more efficiently and automatically").}\]

\[\text{Id. (“The downside of such a highly developed schema is \textit{schema rigidity}” (emphasis in original).}\]
theories,” planning does conceptually line up alongside intentionality and in opposition to spontaneity. Max Weber’s insights, generalized to non-economic contexts, may well hold that lack of satisfaction with planned outcomes generates and intensifies conflict whereas spontaneously determined outcomes function as a stabilizing factor by narrowing the scope for decision-making and dispute.\textsuperscript{278}

The regulative attitude toward transactional effects describes a happy medium as between a planning and spontaneous conceptual apparatus. We next use ‘transactional’ a bit differently, in its legal practice sense. If we divide law into its transactional (in this limited sense) and litigation components, it should be apparent that the former falls well onto the planning side of the divide, and the latter far more on the side of spontaneity. Yet when planned structures engender disputes, recalling Weber’s teaching, regulative spontaneity steps in. This dynamic was at play, for instance, in \textit{Riggs v. Palmer},\textsuperscript{279} much discussed by Dworkin.\textsuperscript{280} The plan was that a will, properly made and executed, must be given effect.\textsuperscript{281} Reflecting at length on its institutional

\begin{footnotesize}
\begin{enumerate}
\item \textsc{Shapiro, supra} note 9, at 155.
\item \textit{Riggs v. Palmer}, 22 N.E. 188 (N.Y. 1889).
\item \textsc{Dworkin, Law’s Empire, supra} note 7, at 15-20.
\item \textit{Riggs}, 22 N.E. 188, 191 (Gray, J., dissenting) (“the matter does not lie within the domain of conscience. We are bound by the rigid rules of law”). It could be argued, \textit{à la} Dworkin, that the plan’s content is subject to debate, and that the best interpretation of the plan in \textit{Riggs} dictates that it included the principle that no one should profit from his own wrong. But then we would be disagreeing over the moral grounds of plans, which are laws for Shapiro. Under the planning theory, law’s content “cannot be discovered in the manner that Dworkin suggests” because engaging in such moral argument “would effectively unsettle the very matters
\end{enumerate}
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role, the court declined to take the position that a murderer could profit from his wrong and inherit, although the court in Riggs acknowledged precedent to the contrary. The regulative approach fosters a degree of spontaneity in adjudication and outcomes rooted in trade-offs and compromise.

As transactions (now again in the larger sense) occur in the pre-legal social group – promising, injuring, planning and so forth – these give rise to obligations, commitments, resentments, and generally deontic powers. Questions inevitably arise about how to organize, coordinate and prioritize those obligations, resentments and powers. Security, liberty and other interests are at stake and must be balanced, regardless of whether this may occur in a pre-legal society or within a legal institution. Without a structure for accomplishing these ends, however, the smooth functioning of the group cannot continue or get off the ground. A legal system emerges and evolves, engendering regulative and constitutive rules and principles. Either way, a sort of societal “self-binding” happens, itself regulative in the larger sense.

that the law is meant to settle.” SHAPIRO, supra note 9, at 309.

Riggs, 22 N.E. 188, 190 (citing Owens v. Owens, 6 S.E. Rep. 794 (N.C. 1888)).

See generally Thomas Morawetz, Commentary: The Rules of Law and the Point of Law, 121 U. PA. L. REV. 859, 861 (1973) (“it may be impossible in principle to give an exhaustive and complete account of the rules of the practice, either because they are unlimited in number or, more importantly, because the set of rules is constantly evolving”).


The legal system may create a rule for enforcing promises as follows: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” 286 In the area of personal injury, members of the group internalize a sense of obligation when its breach gives rise to some level of collective resentment because it violates a governing norm the group may reasonably be expected to infer. 287 People liberally assign fault, even when actual fault is improbable. 288 So much the more when there is personal injury. The legal system may declare that duty in tort is an obligation or set of obligations to adhere to a particular standard of care, which the law recognizes as binding across the community, and for the injurious breach of which the law allows a private remedy. 289 Criminal law, as well as tort, may develop to safeguard the community from freewheeling resort to the vendetta or blood feud. 290

Law emerges and intervenes to regulate our transactions. It’s coercive capability may not be strictly necessary to a concept of law, as Shapiro maintains in articulating his planning

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289 See generally Gipson v. Kasey, 150 P.3d 228, 230 (Ariz. 2007); A.W. v. Lancaster County School Dist. 0001, 784 N.W.2d 907, 914 (Neb. 2010).

theory, but “in the world of law as it exists and as it is experienced, coercion is rampant and sanctions are omnipresent.” By this article’s terms, a concept of law omitting these elements would violate the explanation condition and would therefore be less than adequate. On the other hand, it may be begging the question a bit to say, with Dworkin, that law’s main point is to justify such coercion and collective force. The regulative point of view addresses the epistemologically and metaphysically prior questions of the functional role of these inevitable features.

Tort law is illustrative is showing that the regulative attitude connects well to theories explaining discrete areas within law. Courts addressing tort cases engage in an instrumental, normative exercise by which they use their discretion, if need be, to construct authority for the purpose of regulating the status of the set of moral and non-moral rights and obligations coursing through society. As shown, the community’s construction of innumerable rights and obligations balancing security and liberty interests is deontically prior to law’s prescriptions, and courts develop their embodied or practical philosophies by determining which rights and obligations

291 SHAPIRO, supra note 9, at 8-10.


293 See supra notes 95-97, and accompanying text. It is also significant that, while the regulative point of view does not unavoidably define a law as a regulation; see supra notes 241-42, and accompanying text; Shapiro claims that laws are plans; SHAPIRO, supra note 9, at 119; and thereby establishes membership criteria for the class of things that are laws. See Ehrenberg, supra note 199, at 94-95. As Ehrenberg explains, “[w]hen we define something by its function in this way, we thereby make the success criteria embodied by the function into membership criteria for the explanandum.” Id., at 95. The regulative approach, by contrast, and in this respect resembling Dworkin’s instrumental view in Law’s Empire, affords a functional, or near-functional, explanation rather than a definition.

294 DWORKIN, LAW’S EMPIRE, supra note 7, at 93.
tort law should enforce.

The no-duty to rescue doctrine structures significant acreage in tort law, and should give Dworkinians far greater reason for pause than it has. The traditional rescue paradigm – involving the easy rescue of a helpless stranger – barely captures the doctrine’s theoretical significance. The rescue concept is a legal theoretical construct, and its application therefore depends upon the court’s construction of the theoretical parameters that qualify the no-duty defense. However, cases passing on rescue embody policy’s priority over principle.

Dworkin tried to tackle rescue in Justice For Hedgehogs. He explained that the morality of our decision can be evaluated on the basis of two principles of dignity, self-respect (taking one’s life seriously) and authenticity (taking personal responsibility for defining how to make one’s project in life successful). Evaluating our moral obligation to come to the aid of others then requires us to balance full respect for the equal objective importance of every person’s life against full respect for the value of our own life’s project. Any plausible test, said Dworkin, “will make room for three factors: the harm threatened to a victim, the cost a rescuer would incur, and the degree of confrontation between victim and potential rescuer.”

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297 DWORKIN, HEDGEHOGS, supra note 119, at 203-04, 272.

298 Id., at 272.

299 Id., at 275. The first two factors are self-explanatory. By the third, the degree of confrontation, Dworkin meant two things: the clarity with which we can identify who will be harmed without our intervention, and the proximity of the potential rescuer to the hazardous
Legal systems treat the rescue situation differently. European civil law generally requires citizens to aid victims in peril, but only a small handful of American states have certain narrowly-tailored assistance statutes.  

Constructive interpretation cannot adequately explain the prevailing no-duty-to-rescue doctrine, yet several moral analyses would likely overturn it. This is not to say that a moral argument could not be summoned to justify the rule permitting a capable adult to stand idly by even when his risk-free action would save a young child’s life. It would be difficult, however, to justify the practice and place it in its best light by virtue of our political morality.

By their self-reflexive inquiry, the courts ask, “what will taking this action say about our institution?” and “what will be the impact of our action both on the subjects of primary rules and on the officials obligated to follow secondary rules?” Their forward-looking regulative attitude counsels balancing policy factors that weigh in favor of various societal interests, such as liberty, security, privacy, and so forth. In adjudication the lay fact finder, by contrast, is charged with considering neither the legal institution’s standing and legitimacy in relation to the cross-section of societal interests, nor the impact of a particular determination on larger issues of behavior in the community.  

The courts are left to consider, manifestly or latently, law’s position and impact, and these considerations take the form of policy factors with which the judge’s embodied situation. *Id.*, at 277-78.

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301 Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care*, 44 WAKE FOREST L. REV. 899, 909 (2009).
philosophy reckons. In the context of rescue, as American law stands, policy factors privileging the liberty interest outweigh the negative impact of distress resulting from permitting a non-responsible party to choose immorally to stand idly by.302

VII. CONCLUSION

Law emerges and intervenes to engender a functional society by regulating transactions. And so this article has sought to advance a regulative perspective on legal systems. Legal positivism has not well-appreciated Dworkin’s understanding of the jurist as philosopher, but ultimately this understanding nicely accommodates positivist commitments to judicial discretion and an adjudication that asks what law should be.

By virtue of its regulative role in structuring a smoothly functioning society (for good or for evil), the legal system is predisposed to privilege compromise, even as it stands ready to coerce. To maintain legitimacy, legal systems are structured to build authority to justify their power. Other institutions typically build power to justify authority.303 Building authority to legitimize power is not necessarily unique to law. But it is something the gunman writ large


cannot do, because legitimacy is the one thing he necessarily lacks.\textsuperscript{304}

Positivists and nonpositivists agree that the constraints of the rule of law underwrite legitimate government.\textsuperscript{305} In building authority, officials self-reflexively speak of their institution’s role and competency, and this underlies their embodied philosophy and, in turn, regulative undertaking. Because any institution’s authority is diminished when it fails to abide by intentionality and exactness constraints delimiting its powers to those clearly expressed and fairly directed at the newly arising circumstances, legal rules and principles are themselves delimited, and officials’ exercise of discretion transforms the nonlegal into the legal.\textsuperscript{306} If so, in law, and in its discrete areas, questioning what the law should be – so that it may best achieve its regulative ends – is not lawless.

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\textsuperscript{304} Abner S. Greene, Symposium: Theories of Taking the Constitution Seriously Outside the Courts: \textit{Can We Be Legal Positivists Without Being Constitutional Positivists?}, 73 FORDHAM L. REV. 1401, 1402 n.4 (2005).

\textsuperscript{305} David Dyzenhaus, \textit{The Rule of Law as the Rule of Liberal Principle, in RONALD DWORKIN} 56, 56 (Arthur Ripstein ed., Cambridge U. Press, 2007) (noting that the disagreement among philosophers of law is rather “about whether the constraints suffice to make government to some extent legitimate”).

\textsuperscript{306} See Dennis Patterson, Symposium: Corrective Justice and Formalism: \textit{The Metaphysics of Legal Formalism}, 77 IOWA L. REV. 741, 759 n.92 (1992).