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# Book Review

## Method and Principle in Legal Theory

Stephen R. Perry<sup>†</sup>

*The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory.* By Jules L. Coleman.\* Oxford: Oxford University Press, 2001. Pp. 226. \$39.95.

Jules Coleman is an exceptionally distinguished legal theorist who has made significant contributions to many different fields in legal and political philosophy, but he is particularly well known for his work in tort theory and in jurisprudence. In tort theory, he has offered a powerful and sustained defense of the view that tort law is best understood by reference to the principle of corrective justice.<sup>1</sup> In jurisprudence, he is one of the two most prominent contemporary legal positivists—the other is Joseph Raz—and also the leading proponent of the view that has come to be known as inclusive legal positivism.<sup>2</sup> That view holds that while a particular legal system's criteria of legality—the criteria that determine which norms are to count in the system as legal norms—must be grounded in a social convention of a certain kind, the criteria themselves need not refer exclusively to social sources; contrary to what Raz has argued, the sources of law can also be moral in character.

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1. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

2. See, e.g., Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART'S POSTSCRIPT 99 (Jules L. Coleman ed., 2001).

In his important new book *The Practice of Principle*,<sup>3</sup> Coleman further develops and deepens his views in both tort theory and jurisprudence. The versions of those views that he presents in the book are substantively appealing and often persuasive. Although torts and jurisprudence might appear to be not particularly closely related fields of theoretical inquiry, Coleman provides a unifying theme through his discussions of methodology. His sophisticated examination of methodological issues is one of the most rewarding aspects of a rich and rewarding book. Coleman presents his theory of corrective justice as an application of a more general method of theorizing about particular areas of substantive law, which he calls pragmatic conceptual analysis. The hallmark of this approach is the attempt to discover the principles that are embodied in a given area of the law, without concern for the moral appeal of those principles. So far as jurisprudence is concerned, Coleman argues that while the defense of jurisprudential theories necessarily relies on epistemic norms, it does not require appeal to moral or political considerations.

The methodology that is involved in studying tort law and other 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. But there is nonetheless a unifying connection between the respective methodological approaches that Coleman advocates for these two types of inquiry. Although both are subject to norms governing theory formation, neither, on his view, involves substantive moral or political argument. The central theme of this Review is that, in the case of both jurisprudence and the explanation of discrete areas of law, this methodological claim is mistaken. Sympathetic as I am to Coleman's substantive views, I do not think that his methods of arguing for them can ultimately be sustained.

Part I of *The Practice of Principle* is concerned with tort theory, Part II with the defense of inclusive legal positivism, and Part III with methodology in jurisprudence. Parts I-III of this Review follow the same organizing framework. Although I discuss both the substantive and the methodological aspects of Coleman's views, the emphasis throughout is on methodology.

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3. JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* (2001). The book is the published version of the Clarendon Lectures in Law that Coleman delivered at Oxford in 1998.

## I. TORT THEORY

A. *Pragmatic Conceptual Analysis*

The main thesis that Coleman defends in Part I, which is entitled *Tort Law and Corrective Justice*, is that tort law is “best explained” by the principle of corrective justice.<sup>4</sup> The principle of corrective justice states, on Coleman’s understanding, that “individuals who are responsible for the wrongful losses of others have a duty to repair the losses.”<sup>5</sup> The defense of the corrective justice view of tort law that Coleman advances in *The Practice of Principle* both strengthens and clarifies the arguments that he has offered in previous work. This is particularly true with regard to issues of methodology. Thus, Coleman makes clear that the role of corrective justice in explaining tort law is meant to be independent of the defensibility of corrective justice as a moral ideal. It is not part of Coleman’s explanatory claim that tort law is morally defensible, and this is so even though he accepts that corrective justice is indeed a form of justice and that tort law is, as it happens, a valuable social institution.<sup>6</sup> It is thus evident that the form of explanation Coleman is offering is not Dworkinian interpretation. This represents a departure from at least some of Coleman’s previous work, since in the past he has on occasion explicitly embraced a Dworkinian methodological approach to explaining tort law.<sup>7</sup>

As Coleman makes clear, the form of inquiry he now has in mind begins not with general principles that are independently believed to have a moral claim on us, nor with the fine-grained details of legal doctrine, but rather “in the middle.”<sup>8</sup> The idea is to ask which principles, if any, are embodied in our current legal practices, without making any assumptions about the moral status of those principles. It is important to note that Coleman envisages the methodological approach he advocates as a pragmatically oriented form of conceptual analysis. The strategy of looking for mid-level principles that are embodied in the relevant practice, which Coleman labels “explanation by embodiment,” is one of a cluster of features that characterize his version of this approach.<sup>9</sup> The other features are semantic nonatomism, which denies that any single element of a language, conceptual scheme, or other semantic system has a determinate meaning that is independent of at least some other elements of the system;

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4. *Id.* at 9.

5. *Id.* at 15.

6. *Id.* at 4 n.4.

7. *See, e.g.*, COLEMAN, *supra* note 1, at 383-84.

8. COLEMAN, *supra* note 3, at 5.

9. Benjamin Zipursky has labeled this approach “pragmatic conceptualism.” Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).

inferential role semantics, which holds that the content of a concept is to be analyzed by reference to the practical inferences it warrants or in which it figures; holism, which in this context asserts that the different practices in which a concept figures must, for purposes of analyzing the concept, be considered together; and, finally, revisability, which holds that all beliefs, including those that are nonempirical in character, are revisable in the light of recalcitrant experience.<sup>10</sup>

Coleman adopts this methodological stance to the explanation of social practices—a stance that has clearly been strongly influenced by the work of W.V.O. Quine<sup>11</sup>—in order to defend the central thesis of Part I of *The Practice of Principle*. That thesis is, to repeat, that tort law is best explained by a principle of corrective justice. Much of the argument for this thesis takes the form of a critique of the economic analysis of tort law. Coleman begins by suggesting that the “economic explanation” of tort is unsatisfactory if it is taken to be an instance of conceptual analysis, by which he clearly means his own pragmatic version of conceptual analysis.<sup>12</sup> For good measure he describes two other forms that an explanation of a social practice might possibly take, namely, a causal-functional explanation and a Dworkinian interpretation, and then argues that the economic understanding of tort law cannot be regarded as an adequate instance of either of those approaches.

In the following Section, I consider Coleman’s objections to each of these three possible forms that an economic explanation of tort law might take, paying attention not just to the substantive arguments but also to the underlying methodological issues. It is evident that Coleman regards the debate between corrective justice and the economic model as a kind of proving ground and showcase for pragmatic conceptual analysis. As clearly emerges from his discussion of this debate, the articulation of conceptual explanation into a number of distinct elements—semantic nonatomism, holism, revisability, and so on—is a very helpful analytic tool and a significant contribution to the methodology of legal explanation. There is, however, no reason to regard the five elements Coleman describes as the *only* criteria of adequacy that pragmatic conceptual analysis should bring to bear in assessing substantive theories of law. More particularly, there is no reason to exclude, and there is positive reason to include, substantive moral and political considerations. Including such considerations—or at least not excluding them from the outset—is more in keeping with Coleman’s holistic, open-ended pragmatism than is a fixed list of evaluative criteria that has presumably been determined on an a priori basis.

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10. COLEMAN, *supra* note 3, at 6-9.

11. WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960).

12. COLEMAN, *supra* note 3, at 11.

### B. *The Critique of the Economic Model*

Coleman observes that if the economic model is viewed as offering a conceptual analysis, then that analysis must be taken to be both reductive and functional. It is reductive because it “seeks to explain tort law by showing that its central concepts can be reduced to the concept of economic efficiency.”<sup>13</sup> It is functional because in undertaking this reduction it ascribes to tort law a certain function, namely, the pursuit of efficiency. Coleman’s critique of the economic model, understood as an instance of conceptual analysis, is a reformulated version of an argument he has offered before, based on the so-called structure of tort law.<sup>14</sup> The argument’s starting point is the idea that tort law has a structural and a substantive “core.”<sup>15</sup> The substantive core consists of liability rules, both fault-based and strict. The structural core of tort law is represented by “bilateral” adjudication, in which a particular victim sues a particular person or limited set of persons whom the victim claims to be responsible for her loss. “Responsibility” entails, at a minimum, actual causation. If the victim’s action succeeds, she is awarded a judgment against some or all of the persons she sued and not against, say, society as a whole or a general compensation fund.

Coleman’s critique of the conceptual interpretation of economic analysis focuses, for the most part, on the structural rather than the substantive core of tort law. He points out that the economic analysis offers a forward-looking account of tort, in which the point of liability rules is to provide persons with incentives to behave in a cost-efficient manner in the future. But the conceptual structure of tort law is backward-looking; the plaintiff alleges that the defendant harmed her in some way that he had no right to do, and she seeks redress for that past harm. As Coleman memorably puts the point, “The judge is there . . . to serve [the parties]—to do justice between them; they are not there to serve the judge in his policy-making capacity.”<sup>16</sup>

Coleman further argues that the scope of the forward-looking goal of optimal reduction in accident costs cannot be limited in principle to past injurers and their victims, since it is always theoretically possible that the person who is in the best position to achieve that goal is a third party who did not causally contribute to the victim’s harm. In other words, the fundamental, backward-looking requirement of actual causation is an arbitrary limitation on the forward-looking, incentive-oriented goal that economic analysis attributes to tort law. The only explanation for this

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13. *Id.*

14. COLEMAN, *supra* note 1, at 374-85.

15. COLEMAN, *supra* note 3, at 15.

16. *Id.* at 17.

limitation that the economist can offer is, according to Coleman, the empirical claim that the search costs required to identify the true optimal cost reducer are not outweighed by the benefits of finding that person and holding him liable. If search costs were in fact sufficiently low, Coleman continues, then the economic model would seem to be committed to the idea that a victim should have a duty to seek out the true optimal cost reducer and sue him. But tort law, as it currently exists, could not permit or accommodate any such general abandonment of the requirement of actual causation. Furthermore, as Coleman points out, tort law does not impose any duty at all on victims to sue those who might have prevented their injury in a cost-efficient manner. Instead, victims are given a right of civil recourse, meaning they are given the *opportunity* to seek redress if they so wish.<sup>17</sup>

Finally, Coleman argues that the economic analysis of tort law cannot account for the fact that the injurer who is found liable comes under a duty to compensate the victim, and not simply a duty to pay a fine, say, or to contribute to a general compensation fund.<sup>18</sup> From the economic point of view, appropriate incentives for both potential injurers and potential victims could, in principle, be created without recognizing an obligation that is owed by injurers to the particular victims they have harmed. The case for setting up an institution of private enforcement, which is what the economic model takes tort law to be, must itself be economic, and hence contingent, in nature. On the economic account, the justification for requiring an injurer to compensate her victim thus has nothing to do with the latter's allegation that the former wronged her. The remedy of damages is viewed, rather, as a mechanism for inducing both injurers and victims to take cost-efficient precautions (a mechanism that, in the case of victims, works by withholding or reducing the damage award), and also for inducing victims to initiate private enforcement actions. It is always an open question, on the economic view, whether some other mechanism, such as a regime of public enforcement, might not be preferable because cheaper overall.

Coleman sums up these specific criticisms of economic conceptual analysis with the following generalization: “[E]very core feature of the structure of tort law is explained by first (so to speak) disconnecting the injurer from the victim.”<sup>19</sup> Injurer and victim are brought together in the economic model for reasons that have nothing to do with the event that occurred between them; the fact that the injurer wrongfully harmed the victim has only epistemic, not normative, significance. The overall effect of

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17. *Id.* at 20; see also Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) (arguing that tort law embodies a principle of civil recourse that entitles an individual to redress against one who has committed a legal wrong against him).

18. COLEMAN, *supra* note 3, at 17-18.

19. *Id.* at 20.

the economic account is, Coleman concludes, to make tort law appear mysterious. Corrective justice, on the other hand, offers an explanation of tort law that shows how tort law's central concepts—enumerated by Coleman as wrong, duty, responsibility, and repair—cohere and mutually support one another by together expressing “the fundamental normative significance of the victim-injurer relationship.”<sup>20</sup>

Coleman thus concludes that the economic model of tort law fails if it is taken to be an instance of conceptual analysis. As noted earlier, however, he also considers two other forms of explanation that the economic model might be thought to take. These are, first, a causal-functional explanation, and second, a Dworkinian interpretation. The causal-functional approach seeks to show that the function of attaining economic efficiency is explanatorily important not because it figures in the self-understanding of those who engage in the practice of tort law,<sup>21</sup> but rather because it figures in a causal account of why the practice exists and takes the shape that it does.<sup>22</sup> A different example of a causal-functional explanation can be found in the Marxist claim that, in capitalist societies, the property regime and other aspects of economic relations serve the function of further developing the forces of production.<sup>23</sup> Coleman argues, plausibly enough, that a causal-functional account must point to some specific causal mechanism linking the alleged function of the social practice in question, understood now as an *outcome* of that practice, with the existence of the practice, its content, or both. Drawing on an analogy with evolutionary biology, he argues that it is not enough to assert that the existence of a leopard's spots are explained by the function of camouflage, nor is it enough to conjecture that were it not for that function, the leopard's spots would not exist (or would not have the properties that they do). Without the identification of some specific causal mechanism, we have merely a Just So Story, which explains nothing.<sup>24</sup>

In the case of evolutionary biology, the specific causal mechanism that turns the Just So Story into a true explanation is, of course, the process of random mutation and natural selection. Is there an analogous mechanism that can show why the practice of tort law produces economically efficient liability rules, as is alleged by some economic theorists? Coleman maintains that “the typical economic analysis of tort law” offers neither an intentional explanation of this supposed fact—for example, an explanation that appeals to the intentions of judges—nor an explanation embodying a

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20. *Id.* at 23. Ernest Weinrib has pursued a similar, if more formalistic, line of thought. See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

21. This would seem to be the claim of conceptual analysis, at least as Coleman understands that notion, since the conceptual structure of tort law is ultimately a reflection of participants' self-understanding.

22. COLEMAN, *supra* note 3, at 24-26.

23. *Id.* at 25 & n.2.

24. *Id.* at 26-27.



specific causal mechanism which can be shown to play a role analogous to that of random mutation and natural selection in evolutionary biology.<sup>25</sup> He acknowledges that some theorists have in fact offered causal-functional, evolutionary accounts of the common law's supposed efficiency, based on the idea that efficiency is an unintended byproduct of rational litigation and settlement strategies.<sup>26</sup> But Coleman thinks that even if these explanations can be shown to be true, they are very limited in scope. At most they can explain the behavior of litigants who take common-law institutions and procedures as a given. They cannot explain why those institutions, and, in particular, the institution of tort law, take the form that they do. "The litigation and settlement models start from the assumption that tort law has its characteristic bilateral structure, and make no pretense of explaining this structure."<sup>27</sup>

Having thus dismissed the possibility that economic analyses of tort law can be plausibly regarded as causal-functional explanations, Coleman next considers the possibility that they can be understood as Dworkinian constructive interpretations.<sup>28</sup> According to Ronald Dworkin, a constructive interpretation of a given body of law (or, more generally, a given social practice) has two distinct dimensions, namely, fit and value.<sup>29</sup> A proposed interpretation must meet the requirement of fit by offering a minimally plausible account of the distinctive doctrinal features of the body of law in question. But more than one interpretation might meet this requirement, so choosing among interpretations generally also requires appeal to the dimension of value. This involves attributing a point or function to the relevant body of law in such a way as to place it in its best light, which means showing it to be as good an instance of the kind of thing that it is as it can be shown to be. Coleman argues that, understood as a Dworkinian interpretation, economic explanation does particularly badly on the dimension of fit, for the reasons that have already been canvassed under the heading of conceptual analysis. The upshot, he says, is that the economic account looks not so much like an interpretation as an imposition on tort law of a "completely external goal."<sup>30</sup> Nor, on Coleman's view, does the economic approach do much better on the dimension of value, since an argument is required to show that economic efficiency is morally more attractive than the values represented by corrective justice, and economic theorists have no such argument to offer.

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25. *Id.* at 27.

26. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

27. COLEMAN, *supra* note 3, at 27.

28. *Id.* at 29-31.

29. RONALD DWORKIN, *LAW'S EMPIRE* 67-68 (1986).

30. COLEMAN, *supra* note 3, at 31.

Coleman's differentiation among three distinct explanatory guises that economic analysis might take is a very helpful move in its own right, particularly since economic theorists are not always as clear as they ought to be about their methodological presuppositions. (The same is often true, of course, of corrective justice theorists.) Whether or not one agrees with Coleman about the putative deficiencies of the various forms of economic explanation he discusses, he is surely correct to demand of theorists of all stripes that they make clear, in advancing a particular theory, just what type of theory they mean to be advancing.

In my opinion, Coleman has also shown beyond cavil that economics cannot account, in any plausible way, for the bilateral structure of tort law. This is a very significant point in the explanatory debate about tort law. Despite the fact that Coleman has been forcefully making the point for some years now, it has not been answered or even properly addressed by economic theorists.<sup>31</sup> Still, the structural argument alone is not sufficient to ensure that corrective justice wins the explanatory debate, for the reason that economic analysis clearly means to focus on substance rather than on structure. Coleman distinguishes, it will be recalled, between the substantive and the structural cores of tort law. In the case of all three possible forms of economic explanation, Coleman's criticisms emphasize structure almost exclusively; substance is barely mentioned. This is so despite Coleman's telling us, when he first draws the distinction between structure and substance, that an explanation of tort law must consider both. Thus, on the substantive side,

[a]ny plausible theory of tort law should explain both [fault and strict liability]—and the difference between them—and should if possible provide a defense of each, and an explanation of why fault liability provides the appropriate standard of liability and recovery in some cases, while liability in other cases is appropriately strict.<sup>32</sup>

*This* is the primary focus, not to mention the strength, of economic analysis.

Thus the evolutionary models of tort law that Coleman mentions, which claim that efficient liability rules are the by-product of rational litigation

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31. Coleman first advanced the structural critique in Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988). In *The Practice of Principle* he remarks that some economic theorists have recently advocated looking at tort law not in isolation, but rather as just one of a number of institutions and practices that are concerned with risk regulation. COLEMAN, *supra* note 3, at 36-37. The argument is then said to be that economic analysis provides the best explanation for this set of institutions considered as a whole. Although this proposal is apparently meant to be a response to the structural critique, Coleman does not cite any theorists who have endorsed it. He suggests that while such an argument is along the right lines, revising conceptual boundaries is not justified unless a sufficiently strong reason is offered for doing so, and the proponents of the risk regulation idea have not met this burden. *Id.* at 37-40.

32. COLEMAN, *supra* note 3, at 15-16.

and settlement strategies, are aimed precisely at explaining how tort doctrine came to have the particular content that it has. This is not the place to attempt an assessment of these theories in their own terms, but it is fair to say that a successful explanation of this kind would be an important result. There is, moreover, no reason in principle why similar accounts could not be offered for the institutional as well as for the substantive aspects of tort law, or for the common law generally. That having been said, though, Coleman is clearly right that the causal-functional accounts that have been offered to date have been distinctly modest in scope.

Let me turn, then, to the other two forms of explanation that Coleman considers, namely, conceptual analysis and Dworkinian interpretation. As in his discussion of causal-functional explanations, his focus in these two cases is also almost exclusively on structure. Once again, though, the strength of economic analysis is substance. It is fair to say that theorists who concern themselves with the economics of accidents have now settled on a standard model of tort law, which is set out in its clearest and most persuasive form in the work of Steven Shavell.<sup>33</sup> The heart of that model concerns the content of, and relationship among, different liability rules. The economic model offers not only a precise formulation of the negligence standard of reasonable care, namely, the Hand formula,<sup>34</sup> but also a criterion for determining when the law should adopt a negligence rule and when it should adopt a standard of strict liability.

Taking as its starting point a proof that appropriately formulated standards of negligence and strict liability will both produce an optimal minimization of the sum of accident costs and accident prevention costs, the standard economic model points to the regulation of activity levels as the proper basis for choosing between liability rules. Residual accident costs—the costs of accidents that are not cost-efficient to prevent—must fall somewhere, and the claim of the standard model is that these costs ought to be placed on the party to a tort action whose activity stands in greater relative need of being subjected to level-controlling incentives. If it would maximize social welfare to create incentives that force those engaged in the plaintiff's activity to take into account, in the calculation of their rational self-interest, the extent to which they engage in that activity, then, according to the standard model, a negligence rule ought to be adopted. If it would maximize social welfare to give similar incentives to those engaged in the defendant's activity, then a rule of strict liability is called for. Notice that this is not meant simply to be a policy prescription for judges and

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33. STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5-46 (1987).

34. Coleman notes that the Hand formula, which calls for a comparison of the expected costs of accidents with costs of accident prevention, is a direct expression of the central function that economic analysis attributes to tort law, namely, "the optimal reduction of accident costs." COLEMAN, *supra* note 3, at 14.

legislators who have to choose a liability rule. It is also meant to be an explanation of existing legal doctrine. More specifically, the claim is that this approach both fits and justifies, in something like the Dworkinian sense, the following doctrinal facts: first, that the default standard of liability for unintentional harm is a negligence standard, and second, that strict liability is nonetheless adopted in certain contexts, in particular for so-called abnormally dangerous activities.<sup>35</sup>

My purpose here is not to defend the standard economic model. It is, rather, to point out that the assessment of competing explanations of tort law is a messier and more complicated business than Coleman seems to suggest. Coleman himself states that a satisfactory explanation of tort law has to take into account the substantive as well as the structural core of tort law. He nonetheless focuses, in both his criticism of economic analysis and his defense of corrective justice, on structure alone. So far as the criticism of economic analysis goes, he does not discuss the standard model and its attempt to account for the particular combination of liability rules that is actually found in the common law.<sup>36</sup> On the corrective justice side, he says little about what the appropriate liability rules should be. In previous work Coleman has tended to defend a fault standard,<sup>37</sup> but in *The Practice of Principle* he adopts an approach that seems almost formalistic in character. He argues that “corrective justice is an account of the second-order duty of repair,” and “the relevant first-order duties are not themselves duties of corrective justice.”<sup>38</sup> This is not to say that corrective justice is, in Coleman’s view, compatible with any set of first-order duties, since it is only intelligible as a principle of *justice* if it identifies certain first-order duties, such as the duty not to commit battery, as paradigmatic.<sup>39</sup> As Coleman says, in my view rightly, paradigm cases of this kind impose constraints on the content of corrective justice.<sup>40</sup> But the constraints Coleman envisages are minimal ones, and hence leave entirely open the question of what standard of liability should be adopted for unintentional harm. So far as the dispute with economic analysis goes, that question is surely a critical one.

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35. It is worth pointing out, in passing, that the activity-level idea might serve as the starting point for a somewhat more persuasive account of the bilateral structure of tort law than could otherwise be offered by economic analysis.

36. Somewhat oddly, throughout his discussion of the economic analysis of tort law, Coleman does not cite a single book or article in which this approach is defended, apart from the article in which Priest and Klein argue that the supposed efficiency of the common law can be explained by appeal to a causal-functional, evolutionary model. See Priest & Klein, *supra* note 26.

37. COLEMAN, *supra* note 1, at 367-69; Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995).

38. COLEMAN, *supra* note 3, at 32.

39. *Id.*

40. *Id.* at 33.

This apparent gap in Coleman's critique of the economic understanding of tort law has methodological implications. Coleman defines tort law's substance by reference to liability rules, and its structure by reference to the bilateral character of tort litigation. Taken together, substance and structure constitute the general configuration of doctrinal content and institutional features that a Dworkinian would say a constructive interpretation of tort law must "fit." But in asserting that corrective justice decisively defeats economic analysis on the dimension of fit, Coleman for the most part ignores the issue of substance. Once we begin to take substance into consideration, it is not so obvious how the debate about fit should come out. The deficiencies of the economic model in explaining the structure of tort law are, it could be argued, made up for by the accuracy of its account of the substance of tort law. In a similar vein, it might be pointed out that economic theorists are, for the most part, agreed on the content of the standard economic model, and that they have sometimes criticized corrective justice theorists for disagreeing too much among themselves and relying too heavily on controversial appeals to intuition.<sup>41</sup> Consensus among a particular group of theorists, while obviously not determinative, presumably carries at least some evidentiary weight in these matters.

If neither side decisively wins the dispute over substance, how are we to determine which one offers the better explanation of tort law? The obvious and, I think, unavoidable answer is to appeal to Dworkin's second interpretive dimension, namely, value. Coleman's preferred methodology of pragmatic conceptual analysis is, in a sense, an attempt to limit explanations of social practices to the Dworkinian dimension of fit, without having to bring in a dimension of value at all. What it means for an explanation to fit a practice is then explicated by reference to the features of semantic nonatomism, explanation by embodiment, holism, and so on. Coleman's articulation of these various features of conceptual analysis, understood now as different aspects of the dimension of fit, is, in my view, deeply illuminating. But the further claim that we can do without a dimension of value seems dubious. Coleman's claim that, on the dimension of fit, corrective justice is dispositively superior to economic analysis is presumably meant to provide at least indirect support for the methodology of pragmatic conceptual analysis itself, by showing that this form of explanation can produce determinate results. But if the claim is not obviously true, then support for the methodology is correspondingly undermined. It is also important to bear in mind here that accounts of corrective justice other than Coleman's address the substance of tort law in much greater detail, defending particular interpretations of the content of

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41. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 966 (2001).

negligence and strict liability, on the one hand, and offering accounts of which standard or combination of standards is normatively preferable, on the other.<sup>42</sup> In other words, there is a debate about these matters not just between economic theory and corrective justice, but also among different versions of corrective justice. It is difficult to see how there can be any hope of deciding which of these various competing views offers the best explanation of tort law without recourse to the moral defensibility of those views.<sup>43</sup>

Coleman might wish to argue in response that if two conceptual analyses of tort law both fit the practice equally well, in the sense that both meet the criteria of semantic nonatomism, holism, and so on in the same way and to the same degree, then there is nothing more to be said; tort law is capable of being explained in two different ways, and that is the end of the matter. There are, however, at least three difficulties with this response. First, the explanations in question are meant to appeal to *principles*, which are normative standards of a certain kind. Since tort law itself consists of a set of normative propositions, it is hard to avoid the conclusion that the explanatory relation between principles and tort law is properly understood as justificatory in character. But if that is so, then we surely must take account of the actual justificatory force of those principles in assessing the success of the explanations they underpin. The second, related difficulty is that there does not in any event seem to be a clear line to be drawn between the dimensions of fit and value. Dworkin said as much in his discussion of interpretivism,<sup>44</sup> and indeed Coleman persuasively argues that the Dworkinian dimension of fit is ultimately best understood as just one aspect

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42. ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 48-72 (1999) (advancing a fault standard based on fairness); WEINRIB, *supra* note 20 (advancing a fault standard based on self-determining agency); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (advocating strict liability based on causation); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (advocating a combination of fault and strict liability based on reciprocity); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72 (Gerald J. Postema ed., 2001) (advocating a combination of fault and strict liability based on avoidability and reciprocity).

43. Coleman comes close to acknowledging as much when he writes:

It is possible, of course, that the best theory of tort law will tell us that one of the two principles of liability [strict liability or fault liability] lacks rationale or justification—or that the two represent conflicting principles or ideals. In that case, it is possible that existing tort law would need to be reformed in a particular way—for example, by abandoning one principle of liability in favor of the other.

COLEMAN, *supra* note 3, at 16 n.3. I assume that the “best theory of tort law” is meant to be “the best explanation of tort law.” It is difficult to see why we should look to that theory to resolve issues of doctrinal reform unless we have already determined, in the course of selecting the theory as the best one, that it provides a morally attractive account of tort law as a whole. What Coleman describes here sounds suspiciously like what Dworkin calls the postinterpretive stage of constructive interpretation. See DWORKIN, *supra* note 29, at 66.

44. DWORKIN, *supra* note 29, at 229-32, 257.

of the dimension of value.<sup>45</sup> If that is so, however, then Coleman's apparent attempt to isolate the dimension of fit and make it serve as the sole basis of conceptual analysis seems artificial at best. The third difficulty with the suggested response concerns the pragmatic and holistic aspects of Coleman's methodological approach. In the absence of a decisive argument showing why substantive moral considerations should *not* be taken into account in assessing competing explanations, it seems odd that a pragmatic holist would wish to rule them out in advance. This is a little like saying that in the hold of Neurath's ship there are certain beams that the crew has not gotten around to examining closely, but that they think may play no significant structural role in holding the vessel together. The sailors would be well advised not to be too hasty in chucking the beams overboard as deadweight.

### C. *Fairness*

In chapters 4 and 5, Coleman turns from the critique of the economic model in order to sketch a very ambitious unifying explanation of a number of different aspects of legal practice. In doing so he invokes the theoretical norm of "consilience," which judges a theory of law as more attractive, all other things being equal, the better it is at unifying "distinct areas of inquiry."<sup>46</sup> The suggestion is that corrective and distributive justice, far from being completely independent principles, are best understood as local manifestations of a more general principle of fairness. That principle underpins not just tort law, but other legal institutions as well:

[T]he institutions of tort law and our redistributive institutions together articulate the requirements of fairness with respect to allocating the costs of life's misfortunes. Moreover, the idea of fairness common to these institutions is itself an aspect of a more general principle of fairness: fairness with respect to the terms of interaction among free and equal persons in a cooperative endeavor.<sup>47</sup>

Coleman is suggesting, in other words, that the principle of fairness he describes provides a unified explanation of apparently quite disparate areas of legal and political practice. These include, on the one hand, tort law and perhaps private law generally, and on the other hand, the entire panoply of legal doctrines and institutions—tax law, welfare law, administrative law,

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45. Coleman attributes the point to Mark Greenberg. COLEMAN, *supra* note 3, at 29 n.10, 162-63.

46. COLEMAN, *supra* note 3, at 39.

47. *Id.* at 43.

competition law, and so on—that gives effect to our collectively held views on distributive justice.

Coleman expands on this very interesting thesis in a number of different ways. First, he argues that the understanding of fairness that figures in tort law is partly determined by the entirety of moral practices in which the concept of fairness plays a role, including legal, political, and private practices.<sup>48</sup> This is one of the ways in which holism, which is one element of pragmatic conceptual analysis, enters into the explanation of tort law. But the appropriate conception of fairness is also partly determined by the practice of tort law itself: Corrective justice is not only embodied in tort law; it is also made more determinate by tort law.<sup>49</sup> Second, Coleman maintains that the conception of fairness that underpins tort law is grounded in the “‘responsibility-for-outcome’ relationship,”<sup>50</sup> and he defends a particular understanding of this relationship that is based on “the requirements of political fairness as reciprocity among free and equal persons.”<sup>51</sup> He argues for this view against the understanding of outcome-responsibility that I have defended elsewhere,<sup>52</sup> as well as against the causation-based understanding that libertarians have defended.

Third and finally, Coleman suggests that the overarching conception of fairness that underpins both corrective and distributive justice reflects “a kind of conceptual claim at the core of the liberal ideal.”<sup>53</sup> This ideal, which is concerned with the individual as a choosing agent, holds that “the individual [must] have a certain kind of ultimate responsibility for how his

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48. *Id.* at 57.

49. *Id.* at 56.

50. *Id.* at 44.

51. *Id.* at 45.

52. *See, e.g.,* Perry, *supra* note 42. I cannot respond in detail to Coleman’s critique, but I would like to correct an apparent misunderstanding. Coleman remarks, correctly, that I defend a conception of outcome-responsibility that is based on the avoidability, and hence the foreseeability, of harmful outcomes. But he argues that while foreseeability and avoidability are important aspects of our conception of effective agency, they “do not capture any recognizable notion of responsibility at all.” COLEMAN, *supra* note 3, at 51. He further argues that “there is [no] recognizable conception of *responsibility* whose content is independent of our practices of responsibility.” *Id.* In response, I have never claimed that there is a conception of responsibility that is independent of our practices. One part of the overall case that I make for the avoidability conception is that it represents the core of responsibility judgments as these figure in a number of different contexts, including tort law, criminal law, and private morality. *See* Perry, *supra* note 42, at 91-97. It is no part of my argument that the content of the avoidability conception is determined independently of these practices. The argument is, rather, at least in part, that different kinds of responsibility judgment, which figure in different kinds of moral and legal practices, can be seen to share a common core element. Coleman may be correct that there is no common usage of the term “responsibility” that coincides with the avoidability conception, but I am making a philosophical claim, not a claim about usage. That claim is that our various responsibility practices have something in common, namely, the elements of foreseeability and avoidability, which further tie those practices to our concept of effective agency. It is, in other words, a holistic claim of exactly the kind that Coleman favors.

53. COLEMAN, *supra* note 3, at 60.



life goes.”<sup>54</sup> The point of liberal political institutions, Coleman suggests, is to bring about the conditions under which it is equally possible for all individuals to be responsible for their lives: Circumstances affecting the material conditions of choice should be equalized, but only insofar as they are not themselves the effects of choice.<sup>55</sup> Distributive justice is concerned, in Coleman’s view, with fairness in the allocation of resources affecting the material conditions of choice, whereas corrective justice is concerned with fairness in the allocation of the costs of misfortunes that are the upshot of choice.<sup>56</sup>

Coleman’s fairness thesis, as described in the preceding two paragraphs, is in many ways a very attractive moral and political view, and there is much in it with which I agree. I do not intend to enter into a discussion of the substantive merits of the thesis here,<sup>57</sup> since Coleman offers only a sketch of the view and not a full defense of it. Instead, let me simply comment on certain of its methodological implications. Coleman clearly regards the fairness thesis as involving a further application of his favored methodology of pragmatic conceptual analysis. However, even if he were right that a conceptual analysis of a discrete area of law need not involve any moral assessment of that area of law—a view that I argued in the preceding Section is mistaken—it is difficult to see how he can make the same claim about a unifying proposal such as the fairness thesis. Coleman’s claim that corrective justice offers the best explanation of tort law is meant to track existing conceptual boundaries; that is why the further claim that moral evaluation is not involved might seem to have at least a superficial plausibility. But the fairness thesis involves the revision of existing boundaries; it asks us to see connections that are not in fact acknowledged in existing legal and political practice. Is it really plausible to suppose that the ideal of the individual as a choosing agent is simply a conceptual ideal that just happens to be embodied, in quite different ways, in both corrective and redistributive institutions? There are *many* different moral and political views that have plausibly been advanced as underpinning these institutions, some of which vehemently deny that they should be conceived in a unified fashion.

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54. *Id.*

55. *Id.* at 61. This aspect of Coleman’s general understanding of fairness clearly has affinities with the family of views in political theory that has been dubbed “luck egalitarianism.” See, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE* 65-119 (2000); G.A. COHEN, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906 (1989).

56. For a view along somewhat similar lines, see RIPSTEIN, *supra* note 42, at 264-95.

57. Coleman has defended aspects of this unifying thesis before, in an article coauthored with Arthur Ripstein. Coleman & Ripstein, *supra* note 37. I have criticized that version of the thesis at length elsewhere. Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune, and Tort Law*, in *ANALYZING LAW* 141 (Brian Bix ed., 1998).

At the very least, Coleman has to enter into substantive moral argument in order to criticize rival conceptions of outcome-responsibility and to establish that the principles of corrective and distributive justice, regarded by many theorists as completely independent from one another,<sup>58</sup> are in fact just manifestations of a more general principle. Moreover, by Coleman's own pragmatic and holistic lights, practice is partly determinative of principle and vice versa; there is no clear line of demarcation between the two. If that is so, however, it seems particularly difficult to maintain that the very aspect of a principle that makes it a principle, namely, its normative or justificatory force, is systematically excluded from the assessment of theories which appeal to the principle to explain a given practice. If it were not for the fact that Coleman seems to deny it, I would have thought it was obvious that he is, first, defending the moral attractiveness of a certain controversial political vision, and, second, appealing to the attractiveness of that vision to argue that quite disparate aspects of legal and political practice should be understood by reference to it. I would have thought it was obvious, in other words, that he is offering a Dworkinian interpretation of corrective and redistributive institutions.

## II. SUBSTANTIVE LEGAL POSITIVISM

### A. *The Possibility of Law*

In Part II of *The Practice of Principle*, Coleman develops and defends a substantive jurisprudential theory. The theory is positivist in character, which for Coleman means, at the most fundamental level, that "legal authority is to be explained in terms of a social convention."<sup>59</sup> The particular substantive theory Coleman develops is a version of inclusive legal positivism. Such a theory claims that criteria of legality—the criteria that determine, in a given legal system, which norms are *legal* norms—are not limited, as Joseph Raz and others have maintained,<sup>60</sup> to social sources such as legislation and judicial precedent, but may also include substantive, and in particular moral, tests.

Coleman sets out three questions that a jurisprudential theory should answer, the first two of which are said to be the central problems of jurisprudence.<sup>61</sup> The first question concerns "how to explain the possibility

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58. See, e.g., WEINRIB, *supra* note 20, at 61-63; Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992).

59. COLEMAN, *supra* note 3, at 148.

60. JOSEPH RAZ, *Authority, Law, and Morality*, in ETHICS IN THE PUBLIC DOMAIN 194 (1994); Scott Shapiro, *On Hart's Way Out*, in HART'S POSTSCRIPT, *supra* note 2, at 149.

61. COLEMAN, *supra* note 3, at 70.

of legal authority without appealing to legal authority itself.”<sup>62</sup> The problem Coleman has in mind here has been characterized by Scott Shapiro as the “chicken-egg” problem: “[I]f legal authority can only be created by rules, who makes the rules that creates the authority?”<sup>63</sup> The potential difficulty, as Shapiro describes it, is that an explanation of legal authority that appeals to legal rules will lead either to a vicious circle or to an infinite regress. The basic positivist answer to this puzzle, according to Coleman, is to explain legal authority by appeal to a convention—very loosely, an agreement of some kind—among certain persons, namely, those persons whom we can designate after the fact as “officials.” Coleman refers to this claim as the conventionality thesis.<sup>64</sup>

The second question a jurisprudential theory must answer is: “[I]n what way does law purport to govern conduct?”<sup>65</sup> Coleman says this question can be reframed as follows: What, if anything, is distinctive about the kind of authority that law claims for itself?<sup>66</sup> The prevalent answer to the second question among contemporary legal positivists is, according to Coleman, that law purports to govern as a practical authority, which means that law purports to create reasons for action for those who it claims are subject to its authority.<sup>67</sup> More particularly, law purports to create reasons that are normative grounds for action, rather than reasons that must themselves motivate action. In other words, law requires compliance with the reasons it purports to create, but it does not require that compliance be motivated *by* those reasons. Coleman clearly regards the positivist claim that law purports to create new reasons for action as just the starting point of a complete answer to his second question. This is because he accepts a version of Raz’s thesis that since law’s claim to possess legitimate authority is a necessary feature of law, law must be the kind of thing that is capable of possessing legitimate authority.<sup>68</sup> To show that law is capable of possessing legitimate authority, a positivist—meaning, in this context, someone who accepts that law’s claim to authority is to be explained as a claim to create new reasons for action—must show that law is in fact capable of giving people reasons for action they would not otherwise have.

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62. *Id.* (emphasis omitted).

63. Shapiro, *supra* note 60, at 152.

64. COLEMAN, *supra* note 3, at 71.

65. *Id.* (emphasis omitted).

66. A related question asks how we are to explain the apparent normativity of law, i.e., the fact that legal discourse employs, apparently irreducibly, such normative terms as “right,” “duty,” “obligation,” and so on.

67. COLEMAN, *supra* note 3, at 71.

68. See *id.* at 124; RAZ, *supra* note 60, at 94. I say that Coleman accepts a *version* of Raz’s thesis because, while he accepts that law claims authority, he does not accept that it claims legitimate, or moral, authority. But Coleman accepts that law purports to create “genuine rights and obligations,” and that is sufficiently close to Raz’s thesis to suffice for present purposes. See *infra* notes 70-73 and accompanying text.

The best known positivist account of how law is capable of creating reasons for action for nonofficials is Raz's service conception of authority. I discuss this conception later, when I set out Raz's argument for exclusive legal positivism. Coleman says that his version of legal positivism is compatible with a range of possible accounts of law's normativity.<sup>69</sup> In fact, I believe that the only *positivist* account that he considers is Raz's. As I discuss in the following Section, the one other possible source of normativity for law that Coleman considers is political morality. A view that explains law's normativity by taking law to be an expression of political morality is not one that is committed to a positivist answer to Coleman's second question. It is not committed, in other words, to the thesis that law purports to govern by creating reasons for action. It might well adopt a version of the general Dworkinian view that will be discussed shortly.

The third question that Coleman says a jurisprudential theory must answer is this: Under what conditions, if any, are the reasons that law purports to create moral reasons?<sup>70</sup> Coleman does not address this third question in any detail. What he does say is that while law "necessarily claims a normative power to create genuine rights and obligations," these rights and obligations need not be moral in nature, and the authority to create them need not be moral authority.<sup>71</sup> Raz, by contrast, regards law as necessarily claiming not just authority but legitimate or moral authority. He has defended this view by arguing, against Hart, that judges who accept a rule of recognition must accept (or at least must pretend to accept) that legal obligations are morally binding. The reason for this is that a person cannot sincerely accept a rule that purports to impose duties on other people except for moral reasons.<sup>72</sup> There is reason to think, though, that Coleman and Raz are not in fact very far apart here. Coleman characterizes the "genuine" rights and obligations that he says law purports to create as "figur[ing] in our determination of what we ought to do generally and not just in our deliberations about what we ought to do in playing the game 'law.'"<sup>73</sup> For present purposes, I do not think that anything of significance turns on the difference, if any, between genuine rights and obligations and moral rights and obligations.

Coleman says that his goal in Part II of the book is not to refute other jurisprudential views, but rather to set out a coherent and plausible

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69. COLEMAN, *supra* note 3, at 119.

70. *Id.* at 72.

71. *Id.* at 144. On this point Coleman agrees with Hart, who thinks that normative language has a completely different meaning in legal discourse from the meaning it has in moral discourse. See, e.g., H.L.A. HART, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM* 127, 153-61 (1982).

72. J. Raz, *Hart on Moral Rights and Legal Duties*, 4 *OXFORD J. LEGAL STUD.* 123, 129-31 (1984).

73. COLEMAN, *supra* note 3, at 143.

alternative to Dworkin's theory of law-as-integrity and Raz's exclusive positivism.<sup>74</sup> It is, of course, perfectly reasonable to focus in this way on the internal coherence and viability of one's preferred theory. But we nonetheless have reason briefly to consider, even at this early stage of inquiry, rival views to Coleman's own, because doing so permits us to see that Coleman frames the first of the three questions a jurisprudential theory is supposed to address in a way that invites the general kind of positivist response that he wishes to give. The reason this is important is not because Coleman's defense of his substantive theory is undermined by the way he frames the question, which I do not believe to be the case. The reason, rather, is that in addition to defending a particular substantive theory of law, Coleman also defends a certain positivist understanding of methodology in jurisprudence. The manner in which Coleman frames what he takes to be the central questions of jurisprudence will almost certainly bear on how we assess his more general conclusions about methodology.

The first of Coleman's three questions asks, it will be recalled, how we can explain the possibility of legal authority without appeal to legal authority. As framed, this question treats the question of the possibility of legal authority as *conceptual* in nature. This conceptual question arises because of what Shapiro calls the chicken-egg problem, i.e., the problem of which came first, the legal authority or the legal rules. Shapiro helpfully reformulates this problem as follows.<sup>75</sup> If we define "norm-governed behavior" as "behavior that is subject to the regulation of an actual norm," the problem is to determine how norm-governed behavior is possible.<sup>76</sup> A legal norm can apparently only govern a situation if it was created by someone engaged in norm-governed behavior, and we must therefore ask who created the norm that governs this norm-creating behavior, and so on ad infinitum (or ad circulum). As I think this reformulation makes clear, the chicken-egg problem only arises because law is already being conceptualized in a certain way, namely, as a social practice whose function is to guide conduct by creating new norms.<sup>77</sup> In other words, Coleman's

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74. *Id.* at 69.

75. Coleman accepts this reformulation. *Id.* at 78.

76. Shapiro, *supra* note 60, at 153.

77. Strictly speaking, the claim is that the function of law is to guide conduct by singling out, from within some domain of actual or possible norms, those that are to be treated as authoritatively binding and hence as reason-giving (for all persons who the law says fall within the norm's scope). This could involve the literal creation of a norm, as when a piece of legislation is enacted. It could involve singling out an existing social custom as binding law. Or it could involve, on an inclusive conception of positivism, the singling-out of a moral norm as binding law. As I discuss below, a number of positivists, including Shapiro, argue that inclusive positivism is incompatible with law's guidance function. The present point, though, is that whether or not the norm was created out of whole cloth by the legislature or a court, it is the fact that it was singled out as a *legal* norm that makes it, in the eyes of the law, categorically reason-giving for those subject to it. We might say that the act of singling out a norm as legally valid is equivalent to an act of creating a new norm, namely, a legal norm.

first question has been framed in a way that presupposes the positivist answer to his second question. The second question, it will be recalled, concerns the way in which law purports to govern conduct, and the positivist answer is that it purports to govern conduct by creating new reasons for action.<sup>78</sup>

At this point it might be asked: How else can law be conceptualized, other than as a social practice whose function is to guide conduct by creating new reasons for action? This is where alternative theories of law enter the picture. Conceived in the most abstract way possible, the essence of Dworkin's substantive theory of law is, I think, something like this. The function of law is to determine and, by institutionalized coercive means, to enforce (certain of) the moral rights and obligations that people actually have.<sup>79</sup> In an extreme form, such a theory would say that the function of law is to enforce moral rights and obligations that people have independently of the law, and *only* such rights and obligations. Even this extreme version of the general approach would not be vulnerable to the criticism, often leveled against extreme natural law theories, of not being sufficiently tied to social practice, since the core of the theory is the social phenomenon of institutionalized coercion. But a theory that emphasizes the enforcement of existing rights and obligations need not take this extreme form, since such a theory can of course recognize that the social practice of law is capable of giving rise to new moral rights and obligations, i.e., moral rights and obligations that exist only because the practice exists. Dworkin's own theory of law-as-integrity takes this form. But even such a moderate version of the general approach still claims that the most fundamental feature of law is the judicial enforcement of existing rights and obligations, rather than the creation by fiat of new rights and obligations.<sup>80</sup> The creation of new rights and obligations by means of, for example, practices of legislation and precedent is of course an important part of law, but those practices must themselves be justified by reference to underlying moral principles. From the point of view of a theory of this kind, the problem of explaining legal

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78. I take it to be obvious that if law is understood to govern conduct by creating new reasons for action, those reasons for action must in turn be understood, at least in the standard case, as exclusionary norms.

79. I have defended a view along these general lines in Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 215-19, 239-43 (1987) [hereinafter Perry, *Judicial Obligation*], Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. CAL. L. REV. 913, 957-63, 981-86 (1989), and Stephen R. Perry, *Two Models of Legal Principles*, 82 IOWA L. REV. 787, 794-801 (1997) [hereinafter Perry, *Two Models*].

80. See DWORKIN, *supra* note 29, at 400-01 (stating that "law is a matter of rights tenable in court"). A Dworkinian theory thus offers an answer to Coleman's second question that differs from the positivist answer. The Dworkinian answer is that law purports to govern conduct—a less question-begging formulation would be that law purports to govern normative relations among persons—not necessarily by creating new rights and obligations, but rather by enforcing existing ones.

authority is not *conceptual*, but rather *normative*. It is the problem of justifying the enforcement of moral rights and obligations by means of state coercion. This is one way, although by no means the only way, that moral argument enters into Dworkin's substantive theory of law.

My purpose here is not to defend a Dworkinian theory. It is, rather, simply to point out that Coleman's formulation of what he takes to be the two central questions of jurisprudence is already skewed toward positivist answers. The first question, in particular, presupposes that law has a certain function, but the attribution of that function to law is contestable, and at some point it must be defended. This is an issue to which I return in Part III below.

### B. *The Conventionality Thesis*

As noted earlier, Coleman maintains that the heart of substantive legal positivism is the conventionality thesis, which holds that legal authority is explained by appeal to a convention of some kind. Chapter 7 of *The Practice of Principle* is almost certainly destined to become one of the classic discussions of this view. Coleman takes as his starting point Hart's understanding of the relevant convention, which Hart called the rule of recognition. Coleman's examination of Hart's substantive theory is illuminating, and it corrects a number of serious misunderstandings on the part of other commentators. But Coleman's account of the rule of recognition is much more than an interpretation of Hart. It is a sophisticated and philosophically powerful version of the conventionality thesis that stands on its own.

According to Hart, the rule of recognition is a particular instance of a social rule.<sup>81</sup> A social rule involves, in the first instance, a general pattern of convergent behavior among a specified group of persons. A social rule is also marked by an "internal aspect," which consists of a "reflective critical attitude" toward the pattern of behavior on the part of the group's members.<sup>82</sup> The internal aspect of the rule consists in a certain shared attitude among members of the group, such that they regard the pattern of behavior in question as obligatory, and divergence from the pattern as justifiably subject to criticism. In the case of the rule of recognition, the relevant group consists of those persons in a society who are appropriately identified as "officials." The rule sets out criteria for identifying which other norms are, within the legal system in question, valid legal norms. Hart also regarded the rule of recognition as imposing a duty on officials,<sup>83</sup> and

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81. H.L.A. HART, *THE CONCEPT OF LAW* 101-03 (2d ed. 1994).

82. *Id.* at 55-57.

83. On the proper interpretation of Hart on this point, see JOSEPH RAZ, *THE AUTHORITY OF LAW* 92-93 (1979).

Coleman follows him in this. In Coleman's words, the rule imposes on officials "the duty to evaluate conduct by appealing to all and only those norms that are valid under the rule."<sup>84</sup>

Coleman makes the point that the rule of recognition, like other social rules, only comes into existence because it is practiced; the fact that it is practiced is thus an existence condition of the rule.<sup>85</sup> This does not mean that the content of the rule is completely constituted by the behavior of officials, since "there must always be a gap between the mere description of rule-guided behavior and the content of the rule that guides it."<sup>86</sup> The fact that the existence of the rule of recognition depends on its being practiced distinguishes it from the rules that it identifies as legally valid, since these latter rules exist whether anyone complies with them or not. This is the key to solving the problem of the possibility of legal authority: The infinite regress of legal norms stops with a norm that exists not because it is valid, but because it is practiced. The rule of recognition's existence depends, however, not just on a convergence of behavior, but on the fact that officials adopt the shared attitude that Hart terms the internal point of view. The internal point of view, Coleman maintains, is itself an existence condition of the rule of recognition.<sup>87</sup> This fact has the following implication. For the rule of recognition to exist, officials not only must conform their conduct to the requisite pattern of behavior, but must in doing so be guided by the rule. Following Shapiro, Coleman holds that "[t]o take the internal point of view toward rule-governed behavior is to take the rule . . . as the reason for one's compliance."<sup>88</sup>

Coleman states that "[a]cceptance of the rule of recognition from the internal point of view by officials is a conceptual requirement of the possibility of law."<sup>89</sup> This is only true, however, if nonconventional responses to the problem of the authority of law are not just ruled out, but are ruled out *on conceptual grounds*. The conventionalist account outlined

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84. COLEMAN, *supra* note 3, at 85. As Coleman recognizes, this formulation is only a first cut at the problem. But it will do for present purposes.

85. *Id.* at 78.

86. *Id.* at 80.

87. *Id.* at 83.

88. *Id.* at 82. As Coleman recognizes, this solution to the problem of the possibility of legal authority is essentially the same as Shapiro's solution. *Id.* at 78. Shapiro distinguishes "'norm-governed' behavior," defined as "behavior that is subject to the regulation of an actual norm, whether or not the behavior conforms to the norm," from "'norm-guided' behavior," which is "behavior that conforms to a norm for the reason that the norm regulates the action in question." Shapiro, *supra* note 60, at 153. The chicken-egg problem is the problem of explaining how legal norm-governed behavior is possible. Hart's solution, according to Shapiro, was to insist that all norm-governed behavior must ultimately depend, not on other norm-governed behavior, but rather on norm-guided behavior. As Shapiro puts the point, "Legal rules come into existence by virtue of the fact that certain people accept certain standards of conduct as norms and guide their conduct accordingly." *Id.* at 154. The people in question are officials, and the standard of conduct they accept as a norm is the rule of recognition.

89. COLEMAN, *supra* note 3, at 76.



in the preceding paragraph is an ingenious and elegant solution to the problem of legal authority, but it bears remarking that it is not, on the face of it, the only possible solution. As Coleman notes, the natural law tradition explains the possibility of legal authority by appealing to moral authority.<sup>90</sup> In contemporary legal philosophy, Dworkin has similarly pointed out that even if the existence of a legal system depends on the existence of a certain kind of social fact, namely, convergent behavior among officials, the apparent normativity of their practice can be explained in nonconventionalist terms if we suppose that each official regards that convergent behavior as justified either by a single, shared conception of political morality or, more weakly, by *some* conception of political morality that may vary from official to official.<sup>91</sup> A nonconventionalist solution of this kind appears to be possible even if one thinks that the function of law is to guide conduct and not, as Dworkin himself thinks, to enforce existing rights and obligations.

Of course, a Dworkinian must show that an appeal to morality on the part of officials is in some appropriate sense necessarily connected with the idea of law and not just an interesting contingent fact (if indeed it is a fact). By the same token, though, a positivist is presumably obliged to show that legal authority must necessarily be explained by an appeal to convention. Coleman, however, does not take up this issue. He simply points out that the prevailing view among positivists is that there is no “conceptual connection” between law and morality,<sup>92</sup> without offering any argument to show why that is so. A plausible explanation for this omission is that Coleman is not trying in Part II of the book to refute other theories of law, but is simply setting out his own theory in as coherent and plausible a fashion as possible.<sup>93</sup> This is fair enough. Still, the issue raises further concerns about methodology, which I address in Part III.

The conventionalist solution also poses a challenge of its own, beyond the defense of the claim that the notion of a convention is a conceptually necessary aspect of law. Recall that Coleman accepts that a successful positivist theory of law must explain law’s normativity, in the strong sense of showing that law is capable of giving people reasons for action that they would not otherwise have. If the notion of a convention among officials is central to the concept of law, then it must be shown that the existence of such a convention among officials is capable of giving people new reasons for action. Coleman acknowledges as much when he writes that the adoption of the internal point of view by officials is not just an existence

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90. *Id.* at 74.

91. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 59-60 (1978).

92. COLEMAN, *supra* note 3, at 74.

93. *Id.* at 69.

condition of the rule of recognition, but also “a possibility condition for the rule’s providing reason for action.”<sup>94</sup>

Coleman’s explanation of how the rule of recognition can give rise to new reasons for action begins with an examination of “the normative structure of the pattern of behavior” to which those who adopt the rule of recognition are thereby committed.<sup>95</sup> He considers the possibility that the rule of recognition is a convention in the narrow sense of being a solution to a coordination problem, namely, the problem of settling on a set of criteria for identifying which norms are to count as legally valid. As Coleman notes, this assumes that would-be officials have already agreed, for whatever reason, that a legal system is desirable, and that they each have individual preferences as to what the set of criteria of legal validity should be. Even if their individual preferences differ, they may nonetheless have a dominant preference that they all adopt the same set. This would mean that we are dealing not with a pure coordination problem, but rather with a game of partial conflict (a “battle of the sexes”). Adopting a single rule of recognition solves this problem. Treating the rule of recognition as a coordination convention also explains how a general pattern of behavior can create reasons for action, since each official has reason, so long as others comply with the rule of recognition, to comply with it herself and refrain from imposing her preferred set of criteria of legal validity. The internal point of view plays a “subsidiary role” in this account, because knowledge of the psychological capacity of humans to commit to a norm can be a causal factor in providing the requisite assurance that others are in fact complying with the rule of recognition.<sup>96</sup>

An interpretation of the rule of recognition along these general lines has been proposed by Gerald Postema<sup>97</sup> and, in previous work, by Coleman.<sup>98</sup> But in *The Practice of Principle*, Coleman rejects this interpretation for the following reasons. First, there is no good ground for insisting, not just that officials have preferences concerning possible criteria of legal validity that are structured in the form of a game of partial conflict, but that their having such preferences is a conceptual truth about law.<sup>99</sup> Second, the explanation that this account offers of why officials adopt the rule of recognition focuses too narrowly on reasons for behaving as others do simply because they behave that way; the account leaves insufficient room for the possibility that a set of criteria of legal validity might have been adopted

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94. *Id.* at 83 (emphasis omitted).

95. *Id.* at 91.

96. *Id.* at 93-94.

97. Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 187 (1982).

98. *E.g.*, Jules Coleman, *Authority and Reason*, in *THE AUTONOMY OF LAW* 287, 302 (Robert P. George ed., 1996).

99. COLEMAN, *supra* note 3, at 94-95.

“as part of a plan or project (a legal system) that can serve valuable ends.”<sup>100</sup> Third, while the coordination account can explain how social rules can be reasons, it fails to explain how such rules can impose duties.<sup>101</sup> These reasons for rejecting the coordination account are completely persuasive. One might further add that the demotion of the internal point of view to playing a mere causal role in the explanation of the normativity of the rule of recognition does not seem consistent with Coleman’s insistence that acceptance of the rule of recognition from the internal point of view is a *conceptual* condition of the possibility of law.<sup>102</sup>

In what sense, then, is the rule of recognition conventional in character, and how do we show that it is capable of creating duties? Following a suggestion by Scott Shapiro, Coleman turns to Michael Bratman’s notion of “shared cooperative activity” (SCA) to answer these questions.<sup>103</sup> Bratman identifies three characteristic features of an SCA, which are, in somewhat abbreviated form, the following. First, each participant in an SCA attempts to guide his behavior with an eye to the intentions and actions of the other participants, knowing that the others seek to do the same (mutual responsiveness). Second, each participant is committed to the activity, though perhaps for different reasons in each case, and the mutual responsiveness of all participants is in pursuit of this commitment (commitment to the joint activity). Third, each participant is committed to supporting other participants in carrying out their role in the joint activity, with a view to all of them performing the joint activity successfully (commitment to mutual support). Coleman holds that “[t]he practice of officials of being committed to a set of criteria of legality exhibits these features,” as when lower-court judges are responsive to the intentions of higher-court judges regarding the bindingness of precedent.<sup>104</sup> Coleman approvingly quotes Kenneth Himma’s claim that “[i]t is a conceptual truth about law that officials must coordinate their behavior with one another in various ways that are responsive to the intentions and actions of the others.”<sup>105</sup> As for the normativity of the practice, Coleman quotes Himma again. This passage is worth setting out at length:

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100. *Id.* at 95.

101. *Cf.* LESLIE GREEN, *THE AUTHORITY OF THE STATE* 111-15 (1988) (arguing that conventions create first-order rather than exclusionary reasons for action, and hence cannot give rise to binding commitments or duties); Perry, *Judicial Obligation*, *supra* note 79, at 253 n.128 (criticizing Gerald Postema’s argument that the rule of recognition can be “reconstructed” as a solution to a coordination problem on the ground that this view cannot account for the duty of officials to apply valid laws).

102. COLEMAN, *supra* note 3, at 76.

103. *Id.* at 96-98 (citing Michael E. Bratman, *Shared Cooperative Activity*, 101 *PHIL. REV.* 327 (1992)).

104. *Id.* at 96-97.

105. *Id.* at 98 (quoting Kenneth Einar Himma, *Inclusive Legal Positivism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY* (Jules Coleman & Scott Shapiro eds.,

“The notion of an SCA involves more than just a convergence of unilateral acceptances of the rule of recognition. It involves a joint *commitment* on the part of the participants to the activity governed by the rule of recognition . . . . And there is no mystery (or at least not one that a legal theorist is obliged to solve) about how joint commitments can give rise to obligations; insofar as such commitments induce reliance and a justified set of expectations (whether explicitly or not), they can give rise to obligations.”<sup>106</sup>

The idea that the rule of recognition should be interpreted in light of Bratman’s notion of shared cooperative activity is an intriguing one. While I think that a great deal more needs to be said in support of this idea, I have no doubt that, with further refinement, it can serve as the foundation of a powerful version of substantive legal positivism. If the proposal is to succeed, though, a number of difficulties must be overcome. Let me point out what I take to be the most serious of these.<sup>107</sup>

First, the proposal must reconcile the hierarchical nature of law with the element of “mutual responsiveness” in an SCA. Law is not like the one other example of an SCA that Coleman gives, namely, going for a walk together. Nor is it like the examples of SCAs that Bratman himself tends to give, such as painting a house together, singing a duet, or going on a trip together.<sup>108</sup> Unlike these other examples, law involves asymmetrical normative relations between various participants, often based on categorical obligations. The legislature is obligated to defer to the Supreme Court in constitutional matters; courts are obligated, with respect to matters within a legislature’s jurisdiction, to defer to the legislature; lower courts are obligated to defer to higher courts; and citizens are obligated to defer to legal authority generally.<sup>109</sup> Perhaps one can make sense of the “normative structure” of relations among officials (and citizens?) in terms of mutual responsiveness, but more needs to be said to establish this.

Second and relatedly, it is not clear that Himma’s explanation of the manner in which the rule of recognition obligates officials is an appropriate one. Himma points to the fact of “joint commitment” and argues that there is no mystery about the manner in which joint commitments can create obligations, namely, by inducing reliance and justified expectations. In fact,

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2001)). Himma’s essay was unpublished at the time I wrote this Review. My discussion of the essay is limited to the passages quoted by Coleman.

106. *Id.* (quoting Himma, *supra* note 105) (ellipsis in original).

107. Since writing this Review, I have read an unpublished paper by Scott Shapiro in which he sets out a detailed, Bratman-inspired account of judicial practice, and in which he also addresses questions of the general kind I discuss in the text. Scott Shapiro, *Law, Plans, and Practical Reason* (2001) (unpublished manuscript, on file with author). I cannot consider the success of Shapiro’s account here.

108. Bratman, *supra* note 103, at 327.

109. There are of course exceptions to all these generalizations, but they nonetheless serve to illustrate the basic concern.

though, it is not *joint* commitments that create obligations in this fashion; it is *individual* commitments. Of course, I might not commit unless you commit and vice versa, so joint commitments can play a causal role in determining whether or not individual commitments are made. But the source of the obligation is the individual, voluntary act of commitment on the part of each official. It is because I publicly commit to behaving in a certain way that others are induced to rely on me actually to behave in that way. Furthermore, while inducing reliance and justified expectations can indeed give rise to obligations, the obligations that arise are conditional. Unless an undertaking or commitment amounts to a *promise*—i.e., amounts to an act in which one voluntarily places oneself under a categorical obligation—one does not have to perform that which one has undertaken to do, as long as one ensures that those to whom one gave the commitment are not made worse off by their reliance.<sup>110</sup>

What are we to make, for example, of the lower court judge who lets it be known that henceforth she no longer regards herself as bound by the decisions of a higher court in some area of the law in which she is an acknowledged expert; that she is making this announcement so that other judges will not in the future rely on her to follow precedent in that area of law; and that, in the spirit of mutual responsiveness, she invites judges on the higher court to respond to her intentions and future actions with a view to making their joint activity of judging as successful as possible? Hart was quite clear that, as long as an unspecified minimum proportion of the members of a group regarded all members of the group as bound by a social rule, then all *were* bound, regardless of individual views on the matter.<sup>111</sup> Coleman similarly insists that the duties that arise under the rule of recognition cannot be “extinguished unilaterally,” and offers this as a further criticism of the coordination convention view.<sup>112</sup> But the obligations that arise under an SCA can be extinguished unilaterally, at least on the account that Himma gives and that Coleman accepts. The only way to avoid this conclusion would be to say that the individual commitments in question amount to promises. Even then, the obligation would depend on the voluntary acts of individuals, considered one by one. I assume that no defender of a Hartian version of positivism would want to make the

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110. Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247, 285-86 (1992); Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 ARISTOTELIAN SOC'Y 79 (Supp. 1972).

111. HART, *supra* note 81, at 115-16.

112. COLEMAN, *supra* note 3, at 95 (“[A] duty-imposing rule cannot normally be extinguished unilaterally, whereas rules that are reasons solely in virtue of one’s commitment to them can, in the typical case, be unilaterally extinguished.”). So far as I can tell, this point applies as much to commitments that are given in an SCA as it does to commitments that are given to maintain a coordinating convention.

bindingness of the rule of recognition on officials depend on this kind of individualistic consideration.<sup>113</sup>

The third and final problem with the SCA idea that I wish to mention is this. Is it so clear that if the “normative structure” that holds among officials is best regarded as an SCA in Bratman’s sense, we are really dealing with a practice that is *conventional* in character? To be sure, we are dealing with normatively structured social activity, but that is also true under Dworkin’s interpretation of what judges do. In defending the SCA idea, Coleman writes that “[t]he best explanation of judges’ responsiveness to one another is their commitment to the goal of making possible the existence of a durable legal practice (though judges may have different reasons for thinking that a durable, sustained legal practice is desirable).”<sup>114</sup> He goes on to say that judicial practice constitutes, under the SCA view, a framework for bargaining that allows for substantial disagreement about the content of the rules that constitute the practice.<sup>115</sup> Such disagreement can be “substantive and important,” and “might well be settled by an appeal to substantive moral argument about how one ought to proceed, and that may invite discussion about the point of the practice.”<sup>116</sup> Coleman is of course being deliberately provocative here, by suggesting that positivism can incorporate Dworkin’s claim that judges often decide individual cases by appealing to a general moral interpretation of the social practice of law.

The overall goal to which judges are committed on the SCA view is, Coleman says, that of making possible the existence of a durable legal practice. But a durable legal practice can take many forms. The further suggestion that the shape and content of the practice might be determined by appeal to moral argument invites the worry that the practice is not, after all, a conventional one. Most participants in this debate, including both Hart and Coleman, have accepted Dworkin’s characterization of a conventional normative practice as one in which the fact of agreement about what a rule requires is an essential part of the grounds for treating the rule as reason-giving.<sup>117</sup> The rule at issue in the present context is the rule of recognition.

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113. Another way in which individual actions within a joint enterprise might give rise to obligations was suggested by Hart himself, in the form of his principle of fair play. See H.L.A. Hart, *Are There Any Natural Rights?*, in THEORIES OF RIGHTS 77 (Jeremy Waldron ed., 1984). As Waldron has observed, Hart did not think that either legal systems or the practices of officials within legal systems were joint enterprises in the necessary sense. See Jeremy Waldron, *All We Like Sheep*, 12 CAN. J.L. & JURISPRUDENCE 169, 184-85 (1999).

114. COLEMAN, *supra* note 3, at 97. In this respect, the rule of recognition is very different from Bratman’s main examples of SCAs, which involve such activities as people singing a duet or painting a house together. Any obligations that arise out of such interactions would be, for the reasons given earlier in the text, voluntarily extinguishable. Beyond that, these activities, unlike the activities of officials, do not have normative implications for anyone other than the immediate participants.

115. *Id.* at 99.

116. *Id.*

117. DWORKIN, *supra* note 91, at 53.

According to the SCA-based interpretation of the rule of recognition that Coleman presents, judges might have different views about the moral point of the social practice of law, and they might invoke those views to determine “the content of the rules that constitute the practice.”<sup>118</sup> The concern is that individual judges might adhere to the rule of recognition not because other judges generally adhere to it, but rather because they think it has moral point or value. In fact the idea of the “practice” seems to become an almost empty vessel in search of both content and justification, and the obvious place to look for both is political morality.

The picture that most naturally emerges from Coleman’s discussion of the SCA idea is one in which individual judges regard their joint activity as morally worthwhile, but possibly each for different reasons.<sup>119</sup> On its face, this picture is strongly reminiscent of Dworkin’s claim, mentioned earlier, that the apparent normativity of judicial practice can be explained in nonconventionalist terms if we suppose that each judge regards the convergent behavior that constitutes the practice as justified either by a shared conception of political morality or at least by *some* conception of political morality that may vary from judge to judge.<sup>120</sup> Coleman goes so far as to suggest that, “given the structure of [Dworkin’s] theory,” Dworkin cannot avail himself of the idea that legal practice is an SCA,<sup>121</sup> but he does not say why this is so. In fact, given Coleman’s description of how the SCA idea works in practice, the more natural conclusion would seem to be that this just *is* Dworkin’s theory.

Perhaps Coleman should be understood as trying to preserve the positivist character of his theory not through a strict adherence to conventionalism, but rather through the claim that the function of law is the guidance of conduct. Thus he writes that although law can serve many valuable ends, “none is necessary to the concept of law”: “Whatever ends it serves, . . . the distinctive feature of law according to most positivists is that it serves these ends through rules that purport to guide conduct.”<sup>122</sup> Of course Dworkin does not insist, nor need he, that law serves any particular end as a conceptual matter. A core premise of Dworkin’s theory is that law is assumed by officials to be capable of serving *some* valuable end, and this is a premise that Coleman might plausibly now be taken to share. Moreover, Dworkin can certainly allow that the guidance of conduct is one possible function that could be attributed to law, as long as that attribution

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118. COLEMAN, *supra* note 3, at 99.

119. Given that the practice in question is one that purports to impose duties not just on officials but on members of society at large, Raz’s argument, to the effect that officials must, if sincere, accept the rule of recognition for moral reasons, seems apposite. *See supra* text accompanying note 72.

120. *See supra* text accompanying note 91.

121. COLEMAN, *supra* note 3, at 100.

122. *Id.* at 101.

is defended by means of substantive moral argument. But once conventionalism has effectively been abandoned, it seems quite arbitrary to build that function into the very concept of law.

### C. *Inclusive Legal Positivism*

In this Section, I turn to Coleman's defense of inclusive legal positivism. Inclusive legal positivism holds that the criteria of legal validity can, but need not be, moral in character. The contrast is with exclusive legal positivism, which holds that the criteria of legal validity must be social sources such as legislation and judicial precedent, and hence cannot involve an appeal to moral argument.

As Coleman remarks, the most important line of argument for exclusive legal positivism is conceptual in nature. Joseph Raz has presented the best known argument of this kind.<sup>123</sup> Raz argues that law claims legitimate—meaning moral—authority, and hence must be capable of possessing such authority. Law is capable of possessing legitimate authority, according to Raz, because it is capable of mediating between persons and the reasons—including moral reasons—that apply to them. On Raz's view, the law claims that its directives are content-independent reasons for action that *replace* (certain of) the reasons that people already have, i.e., the reasons people have apart from the existence of the law. A legal directive purports to be content-independent because it purports to be a reason for action simply because it has the status of a legal directive, and not because it has a certain content. In purporting to replace (certain of) the reasons that apply to people, law purports to create so-called exclusionary reasons, which preclude people from acting directly on the reasons that are supposed to have been replaced.<sup>124</sup> The law succeeds in creating the content-independent, exclusionary reasons that it claims to create just in case people would do better overall in complying with the reasons that apply to them if they were to follow the law's directives than if they were to act on the basis of their own judgment about what those reasons require. But the law can only replace the reasons that underlie a directive with a new, mediating reason if it is possible to identify the directive without appealing to the underlying reasons. This is in turn only possible, Raz argues, if legal

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123. See RAZ, *supra* note 60.

124. Coleman follows Hart in characterizing legal directives as purporting to create content-independent, "peremptory" reasons for action. "A peremptory reason is a reason not to deliberate on the underlying merits of complying with a directive." COLEMAN, *supra* note 3, at 122 (emphasis omitted); see also H.L.A. HART, *Commands and Authoritative Reasons*, in *ESSAYS ON BENTHAM*, *supra* note 71, at 243, 253-54 ("[T]he word 'peremptory' . . . means cutting off deliberation, debate or argument."). This is too strong, however. As Raz has made clear, what is foreclosed is not deliberation about the underlying reasons, but rather action on the basis of those reasons. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 39 (1986).



directives are identifiable solely by reference to social facts, without recourse to moral argument. This is the so-called sources thesis.

Coleman accepts that the *grounds* of criteria of legal validity must be a social fact, namely, a convention accepted by officials, but denies that the *content* of the criteria must refer exclusively to social facts.<sup>125</sup> The content can, but need not, be given by reference to morality. The requirements of morality can of course be controversial, but this is not a problem for inclusive legal positivism because judges can agree about what the rule of recognition is without necessarily agreeing about what the rule requires.<sup>126</sup>

Coleman notes that Raz's argument for the sources thesis does not seem to preclude the possibility that a moral principle might be treated as a necessary condition of the legal validity of a directive. This is because, in such a case, the principle need have nothing to do with the justifying reasons underlying the directive; it could simply set an independent moral test that directives must meet to count as law.<sup>127</sup> Constitutional provisions like the Equal Protection Clause are often understood in just this way. Coleman, however, wishes to defend a robust form of inclusive positivism, in which moral principles can serve as sufficient conditions of legal validity. In the case of criteria of legal validity that treat morality as sufficient for legality, Raz's argument has direct application and must be addressed. Coleman's response, which he has defended before, is to distinguish between criteria of legality and criteria of identification:

If law is to be capable of being an authority, there must be some way of identifying it and its content without recourse to morality; but there is no reason why that vehicle must be the rule of recognition, and no reason, therefore, why the rule of recognition should not be capable of imposing morality conditions, even as sufficient conditions of legality.<sup>128</sup>

Perhaps, Coleman suggests, most people learn the law not from the rule of recognition, but from a "legal-moral expert."

What about the legal-moral expert himself? Obviously, *he* has to engage in moral reasoning to learn what the law is. But does the law not have to be in principle identifiable without recourse to moral argument by each and every person over whom it claims authority? Coleman responds to this objection by saying that the law is in principle identifiable without appeal to moral argument even by the legal-moral expert, since somebody else might have been the expert. "The fact that someone has to be the

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125. COLEMAN, *supra* note 3, at 107.

126. *Id.* at 116.

127. *Id.* at 126-27; see also W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 139-40 (1994).

128. COLEMAN, *supra* note 3, at 128.

expert does not mean the law is the kind of thing that cannot, in principle, be identified by each person over whom the law claims authority without appealing to the underlying moral justification of the law.”<sup>129</sup> To deal with further possible complications, the details of which need not detain us here, Coleman also supposes that the expert is not subject to the jurisdiction of the relevant legal system. He assumes that the legal system is that of the United States, and the expert is a Swede who lives in Sweden. Every individual who is subject to the jurisdiction of the American legal system could, in principle, learn the law from the Swede. Coleman argues that to insist that everyone must, in principle, be capable of learning what the law is from the rule of recognition is simply to beg the question. As it happens, most people learn about the law from sources other than the rule of recognition, and in any event “the authority of a law does not depend on how one learns what the law is or on what its content is, but on how the law can affect one’s deliberations.”<sup>130</sup>

This is an extremely ingenious argument, but it is subject to the following difficulty. Either the Swede is designated by the American legal system itself as the legal-moral expert, or else those who are subject to the jurisdiction of that system have somehow just discovered that the Swede’s pronouncements are a reliable indicator of what behavior is required by the moral principles that, by hypothesis, have been incorporated into American law. If the Swede has been designated as the official expert, then the source of the law is not morality but rather a social fact, namely, the pronouncements of the Swede. The law is what the Swede says it is, and this is so even if the Swede gets morality wrong part of the time, or, for that matter, all of the time. (Of course, the Swede would presumably have been designated as the expert because it was believed that he was more likely to get morality right than those who are subject to the American legal system, but this belief might be mistaken.)

Suppose, on the other hand, that Americans have somehow just discovered the moral expertise of the Swede. In that case, whether the law can be identified without recourse to moral argument depends on several contingent facts. First, it depends on the existence of an expert like the Swede; there might simply be no such person. Second, and perhaps more importantly, it depends on the fact that Americans have accurately identified the Swede as an expert who gets morality right most of the time. There are two points to be noted here. First, if Americans are to be able to identify the law without recourse to moral argument, then it is not enough that they believe the Swede is likely to get morality right. It is, after all, not the beliefs of the Swede that have been incorporated by reference into law,

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129. *Id.* at 129.

130. *Id.* at 130.

but rather some aspect of morality itself. The Swede must get it right all or most of the time, and Americans must know that he gets it right. But it would seem that the only way they could know this without themselves engaging in moral argument would be to consult some other expert, and this is the start of an infinite regress.<sup>131</sup> The second point is that it seems quite odd to say, as Coleman says, that it is a conceptual truth that law must be capable of guiding conduct, yet at the same time to allow law's capacity to guide conduct to turn on contingent facts of the kind just noted.

Coleman does not respond directly to the dilemma just posed, but he responds implicitly during the course of a discussion in chapter 10 of a different challenge to inclusive legal positivism that has been advanced by Scott Shapiro. In order to appreciate Coleman's response, we must first set out Shapiro's challenge. Shapiro distinguishes between two ways in which a rule can guide conduct. A person is *motivationally* guided by a legal rule "when his or her conformity is motivated by the fact that the rule regulates the conduct in question."<sup>132</sup> A person is *epistemically* guided by a legal rule "when the person learns of his legal obligations from the rule provided by those in authority and conforms to the rule."<sup>133</sup> Shapiro points out that a rule can epistemically guide conduct even though compliance is motivated not by the rule itself but by, say, the existence of sanctions. Shapiro interprets Hart as making a "composite claim" about the guidance function of the law. So far as ordinary persons are concerned, the function of the law is to provide epistemic guidance. The law simply does not care why ordinary persons comply with the law, as long as they comply. In the case of officials, though, Shapiro argues, in conformity with his understanding of Hart's solution to the chicken-egg problem, that the rule of recognition must guide judges motivationally. He thus explains the internal point of view as the requirement that judges must not simply comply with the rule of recognition, but must also be motivated by it. Shapiro further interprets Hart as holding that judges must be motivationally and not just

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131. Notice that this is not a problem for Raz's argument for the sources thesis, since that argument does not assume that those subject to a morally legitimate legal system must know that it is legitimate. The system is legitimate because those who are subject to its authority are more likely to comply with the (moral) reasons that apply to them than they would be if they tried to act on their own judgment. This fact could be true even if those who are subject to the legal system's authority do not know that it is true. This brings out the interesting fact that, on Raz's account, the rationality of complying with a de facto authority is presumably dependent not on the authority's actual legitimacy, but rather on its perceived legitimacy. It might be rational for a person to believe, on the evidence available, that she is more likely to comply with the reasons that apply to her if she follows a legal system's directives than if she acts on her own judgment, and hence it might be rational for her to comply with those directives. All of this is completely compatible with the possibility that she is mistaken in her beliefs, so that the legal system is not in fact a morally legitimate authority for her.

132. Shapiro, *supra* note 60, at 173.

133. *Id.*

epistemically guided by the rules that are identified by the rule of recognition as legally valid.

Suppose now that a certain legal system has a rule of recognition that includes a sufficiency clause that says, “Act in accordance with the rules of morality.”<sup>134</sup> This legal system cannot provide epistemic guidance for either ordinary citizens or for judges, because “[t]elling people that they should act on the rules that they should act on is not telling them anything.”<sup>135</sup> Nor can a judge be motivationally guided by the legal status of the individual moral rules that have been validated as legal rules, because the judge is *already* motivated by the rule of recognition itself to act in conformity with morality. The legal status of individual moral rules can therefore make no practical difference to her conduct. A legal system that has an “inclusive” rule of recognition thus cannot perform the “essential guidance function” of law.<sup>136</sup> However, a legal system with an “exclusive” rule of recognition—one that makes legal validity depend solely on social sources—can fulfill this function. The rules that such a system marks as legally valid can clearly guide conduct epistemically. They can also guide judges motivationally, because they can make a practical difference to the judge’s conduct. For example, a law that is valid because it was enacted by the legislature “changes the satisfaction conditions of the rule of recognition.”<sup>137</sup> The judge can only conform to the rule of recognition by conforming to the legislative enactment. If the enactment were repealed, the judge could only conform to the very same rule of recognition by treating the repealed rule as *not* legally binding. Both the enactment and the repeal of the legislative provision make a practical difference to her conduct. The reason for this is that an exclusive rule of recognition is “dynamic,” meaning the social sources of law can change. An inclusive rule of recognition, by contrast, is static, because morality itself is a static system whose content cannot change over time.

This is a subtle and difficult argument. As Coleman remarks, its upshot, like that of Raz’s argument, is that “the conventionality thesis, the practical difference thesis, and inclusive legal positivism form an inconsistent set.”<sup>138</sup> The practical difference thesis, which Shapiro takes to be a central tenet of legal positivism, says that law must, by virtue of its status as law, be capable of guiding conduct by making a practical difference to that conduct. Coleman’s first response to Shapiro’s challenge is to invoke the Swede again: If ordinary persons can identify the law by looking to the Swede,

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134. Shapiro offers a separate argument for necessity clauses, which I do not consider here.

135. Shapiro, *supra* note 60, at 177. This is, in a nutshell, Raz’s argument for the sources thesis. See *supra* text accompanying notes 123-124.

136. Shapiro, *supra* note 60, at 177, 179-80.

137. *Id.* at 180.

138. COLEMAN, *supra* note 3, at 142.

then the rules that are addressed to such persons can in fact guide them epistemically.<sup>139</sup> Shapiro points out in response that if ordinary persons' conduct is being guided by the Swede because that is what the law requires, then the law in effect treats the Swede and not morality as the true determinant of legal validity.<sup>140</sup> This is the first horn of the dilemma posed earlier. But Coleman cannot avoid this horn by grasping the second one, which would treat the Swede as just a contingently available guide to the conduct that is independently required by law. This is because, even apart from the problem of the infinite regress, the norms identified by the Swede as law would not guide persons by virtue of their status as law. The status of these norms as law depends, by hypothesis, on their status as moral norms. But persons would be guided by these norms not because they were moral norms, but rather because the Swede *said* they were moral norms.

This is a formidable challenge to inclusive legal positivism. In the past, Coleman has flirted with the solution of simply abandoning the practical difference thesis,<sup>141</sup> but in *The Practice of Principle* he takes a different tack. He accepts that it is "a conceptual truth about law" that it be capable of guiding conduct by providing reasons for action.<sup>142</sup> He apparently also accepts Shapiro's claim that only source-based laws can guide conduct in the appropriate way. He thus resolves the dilemma posed by the Swede by abandoning the Swede altogether. But while Coleman accepts that *law* must be capable of guiding conduct by providing source-based reasons for action, he argues that this need not be true of *every* law. To insist that each and every law must be capable of making a practical difference to conduct in order to count as law would be to commit the fallacy of composition.<sup>143</sup> This suggests that the practical difference thesis becomes a kind of floating charge on a legal system, requiring that it contain at least some rules that are capable of guiding conduct because their validity depends on a social rather than on a moral source. Coleman is unclear about whether a social practice must, in order to count as a legal system, in fact contain at least some such rules, or whether it is enough that the system could have contained such rules. The latter is a very weak claim, but it is surely sufficient to ensure that the system is *capable* of guiding conduct in the requisite way.

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139. *Id.* at 141.

140. Coleman reports this response as having been expressed to him by Shapiro in conversation. *Id.* at 141 n.15. Shapiro has since discussed cases like that of the Swede in print. Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 LEGAL THEORY 127, 149-52 (2000). He argues there that "[o]nce the process of identification is contaminated by someone's deliberation [e.g., the Swede's], . . . the chain of authoritative guidance is broken and the deliberator plays the role of the practical authority." *Id.* at 151.

141. Coleman, *supra* note 2, at 145-47.

142. COLEMAN, *supra* note 3, at 144.

143. *Id.*

Why might a legal system adopt an inclusive rule of recognition? Coleman answers this question by observing that “[g]iving concrete institutional expression to a shared political morality is surely among the legitimate ends law might serve.”<sup>144</sup> If so, there is no obvious reason, on Coleman’s account, why a particular legal system could not adopt the institutional expression of a shared political morality as its *sole* end. Thus one might imagine a legal system in which the rule of recognition simply said to judges, “Enforce the moral rights and obligations that people actually have.” This is, of course, an extreme version of a Dworkinian substantive theory of law.<sup>145</sup> Can we say that such a system is capable of guiding conduct because it could have adopted an exclusive rule of recognition instead of an inclusive one? Perhaps this renders the connection to law’s assumed guidance function simply too tenuous. In that case, perhaps it is enough to have a rule of recognition such as the following: “Enforce the moral rights and obligations that people actually have, as well as any conduct-guiding rules that you see fit to enact.” As it happens, though, the judges and other officials of this system do not enact any rules, because they think the sole end of law should be to enforce moral rights and obligations that exist independently of law. Does tacking on a “social sources clause” to what would otherwise be a purely inclusive rule of recognition make the system a legal system, where otherwise it would not be? This seems just as arbitrary as insisting that the system must actually contain some source-based rules.

The more general point here is that once we abandon the very tight connection between law and the function of guiding conduct that is envisaged by both Raz’s and Shapiro’s versions of exclusive legal positivism, it seems quite arbitrary to insist that it is a conceptual truth about law that it be capable of guiding conduct. Guiding conduct becomes just one end among others that a legal system might serve. Furthermore, as in the case of Coleman’s treatment of the SCA idea, the conventionality thesis itself is called into question. At least on Shapiro’s version of positivism, the conventionality of the rule of recognition is, for the reasons that were explained earlier, closely tied to law’s guidance function.<sup>146</sup> Coleman had seemed to endorse a similar approach when he said that the conventionality of the rule of recognition is a possibility condition of law, because only if officials are motivated by the rule of recognition (as opposed to simply complying with it) is it possible for law to create conduct-guiding norms without being subject to an infinite regress. But once we recognize the possibility that law might give institutional

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144. *Id.* at 146.

145. *See supra* text accompanying note 79.

146. *See supra* note 88; text accompanying notes 132-137.

expression to political morality without thereby having to guide conduct, there is no obvious reason why we should not suppose that judges are moved by the precepts of political morality itself, rather than by the formal and nearly empty shell of an inclusive rule of recognition.

None of this should be taken to suggest that I do not find Coleman's substantive theory of law attractive. On the contrary, although I am not a positivist, I find his views about the possibilities for law to be much richer and truer to our actual practice than the restrictive and somewhat aridly conceptual versions of exclusive positivism that Raz and Shapiro defend. But for that very reason, I do not think that Coleman can, in the end, maintain those views without giving up the idea that law's supposed guidance function is conceptually privileged in the way that both Raz and Shapiro take it to be. Coleman's original inclination to abandon the practical difference thesis was sound, but this means that a more inclusive attitude toward the possible functions that law might serve is warranted. This squarely raises the issue of jurisprudential methodology. Coleman observes that "the dispute between exclusive and inclusive legal positivists cannot be resolved on descriptive grounds, for the simple reason that the dispute is not a descriptive one. It is an interpretive dispute."<sup>147</sup> This is surely correct. Coleman would resolve the interpretive dispute by appeal to "the norms that govern theory construction,"<sup>148</sup> but without allowing that those norms include any consideration of the moral attractiveness of a theory. Once the conceptual status of the claim that the function of law is to guide conduct is thrown into doubt, however, it is perhaps less easy to resist the pull of moral considerations in choosing among different interpretations of legal practice. This is one of the questions I consider in the following Part.

### III. METHODOLOGY IN JURISPRUDENCE

#### A. *Competing Substantive Theories*

Part III of *The Practice of Principle* is concerned with methodology in jurisprudence. Before directly addressing this topic in chapter 12, Coleman first considers, in chapter 11, some of the major differences between positivism and Dworkin's theory of law. He begins by observing that the heart of any positivist theory of law is the "social fact thesis," which holds that "the grounds of the criteria of legality in every community that has law are a matter of social fact."<sup>149</sup> Coleman's own understanding of the social

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147. COLEMAN, *supra* note 3, at 109.

148. *Id.* at 117.

149. *Id.* at 152.

fact thesis—an understanding that is widely shared among contemporary positivists—equates it with the conventionality thesis. As we have already seen, the conventionality thesis holds that the criteria of legality in particular legal systems are determined by a certain kind of conventional practice among officials.<sup>150</sup> Coleman further observes that the core of the various objections to positivism that Dworkin has offered over the years is the claim that if the criteria of legality are grounded in convention, then judges cannot meaningfully disagree about what those criteria are. But since judges do disagree on just this question, Dworkin's objection continues, the criteria of legality cannot be grounded in convention. Dworkin's own view is that criteria of legality, which he calls the "grounds" of law, are at least partly determined by moral considerations. According to the particular theory of law he defends, which he calls "law as integrity," "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."<sup>151</sup>

Coleman responds to Dworkin's criticism of the thesis that law is conventional in nature by arguing that Dworkin holds too narrow a conception of conventionalism. Here Coleman adverts to his view, discussed in the preceding Part, that the rule of recognition is an instance of shared cooperative activity in Bratman's sense. If this is true, Coleman argues, "it is unsurprising that individuals engaged in such a practice would have a range of disagreements about what it requires of them, what its content is, how to resolve disputes about what its point is, and how to proceed."<sup>152</sup> I have already registered the concern that the SCA-based approach might bring Coleman's substantive theory of law uncomfortably close to Dworkin's. Coleman asserts that the sense in which an SCA-style rule of recognition is conventional is "plain," since "[i]ts existence does not depend on the arguments offered on its behalf, but rather on its being practiced—on the fact that individuals display the attitudes constitutive of shared intentions."<sup>153</sup> But Dworkin would presumably not disagree that the existence of law depends on its being practiced. The crucial point is that, as we saw in the preceding Part, Coleman seems to allow the *content* of law to depend on a specification of the point or value of law. It is in this respect that Coleman's view seems in danger of converging with Dworkin's.

Coleman also responds to a natural-law-based criticism of positivism, which states that in attempting to explain the normativity of law by reference to social facts, positivism is trying to derive an "ought" from an "is." In response, Coleman argues:

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150. See *supra* Section II.B.

151. DWORKIN, *supra* note 29, at 225.

152. COLEMAN, *supra* note 3, at 157.

153. *Id.* at 158.



Positivism seeks to show that the way in which law can give rise to duties is no more—and no less—mysterious than the way in which promises, pacts, reciprocal expectations, and so on can create duties. The ontology of the duties that inhabit this class of practices is not a *special* problem for legal theory, but is rather in the provenance of meta-ethics.<sup>154</sup>

Coleman is surely correct that it is not up to legal theory to solve the is-ought problem. But it is up to legal theory—at least as Coleman understands the discipline—to show whether or not the social practice of law is capable of creating new reasons for action. This, I take it, is a problem of first-order moral theory rather than metaethics. Now it is certainly conceivable, once we set aside the is-ought problem, that the principle that explains how the rule of recognition can give rise to new duties (assuming such a principle exists) is similar to the promising principle, or to the principle of harm avoidance (this being the principle that grounds obligations to avoid causing harm by inducing detrimental reliance). As we have seen, Coleman in fact makes a suggestion along these lines, when he writes that the rule of recognition gives rise to obligations for officials because commitments to an SCA induce reliance and create expectations on the part of other officials.<sup>155</sup> I argued in Section II.B that this view is problematic for positivism because it is individual rather than joint commitments that are doing the normative work, whereas a positivist theory (at least of the kind that Coleman defends) needs to show how the practice as such is capable of creating obligations for officials. The problem of normativity posed by the rule of recognition is thus different from, and almost certainly trickier than, the problem of normativity posed by the class of practices exemplified by promises, pacts, and the inducement of expectations.

Even if I am wrong in thinking that the normativity of the rule of recognition cannot, from a positivist perspective, be satisfactorily explained in terms of reliance and expectations, the fact is that we still have not touched at all on the real problem of the normativity of law. That problem involves showing whether and how law is capable of giving rise to obligations not for *officials*, but for *nonofficials*. Law is, after all, directed primarily at nonofficials, whose rights and obligations it claims in some sense to regulate. Coleman says nothing to show how the status of the rule of recognition as an SCA could obligate nonparticipants in the SCA, and indeed the question of whether or not the rule of recognition is an SCA appears to be irrelevant to the normativity of law as a whole. I assume that Coleman would agree with this assessment. The only positivist account of

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154. *Id.* at 159.

155. *Id.* at 98-99.

law's capacity to create duties for nonofficials that he discusses is Raz's mediating conception of authority,<sup>156</sup> and the truth of that account clearly does not depend on whether or not the practice of officials can be characterized as an SCA.

Of course, one could avoid these questions about reason creation altogether if one thought that a positivist theory does not have to take a stand on whether or not law is capable of obligating either officials or nonofficials; the only thing it has to explain, it might be said, is the fact that the language of the law is normative in character. It is at least arguable that this was Hart's own view of the matter. A positivist theory of this kind might point, for example, to the following facts: first, that many people *believe* that the law obligates, and second, that people who do not believe this can nonetheless use the law's normative language in what Raz has called a detached, or noncommitted, sense.<sup>157</sup> To take this approach would be to adopt a sociological rather than a philosophical attitude to the problem of the normativity of law. Coleman at one point seems to hint at this line of thought.<sup>158</sup> For the most part, however, he adheres to the view that a positivist theory of law ought to explain how law is capable of having authority, which entails showing how it is capable of giving rise to new reasons for action. The reason for this is, as we have seen, that he accepts a version of Raz's thesis that since law claims to possess legitimate authority, it must be the sort of thing that is *capable* of possessing legitimate authority. It is by no means obvious that this thesis is true,<sup>159</sup> but in my opinion Coleman is nonetheless correct to insist that a positivist theory of law ought to explain how law is capable of creating new reasons for action for those subject to law. I return to this issue below.

Coleman remarks that Dworkin's substantive theory of law, which is based on the idea that a person's legal rights and obligations flow from

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156. See *supra* text accompanying notes 123-124.

157. RAZ, *supra* note 83, at 153-54.

158. Coleman argues:

It is not the primary burden of a jurisprudential theory to explain how duties can be created by law. What needs explanation is something else altogether, the possibility of *claiming* to impose such duties as law. We turn to a philosophical theory to make the normative language of the law *intelligible* to us.

COLEMAN, *supra* note 3, at 160. Coleman then goes on to observe, however, that a jurisprudential theory, in addition to "mak[ing] sense of the important normative concepts of legal discourse," must also explain "how legal authority is possible." *Id.* For the reasons that were discussed in Part II, this does require (at least of a positivist theory) an explanation of how law can create new reasons for action. More particularly, it requires an explanation of how law can give rise to new duties for nonofficials.

159. Raz's only argument for this thesis appears to be that although legal officials and institutions can occasionally be conceptually confused, "they cannot be systematically confused," because the claims of law are a central aspect of our concept of authority. RAZ, *supra* note 60, at 201. But this is not very convincing. Perhaps our concept of authority is itself fundamentally flawed. Perhaps nothing is the sort of thing that is capable of being a legitimate practical or political authority, despite what Raz takes to be the general assumption to the contrary.

constructive interpretations that seek to discover the political virtue of integrity in legal practice as a whole, regards “[official legal pronouncements]” as “data points that constrain the interpretive theory.”<sup>160</sup> Coleman contrasts this view with the positivist understanding, according to which such pronouncements “are, in the first instance, potential guides to human conduct.”<sup>161</sup> This is an important point of difference between Dworkin’s theory and a positivist theory, and Coleman is right to draw attention to it. He goes on to criticize Dworkin’s theory precisely because it treats official pronouncements as provisionally binding rather than as binding simply by virtue of their status as official pronouncements. He treats this apparent problem as symptomatic of a deeper problem:

Suppose one holds that it is a conceptual truth about law that something is law only if it is capable of guiding conduct, and a norm, decision, or rule is capable of guiding conduct only if those to whom the law is addressed can know in advance what it requires of them. On this view, determinate answers to disputes state the law only if they are knowable in advance.<sup>162</sup>

Coleman argues that even if Dworkin has presented a correct theory of adjudicatory content—by which he means, apparently, a theory of what judges are legally obligated to do—it does not follow that that theory is also a correct theory of legal content. It does not follow, in other words, that just because a judge is legally obligated to decide a case for *P* rather than for *D*, it is antecedently true that *the law* is for *P* rather than for *D*. Coleman explains:

[W]e must first know what is true conceptually about law before we can figure out whether a determinate answer is a legal answer; and so we cannot infer backwards that the set of binding legal

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160. COLEMAN, *supra* note 3, at 165.

161. *Id.*

162. *Id.* at 167. Coleman states that he is not defending this view, but is simply making a point about the derivability of a theory of legal content from a theory of adjudicatory content. Since at other points in the book Coleman states that it is a conceptual truth about law that it must be capable of guiding conduct, *id.* at 123 n.5, 144, the view that he is considering but not defending here is, presumably, the thesis that all *individual* laws must be capable of guiding conduct. Coleman rejects this thesis in Part II, because it cannot be reconciled with his version of inclusive positivism. *Id.* at 144. If this is a correct understanding of Coleman’s point in the passage quoted in the text, it is odd that he would, in his criticism of Dworkin’s theory, place any weight at all on a putative conceptual truth about law that he not only does not defend, but rejects elsewhere in the book. However, the truth of Coleman’s more general claim, which is that the existence of a judicial obligation to decide *X* does not mean that *X* is already law, does not depend on the truth of the thesis that something is law only if it is capable of being known in advance.

standards are just those that figure in determining the unique answer to disputes that arise under the law.<sup>163</sup>

Assuming that I have understood him correctly, Coleman is quite right to insist that just because a judge is legally obligated to decide *X*, it does not follow that *X* is already the law. The point is similar to the one Raz makes when he suggests that sometimes judges are subject to a “directed power” that legally requires them to make or change the law in a certain way.<sup>164</sup> Coleman is also right to insist that what is at issue here is ultimately a methodological question. Coleman, of course, takes a certain view of what the answer to that question is. He claims that before we can decide whether, say, a theory of adjudicatory content is also a theory of legal content, we must first decide what is *conceptually* true about law, where conceptual truths about law are to be determined without appeal to substantive moral or political argument.<sup>165</sup> Dworkin denies just this claim, arguing that we must decide between law-as-integrity and positivist theories by appealing to moral and political considerations. This amounts to a claim that constructive interpretation figures in jurisprudence in a second way, in addition to the role it plays in the theory of law-as-integrity: It serves as the basis for choosing among substantive theories of law themselves. In other words, the choice among law-as-integrity, exclusive and inclusive versions of positivism, and other substantive jurisprudential theories is itself an interpretive question, and hence a question that cannot be answered without recourse to moral argument.

### B. *The Semantic Sting*

As Coleman points out, the heart of Dworkin’s argument for an interpretive methodology in jurisprudence is the so-called semantic sting. Dworkin argues that positivists (among others) hold the view that in using the word “law,” all lawyers follow shared rules which “set out criteria that supply the word’s meaning.”<sup>166</sup> In the case of “law,” these rules are concerned with the “grounds” of law, i.e., with the criteria used in determining when propositions of law are true or false. The rules are

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163. *Id.* at 170.

164. JOSEPH RAZ, *The Inner Logic of the Law*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra* note 60, at 222. Another possibility that Coleman might have in mind is that the judge is morally, rather than legally, obligated to decide *X*. In that case, too, it clearly does not follow that *X* is already law.

165. COLEMAN, *supra* note 3, at 170, 194-95.

166. DWORKIN, *supra* note 29, at 31. For interesting discussions of the semantic sting, see Timothy A.O. Endicott, *Herbert Hart and the Semantic Sting*, in *HART’S POSTSCRIPT*, *supra* note 2, at 39; Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in *HART’S POSTSCRIPT*, *supra* note 2, at 1; and Nicos Stavropoulos, *Hart’s Semantics*, in *HART’S POSTSCRIPT*, *supra* note 2, at 59.

concerned, in other words, with what Coleman calls the criteria of legality. Positivist theories are, according to Dworkin, “semantic” theories: “Semantic theories suppose that lawyers and judges use mainly the same criteria . . . in deciding when propositions of law are true or false; they suppose that lawyers actually agree about the grounds of law.”<sup>167</sup> More particularly, positivist theories are semantic theories which suppose that “the shared criteria make the truth of propositions of law turn on certain specified historical events,”<sup>168</sup> such as the enactment of legislation. Dworkin, in other words, supposes that legal positivism should be understood in terms of exclusive positivism. Dworkin maintains that lawyers disagree not just about whether or not the grounds of law are satisfied in a particular case—whether, for example, the legislature did in fact enact a certain law—but also about what the grounds of law actually are. He argues that in order to accommodate such “theoretical” disagreement about law, we must turn away from semantic theories and embrace in their stead his preferred interpretivist methodology. A constructive interpretation of a social practice—in the present context, an interpretation of the general social practice of law itself—is judged according to the two dimensions of fit and value. To meet the requirement of fit, an interpretation must offer a minimally plausible account of the institutional features of law. To meet the requirement of value, it must attribute a point or value to law so as to “try to show legal practice as a whole in its [morally] best light.”<sup>169</sup>

Coleman’s response to this methodological challenge comes mainly in chapter 12 of *The Practice of Principle*, which is the final chapter of the book. He begins by observing that Dworkin’s formulation of the semantic sting runs together two notions, namely, the criteria for applying the term “law,” on the one hand, and the criteria of legality—i.e., the grounds of law—on the other.<sup>170</sup> This amounts to a confusion, he says, between the content of the concept of law and the content of the law of a particular community.<sup>171</sup> Coleman asserts it is possible to disagree about the content of the concept of law while agreeing about the criteria of legality in a particular legal system. He also asserts, more importantly, that it is possible to agree about the content of the concept while disagreeing about the

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167. DWORKIN, *supra* note 29, at 33.

168. *Id.*

169. *Id.* at 90.

170. COLEMAN, *supra* note 3, at 180.

171. Coleman himself runs together the idea of criteria for applying the term “law,” which is a semantic notion, with the idea of the content of the concept of law, which is not a semantic notion. There is, however, not very much harm in this. As Joseph Raz has noted, Dworkin was mistaken in supposing that Hart (and pretty much every other legal philosopher) defended a semantic theory of the term “law.” But, as Raz also notes, nothing of significance turns on this, because the semantic sting can easily be reformulated to apply to an explanation of the concept of law, as opposed to an account of the meaning of “law.” See Raz, *supra* note 166, at 11-12.

criteria in a particular system. He is clearly right on both counts. He is also right that in *Law's Empire* Dworkin did not distinguish as clearly as he should have done between the criteria for applying the term "law" and the criteria of legality in particular legal systems. But this carelessness on Dworkin's part may well be nothing more than harmless error.

Consider the example that Coleman gives to back up his assertion that it is possible to agree about the concept of law while disagreeing about criteria of legality. We can imagine two people, both of whom accept the theory of law-as-integrity but who disagree about the particular constructive interpretation that is appropriate for their legal system. They disagree, that is, about which set of moral principles best fits and justifies the legal practice of their community considered as a whole.<sup>172</sup> Clearly, these two persons disagree, at some level, about criteria of legality. But their disagreement is not a fundamental one. In fact we might say, adopting a distinction Coleman relies on to defend inclusive positivism, that they agree on the criteria but disagree about their application. Let me grant, however, that they are disagreeing in some way about the criteria of legality themselves.

One of the premises of Dworkin's semantic sting argument is that there exists *theoretical* disagreement about criteria of validity. More particularly, Dworkin supposes that there is disagreement not just about borderline cases, but also about so-called pivotal cases. This is disagreement about such questions as "why any legislative act, even traffic codes and rates of taxation, impose the rights and obligations everyone agrees they do."<sup>173</sup> It is plausible to think that disagreement about such questions as this will often involve disagreement about the *types* of criteria of validity that a legal system either may or must use. For example, one could argue that propositions of law based on legislation are valid because legislation is a recognized social source of law. Alternatively, one could argue that they are valid because there is a moral principle that imparts normative force to the enactments of a democratically elected legislature. Disagreement of *this* kind presumably indicates that those who are disagreeing hold different theories of law. To put the point in Coleman's terms, they hold different views about the content of the concept of law.

The persons in Coleman's example are clearly not having a theoretical disagreement, since they agree that the truth of propositions of law is determined by Dworkin's best-justification idea. But theoretical disagreement about criteria of validity clearly exists, and we do not even need to look so far as the dispute between positivists and Dworkinians to establish this. The debate between exclusive and inclusive positivists

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172. COLEMAN, *supra* note 3, at 182.

173. DWORKIN, *supra* note 29, at 42-43.

involves theoretical disagreement over a type of pivotal case, namely, moral standards that could plausibly be regarded as having been incorporated by reference into law. Raz relies on law's supposed guidance function in order to argue that such standards cannot be law.<sup>174</sup> Coleman relies on the claim that law can give expression to political morality in order to argue the opposite.<sup>175</sup> Coleman acknowledges that this dispute is interpretive rather than descriptive in character,<sup>176</sup> which effectively concedes Dworkin's main point in advancing the semantic sting argument. The only remaining question, it would seem, is how such interpretive disagreements should be resolved.

The semantic sting argument is thus not mistaken simply because Dworkin failed to distinguish as clearly as he should have done between criteria for applying the concept of law and criteria of legality.<sup>177</sup> *Theoretical* disagreement about criteria of legality is presumably indicative of disagreement about the content of the concept of law. It follows that we cannot determine which theory of law we should adopt simply by looking for agreement about the content of the concept of law, because there is no such agreement. In this sense, we can agree with Dworkin's rejection of "semantic" theories (without, it should be noted, having to accept his claim that substantive positivist theories have heretofore all been semantic in character). However, Dworkin takes the semantic sting argument to have established not just the unacceptability of semantic theories, but also the correctness of his own interpretivist methodology. In response to this claim, Coleman correctly remarks that constructive interpretation, meaning Dworkin's particular version of interpretivism, is not the only alternative to the development of semantic theories.<sup>178</sup> Coleman's own suggestion is that jurisprudential theories are "responsive to the norms governing theory construction."<sup>179</sup> The norms governing theory construction include "consilience," "systematicity," and "unification," but they do not, on

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174. See RAZ, *supra* note 60.

175. COLEMAN, *supra* note 3, at 146-47.

176. *Id.* at 109.

177. It is not obvious that Dworkin's carelessness in this regard is as egregious as Coleman assumes. It is plausible to think that, in the context of the semantic sting argument, Dworkin is using the term "law" to refer to legal propositions in general, rather than to either the propositions true in a particular legal system or the general idea of a certain type of institutionalized social practice. In the context of discussion about *types* of criteria of legality, this usage makes perfect sense. It is in this sense that an exclusive positivist, for example, asserts that a norm cannot be "law" if its validity would depend on moral argument rather than on a social source. This is a claim about legal propositions in general, which is based on a further claim about the generally permissible types of criteria of legality. It is not a claim about one or another particular legal system. The semantic sting argument is, I think, best understood as addressing general claims of this kind.

178. COLEMAN, *supra* note 3, at 183.

179. *Id.* at 178.

Coleman's view, extend to moral or political norms.<sup>180</sup> Coleman thus allows that jurisprudential theories are normative in character, but only in a very limited sense. Recall that, according to Dworkin's interpretivist methodology, substantive moral considerations enter the picture via an attribution of a point or function to law. Coleman apparently accepts that a theory of law might attribute a point or function to law, but holds that it will only do so on conceptual, nonmoral grounds.

I have argued elsewhere that the standard norms of theory construction, which I take to be norms of *scientific* theory construction, are an inappropriate basis for assessing philosophical, as opposed to social scientific, theories of law.<sup>181</sup> I will not repeat that discussion here. In the following Section my primary concern is, rather, with Coleman's direct criticisms of Dworkin's robustly normative version of interpretivist methodology. Toward the end of the Section I also present, in sketchy and incomplete form, some arguments that offer affirmative support for Dworkin's approach.

### C. *The Function of Law*

Coleman offers two main criticisms of interpretivism. He sets up the first criticism by characterizing interpretivism in the following terms:

[I]n order to anchor an interpretation, we need some preinterpretive account of the kind of practice we are interpreting and of its purpose or function. This is presumably the status of Dworkin's claim that law's purpose or function is to justify and limit the coercive power of the state. This pretheoretical imputation of a justificatory function to law is the premise that orients our analysis of the concept of law toward substantive political argument.<sup>182</sup>

Coleman asserts that "in maintaining that the function of law is to justify coercion, Dworkin must be claiming that this is an essential or central property of law" and not just a function that some communities happen to assign to law.<sup>183</sup> Coleman argues that this is not an assumption that Dworkin is entitled to make without argument, and the relevant argument

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180. *Id.* at 199, 201.

181. Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT, *supra* note 2, at 311, 319-31. I discuss issues of methodology in legal theory at greater length both in that article and in Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in LAW AND INTERPRETATION 97 (Andrei Marmor ed., 1995) [hereinafter Perry, *Interpretation and Methodology*]. For an interesting discussion of methodological issues, see also JULIE DICKSON, EVALUATION AND LEGAL THEORY (2001).

182. COLEMAN, *supra* note 3, at 183-84.

183. *Id.* at 184.



cannot be supplied by a constructive interpretation because the function of justifying coercion is presupposed by the interpretivist method.

This criticism of Dworkin's methodology misses its mark. The interpretivist method does indeed presuppose some preinterpretive account of the practice to be interpreted. Dworkin said that this was to be supplied by the very rough idea that there are distinctly legal institutions—legislatures, courts, and administrative agencies—that together form a system.<sup>184</sup> Particular substantive theories of law interpret legal practice as thus identified by attributing a point or function to the practice. An interpretation thus supplies, rather than presupposes, some point or function that law is said to serve. It is true that Dworkin also suggested that the three major theories he discussed—law-as-integrity, positivism (which Dworkin called conventionalism), and pragmatism—could all be regarded as offering more specific conceptions of a particularly abstract understanding of the point of law, which he said was to justify and constrain the use of coercive force.<sup>185</sup> But Dworkin was also clear that this was just a provisional “plateau of agreement” and not a necessary property of law as such: “Neither jurisprudence nor my own arguments . . . depend on finding an abstract description of that sort.”<sup>186</sup> Nor is there any reason to think that Dworkin was mistaken in thinking that nothing of significance turned on the correctness or general acceptability of this abstract formulation.

As it happens, I believe that Dworkin *was* mistaken in thinking that the abstract description he offered captured common ground among the various theories of law he discussed. Positivism, in particular, should not be understood as making any claims about the justifiability of coercion. It should instead be understood, at least according to most contemporary versions, as attributing to law the function of guiding conduct. But this mistake on Dworkin's part was a mistake in the application of the interpretivist methodology, not a defect in the methodology itself. The point to be emphasized is that positivism (in its most persuasive versions) *does* attribute a point or function to law. Dworkin's own theory of law-as-integrity attributes a different point to law, which is (roughly) to determine and coercively enforce persons' rights and obligations, where the determination of what rights and obligations they have is to be made in accordance with a certain conception of equality. We thus have two interpretations of legal practice, both of which have some plausibility and both of which more or less fit the facts of legal practice. Coleman's first criticism of Dworkin's interpretivist methodology does not in any way

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184. DWORKIN, *supra* note 29, at 91.

185. *Id.* at 93.

186. *Id.*

show that we should not make the choice between them by appealing to moral or political considerations.

Coleman's second criticism focuses on Dworkin's claim that different interpretations of legal practice should show that practice "in its best light."<sup>187</sup> Coleman takes this to entail the conclusion that "in order to understand what law is, we must understand it as largely *succeeding* in justifying the state's police power."<sup>188</sup> Coleman regards this as a "dubious" application of Donald Davidson's principle of charity, which holds that "in order to understand an individual's behavior as language . . . we must regard most of the claims that she makes as true."<sup>189</sup> It would be an implausible extension of this principle, Coleman argues, to suppose that "the claims embedded in *specific* cultural institutions and practices must be regarded as mostly true."<sup>190</sup> Coleman is right that an extension of Davidson's principle of charity that took this form would be implausible. Dworkin is not, however, making anything like this argument. He is not purporting to apply the principle of charity; at most, he is drawing an analogy with that principle. Thus, he does not suggest that a successful interpretation of legal practice must show that most propositions of law are true, or anything of the sort. Suppose, Dworkin suggests, that we have a number of interpretations of a social practice, all of which are consistent with the raw behavioral data. The data, in other words, "underdetermine the ascription of value."<sup>191</sup> In these circumstances, he argues, "each interpreter's choice [among competing interpretations] must reflect his view of which interpretation proposes the most value for the practice—which one shows it in the better light, all things considered."<sup>192</sup> As this passage makes clear, the assessment of competing interpretations is *relative*. Thus the best interpretation of legal practice might not find much value in law, and indeed Dworkin allows for the possibility that a completely skeptical interpretation is the best one.<sup>193</sup> This fact alone should make clear that he is not simply applying Davidson's principle of charity.

It should be borne in mind that the point of the interpretive methodological exercise is, according to Dworkin, to determine what are the grounds of law, and hence to determine which normative propositions count as propositions of law. We are not presented with a pretheoretically fixed set of such propositions that we must then attempt to show to be

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187. *Id.* at 90.

188. COLEMAN, *supra* note 3, at 185.

189. *Id.* at 185, 189.

190. *Id.* at 189.

191. DWORKIN, *supra* note 29, at 52.

192. *Id.* at 52-53.

193. *Id.* at 266-75.

true.<sup>194</sup> When, in fact, is a proposition of law true? It might be said to be true in a sense internal to a particular legal system just by virtue of being a proposition of law belonging to that system. But the more important sense in which a proposition of law can be true is surely external: It is true because it possesses the normative force that it purports to have, meaning that people in fact have the obligations (or other reasons for action) that it says they do. Dworkin in effect distinguishes in just this way between the “internal” and “external” truth of propositions of law when he draws a distinction, not mentioned by Coleman, between the “grounds” and the “force” of law.<sup>195</sup> Dworkin holds that, in a “flourishing” legal system, the two can normally be expected to go together, but he nonetheless acknowledges that, under some circumstances or according to some interpretations, they can come apart.<sup>196</sup> It is natural, and indeed almost inevitable, that Dworkin would allow for this possibility, since his general methodology makes room for skeptical interpretations of law. But his explicit recognition that the grounds and force of law might not coincide makes it abundantly clear that he is not simply applying Davidson’s principle of charity.

In assuming that “flourishing” legal systems possess value of a kind that can normally be expected to bring the grounds and the force of law together, Dworkin is offering no more than a defeasible working hypothesis; he is simply not saying, as Coleman thinks he is, that “the claims embedded in [law] must be regarded as mostly true.”<sup>197</sup> Moreover, this working hypothesis does not even appear to be a necessary element of the interpretivist methodology. There is no obvious reason why a theorist

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194. It may be that, in attributing to Dworkin the view that “the claims embedded in [law] must be regarded as mostly true,” Coleman has in mind Dworkin’s substantive theory of law-as-integrity rather than his general jurisprudential methodology. COLEMAN, *supra* note 3, at 189. It is true that the law-as-integrity theory takes “the settled law” as a more or less fixed starting point and then looks for the best justification of that law. (I say “more or less” because the theory allows some prior legal and political decisions to be rejected as mistakes.) This is, arguably, an overly conservative approach, which effectively assumes the truth of the greater part of source-based law. However that may be, the point is irrelevant to the methodological issues at present under consideration. On the question of whether or not Dworkin’s substantive theory is overly conservative, see Perry, *Two Models*, *supra* note 79, at 810-15.

195. DWORKIN, *supra* note 29, at 108-13. Dworkin in fact equates the truth of propositions of law with what I am calling “internal” truth: The grounds of law are “circumstances in which particular propositions of law should be taken to be sound or true.” *Id.* at 110. It is clear, however, that it is “external” truth, rather than the essentially formal notion of “internal” truth, that Coleman requires to make his argument about the principle of charity. It should also be noted that Dworkin equates the force of law with “the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstance.” *Id.* Rather than adopting this understanding of force, I have instead characterized the notion in terms of simple normativity or obligatoriness. This is because the idea of the justifiability of coercion fails, for the reasons given earlier in the text, to capture common ground between Dworkin’s substantive theory and positivism.

196. *Id.* at 109-10.

197. COLEMAN, *supra* note 3, at 189.

could not ask, in a neutral fashion and without making any advance assumptions about the likely answer, whether the institution of law possesses value and, if so, how much value and of what kind. In fact, a theorist need only ask whether or not the institution of law possesses value of a kind that could be manifested, not just by the external truth of propositions of law, but by their *potential* to be systematically true. This is, I believe, the best account of how Dworkin himself understands methodological interpretivism, since this is how he applies the methodology in developing his own theory of law-as-integrity. This becomes clear when he says, first, that legal systems do not necessarily embody the conditions of integrity to which, according to that theory, they aspire, and second, that it is only if they meet those conditions that they in fact give rise to what Dworkin calls associative obligations.<sup>198</sup> In other words, it is only if the conditions of integrity are met that propositions of law systematically possess normative force.

Coleman in effect considers the understanding of interpretivism just discussed when he raises the possibility that an ascription of value to law need not show legitimacy, but only the *potential* for legitimacy. But he dismisses this possibility on the ground that while law has the potential to realize a variety of moral ideals, this fact is not part of our concept of law.<sup>199</sup> Law, he says, can realize various attractive ideals, just as a hammer can be a “murder weapon, a paperweight, or a commodity.”<sup>200</sup> While law may have the “inherent potential” to realize “an attractive moral ideal of governance,” “[n]othing follows from this about the content of our concept of law.”<sup>201</sup> In response to this argument, it should first be noted that Coleman has not actually argued that what is philosophically significant about law must be an aspect of our current concept of law, as opposed to an attribute of the phenomenon of law that is uncovered by theoretical inquiry. Leaving that point aside, however, it is worth remarking, in an *ad hominem* vein, that Coleman’s own substantive positivist theory appears to assume that a moral ideal of governance is in fact built into the concept of law.

Recall that Coleman accepts a version of Raz’s thesis that law claims legitimate authority and hence must be the sort of thing that is capable of possessing legitimate authority: “Law necessarily claims a normative power to create genuine rights and obligations. That law is capable of being an authority in this sense is, in my view, a conceptual truth about law. It is a version of the claim that law guides conduct by providing reasons . . . .”<sup>202</sup> In other words, Coleman accepts that it is a conceptual truth about law that

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198. DWORKIN, *supra* note 29, at 195-216.

199. COLEMAN, *supra* note 3, at 194.

200. *Id.*

201. *Id.*

202. *Id.* at 144.

it has the potential to guide conduct by creating genuine reasons for action. Raz would say that the potential in question is the potential for legitimate authority. Coleman, however, refuses to speak of legitimacy, because he thinks that law claims to create not “moral” rights and obligations but only “genuine” rights and obligations. As I argued in Section II.A, that is a distinction without a difference. In any event, I assume that Coleman would not wish to dispute that the concept of an institution that has the inherent potential to create genuine rights and obligations represents an attractive moral ideal of governance, or at least the kernel of such an ideal.

Perhaps Coleman would wish to argue that, while it is a conceptual truth about law that it has the inherent potential to create genuine rights and obligations, the fact that this potential is plausibly regarded as an attractive ideal of governance is not itself part of the concept of law. But now, it must be asked, how do we come to know that it is a conceptual truth about law that it claims authority for itself and has the potential to create genuine rights and obligations? Dworkin’s answer, stripped to its essentials, is as simple as it is powerful: We make a case for this conceptual claim precisely by pointing to the fact that it can plausibly be regarded as a morally attractive ideal. How would Coleman argue for the truth of the conceptual claim he advances? Rather oddly, given the centrality of this question to both the substantive and methodological jurisprudential debates in which he is engaged, he does not say. The official methodology he defends would have us look to such epistemic norms as consilience, systematicity, and unification,<sup>203</sup> but Coleman never actually shows how these norms support the conceptual claim that law has the potential to guide conduct by creating genuine rights and obligations. Nor is this the only conceptual claim about law that Coleman advances but does not specifically defend by reference to these norms.<sup>204</sup> He appears to treat these various claims as just obviously, or analytically, true. This is an odd stance for a pragmatic Quinean holist like Coleman to take up. It is also not very helpful in resolving genuine disagreement about the truth of the relevant claims, and indeed would appear simply to assume from the outset that nonpositivistic theories are false. As Coleman rightly points out in discussing the claims of normative jurisprudence, an acceptable jurisprudential methodology should be “compatible with the full range of important substantive theories of the concept.”<sup>205</sup> It is far from clear that Coleman’s own methodological practice meets this test.

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203. *Id.* at 201.

204. *See, e.g., id.* at 76 (“Acceptance of the rule of recognition from the internal point of view by officials is a conceptual requirement of the possibility of law.”); *id.* at 78 (“[T]he possibility of a legal rule’s governing depends on the analytically or conceptually prior existence of a convention among officials.”); *id.* at 98 (“The distinctive . . . normative structure of SCA can be seen as conceptually necessary elements of the practice of constituting a rule of recognition.”).

205. *Id.* at 186.

In saying that it is a conceptual truth about law that it has the potential to guide conduct by creating genuine rights and obligations, I take it that Coleman is agreeing with Hart, Raz, and Shapiro that the function of law is to guide conduct.<sup>206</sup> This is exactly the kind of claim that one would expect a plausible interpretivist version of positivism to make. Moreover, as Coleman recognizes, Dworkin's own substantive theory of law does not take law's primary function to be guidance.<sup>207</sup> In its most generic form (and hence abstracting from the particular details of the theory of law-as-integrity), a Dworkinian substantive theory holds that the function of law is to determine and coercively enforce (certain of) the moral rights and obligations that people actually have, where it is understood that these rights and obligations can be affected by legal practice itself. Let me call this, somewhat awkwardly, the determination function. We thus have two very different interpretations of the social practices associated with law, each of which attributes a different function to law. As we have seen, Dworkin would have us choose between them by asking which interpretation represents, in Coleman's apt phrase, a morally more attractive ideal of governance. Coleman, on the other hand, would limit the inquiry to the application of the epistemic norms just discussed. Without further discussion, however, the extent to which these norms could be of assistance is not immediately clear: Is it possible to say which of these two interpretations has greater systematicity, unity, or consilience? Beyond that, why would a pragmatic holist feel compelled to limit, *in advance*, the considerations that are relevant to the choice between theories?<sup>208</sup> To

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206. At one point Coleman states that "there is no function that is inherent in law itself," and "[o]n my reading of him, Raz is similarly dubious of law's having a function in this sense." *Id.* at 205 n.32. But not only does much of the discussion of Part II of *The Practice of Principle* seem to turn on the idea that law serves a guidance function (even if the same may not be true of all individual laws), Coleman explicitly says as much: "The function of law is to guide through reasons . . ." *Id.* at 123 n.5; *see also id.* at 171 ("[T]he positivist has resources for determining when revision [of law] is needed—among these resources are law's guidance function . . ."). Earlier in the book, Coleman also writes that "Raz claims that the function of law is to mediate between persons and reasons." *Id.* at 113. Since Raz thinks that law mediates by providing new reasons for action, Coleman is effectively attributing to Raz the view he himself appears to hold, namely, that law serves a guidance function. Since Coleman appears to treat the guidance function as an attribute of law understood as a general social phenomenon and not just as an attribute that some legal systems happen to have, it seems plausible to assume that the function is an "inherent" one.

207. *Id.* at 165 ("There appears to be no evidence that Dworkin sees legal rules as having the function of offering those governed by them reasons for action."); *id.* at 166 ("For Dworkin, . . . [authoritative legal] pronouncements have no guidance function."). It is, however, probably too strong to say that Dworkin thinks that law has *no* guidance function.

208. In a footnote, Coleman denies that he is doing this:

If this book stands for anything, it stands for the claim that we do not determine the content of our concepts from a priori reflection alone. Rather we construct theories of our concepts, and those theories must answer to the full range of norms—theoretical, epistemic, discursive, political, and practical.

exclude moral and political considerations from the outset seems arbitrary at best, particularly since there is much that can be said about the two competing interpretations from this perspective. For example, to see law as having a guidance function is to see it, among other things, as a “choosing system” that respects individual autonomy.<sup>209</sup> To see law as having a coercive function is to see it, among other things, as a means for collectively vindicating individual rights.

So far, I have argued that Coleman has no reason to foreclose taking into account moral and political considerations when choosing between substantive theories of law. In fact, a stronger conclusion is warranted: We *ought* to take such considerations into account, and indeed we have little option but to do so. This is so, at least, where the choice is between Dworkinianism (the generic version of which was sketched in the preceding paragraph) and the prevailing modern version of positivism, which is based on the idea that law serves a guidance function. To see this, let us reconsider Dworkin’s claim that there is a provisional “plateau of agreement” among contemporary substantive theories of law. I suggested earlier that Dworkin was wrong to look for common ground in the idea that the most abstract point or function of law is the justification and constraint of the use of coercive force by the state. But this does not mean that common ground does not exist. Let me tentatively suggest that an appropriate provisional plateau of agreement can be found instead in Raz’s idea that law claims legitimate moral authority for itself.<sup>210</sup> For a positivist theory, this abstract idea is given a more concrete formulation along the following familiar lines: Law claims through its directives to create new reasons for action for people, and in particular to create new moral obligations which preempt all conflicting reasons unless the law itself provides otherwise. The more concrete Dworkinian formulation might then

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*Id.* at 210 n.36. I find it difficult, however, to reconcile this statement with Coleman’s insistence that methodology in jurisprudence can and should make do with epistemic norms, and not only need not, but should not, appeal to substantive moral and political norms.

209. I borrow the phrase “choosing system” from Hart’s philosophy of criminal law, which I believe is relevant, in ways not always appreciated, to his general theories of jurisprudence. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 44 (1968). At one point, Coleman states that “autonomy, dignity, and welfare do not enter at any point into the analysis that I offer, nor do any other moral properties.” COLEMAN, *supra* note 3, at 195. He adds that “[t]hese ideals are external to the concept of law; law happens to be the kind of thing that can serve them well.” *Id.* Again, however, we must ask how we determine what is internal to the concept of law and what is not, in the face of disagreement about that very issue. I would argue that the case for positivism is only strengthened if it can be shown that law has the potential, when understood as serving a guidance function, to advance autonomy, dignity, and welfare. I would also note that the ideals of autonomy and dignity are particularly closely tied to the idea that law serves a guidance function, in a way that is not true of welfare. See RAZ, *supra* note 83, at 220-23.

210. Again, Coleman thinks law claims not legitimate or moral authority, meaning (on Raz’s understanding) the authority to create moral rights and obligations, but what we might call instead “genuine” authority, meaning the authority to create genuine rights and obligations. I believe the onus is on Coleman to show how genuine authority differs from moral authority.

be something like this: Law claims exclusive moral authority to determine persons' moral rights and obligations—more generally, to determine their normative status—as well as the exclusive moral authority to take appropriate punitive, remedial, or enforcement measures, backed if necessary by coercive force.

I cannot enter here into the details of the debate between these two different approaches to substantive jurisprudence. My point concerns, rather, the nature of that debate. Assuming that I have construed the two approaches fairly—and here I wish to emphasize that I have simply tried to draw out what is implicit in contemporary substantive jurisprudence—how are we to choose between them? The first and most important point is that each approach (provisionally) takes it to be a truth about law that it claims to exercise *moral* authority over persons, and in particular over nonofficials. Even if this particular formulation of what is common to the two approaches is not accepted, it should at least be clear that both view law as a practice having *some* point or purpose that is taken to be of moral significance. This fact alone distinguishes the concept of law from the concept of a hammer to which Coleman compares it.<sup>211</sup> Moving beyond the common ground, we discover that each approach construes the abstract claim of moral authority in a different manner. Assuming that there is in each case a minimally plausible degree of fit with the facts of legal practice, how else could we determine which formulation represents the more apt understanding of the abstract moral claim than by looking to substantive political morality? The concept of law differs from the concept of a hammer insofar as there is at least provisional agreement that the former concept has a moral element, namely, the abstract claim of moral authority. Surely the most natural means for resolving disagreement about how this claim should be construed is to engage in substantive moral argument. To put the point another way, everyone agrees that law has a morally significant point or purpose, but we need to engage in moral argument in order to determine what that point or purpose really is.<sup>212</sup> If a theorist believes it is possible to resolve this debate *without* engaging in moral argument, it is plausible to think that the onus is on him or her to show as much.

Coleman does, in fact, offer another way of understanding law's supposed guidance function. He suggests that in ascribing this function to law, Hart was “offering a certain kind of functional explanation of law.”<sup>213</sup> In other words, “the basic idea is that law's capacity to guide conduct effectively is part of the explanation of its existence and persistence, as well

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211. COLEMAN, *supra* note 3, at 194.

212. Cf. GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 328-36 (1986); Perry, *Interpretation and Methodology*, *supra* note 181, at 129-31; Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART'S POSTSCRIPT, *supra* note 2, at 411, 419-22.

213. COLEMAN, *supra* note 3, at 206.



as of the shape law takes in its mature forms.”<sup>214</sup> One difficulty with this view is that, without a more detailed account of the posited causal mechanism, it is merely a Just So Story of exactly the kind that Coleman rightly criticizes in discussing economic causal-functional explanations of tort law.<sup>215</sup> In the absence of a persuasive causal account, one could as readily offer a causal-functional explanation based on the Dworkinian determination function. However, let us suppose that Coleman can supply a description of the requisite causal mechanism, showing it to be something other than a general conscious assumption that the guidance of conduct is potentially a good thing. While such an account would be very interesting in its own right, offering insight about, among other things, how we got to where we are, it is not immediately clear how that would be relevant to jurisprudence. At least at this stage in the development of law, it is part of our concept of law that the practice has a point or function that is of moral significance and that is, at least to some extent, subject to our collective control.<sup>216</sup> It is this sense of function that I take to be relevant to jurisprudence and to be embedded in the provisional plateau of agreement that I suggested exists among contemporary substantive theories of law. Perhaps Coleman’s complete causal-functional account would show these assumptions about law to be illusory, but such a demonstration would, I think, tend to destroy jurisprudence rather than contribute to it.

I believe that Coleman’s own substantive theory of law would be well served by a normative methodology of the general kind I have described. Exclusive versions of positivism, such as those defended by Raz and Shapiro, regard the appropriate theoretical characterization of criteria of legality—i.e., the claim that criteria of legality must be restricted to social sources—as rooted in the idea that law serves a guidance function. The connection between law’s assumed guidance function and the sources thesis is taken to be purely conceptual and capable of being established without appeal to moral considerations of any kind. While I believe that the attribution of a guidance function to law must ultimately be defended on moral grounds, the claim that the *internal* character of an exclusive positivist theory can be determined, once this attribution has been made, on a purely conceptual basis has at least an initial plausibility.<sup>217</sup> But by

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214. *Id.* Coleman attributes this suggestion to Scott Shapiro.

215. *Id.* at 25-28.

216. This is what Dworkin means in calling law an interpretive concept. *See* DWORKIN, *supra* note 29, at 47.

217. *See supra* Section II.B. I of course do not mean to deny that the sources thesis itself, and not just the premise that law serves a guidance function, can be defended on moral grounds. There are certainly plausible grounds for thinking that it is morally desirable that legal directives be identifiable solely on nonmoral grounds. *See, e.g.,* Waldron, *supra* note 212. In fact, once moral argument for the premise that law serves a guidance function has been provided, I think it will be very difficult to insulate the sources thesis from that argument.

championing inclusive over exclusive positivism, Coleman is forced to abandon this tight conceptual connection between law's assumed guidance function and the theoretical characterization of criteria of validity. In allowing that particular legal systems are sometimes best understood as giving effect to political morality,<sup>218</sup> he is in effect saying that such systems can serve a determination as well as a guidance function. He is implicitly suggesting, in other words, that the correct substantive theory of law might be pluralist in character, in the sense that it makes room for both types of function.

How would one go about arguing for a pluralist view of this kind? Coleman rightly acknowledges that the dispute between exclusive and inclusive positivism—and hence the dispute between one type of univocal theory and a pluralist theory—is not purely descriptive, but rather interpretive in character.<sup>219</sup> Once the pure internal conceptualism of exclusive positivism has been abandoned, there is surely much to be said for the idea that the interpretive question should be resolved by asking which substantive theory attributes greater moral value both to law, understood as a general type of social institution, and to individual legal systems, meaning particular instances of that general type. And once we ask the interpretive question in that way, surely there is also much to be said for the view that a complex social institution that both guides conduct by creating new reasons for action, on the one hand, and that collectively vindicates existing rights and enforces existing obligations, on the other hand, is morally more valuable than an institution that serves only one or the other of these functions.

#### IV. CONCLUSION

*The Practice of Principle* is an excellent book that practically overflows with interesting and original arguments. Coleman is a superb analytical philosopher, as every page of the book attests. This is one of the most important contributions to legal theory to come along in a long time. Coleman's substantive views on both tort theory and jurisprudence reflect the richness and the complexity of the social phenomena, and he advances powerful arguments to support them. But the arguments would be even stronger if Coleman followed through on the logic of his pragmatic holism and abandoned the artificial restrictions he imposes on the use of moral argument in legal theory. Although this change in methodology is warranted in its own terms, the effect of adopting it could only be to enhance both the moral and theoretical appeal of Coleman's views.

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218. COLEMAN, *supra* note 3, at 146.

219. *Id.* at 109.