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ARTICLES

Fidelity to Pre-existing Law and the Legitimacy of Legal Decision

Gregory C. Keating*

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I. INTRODUCTION

The enterprise of adjudication cedes enormous authority to pre-existing norms. "To judge in general," one prominent legal theorist tells us, "means to decide by reference to pre-existing standards rather than personal whim. Courts . . . [decide] cases by reference to external legal standards Thus [a] court is doubly constrained: it must reach decisions that accord with pre-existing standards (it must judge), and it has no choice about the standards to be used in performing that task (it must judge according to law)."¹ In this Article, I explore the extent to which the idea of legal decision as the resolution of disputes by reference to pre-existing, distinctively legal norms can legitimate the enterprise of adjudication. I conclude that this idea can neither supply legal decision with all the legitimation necessary, nor provide persuasive reasons for favoring one of several plausible accounts of how the institution of legal decision ought to proceed.

Part II of the Article argues that the idea of settling disputes by reference solely to pre-existing law has deep and broad appeal within the tradition of liberal political thought. The principle of legislative supremacy, the formal elements of the rule of law, and general liberal beliefs about the nature of legitimate political authority in a free and pluralistic polity, all underwrite a conception of legal decision as decision in accordance with general, pre-existing public norms. Part II then develops the implications of these ideas by sketching the criteria that the enterprise of adjudication

1 PHILIP SOPER, A THEORY OF LAW 111 (1984). Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) ("I urge that . . . the *Rule of Law*, the law of *rules*, be extended as far as the nature of the question allows; and that . . . we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.").

must meet if pre-existing law is to govern the resolution of concrete cases.

Parts III, IV, and V argue that there are two prescriptive accounts of legal decision that hold the most promise of showing how adjudication might be nothing more than the enterprise of deciding cases in accordance with the dictates of pre-existing public norms. One account pictures law as a system of discrete rules, and legal reasoning as rule application. The other account views law as a seamless web of moral principle, and legal reasoning as an enterprise akin to the search for reflective equilibrium in moral reasoning. Both accounts fail to show how legal justification might only rely on the authority of pre-existing public norms. The picture of law as rule founders on the fact that legal rules are plagued by conflicts and beset with gaps; the picture of law as a web of moral principle is undone by the fact that legal materials can be fashioned into several, equally well-woven seamless webs. Under either account, then, the enterprise of adjudication will have to appeal to the authority of something other than pre-existing legal materials.

Finally, Parts VI and VII argue that legal decision cannot escape difficult issues of political legitimacy. Courts exercise political power and their authority must be either legitimated or suspected. The idea of decision in accordance with pre-existing law cannot supply a complete legitimation. The theory of legal decision must therefore bear the burden of showing how the exercise of judicial power consistent with, but not determined by, pre-existing law can be reconciled with the sovereignty of free and equal democratic citizens.

II. THE AUTHORITY OF PRE-EXISTING LAW

A. *Philosophical Justifications*

Three basic premises of liberal political thought strongly support the view that courts ought to decide cases in accordance with the dictates of general, public pre-existing norms: the institutional principle of legislative supremacy; the ideal of the rule of law; and the conviction that political discourse in general, and legal discourse in particular, must be sheltered from the full force of moral conflict and disagreement. The principle of legislative supremacy supports a regime of decision in accordance with pre-existing standards in a blunt and forceful way. Legislatures are law-making bodies; courts are law-applying bodies. Legislatures derive their

legitimacy from the consent of the governed; courts derive theirs from the faithfulness and fairness with which they bring the imperfectly expressed will of the people to bear on the resolution of particular disputes.² On its face, then, the principle of legislative supremacy supports judicial deference and a zealous unoriginality, as far as statutory construction is concerned.

The liberal idea of the rule of law provides additional support for common law adherence to pre-existing law. The aspiration to a government "not of persons but of laws" is central to liberal political theory.³ Individual liberty is the central value of liberal political thought and the rule of law is an institutional precondition for the flourishing of both personal and political freedom. The norms of the legal system establish authoritatively enforced rights and duties, set the terms of social cooperation, and engender legitimate expectations among citizens. "They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties."⁴

As far as legal decision is concerned, the minimum implication of the ideal of the rule of law is that courts should decide cases in accordance with general, public pre-existing laws—and that they should do so impartially and fairly—"without zeal or bias." Doing so will secure the minimum, but non-trivial, benefits of the rule of law: the freedom and security that come from being able to plan one's life in accordance with the obligations, prohibitions, and permissions of a public system of norms; the important although incomplete fairness achieved when like cases are treated

2 THE FEDERALIST NO. 78 is the pre-eminent expression of this proposition within American political thought with its contrast between "will" and "judgment," with the legislature exercising "will" and the judiciary having "neither FORCE nor WILL, but merely judgment." THE FEDERALIST NO. 78, at 229-30 (Alexander Hamilton) (Encyclopedia Britannica ed., 1952). Furthermore, "[t]he courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." *Id.* at 231-32. THE FEDERALIST NO. 78, therefore, contemplates that both statutory construction and constitutional interpretation will be unoriginal in this way.

3 "But where, says some, is the King of America? I'll tell you, friend, he reigns above, and does not make havoc of mankind like the royal brute of Britain . . . [I]n America THE LAW IS KING. For as in absolute governments, the King is law, so in free countries the law OUGHT to be King; and there ought to be no other." Thomas Paine, *Common Sense*, in COMMON SENSE AND OTHER POLITICAL WRITINGS 3, 32 (Nelson F. Adkins ed., 1953), quoted in Scalia, *supra* note 1, at 1176.

4 JOHN RAWLS, A THEORY OF JUSTICE 235 (1971). Rawls prefaces this passage by observing that "the rule of law is obviously closely related to liberty."

similarly; and the buffer against the arbitrary exercise of state power that adherence to public rules, impartially applied, secures.⁵

The third pertinent premise mandates that legitimate political authority be at least partially distinct from general moral discourse. Liberalism supposes that modern societies are marked by deep and pervasive disagreements over fundamental moral questions. Liberal political theory therefore insists that politics must be grounded on principles which avoid or transcend those deep and enduring disagreements.⁶ "In a world in which opinions differ about morality and the status of moral norms, it is of utmost importance to have normative guidance that cannot be collapsed to

5 The achievement of formal justice is a part of substantive justice because just laws are rendered less just when their application is arbitrary or unfair, and unjust laws are often rendered more unjust when they are arbitrarily applied. "[T]here is even greater injustice if those already disadvantaged are also arbitrarily treated in particular cases when the rules would give them some security." *Id.* at 59.

The achievement of decision in accordance with pre-existing norms is only a part of a decent legal system because this achievement is fully compatible with norms whose content is deeply unjust. Slave and caste systems can achieve formal equality of treatment.

The achievement of formal equality comes at a certain cost. See, e.g., Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) ("I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good'! It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—not a considerable virtue—but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage.") (reviewing EDWARD P. THOMPSON, *WHIGS AND HUNTERS* (1975)).

6 One strand of the liberal tradition, beginning with Hobbes, considers moral belief to be the domain of purely subjective value choices, options over which persons and groups disagree, and about which rational argument is impossible. This stark picture makes the very maintenance of civil order depend on the separation of law from morality and on the sheltering of legal discourse from moral discourse. See THOMAS HOBBS, *LEVIATHAN* (Penguin Books 1974) (1651). For an imaginative reconstruction of Hobbesian liberalism, see ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* (1975). In more muted form, the themes of this tradition frequently appear in the jurisprudence of legal positivism, in utilitarian moral, legal, and political theory, and in normative economics.

A second, less pessimistic strand of liberal political theory rejects the belief that moral value is essentially subjective. This strand subscribes to the belief that "there are many conflicting and incommensurable conceptions of [human] good, each compatible with the full autonomy and rationality of human persons" and that "it is a natural condition for a free democratic culture that a plurality of conceptions of the good is pursued by its citizens." John Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 159, 160 (Amartya Sen & Bernard Williams eds., 1982). This strand follows the tradition of Locke, Rousseau, Kant, and now Rawls. For a clear statement of the significance of reasonable pluralism in Rawls' theory, see John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 234-35 (1989) [hereinafter Rawls, *Domain of the Political*]. See also JOHN RAWLS, *POLITICAL LIBERALISM* xvii, xxiv, 24 n.27, 36-40, 216-20 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*].

those controversial beliefs We have a reason for keeping the law from collapsing totally into politics or morality."⁷ In fact, we have the strongest of reasons. The deepest wish of liberal democratic politics is to do away with founding political authority on brute force, noble lies, or divine right and, instead, to ground it in the rational consent of free and equal persons. This consent requires commonly held and publicly affirmed principles and values.

Liberalism therefore demands that legal justification be at least partially autonomous from purely moral or political justification.⁸ By so doing, it underscores the attractiveness of building the institution of adjudication around the authority of pre-existing public norms. In our (liberal) legal culture the authority of pre-existing norms supplies the only uncontroversial justification readily available for any legal decision. All other grounds are controversial. Courts institutionally are ill-suited to express popular will or common consensus;⁹ appeals to divine or natural right seem on their face incompatible with the character of democratic political authority;¹⁰ direct appeals to what is good or just risk foundering on the moral conflict that liberal political philosophy recognizes to be central to modern societies; and appeals to technical

7 Ruth Gavison, *Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 754-55 (1991).

8 Liberal political theory's conception of institutional roles contributes to its view of the difference between permissible forms of legal justification and permissible forms of political justification. Liberalism accords greater freedom to legislatures than to courts. Legislatures and their members are free to throw out old laws and to enact new ones without deference to some pre-existing norm. Legislators thus have more latitude to act and greater access to a more varied set of grounds on which they may act than do courts. For a good discussion of these differences, see Rawls, *Domain of the Political*, *supra* note 6, at 254-55. See generally RAWLS, *POLITICAL LIBERALISM*, *supra* note 6.

An adequate account of legal decision will show how legal justification honors these contrasts between legislation and adjudication. (Note that these contrasts are plainly incomplete. For example, addressing the legitimacy of administrative decision-making requires exploring further arguments and issues).

9 For the classic modern statement of this point (albeit in a constitutional context), see JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980). For an effort to specify how such an appeal could be legitimate, see MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 14-19 (1988).

10 Democratic sovereignty resides in the people, and so democratic moral authority resides in the public culture. Democratic political philosophy thus emanates from, and returns to, moral and political ideals embedded in the culture that it addresses. See, e.g., MICHAEL WALZER, *THE COMPANY OF CRITICS* (1988); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. (1985); RAWLS, *POLITICAL LIBERALISM*, *supra* note 6, at 43-46, 138-72, 212-54; Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379 (1981).

expertise or knowledge, pure and simple, appear to lack the requisite moral authority.¹¹

These are not necessarily insuperable problems. One can, for instance, cloak even appeals to natural law in the authority of our practices and so argue that democratic sovereignty presupposes, rather than denies, the authority of natural law.¹² But these are arduous endeavors in whose pursuit success is elusive. Therefore, it is tempting to ground the authority of legal decision solely on the invocation of pre-existing standards.

B. Institutional Constraints

Taking seriously the idea of decision in accordance with pre-existing norms thus imposes three general conditions on the practice of legal decision. First, the practice must meet the formal conditions of generality, publicity, prospectivity, and impartiality imposed by a thin notion of the rule of law.¹³ Second, the prac-

11 Appeals to this kind of authority appear to be one of the legacies of legal realism. See EDWARD A. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* chs. 2, 3 (1973).

Technical expertise is one of the most salient considerations affecting the legitimacy of administrative agencies—and one of the reasons why they require separate consideration. *Id.*

12 Michael Moore employs a strategy of this sort when he writes “that our interpretive practices reveal us to be . . . natural lawyers.” Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 397 (1985).

13. See *supra* notes 4, 5 and accompanying text. I understand this “thin” notion of the rule of law to be “the conception of formal justice, the regular and impartial administration of public rules . . . applied to the legal system.” RAWLS, *supra* note 4, at 235. Its formal conditions “are those that would be followed by any system of rules which perfectly embodied the idea of a legal system.” *Id.* at 236. The precepts of the rule of law (“treat like cases alike,” “no penalty without a law,” “ought implies,” and the requirements of procedural due process) express these formal conditions.

A similarly “thin” notion is found in H.L.A. HART, *Principles of Legality and Justice*, in *THE CONCEPT OF LAW* 202 (1961). Joseph Raz’s account of the rule of law and its virtue is also relatively thin, though some of its principles are intended to apply to law-making and criminal enforcement in particular. See JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (1979).

This “thin” conception is part of virtually all “thicker” conceptions of the rule of law, such as those of Hayek, Fuller and Dworkin. See RONALD DWORKIN, *Political Judges and the Rule of Law*, in *A MATTER OF PRINCIPLE* 9 (1985); LON L. FULLER, *THE MORALITY OF LAW* ch. 2 (2d ed. 1969); FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* ch. 6 (1946). “Thicker” conceptions of the rule of law either add more elements to the ideal, as Dworkin does, or extract far greater normative content from seemingly formal notions, as Fuller and Hayek do.

I assume a modern conception of the rule of law, not an ancient one. The meaning given to the rule of law by ancient political theorists, such as Aristotle, is very different. See Judith Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY?* (Allan C. Hutchinson & Patrick Monahan eds., 1987).

tice of legal justification must express the contrast between the rule of general norms and the rule of persons (the rule of law and the rule of "men") by being recognizably different from the activity of justifying a particular political program or a particular moral conception. This condition expresses both liberalism's conviction that deep moral disagreement is a fundamental characteristic of modern political life and its belief that the institutional roles of courts and legislatures differ markedly. Third, legal justification must be capable of yielding legal decisions—decisions distinctly rooted in pre-existing legal norms.

The meaning of, and justification for, this third condition may be unclear. The basic idea is this: legal rationality may not require uniquely and demonstrably correct answers, but it must be able to perform the institutional task assigned to it—the task of ordering conflicting claims on the basis of *legal* reasons. The rule of law depends on the differentiation of law from non-law. Legal justification must honor this contrast by assigning legal reasons a decisive role in the ordering of legal claims.

This requirement follows directly from the idea of a perfected enterprise of decision in accordance with pre-existing law. For such an enterprise to succeed, the prescriptive force of legal norms cannot be exhausted before legal decisions are reached, and the system of legal norms must be complete and coherent, that is, free of insoluble internal conflicts.¹⁴ Incomplete legal sys-

14 It is widely recognized that completeness and coherence are necessary to a mature legal system. See CHARLES FRIED, *CONTRACT AS PROMISE* 67-68 (1981) (discussing the axiom of completeness "which is part of most conceptions of a mature legal system"); JULIUS STONE, *LEGAL SYSTEM AND LAWYER'S REASONING* 185-92, 212-18 (1964); MAX WEBER, *ECONOMY AND SOCIETY* 657-58 (Guenther Roth & Claus Wittich eds., 1978). Joseph Beale notes it as a necessary characteristic of law. See JOSEPH HENRY BEALE, *THE CONFLICT OF LAWS* § 4.12 (1935) ("It is unthinkable in a civilized country that any act should fall outside the domain of law. If law is regarded as command, then every act done must either be permitted or forbidden."). See also John Leubsdorf, *Deconstructing the Constitution*, 40 *STAN. L. REV.* 181, 182 (1987) ("We usually read legal writings in the light of their use to decide controversies, and therefore demand at a minimum that they be complete and consistent. Every act must be either lawful or unlawful; none can be both.").

Arthur Jacobson presents the pursuit of gaplessness as a dynamic property within an inevitably open system—that is, as a Sisyphean striving for legal actors: "The persons of the correlation-altering jurisprudences [i.e., common law ones] attempt as one of the ordinary burdens of legality to fill the universe with as much law as possible Persons cannot fulfill the ordinary burdens of legality without creating fresh legal materials. The universe in such jurisprudences is not full . . . only fillable." Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 *CARDOZO L. REV.* 877, 880-81 (1989). Frederick Schauer recognizes it as a property of common law legal systems. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULES BASED DECISION MAKING IN LAW AND IN*

tems cannot perfect legal decision in accordance with pre-existing norms because they will be silent on disputes that may arise in the course of their operation. Viewed from the vantage point of adjudication, the role of legal norms is to determine claims of entitlement. Consequently, just as the rules of tennis must make all serves either in or out,¹⁵ so too the "rules" of law must make all claims of legal entitlement either valid or invalid. The dispositive nature of legal rules requires our third criterion. Legal systems presuppose that they contain within themselves the resources required to resolve the questions that arise in the course of their operation. Recourse to reasons that lie beyond the boundaries of the legal system represents a failure to perfect legal decision in accordance with pre-existing legal norms.¹⁶

LIFE 373-75 (1991). See also ALLAN GIBBARD, WISE CHOICES, APT FEELINGS 95 (1990) ("If [a system of norms] is complete, then for every conceivable fully described occasion governed by norms, the system classifies each alternative as required, optional, or forbidden."). As suggested later in this Article, the necessary completeness of the legal system is central to Dworkin's critique of positivism. For a particularly clear statement of its relevance, see DWORKIN, *supra* note 13, at 120-25.

The principle also makes its way into primary legal materials. For example, Hart and Sacks take a passage from RADBRUCH, INTRODUCTION TO LEGAL STUDY 158-61 (9th rev. ed. 1952), which quotes a provision of the French Civil Code (1804): "A judge who refuses to enter judgment on the pretext of the silence, obscurity or inadequacy of the statute is subject to prosecution for a denial of justice." Radbruch remarks that the terms of this provision "[w]hether express or implied . . . are in force everywhere." H. M. HART & ALBERT M. SACKS, THE LEGAL PROCESS 1408-09 (1958).

The idea of completeness overlaps with the idea of comprehensiveness, which is also often taken to be a characteristic feature of legal systems and is discussed in some of the cases cited in this Article. For our purposes, completeness is the more important idea and the fine points of its relationship with comprehensiveness can be ignored.

15 The tennis example is Dworkin's. See DWORKIN, *supra* note 13, at 124.

16 The arguments of the next three sections reconstruct and criticize conceptions of legal rationality associated with three jurisprudential traditions: legal idealism, legal positivism, and critical legal studies. By so doing, I am attempting to construct the best case for the thesis that legal decision is the application of pre-existing standards to present cases. My interpretations and criticisms of these traditions are driven by my attempt to determine if and how (or if not, how not and why not) legal decision might be reduced to the enterprise of resolving present disputes by pre-existing norms. My interpretations of these positions, therefore, are likely to appear unbalanced and unsympathetic to their adherents. It might help the reader to place quotation marks around my use of terms like "formalism" and "positivism" and names like "Hart" and "Dworkin."

Strictly speaking, then, it is correct to object to my readings of these positions as incomplete at best and inaccurate at worst, but it is also beside the point. Selective interpretation of these traditions is necessary to determine the extent to which the ideal of decision in accordance with pre-existing norms can legitimate the institution of legal decision. Furthermore, more relaxed and accurate renderings of positivism, idealism, and critical legal studies only deepen the problems described here. Insofar as positivism and idealism rely less on the authority of pre-existing norms and more on other grounds of

III. THE ALLURE OF POSITIVISM AND FORMALISM

Prescriptive accounts of legal justification come in two basic types. One type conceives of law as rule, and of legal reasoning as rule application. The other conceives of law as a web of basic moral principles and legal reasoning as a kind of dialectical tacking between particular rules and general principles—between specific parts and the whole that they comprise. Each account has been expressed in a wide variety of ways,¹⁷ and each, as we shall see, can be reconstructed as an account of legal decision in accordance with pre-existing norms.

In one form or another, legal idealism seems to dominate prescriptive American thought about legal decision. Indeed, Bruce Ackerman presents the central precepts of idealism as relatively uncontroversial aspects of sophisticated legal practice.

legitimacy to vindicate their accounts of legal decision, the legitimation problems that afflict their accounts of legal decision are even more acute than I suggest. This is so because the authority of pre-existing norms is the only uncontroversial ground to which legal decision can appeal. I am grateful to Scott Altman for putting this objection to me forcefully.

17 For important accounts of law and legal reasoning as "rule," in addition to those of Hart and his followers, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949) and SCHAUER, *supra* note 14. For a less jurisprudential though highly instructive account, see WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES (2d ed. 1982).

The belief that law is morally saturated, and legal justification holistic and coherentist, finds its most distinctive jurisprudential expression in the work of Lon Fuller, Henry Hart, Albert Sacks, and Ronald Dworkin. (Following Lewis D. Sargentich of Harvard, I shall call this position "legal idealism" to distinguish it from positivism on one side, and natural law on the other. The term is also used by Raymond Bellotti to describe Dworkin's theory. See RAYMOND A. BELLOTTI, JUSTIFYING LAW ch. 4 (1992)).

Some form of legal idealism is the dominant position in American academic legal thought of a liberal cast. Bruce Ackerman, John Hart Ely, Owen Fiss, and Richard Fallon, to name only a few, all endorse conceptions of constitutional interpretation which emphasize its moral core and are holistic and coherentist. See JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 515-19, 525-26, 540-45 (1989); Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Owen M. Fiss, *Objectivity and Interpretation*, 84 STAN. L. REV. 739 (1982).

Similar emphases on holistic interpretation and the dependence of legal norms on moral norms are also found in influential contemporary theories of statutory construction, including those of Calabresi and Sunstein. See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1693 (1988).

With its emphasis on both formal coherence of general principles and overt moral evaluations, the "grand style" of American adjudication praised by Karl Llewellyn also seems to be an exemplary instance of idealism. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION 36 (1960).

No good tax lawyer . . . would ever think of reading the Internal Revenue Code one clause at a time While, of course, the text of each clause is always important, a good lawyer cannot fix its meaning without construing it in the light of principles that make sense of the larger Code of which it is a part. In attempting this familiar kind of holistic interpretation, the reader tries to understand the text as something more than an odd assortment of particularized commands. She tries to organize the rules in terms of principles that give the rules an intelligible order, working from particular clauses to more general principles until she reaches reflective equilibrium.¹⁸

As renderings of the ideal of decision in accordance with pre-existing law, however, accounts of law as rule seem to have a certain priority.

The precepts of the rule of law push powerfully towards both positivism and formalism. Maxims of *possibility* ("ought implies can"), *publicity* ("no offence without a law"), and *prospectivity* ("no penalty without a law") press the law towards positivism. Laws must be clear and publicly comprehensible, distinct from conventional morality, custom, consensus, or political morality by some criterion or set of criteria. The more clear, specific, and publicly knowable the law is, the more the rule of law (the rule of impersonal norms) is achieved. The less clear, specific, and knowable the law is, the less secure liberty is,¹⁹ and the more dependent citizens are on the benevolence and wisdom of those charged with enforcing and interpreting the law. Abstractness and vagueness make the rule of law less distinct from the rule of persons.

Hence the allure of positivism. The rule of law suggests that the law should be a matter of rules as norms—as general directives capable of guiding conduct.²⁰ This sense of rule is essential both to the rule of law as rule by impersonal agency (and so to the contrast between constitutionalism and despotism), and to the rule of law as a disciplining of political power by general guidelines and boundaries (and so to the contrast between constitutionalism and totalitarianism). Second, the ideal of the

18 Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1425-26 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990)).

19 See RAWLS, *supra* note 4, at 235-40.

20 This is the idea of law as "social rule" that Hart made famous. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1990). For our purposes, the critical property of norms understood in this way is their autonomy: the norms themselves guide; they are not merely markers of and for deeper moral reasons.

rule of law directs the law towards rules understood as specific, distinctively legal prohibitions ("no vehicles in the park") in contrast to abstract moral principles ("no man may profit from his own wrong").²¹ Abstract moral principles are less determinate than specific rules and less autonomous from political morality, custom, and convention. If the rule of general norms is to be sharply distinguished from the rule of particular persons, then legal norms must be both clear and clearly distinguished from other normative material. Positivism is the conception of law which appears fully to satisfy these requirements of autonomy and intelligibility.²²

21 The former is the rule that H.L.A. Hart uses to illustrate the characteristics of legal reasoning. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Ronald Dworkin takes its specificity to be essential to its "ruleness" in his influential critique of Hart. See HART, *supra* note 20, at ch. 7; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 2 (1977). The latter is an abbreviated version of the principle that Dworkin cites as a typical legal principle. See DWORKIN, *supra*, at 23.

22 The view that the rule of law requires positivism in legal theory and formalism in legal reasoning is undergoing something of a renaissance, in both theory and practice. Practically, the renaissance is led by Justice Scalia. See, e.g., Scalia, *supra* note 1. Scalia's opinions can be even more stark: "A government of laws means a government of rules. Today's decision is ungoverned by rule, and hence ungoverned by law." *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting).

Theoretically, the renaissance is led by Frederick Schauer. See Frederick Schauer, *Rules and The Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 666-67 (1991) ("Positivism . . . is not only a descriptive claim, purporting to give an account of those legal systems in which a limited and pedigreed set of norms is extensionally divergent from the non-pedigreed set of norms then accepted within a society [T]he distinction between law and non-law is a central feature of the positivist picture. Under the 'limited domain' account, there is plainly a close affinity between legal positivism and rule-based decision-making. This affinity stems from the fact that both the idea of a rule and the idea of positivism as a limited set of norms entail some extensional divergence between the set of results indicated by a rule or set of rules and the set of results indicated by the full array of norms otherwise accepted by some decisionmaker.") (footnotes omitted). See generally SCHAUER, *supra* note 14.

Schauer's conception of positivism, like my own, is a prescriptive one. Prescriptive positivism holds that law ought to consist of a limited set of pedigreed rules so that legal decisions can be made without the exercise of moral judgment. Hobbes, Hume and Bentham are pre-eminent proponents of prescriptive positivism. See generally GERALD POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 328-36 (1986). Descriptive positivism holds that all law can be understood as a system of norms whose ultimate authority derives from some positive convention. H.L.A. Hart is frequently regarded as a descriptive positivist. See generally JULES L. COLEMAN, *Negative and Positive Positivism*, in *MARKETS, MORALS AND THE LAW* 3 (1988); Gavison, *supra* note 7; Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 158, 159-62 (Robert P. George ed., 1992).

The belief that formalism is the theory of adjudication required by the rule of law is not confined to supporters of positivism. It has also seemed irresistible to many who would like to resist it. See, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation*,

Legal positivism pictures law as both the quintessential human artifact (as something willed or posited) and the quintessential social fact (as a fact determined by the prior acts of legislators). As the quintessential human artifact, law is no more related to morality than is any other human tool. As the quintessential social fact, law is not dependent for its application on an infusion of moral value.²³ The question of what the law is at any particular moment in time and with respect to any particular dispute is a thoroughly empirical question about what laws have been willed into existence. To answer the question, one looks not to moral ideals or to truths discerned through the rational apprehension of an independent order of natural or divine values, but to "institutional facts"²⁴—facts about what legislatures and courts have done and said. Valid laws, in brief, are identified by determining what legislative bodies have enacted and what adjudicative institutions have ruled.

Prescriptive positivism thus demoralizes law.²⁵ Law is a system

58 S. CAL. L. REV. 277 (1985); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791, 792-97, 810-12 (1989).

23 The fundamental challenge for positivism is to explain the "fact" that law is regarded as normative by those subject to its sway without conceding any necessary link between law and morality. Forms of positivism vary in the way that they account for legal normativity. The sketch of positivism given here is derived from H.L.A. Hart. For Hart, law's normativity derives from the fact that the legal system's fundamental norm (its "rule of recognition") is accepted by the citizenry the legal order governs. See HART, *supra* note 20. My interpretation of Hart is unbalanced because I am constructing a prescriptive conception of positivism. For a more balanced perspective, see NEIL MACCORMICK, H.L.A. HART (1981). For a discussion of the distinction between descriptive and prescriptive forms of positivism, see *supra* note 22.

24 See Neil MacCormick, *Law as Institutional Fact*, 90 L.Q. REV. 102 (1974).

25 Although both prescriptive and descriptive positivism are, strictly speaking, agnostic on the character of the moral order, prescriptive positivism in particular is frequently linked with the thesis that all values are equal because the choice of any value must be arbitrary, subjective and without rational foundation. Here the source is Hobbes. A notorious recent example of the linkage is Robert Bork. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971). Cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA* ch. 7 (1990). Value subjectivism reinforces positivism in two related ways. First, if the moral order is a realm of unarbitrable chaos, the need for positivism—the need to separate legality and morality—is all the more acute. Second, if moral choice is essentially arbitrary, we not only need to separate law from morality, we also need to purge law of morality. We not only need positivism, we need a truly pure sort of positivism. Law must be a matter of specific rules, not a matter of abstract principles because the concrete implications of abstract principles must be worked out before such principles can resolve actual disputes. And to the extent that abstract legal norms must be cemented by further specifications of the values that they embrace, abstract norms require moral choices and thereby threaten to thrust such legal reasoning back into the

of conventional rules, highly specific in character and clearly separate from background morality, custom, and consensus by criteria of recognition, criteria which pertain principally to pedigree or origin.²⁶ Moreover, the legal order as a whole is grounded not on congruence with natural or divine law or any other form of moral authority, but on the social fact of acceptance. Moral grounds enter into law only at those discrete points where they are willed in—when the legislature incorporates a moral conception into a positive legal order by enacting the concept of “good faith,” for instance, or when the Constitution bans “cruel and unusual” punishment.²⁷

Legal positivism also demoralizes legal reasoning. It promotes a conception of law as a system of distinctively legal rules, unified by pedigree or genealogy, and applied to the resolution of disputes by acts of subsumption. In applying those rules, recourse is required only to posited sources of value—to the values enshrined by those legislative acts of will which create law, and, in difficult cases, to the legislative intentions underpinning those laws. In applying a norm which bans “vehicles” from the park, for example, judges are not required to make any choices about the sorts of activities that ought to be banned from the park; they merely decide what counts as a “vehicle,” an issue largely governed by linguistic conventions shared by judges, legislators, and citizens

whirlpool of unarbitrable moral conflict. Thus, there is a natural connection between value skepticism in moral theory and legal positivism. See generally COLEMAN, *supra* note 22, at 9-10. Moral skepticism provides a reason for subscribing to legal positivism. As Philip Soper points out, this is a one-way street. Legal positivism does not provide a reason for subscribing to moral skepticism. See SOPER, *supra* note 1.

The prescriptive positivist's impulse to purge abstract, moral principles from law, and to replace them with concrete rules, is at its clearest in constitutional scholarship where extreme positivists like Bork and Scalia struggle to reduce the Constitution's broad principles to precise rules in order to avoid abstract moral theorizing. See ROBERT H. BORK, *supra*; ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 7-11 (1984); Scalia, *supra* notes 1 and 22.

26 HART, *supra* note 20, at 120-24.

27 Although positivism can account for general, morally weighted norms, such as the due process and equal protection clauses of the Constitution, it requires such clauses to be atypical as places where positive law incorporates principles of political morality. Prescriptive positivism's natural habitat is the highly technical, rule-like fields of private law (tax, property, contract in its heyday), not the ideally impregnated fields of public law. In such fields the positivist impulse is to tie ideal conceptions down by specifying them into intricate formal doctrines. See, e.g., Scalia, *supra* note 1, at 1178-79, 1182-84 (arguing for adoption of originalist approach to constitutional adjudication on the ground that so doing will yield the constitutional rules that the rule of law requires). For the significance of the social fact of acceptance, see, *inter alia*, COLEMAN, *supra* note 22, at 3; HART, *supra* note 13, at 97-107, 144-50.

alike.²⁸ On those rare occasions when neither statutory language nor linguistic conventions settle the matter, the role of the judge is to ferret out the intentions of the legislature, obscure though they may be.²⁹ Legal decision is thus purged of value choices. The law, like the facts, is found, not made.

The implication of formalism by the thin conception of the rule of law is, if anything, even stronger and more direct than the implication of positivism. If law is a system of rules, and if the rule of law is the principle of formal justice applied to that system, then legal reasoning ought to be formal rule application: the syllogistic subsumption of particular facts under pre-existing rules.³⁰ As Hart himself stated: "[I]t might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest or caprice."³¹ Rule formalism in legal decision is formal justice in action.

IV. THE IDEALIST INTERPRETATION OF FIDELITY TO PRE-EXISTING LAW

Positivism (and its version of formalism) can be (and are) criticized from all directions. The distinctiveness of the idealist critique of positivism reconstructed here lies in the claim that positivism disappoints the ideal of decision in accordance with pre-existing law, whereas idealism perfects that ideal.³² The elements

28 See HART, *supra* note 20, at ch. 7.

29 Hart himself calls for creative choice at this point. A more prescriptive positivist would insist on recourse to legislative intention and legislative history. See DWORKIN, *supra* note 13, at 9, 14-15, 19-23.

30 Moreover, as the preceding discussion shows, prescriptive positivism itself implies formalism. Once we posit a system of rules, we are naturally led to picture legal decision as the formal application of those rules.

31 HART, *supra* note 20, at 156-57. Schauer also embraces formalism understood as a practice where "a decisionmaker reaches the result indicated by some legal rule, independent of that decisionmaker's own best judgment and independent of the result that might be reached by direct application of the justifications lying behind the rule." Schauer, *supra* note 22, at 664. See generally SCHAUER, *supra* note 14. I agree with Schauer that formalism in this sense should not be an epithet.

32 Although I shall reconstruct this argument out of Dworkin's writings, the writings of Lon Fuller, Henry Hart and Albert Sacks prefigure the argument. See HART & SACKS, *supra* note 14, at 138-41, 155-71, 386-400. Hart and Sacks' account of "reasoned elaboration" prefigures Dworkin's constructivist account of legal reasoning. *Id.* at 161-71. Both accounts emphasize the attribution of moral justifications to positive legal rules; stress the role of coherence with the primary legal materials as the test of permissible justifying theories; criticize the positivist doctrine of discretion as a phenomenologically wrong ac-

of this claim can be reconstructed out of Ronald Dworkin's writings.³³ By reconstructing Dworkin, we can fashion the strongest argument that decision in accordance with pre-existing standards requires a holistic and coherentist form of legal justification.

A. *The Failure of Positivism and Formalism*

The idealist critique of positivism³⁴ (and its version of formalism) can be cast (or, better, recast) as an attack on these theories for failing to perfect the enterprise of decision in accordance with pre-existing norms. Gaps and conflicts in legal rules prevent any system of rules from fulfilling the dream of decision in accordance with pre-existing norms. Paradoxically, the byproduct of the law's quest for comprehensiveness and closure is the creation of gaps and conflicts. Legal rules are framed with paradigmatic cases in mind. The rule that running a red light is *per se* evidence of negligence is framed with the ordinary driver going about his or her ordinary business in mind, not with the fire engine racing to put out a fire in mind. However, the comprehensiveness of the legal system prevents courts from holding that the unprovided-for case is simply not covered, and from declining to rule on the controversy.³⁵ When facing the case of a fire engine that runs a red light and injures a pedestrian, the court must determine whether

count of decision in hard cases, and as a failure to discharge judicial duty; and argue that the pursuit of the "right answer" does (and should) govern hard cases. *Id.* at 168.

Lon Fuller's emphasis on the role of reason as opposed to fiat in legal decision; his emphasis on structure as the principal source of constraint on legal decision-making; and his insistence that the fundamental issue in his debate with H.L.A. Hart was "fidelity to law," all implicate an idealist conception of the rule of law. See LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664-67 (1957-58); Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946). For an extended and valuable consideration of these connectors, see Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413 (1987).

33 This reconstruction of Dworkin's writings is not meant as a balanced or fair reading of his work. In particular, the reconstruction systematically underrates the degree to which Dworkin argues for a fusion of positive law and genuine moral rights, a fusion Dworkin regards as essential both to good law and to a good understanding of law. Furthermore, in Dworkin's current articulation of his theory, criteria of fit do not play the decisive role attributed to them here. Dworkin thus extracts less from the idea of decision in accordance with pre-existing norms than does this paper. My aim here is to grind a particular axe and my interpretations and criticisms of Dworkin are driven by the argument that I wish to develop. For an excellent, sympathetic exposition of Dworkin, see STEPHEN GUEST, *RONALD DWORGIN* (1991).

34 The positivism that idealism attacks is an interpretation of the positivism of H.L.A. Hart.

35 See SCHAUER, *supra* note 14, at 224-26.

the fire engine acted negligently. The court cannot refuse to rule on the matter on the ground that it is not covered by the pre-existing law.³⁶

Gaps and conflicts are inevitable in any system of rules³⁷ that aims to achieve comprehensiveness. The inexhaustibility of the world yields unprovided-for cases, and the commitment to comprehensiveness requires that those cases be resolved. When an unprovided-for case arises within a comprehensive system of rules, the result can be described either as a conflict or as a gap. The unprovided-for case produces a gap in the sense that it falls between the "core of certainty" of either relevant rule; it produces a conflict in the sense that either rule might be extended to cover the case.³⁸

36 See *Buckoke v. Greater London Council*, 2 W.L.R. 254 (1971); *Lily v. West Virginia*, 92 F.2d 61 (2d Cir. 1928); *LaMarra v. Adam*, 63 A.2d 497 (Pa. Super. Ct. 1949).

37 For present purposes, we need not choose among different conceptions of what rules are. Beale defines "rule" as follows: "[a] rule means a statement of law applicable only to a narrowly defined class of cases and incapable of extension by deduction or analogy. Instances of rules are: the rule in *Shelley's case*; the rule that one must stop, look, and listen before crossing a railroad track; the rule that one must turn to the right to pass a vehicle coming in an opposite direction." 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 21 (1935). Dworkin's similar conception stressing "all or nothing force," see DWORKIN, *supra* note 21, at ch. 2, or Schauer's different notion of rules as entrenched generalization, see SCHAUER, *supra* note 14, at 47, differ in important ways.

All three definitions nonetheless yield gaps and conflicts in roughly the way described in the text. See, e.g., *id.* at 222-26 (analyzing problem of gaps and formal solutions to that problem). My account of the problem of gaps is very similar to Schauer's approach.

38 The "core of certainty" reference is to HART, *supra* note 20. Schauer makes the same point in terms of the extension of entrenched generalizations. See SCHAUER, *supra* note 14, at 47-52.

Illustrations of "gaps" or "conflicts" among rules include the conflict between the rule of strict liability for common carriers and negligence for warehousemen that was the subject of Chief Justice Shaw's famous decision in *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. (1 Gray) 253 (1854), concerning the liability of railroads for goods that they transport; or the question Shaw addressed in *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49 (1842), regarding whether tort rules of vicarious liability, or contract rules disparaging implied contracts of indemnity among contractually related parties, should govern the liability of masters to their servants for "industrial accidents." Many cases of "first impression" arise where either of two "rules" might control a class of cases, but only one can.

A more modern example of a conflict appears in the controversy over the applicability of Rule 407 of the Federal Rules of Evidence—admissibility of subsequent remedial measures—to product liability actions. Here, a specific rule (barring the admission of such evidence in negligence actions) conflicts with a more general rule making all relevant evidence admissible. The question is, then, which rule should be "extended" to control the product liability case. Compare *Flaminio v. Honda Motor Co.*, 733 F.2d 463 (7th Cir. 1984) (Posner, J.) (applying Rule 407) with *Schelbauer v. Butler Manufacturing Co.*,

Because legal rules are permeated by gaps, conflicts, and ambiguities, the law (in a positivist view) frequently runs out and legal decisions frequently resemble legislative choices.³⁹ They do so because gaps and conflicts prevent courts facing them from being "doubly constrained" in the way that Soper describes.⁴⁰ Courts confronting gaps and conflicts must still "reach decisions that accord with pre-existing standards," but they *do* have a "choice about the standards to be used in performing that task."⁴¹ They can decide in accordance with either of the conflicting rules. In *Farwell v. Boston & Worcester Railroad*,⁴² for instance, Shaw might have decided that accidents among servants of the same master should be governed by either a tort rule or a contract rule.⁴³

Gaps raise many difficult jurisprudential questions. For our limited purposes, three observations are sufficient. First, complex modern legal systems bring an enormous number of rules to bear on many phenomena subject to their governance. It is not surprising that gaps and conflicts frequently arise within such systems.⁴⁴ Second, appellate cases—"hard cases" in one familiar sense of the

673 P.2d 743 (Cal. 1984) (refusing to apply identical state law provision).

Within our legal system, conflicts can be quite different from gaps. Common law principles ("no man may profit from his own wrong"); open-ended statutory commands (prohibiting "unfair and deceptive acts or practices" in "trade or commerce"); and great constitutional clauses (equal protection, due process) hover over innumerable rules often overriding them even in cases where the application of the pertinent legal rule is clear. But our legal system is not merely a system of rules.

39 "When a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance, the judge has a 'discretion to decide the case either way.'" DWORKIN, *supra* note 21, at 81 (summarizing positivism).

Formal closure rules (for example, presumptions requiring the strict construction of criminal statutes) appear to allow judges to avoid quasi-legislative choices and the creation of new rules. In fact, however, they only displace the problem. Closure rules avoid some conflicts, but create others, because they force a choice over when to invoke the authority of the pertinent primary rule and when to invoke the authority of the relevant closure rule. *But see* SCHAUER, *supra* note 14, at 224-25.

40 *See* SOPER, *supra* note 1.

41 *Id.* Soper describes the second dimension of the "double constraint" on courts as "no choice about the standards to be used in performing that task." *Id.*

42 45 Mass. (4 Met.) 49 (1842). *See supra* note 38.

43 Under the applicable tort rule, the master would be liable to one servant for the torts of another. Under the contract rule, the master would not be liable.

The parallel freedom in both *Flaminio* and *Schelbauer*, *see supra* note 38, is the freedom to subsume product liability cases where the admissibility of post-accident product design, manufacture, or warning changes is at issue, under either the general rule of evidence law that all relevant evidence is admissible or the specific exception to that rule barring the introduction of post-accident remedial measures to prove fault in negligence cases.

44 It is both possible and common for conflicts to arise among more than two rules.

term—are usually cases where more than one legal rule might control the outcome of the case and at least two of the relevant rules call for different resolutions.⁴⁵ Third, the theoretical difficulty presented by gaps and conflicts is largely independent of their frequency (although the importance of the theoretical problem depends on how frequently it arises).

Gaps and conflicts are triply embarrassing for a conscientious judge. First, as long as we assume that a legal system is simply a system of rules, gaps and conflicts frustrate the discharge of judicial duty. In such cases, the judge cannot fulfill her duty to determine what the legal rights of the parties are because there are no pre-existing rights. Second, gaps and conflicts make decisions in hard cases unfair to one party, who is retrospectively subjected to a newly created legal duty. Decisions in these hard cases thus violate a cardinal principle of legality—"no penalty without a law." Third, on the positivist account, decisions in hard cases violate both the commitment to legislative supremacy and the requirement of publicity (implicit in a democratic political culture) stressed in democratic political philosophy⁴⁶ and expressed in le-

45 See SCHAUER, *supra* note 14, at 188-91, 193 ("[T]he array of decisional opportunities confronting a judge will be a self-selected group of cases in which a plausible rule-based argument can be made on both sides of the issue."); Frederick F. Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988).

46 The view that publicity is an essential component of democratic legitimacy is emphasized by John Rawls. See RAWLS, *supra* note 4, at 55, 130 n.5, 133, 177-82, 547 n.13, 570, 582; RAWLS, POLITICAL LIBERALISM, *supra* note 6, at 66-71, 212-54; John Rawls, *Kantian Constructivism in Moral Theory: The Dewey Lectures*, 77 J. PHIL. 515, 534-49 (1980). This view is not peculiar to Rawls. See JOSHUA COHEN & JOEL ROGERS, ON DEMOCRACY 150 (1983); JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 184-88 (Thomas McCarthy trans., 1979); BERNARD A. WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 101 (1985) (describing the ideal of transparency: "the working of [society's] ethical institutions should not depend on members of the community misunderstanding how they work."). Nor is this view new. Rawls finds it implicit in the contract tradition. RAWLS, *supra* note 4, at 16. See also G.W.F. HEGEL, PHILOSOPHY OF RIGHT paras. 142-56, 218-28 (T.M. Knox trans., 1942) (1821) (on the right of self-consciousness and the rule of law). Marx intimates the condition when he writes of removing the "veil . . . from the countenance of the social life process." KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 173 (Ben Fowkes trans., 1977) (1867). Stephen Holmes suggests that publicity may be the central principle of liberal constitutional democracy and connects it with the liberal institutionalization of permanent political opposition. Stephen Holmes, *The Permanent Structure of Antiliberal Thought*, in LIBERALISM AND THE MORAL LIFE 227, 241 (N.L. Rosenblum ed., 1989) ("A good case could be made . . . for the primacy of publicity in liberal thought If policies are set publicly and public criticism is encouraged, a government can avoid self-contradictory legislation, discern problems before they get out of hand, and correct its own mistakes. Liberals conceived the central institution of liberal politics to be the opposition—not least of all because the back-and-forth of public dis-

gal idealism (especially in Dworkin's doctrine of political responsibility and his constructive model of legal justification).

The most evidently undemocratic feature of positivism is that it makes decisions in hard cases resemble legislative choices. Judges must choose, on extra-legal grounds, the better legal rule.⁴⁷ Although practically it may be necessary for judges to lapse into legislative policy choice when legal rules run out, doing so is a theoretically unjustified judicial usurpation of legislative authority. Worse still, the judicial obligation to deliver legal decisions, not legislative choices, obscures the reality of decision in hard cases. Both the morality and the psychology of the judicial role make it difficult for a judge to candidly concede that she is making legislative choices. For a judge to concede the point is to undercut the authority of the very decisions she is making. On the formalist account of hard cases, the judge is faced with a Hobson's choice among irreconcilable obligations. Should she deny the difference between easy cases and hard ones and mask her legislative choices in the language of legal decision, she conceals what she is really doing and so violates the democratic demand that authority be exercised openly and publicly. Should she acknowledge the difference, she is conceding that her decision is illegitimate—that she is making a legislative choice, not rendering a legal decision. However she proceeds, she seems doomed to violate the democratic demand that power be exercised in accordance with its public justification.

These criticisms are not new. Realism prefigures them and sophisticated positivists like H.L.A. Hart more or less acknowledge them. But in the hands of realism and positivism they tend to disempower adjudication. In the realists' hands these criticisms tend to undermine legal decision by implying that formal (norm to case) legal rationality is unworkable and ought to be replaced by purely instrumental (means to ends) rationality. And purely forward-looking preferential policy choice cannot be squared with the

agreement was thought to sharpen the minds of all parties and produce decisions more intelligent than any proposals presented at the outset.") (citing George H. Sabine, *The Historical Position of Liberalism*, 10 AM. SCHOLAR 49 (1940-41), and JOHN MILTON, *AREOPAGITICA* (John W. Hales ed., 1917) (1690)).

It is also worth noting that publicity is also a component of legal legitimacy in a more direct way. "Justice," as a familiar legal maxim has it, "must not only be done, it must also be seen to be done."

47 There are many different positivist descriptions of how this process does and/or should proceed. See HART, *supra* note 13, at 120-32; NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* ch. 8 (1978).

ideal of decision in accordance with pre-existing norms. In the positivists' hands these criticisms tend to lead to an awkward and unsatisfactory staccato alteration of rule subsumption and open policy choice.⁴⁸ The special positivist twist on the policy-choice aspect of legal decision is to confine and deflate it. Positivism is committed to a deferential style of adjudication when legal rules run out. Realism implicitly (and mistakenly) urges free-wheeling policy choice in the gaps; positivism recognizes that judges stand on shaky ground when legal rules run out and counsels deference to custom, popular opinion, or intimations of legislative intent.

Dworkin's writings, and legal idealism in general, show how these objections might be turned against positivism and its version of formalism, not against the legitimacy of legal decision. Far from undermining legal decision, the failings of positivism prompt a flowering of moral and political argument in law. By reconstructing the moral underpinnings of legal doctrine, legal idealism promises to seal the gaps in formal law and so to perfect the workings of legal decision. Paradoxically, rule of law values can be used to justify blurring the line between legal and moral discourse and fostering a style of adjudication whose boldness verges on hubris.

B. Constructing Moral Coherence: The Idealist Conception of Legal Rationality

The general conception of legal reasoning that Dworkin articulates⁴⁹ resembles Rawls' method of reflective equilibrium. Stated briefly,⁵⁰ it calls for the judge (Hercules) to generate decisions in

48 This is Duncan Kennedy's description. See Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 385 (1973).

49 The idealist account of legal reasoning presupposes an ongoing practice whose participants reason in certain ways and make certain judgments. Generally speaking, they reason like lawyers and arrive at the kind of shared judgments that well-trained lawyers reach. Idealism supposes that cases will arise within this practice about which the participants are highly uncertain. They do not know what the correct resolution of these cases is and they may be uncertain of how to proceed in order to reason their way to a conclusion. Idealist jurisprudence is addressed to these participants confronting a practical problem within their enterprise, a problem which leads them to engage in the self-reflection that we call legal philosophy. (These cases frequently involve "gaps" or "conflicts"—cases of "first impression," as the term is used in *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49 (1842)).

Legal theory, then, is legal practice reflecting on its dilemmas, and the theory of legal decision presupposes both a practice of legal decision and a legal sensibility, just as Kant's categorical imperative presupposes a practice of moral judgment and a moral sensibility. See Barbara Herman, *The Practice of Moral Judgment*, 82 J. PHIL. 414 (1985).

50 Many of Dworkin's more famous and controversial positions—for example, the

hard cases by constructing an ideal theory of the institution in question, a theory which is both descriptive of how that legal institution in question does work and prescriptive of how it should work through a dialectical tacking between "political philosophy and institutional detail."⁵¹ By "political philosophy," Dworkin means a structure of principles which has moral or ideal force and, as such, is capable of justifying extant legal rules. By "institutional detail," Dworkin means the settled doctrine and practices of the system and the lower order reasons which purport to justify them.⁵² These lower order reasons are assigned "only an initial or prima facie place in [Hercules'] scheme of justification."⁵³ Provisionally, we might think of the "standing statutes and precedents," the settled doctrine of the system, as roughly analogous to considered judgments in moral theorizing.⁵⁴ We might also regard lower order reasons as roughly analogous to common sense moral precepts or principles⁵⁵ which are displaced and reordered by constructive moral theorizing. Constructive moral theorizing

distinction between policy and principle and the various distinctions among types of rights—are irrelevant for my purposes. I shall also assume that the relation between Hercules' heroics and actual judges need not be spelled out here. Actual judges work more instinctively than Hercules, displaying their theories of law rather than deploring them, and undertake "partial justifications" of the law. See Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 213 (1986); GUEST, *supra* note 33, at 46-47. For a detailed consideration of some of these matters, see James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. (forthcoming Dec. 1993).

51 DWORKIN, *supra* note 21, at 107. Dworkin writes:

[Hercules] must develop a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government He must develop that theory by referring alternately to political philosophy and institutional detail. He must generate possible theories justifying different aspects of the scheme and test the theories against the broader institution.

Id.

Hart and Sacks' account of "reasoned elaboration" prefigures this approach. See HART & SACKS, *supra* note 14, at 160-68.

52 Dworkin's first criterion is captured by his description of theory construction as a quest for the "set of principles that reconciles all standing statutes and precedents." DWORKIN, *supra* note 21, at 119. The first criterion is discussed at length in DWORKIN, *Hard Cases*, *infra* note 76, but the second only is briefly alluded to. *Id.* at 118.

53 *Id.*

54 See RAWLS, *supra* note 4, at 47-49.

55 *Id.* at 47, 100-01 (accounting for and explaining the subordinate place of common sense precepts of justice and on the principle of redress and its relation to the difference principle). Cf. RONALD DWORKIN, *LAW'S EMPIRE* 443-44 (1986) (writing on competitive principles of tort law that "people should not be held responsible for causing injury they could not reasonably foresee and that people should not be put at disadvantage, in the level of protection the law gives them, in virtue of physical disabilities beyond their control.").

drives moral reflection deep beneath the surface of everyday moral reflection and yields principles which subordinate, partially replace, and partially systematize the familiar precepts of ordinary moral discourse.

Idealism requires that its principles be independently appealing on moral and political grounds and thus both justifiable and justifying. This first requirement differentiates idealism from complex types of positivism, which can only accommodate principles on the ground that they are extracted from settled rules and doctrine.⁵⁶ Idealism also requires that the principles its constructs be able to fit, or account for, ongoing institutional practices. This second requirement differentiates idealist legal argument from less fettered forms of moral theorizing. Reflective equilibrium, for example, places no limit on the extent to which considered judgments or prereflective principles may be revised. As long as our considered judgments and justifying principles match, reflective equilibrium exists.⁵⁷ There is no requirement either that we hold the same moral principles at the beginning and the end of our inquiry or that our considered moral principles match the consid-

56 Such a positivism would be more complex than Hart's portrayal of law as a system of relatively discrete low level rules of the "no vehicles in the park" kind. This formalism would make room for the integrated and intricate rule-structures which characterize legal doctrines such as vicarious liability, offer and acceptance, contract damages, and comprehensive statutes such as the UCC and (perhaps) the tax code. The contrast between ideal and formal principles emerges from a comparison of "a man may not profit from his own wrong," DWORKIN, *supra* note 21, at 27, and the principle of corporate taxation that "a shareholder-level tax on corporate income shall be imposed but generally only upon its distribution to shareholders," Robert C. Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90, 100 (1977). The work of Langdell, Beale and the "legal scientists" appears to embody a more complex type of formalism. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 31-37 (1980). So, too, the positivist account of principles given by Neil MacCormick in his adaptation of Hart's theory to accommodate Dworkin's criticisms emphasizes principles as "summaries" of rules. MACCORMICK, *supra* note 47, at 155 ("The principles of a legal system are the conceptualized general norms whereby its functionaries rationalize the rules which belong to the system in virtue of criteria internally observed.").

57 See RAWLS, *supra* note 4, at 48; T. M. Scanlon, *The Aims and Authority of Moral Theory*, 12 OXFORD J. LEGAL STUD. 1, 2-3, 8-10 (1992); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 751, 778, 783 (1993).

The text's description of the differences between ideal theory construction in law and reflective equilibrium is not complete. Reflective equilibrium differs from the constructive conception of legal reasoning in other ways as well. For example, reflective equilibrium requires more than just a match of principles and considered judgments, but also that our judgments at all levels of generality cohere. See John Rawls, *The Independence of Moral Theory*, in 48 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 5, 8 (1975); Scanlon, *supra*, at 8-10; Sunstein, *supra*, at 753.

ered judgments we held when we began moral reflection.⁵⁸ Idealist legal justification, by contrast, limits the extent to which "considered judgments" (the settled law) may be revised. The theoretical structure of justifying principles that Hercules constructs must "fit" most of the existing legal materials.⁵⁹ This limit on the revisionary power of reflection is what gives legal justification its ideological aspect. Legal reflection must, by and large, vindicate the law as it is.⁶⁰ An analogous constraint on moral reflection would require moral theory to vindicate our prereflective moral intuitions.

Taken together, these two requirements of fit and of justification cannot be fully satisfied. No morally defensible structure of principles will justify all of the settled doctrines of any legal system, and any structure of principles which does account for all of the settled doctrine will be a sham. Such a system would be morally incapable of justifying anything.⁶¹ Consequently, "Hercules must expand his theory to include the idea that a justification of institutional history may display some part of that history as mistaken."⁶² This theory has its own complexities. As Dworkin observes, mistakes come in two forms. The first type of mistake loses its "gravitational force," its capacity to flower from a discrete rule into a general principle, but retains its "specific authority" as a rule effective in its own limited sphere.⁶³ The second type of mistake loses both its gravitational force and its specific authority.⁶⁴ Thus quali-

58 See RAWLS, *supra* note 4, at 49.

59 The difference between legal and moral reflection should not be overstated. Total moral criticism—moral reflection which overturns all of our prereflective intuitions—seems inconceivable. Moral criticism which did not look to some of its audiences' fundamental convictions would fail to move its audience. Our moral sense tends to play a fundamental role in any moral theory. But the comparative point—that moral reflection may revise moral intuitions more drastically than legal reflection—appears sound to me.

60 An insistence on the ideological character of legal reasoning is one of the characteristic themes of critical legal theory. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 262-68 (1987); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 5-15, 118-19 (1986).

61 Dworkin writes:

[A]ny set of statutes and decisions can be explained historically, or psychologically, or sociologically, but consistency requires justification, not explanation, and the justifications must be plausible and not sham. If the justification [Hercules] construct[ed] makes distinctions that are arbitrary and deploys principles that are unappealing, then it cannot count as a justification at all.

DWORKIN, *supra* note 21, at 119.

62 *Id.* at 121.

63 *Id.*

64 *Id.*

fied, Dworkin's theory calls for Hercules to construct a structure of principles which will justify most, and criticize some, of the relevant legal materials.⁶⁵

1. Coherence and the Role of Criteria of Fit

Dworkin's criterion of fit is sketchy and phenomenologically incomplete.⁶⁶ For present purposes, however, the details of an adequate criterion of fit count less than the role played by that criterion. Ideal theory construction can perfect legal decision in accordance with pre-existing norms only if its criteria of fit are discriminating enough to filter out a correct ideal theory for any stock of legal materials. Criteria of fit are legal idealism's analogue to positivism's rule of recognition—they separate the domain of legal norms from the background norms of morality and politics.

65 I am indebted to Lewis D. Sargentich for this way of summarizing Dworkin's theory.

66 I attempt to refine the criterion later in this Article. See *infra* Part V. Unfortunately, the idea of "fit" as Dworkin uses it is so abstract that it is more elusive than one would like. Hercules' theories "fit" his entire legal system, and Dworkin's own exercises in theory construction "fit" large chunks of our legal system in very abstract ways.

Two relatively simple examples may clarify the concept of "fit." The first is Dworkin's own use of the story of "Tal's smile" taken from the annals of chess history. See DWORKIN, *supra* note 21, at 102-04. The Russian grandmaster Tal continually smiled at the American grandmaster Bobby Fisher in the course of a chess match. Infuriated, Fisher claimed that Tal's conduct violated a rule prohibiting any player from "unreasonably" annoying another. Fisher's claim requires, Dworkin argues, constructing the particular conception of intelligence that chess seeks to test and applying it to Tal's smile. Constructing that conception requires oscillating between the rules of chess and general notions of intellect. Those rules "rule out" certain general conceptions of intelligence and "rule in" others. A glance at the rules tells us that chess is about strategic intelligence not contemplative intelligence. The task of a chess referee is to decide, by viewing the rules of chess in light of the aims that animate them, whether Tal's smile is or is not a legitimate exercise of the kind of strategic intelligence that chess is supposed to reward. Put differently, whether or not Tal can exploit Fisher's temperamental hypersensitivity depends on whether or not the cleverness displayed in Tal's strategy is the kind of strategic intelligence that chess is designed to test.

The case of *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1230 (Cal. 1975), discussed *infra* note 126, supplies a clear illustration of the rhetoric of "fit." In *Li*, the California Supreme Court replaces contributory negligence with comparative negligence because comparative negligence "fits" better with the master principle of negligence law—apportioning accident costs on the basis of "fault." (The court's rhetoric, of course, may be wrong.)

Ultimately, the idea of "fit" must be seen as very complex, exemplified by the reasoning found in great common law cases such as *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960), and *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Furthermore, Dworkin's own notion of "fit" must be tested at a very high level of generality. See *infra* Part V.

By doing so, criteria of fit ensure that decisions in hard cases rest on distinctively legal grounds, not on moral or political grounds. As long as criteria of fit have the power to filter out a correct theory of decision, even in hard cases, the rule of pre-existing law is realized and positivism is defeated. Should criteria of fit prove insufficiently discriminating, legal decisions must rest on something more than the authority of pre-existing norms. If those norms leave several choices open and a choice must be made, that choice will have to be made on some ground other than the authority of the pre-existing norms.

These considerations bring us to one last component of the idealist conception of legal reasoning—the “right answer” thesis. We can begin to understand the significance of that thesis for rule of law values by viewing it first as a claim about the role responsibility of the judge as a kind of judicial psychology⁶⁷ resembling the constructivist conception of moral justification. Though the analogy is far from perfect, it illuminates certain distinct features of the thesis and brings out its force. In his essay, *A Theory of Justice*,⁶⁸ Dworkin praises the constructive model for its appropriateness as a method of public, political justification.⁶⁹ He traces that suitability to the model’s roots in a doctrine of political responsibility and its special emphasis on the requirement of articulate consistency. “This constructive model presupposes that articulate

67 This follows the spirit of Rawls’ remark that “the procedure of reflective equilibrium does not assume that there is one correct moral conception. It is, if you wish, a kind of psychology and does not presuppose the existence of objective moral truths.” Rawls, *supra* note 57, at 9. By “psychology,” Rawls means the disposition, attitude, or process of judgment characteristic of a certain enterprise.

In their account of the “right answer” thesis, Hart and Sacks also gave the thesis a “psychological” cast of this sort. See HART & SACKS, *supra* note 14, at 168 (“[T]here may be thought to be a justification for describing the act of interpretation as one of discretion But this would be to obscure what seems to be the vital point—namely, the effort, and the importance of the effort, of each individual deciding officer to reach what *he* thinks is the right answer.”). Hart and Sacks further distinguished the powers of “discretion” and “reasoned elaboration” as “processes of judgment which ought not to be confused.” *Id.* at 160-62. See also KENT GREENAWALT, LAW AND OBJECTIVITY 210 (1992) (“Judges see their task as searching for a correct answer, and they do not commonly perceive the law as ‘running out’ (or leaving room for legislative choice) in respect to hard questions.”). In LAW’S EMPIRE, Dworkin connects the claim that those engaged in legal argument suppose that they are searching for a right answer to interpretive activity in general. See DWORKIN, *supra* note 55, at 76.

68 DWORKIN, *supra* note 13, at 159-60.

69 *Id.* at 163. “The natural model, we might say, looks at intuitions from the personal standpoint of the individual who holds them The constructive model looks at these intuitions from a more public standpoint” *Id.*

consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice."⁷⁰

The relevance to this decision in accordance with pre-existing norms is this: the right answer thesis follows from the doctrine of political responsibility and the requirement of articulate consistency. In turn, these doctrines are implied by the idea of decision in accordance with pre-existing norms and its companion conception of the judicial role. This ideal as well as this conception of the judicial role are implicit in legal positivism but betrayed by rule formalism.

As we have seen, decision according to pre-existing law requires legal decisions to be based on legal reasons. This ideal underpins positivism, but is disappointed by it because legal norms and legal reasons frequently expire before legal decisions are reached. Though formalism fails, the role responsibility of the judge persists. The right answer thesis is the consequence of this role responsibility, a claim about the demands placed on legal reasoning by the obligation of the judge. "It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively."⁷¹ And so the right answer thesis must not be understood as a claim about the properties of legal materials, a bizarre claim that those materials are unambiguous and free from gaps or conflicts: "The proposition that there is some 'right' answer . . . does not mean that the [legal materials] are exhaustive and unambiguous; rather it is a complex statement about the responsibilities of its officials and participants."⁷² The right answer thesis should be understood as a claim

70 *Id.* at 160, 162. *Cf. id.* at 163 ("The constructive model requires coherence, then, for independent reasons of political morality . . ."). Dworkin also observes that the constructive model "is not unfamiliar to lawyers," that it "is analogous to one model of common law adjudication" which "accepts . . . precedents as specifications for a principle that he must construct." *Id.* at 160-61. The pertinent model of common law adjudication is the heroic tradition of common law adjudication, epitomized by the bold proclamation that the common law is a seamless web. Moral constructivism rejects the naturalist interpretation of "moral truth . . . as fixed by a prior and independent order of objects and relations, whether natural or divine" and replaces it with an account of moral truth as the result of a procedure of construction answering to certain reasonable conditions. See Rawls, *supra* note 46, at 519.

71 See DWORKIN, *supra* note 21, at 81. *Cf.* HART & SACKS, *supra* note 14, at 165-66.

72 See DWORKIN, *supra* note 21, at 104. *Cf.* HART & SACKS, *supra* note 14, at 160-62, 165-68 (contrasting powers of discretion and powers of reasoned elaboration and arguing that judges do and should try to resolve hard cases by pursuing the "right answer" to them).

about the institutional rights of the parties and the institutional responsibilities of the judge: "The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were."⁷³

Positivism fails to vindicate the institutional rights of the parties and frustrates the discharge of judicial duty. Its failures compromise decision according to pre-existing law. They prompt both judicial embarrassment and a deferential and shallow conception of law and adjudication. When rules expire, judges stand on shaky ground and must act as deferentially as possible.

Legal idealism, by contrast, makes the ideal of decision in accordance with pre-existing norms realizable and calls for a deep, critical, and transformative conception of law. Hard cases do not differ in kind from easy cases. In both, the judge presupposes a right answer and vindicates pre-existing rights. The hard case differs from the easy one only in that it explicitly raises a limited question of political theory and requires that the judge construct a legal ideal which is *not* fully instituted in black letter law. Idealization does not stay on the law's surface of settled rules. Rather, it goes deep into the law's underlying moral and political structure to construct a theory partially critical of the law's surface—its instituted practices and settled rules. Though this links legal discourse to moral and political discourse, it is not an usurpation of legislative authority but the purest realization of decision in accordance with pre-existing law. Legal rules may fall silent, but the judge's obligation to rule remains. Positivist deference does not discharge that obligation; idealist assertiveness does.⁷⁴ And so the ideal of

⁷³ See DWORKIN, *supra* note 21, at 116. Cf. HART & SACKS, *supra* note 14, at 165-66 (emphasizing that the "underlying and pervasive principle of law that like cases should be treated alike" requires judges to rationalize law into a coherent whole). This emphasis on the judge's obligation to construct the underlying morality of legal institutions is what differentiates legal idealism from natural law theories of adjudication. Natural law theories insist on the existence of an independent moral reality which must be discovered, not constructed, by judges. See Moore, *supra* note 12; Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989).

⁷⁴ See DWORKIN, *supra* note 21, at 123-30. This view finds expression in hard cases themselves. In *Norway Plains*, for example, Shaw observed:

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall

the rule of law demands that a "formal style" of adjudication be replaced by a "grand" (or ideal, or constructive) "style" of adjudication.⁷⁵

The realization of decision in accordance with pre-existing norms, however, requires more than a demonstration that judicial duty does not change when cases become hard. It also requires an account of how that duty might be discharged. Though the right answer thesis should not be understood as a claim about the properties of legal materials, it must be understood as a claim about the discriminating power of the canons of ideal theory construction.

Dworkin's actual claims for the discriminating power of the canons of ideal theory construction seem to have evolved over time, though he denies any fundamental change.⁷⁶ The minimum

within it The consequence of this state of the law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them

Norway Plains Co. v. Boston & Maine R.R., 67 Mass. (1 Gray) 253, 267-68 (1854).

⁷⁵ The difference between a "grand style" and a "formal style" of adjudication is Karl Llewellyn's. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 35-45, 62-75 (1960). I take Llewellyn's distinction to parallel (approximately) my distinction between formal and ideal. Dworkin did not invent the high ideal style of legal argument he defends; he did, however, justify it and describe it better than any of his predecessors. For Hart's recognition of the ideal style of adjudication advocated by Dworkin, see H.L.A. HART, *American Jurisprudence Through English Eyes: The Nightmare of the Noble Dream*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 123, 135' (1983) ("To an English lawyer this suggested recipe for the elimination of judicial choice may seem to make too much of, or to hope for too much from, a much admired style of adjudication followed by some great English common law judges."). In England, the style may be anomalous; Llewellyn argues that in America it is not.

⁷⁶ For the various versions of the "right answer" thesis, see RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119 (1985) [hereinafter DWORKIN, *Hard Cases*]; Ronald Dworkin, *No Right Answer?*, in *LAW, MORALITY AND SOCIETY* 58, 84 (P.M.S. Hacker & J. Raz eds., 1977) [hereinafter Dworkin, *No Right Answer?*]; DWORKIN, *supra* note 21, at 349; DWORKIN, *supra* note 55, at 266-75. As explained in the text, Dworkin, in *No Right Answer?*, *supra*, appears to make a "right theory" claim. In *LAW'S EMPIRE*, DWORKIN, *supra* note 55, Dworkin appears to have retreated to something closer to the claim that the postulate of a right answer is a presupposition of legal discourse. See Gregory C. Keating, *Justifying Hercules: Ronald Dworkin and the Rule of Law*, 1987 AM. B. FOUND. RES. J. 525, 532-33 (reviewing RONALD DWORKIN, *LAW'S EMPIRE* (1986)). Note that the role assigned to political philosophy varies in a critical way throughout these pieces. In the true "right answer" thesis, political philosophy enters in only to cement the theory (or answer) selected by criteria of fit. In the unheralded retreats from the "right answer" thesis, political philosophy comes to control the choice of the correct theory. For Dworkin's present position, see Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY* 359 (Michael Brint & William Weaver eds., 1991) [hereinafter Dworkin, *Pragmatism*].

claim required to permit rule by pre-existing norms seems clear enough, however. Criteria of fit—fit with the existing rules and doctrine of black-letter law (first order fit) and fit with the less general reasons used to justify those rules and doctrines (second order fit)⁷⁷—together with the constraints imposed by the doctrine of mistakes, must be tolerant enough to yield a justifying (ideal) theory but stringent enough to yield only one theory. *Hard Cases* appears to make a claim along these lines. Criteria of fit are said to yield a single correct theory, though that theory is insufficiently concrete to decide some cases. Hercules therefore has to “elaborate the contested concepts that the successful theory employs”⁷⁸ simply as a matter of political philosophy. Political philos-

77 I first heard the terms “first order fit” and “second order fit” used by Lewis Sargentich. A double criterion of fit is likewise at the center of Hart and Sacks’ account of “reasoned elaboration.” See HART & SACKS, *supra* note 14, at 165-66 (proposing a “double test” in hard cases: “[the judge] must elaborate the arrangement in a way which is consistent with other established applications of it. And he must do so in the way which best serves the principles and policies [which] it expresses. If the policy of the specific arrangement is open to doubt, the official should interpret it in the way which best harmonizes with more basic principles and policies of law.”). Referring specifically to harmonizing particular statutes or doctrines with “more general principles and policies,” Hart and Sacks argue that “[t]he organizing and rationalizing power of this idea is inestimable.” *Id.* at 167.

Hart and Sacks’ first criterion is very similar to the notion of principled decision-making associated with Herbert Wechsler. See Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978). Dworkin’s account of ideal theory construction appears to presuppose Hart and Sacks’ first criterion and to refine their second criterion. On the assumption of principledness in the sense of Hart and Sacks’ first criterion, see DWORKIN, *supra* note 21, at 248-53. The notion of “fit” is strikingly invoked, but not developed, by Karl Llewellyn. See LLEWELLYN, *supra* note 75, at 190-91, 222-23.

78 DWORKIN, *supra* note 21, at 107. Dworkin writes:

Hercules must then ask just what scheme of principles has been settled. He must construct, that is, a constitutional theory; since he is Hercules we may suppose that he can develop a full political theory that justifies the constitution as a whole. It must be a scheme that fits the particular rules of this constitution, of course

But the theory that is superior under [the fit] test will nevertheless be insufficiently concrete to decide some cases. Suppose Hercules decides that the establishment provision is justified by a right to religious liberty rather than any goal of social order. It remains to ask what, more precisely, religious liberty is The institutional structure of rules and practice may not be sufficiently detailed to rule out either of these two conceptions of religious liberty, or to make one a plainly superior justification of that structure. At some point in his career Hercules must therefore consider the question not just as an issue of fit between a theory and the rules of the institution, but as an issue of political philosophy as well. He must decide which conception is a more satisfactory elaboration of the general idea of religious liberty.

ophy thus enters in to concretize the one theory—the right theory—filtered out by the fit test. Political philosophy is necessary only because the legal ideal that Hercules constructs may not and need not be fully instituted either in the black letter law of the legal system or in the social life that black letter law governs.

Viewed as a plausible specification of the implications of decision in accordance with pre-existing law for the practice of legal reasoning, the “right answer” thesis has two parts. The first part insists that a constructivist conception of justification is required by the judge’s obligation to decide cases in accordance with pre-existing public norms. The second part asserts that judicial obligation can be realized because the criteria of fit employed by constructivist justification are capable of yielding a single, correct ideal theory.

The full closure of gaps and the complete sealing of conflicts requires us to push the argument one step further. The uniquely correct theory filtered out by the fit test must be rich and determinate enough to select one of the relevant legal rules as the correct one.⁷⁹ One ruling should cohere better with the fabric of the law as ideal argument reconstructs and purifies it than any other plausible ruling.⁸⁰ Posner’s argument in *Flaminio v. Honda*⁸¹ implicitly makes this kind of assertion. The ideal of efficiency is presented both as fitting and justifying⁸² product liability law

Id. at 106-07.

For a similar interpretation of Dworkin’s claim in *Hard Cases*, see HART, *supra* note 75, at 139. Dworkin’s subsequent remark provides further confirmation: “When the discriminating power of [the fit] test is exhausted, [we] must elaborate the contested concepts that the successful theory employs.” DWORKIN, *supra* note 21, at 107.

⁷⁹ Compare the similar recommendation made by Hart and Sacks. HART & SACKS, *supra* note 77.

Dworkin’s own practice in discussing particular cases is to consider several possible rulings and to select the best one in light of a highly abstract ideal theory. Dworkin understands abstract theory to be rich and determinate enough to be dispositive even when, as Dworkin now believes, criteria of fit are unable to select one correct theory. See DWORKIN, *supra* note 55, at 238-50 (discussing the recognition of a right to damages for emotional distress).

⁸⁰ Such a theory would provide, in Mill’s words, “considerations capable of determining the intellect” in favor of one rule. JOHN STUART MILL, *UTILITARIANISM* 4 (Hackett ed., 1979) (1861).

⁸¹ 733 F.2d 463 (7th Cir. 1984).

⁸² Dworkin would, of course, reject Posner’s theory as categorically wrong because it rests on “policy” arguments instead of on arguments of principle. For Dworkin’s objections to the use of “policy” rather than “principle” in judicial decisions, see DWORKIN, *supra* note 21, at 90-100, and DWORKIN, *supra* note 55, at 221-24. For Dworkin’s specific criticisms of Posner’s endorsement of wealth-maximization, see DWORKIN, *supra* note 13, at

(indeed all law) better than any other ideal and as sufficiently rich and determinate to provide decisive reasons in favor of extending Federal Rule of Evidence 407's ban on the admissibility of post-accident remedial measures to cases of product redesign and warning label revision.

Idealism is capable of perfecting the enterprise of decision in accordance with pre-existing norms under two conditions. First, criteria of fit must be capable of filtering out a single correct ideal theory for any stock of legal doctrine. Second, the theory selected must be sufficiently rich and determinate to provide a "balance of reasons" favoring one ruling over its competitors. Whether or not idealism can accomplish this Herculean task depends on the filtering power of the fit criterion in complex legal systems.

2. Criteria of Fit and the Argument from Complexity

Thus far, the argument that criteria of fit can filter out a single correct ideal theory for any hard case appears to be mere assertion. Elsewhere in Dworkin's writings, however,⁸³ a bold and intriguing argument in favor of the filtering power of the fit test appears. In a legal system "thick with constitutional rules and practices, and dense with precedents and statutes [t]he antecedent probability of a tie [i.e., of no right answer] . . . might well be so low as to justify a . . . ground rule of the enterprise which instructs judges to eliminate ties from the range of answers they might give."⁸⁴

237.

83 See, e.g., Dworkin, *No Right Answer?*, *supra* note 76.

84 See DWORKIN, *supra* note 21, at 279, 286. Compare Dworkin, *No Right Answer?*, *supra* note 76, at 84 ("[T]hough these occasions [i.e., ties] might be frequent in immature legal systems, or in legal systems treating of only a limited range of the conduct of its constituents, they will be so rare as to be exotic in modern, developed, and complex legal systems. In these jurisdictions the intersections and interdependencies of different legal doctrine will be so intense that . . . [f]or all practical purposes, there will always be a right answer in the seamless web of [the] law.") with DWORKIN, *Hard Cases*, *supra* note 76, at 143 ("Two different theories may well provide equally good justifications, along . . . [the fit] dimension, in immature legal systems with few settled rules, or in legal systems treating only a limited range of the conduct of their constituents. But in a modern, developed, and complex system, the antecedent likelihood of that kind of tie is very small. The tie result is possible in any system, but it will be so rare as to be exotic in these."). For a similar claim that cases where there is no right answer must be "ties," see ROLF E. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 199-200 (1975). Sartorius is likewise inclined to embrace a ground rule instructing judges to ignore the possibility of such ties. *Id.* at 200-01.

The argument from complexity survives in a more muted form in Dworkin's recent work as the claim that later authors participating in the writing of a chain novel are

Framing the question this way is philosophically controversial in its insistence that skepticism about the right answer thesis must be internal (not external) skepticism.⁸⁵ And its assertion that an internal denial of the right answer thesis must be a claim that many cases are "ties"—that is, a claim that in many cases the weight of considerations on both sides is in perfect equipoise—begs the question. Putting these objections aside for the moment,⁸⁶ there are two plausible and potentially powerful arguments in favor of the thesis to consider.

The first argument concerns the relative weights of competing legal principles.⁸⁷ Cases where there is no right answer are so rare as to be all but irrelevant because the antecedent likelihood that two competing principles will be exactly equal in weight in any particular setting is exceedingly low. For example, the principle that "no man shall profit from his own wrong" seems more clearly challenged by allowing a grandson to inherit his grandfather's estate after killing him for the inheritance, than by

more constrained than those who preceded them because of the greater density of the information that later authors face. See DWORKIN, *supra* note 55, at 228-38. Though loosened, it still retains great importance in Dworkin's account of how constraint and objectivity are possible. See, e.g., Ronald Dworkin, *My Reply to Stanley Fish: Please Don't Talk About Objectivity Any More*, in *THE POLITICS OF INTERPRETATION* 287, 293 (W.J.T. Mitchell ed., 1983). See also Dworkin, *Pragmatism*, *supra* note 76. The appeal of the argument from complexity is not confined to Dworkin. Ken Kress more or less endorses the argument. See Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 301 (1989). But the idea is, I think, counterintuitive. Lawyers typically believe that complexity breeds less certainty, not more certainty. For an argument underwriting this intuition, see Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983). Lawyers and law professors also tend to believe that the move from rules to policies, purposes, and principles is a move from a relatively determinate form of discourse to a highly indeterminate one. See, e.g., Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 841, 846 (1972) ("Principles, because they prescribe highly unspecific acts, tend to be more vague and less certain than rules Though principles sometimes limit the scope of the courts' discretion, they tend on the whole to expand it."); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 534 (1988) (stating that move from rules to purposes invites "a potentially infinite regress"). Schauer, however, appears to modify this argument. See SCHAUER, *supra* note 14, 75-76.

85 The right answer thesis is defended as a sound ground rule of the enterprise and its denial disparaged as a claim typically not made "within the institution, [but] forced upon the institution by external philosophical considerations." Dworkin, *No Right Answer?*, *supra* note 76, at 83. See also Dworkin, *Pragmatism*, *supra* note 76, at 365-66; DWORKIN, *supra* note 55, at 78-86, 267-74. For an argument that Dworkin cannot bypass external skepticism in the manner that he proposes, see ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 80-82 (1992).

86 See *infra* Part V.

87 Elsewhere in his writings Dworkin discusses the "weight" of principles in considerable detail. See DWORKIN, *supra* note 21, at 14, 46. Cf. Raz, *supra* note 84, at 829-34, 836-42, 846-48 (discussing principles and "weight").

allowing a man who has traversed another's property unchallenged for fifteen years to acquire a prescriptive easement by adverse possession. So, too, principles of unconscionability have more weight in the consumer context than in dealings among sophisticated businessmen.⁸⁸ Moral considerations are context-sensitive and so are unlikely to have equal weight irrespective of the setting to which they are applied.

The second argument invokes the complexity and density of modern, mature legal systems. That density helps to make both silence and perfect equality of fit highly improbable. Dense and intricately developed legal systems cover every possible contingency, and their intricacy and detail rule out more and more possible interpretations. Numerous interpretations can fit a handful of fixed pieces of data whose structural relations are simple. Fewer and fewer interpretations fit with each incremental addition of data and each complication of structure.

This argument has some appeal. It seems likely that the less one is writing on a *tabula rasa*, the more one is constrained by what already has been written. Earl Warren is less free than John Marshall. Offhand, it appears that it should be easier to make competing principles of tort law such as negligence and strict liability fit a handful of scattered decisions than a well-developed body of tort law because the more the laws develops, the more it is forced to confront cases where strict liability and negligence call for different results. A simple mathematical analogy suggests why.⁸⁹ Consider the following three series of numbers: (3, 6 . . .), (3, 6, 9, 12, 15 . . .), and (3, 6, 12, 24, 48 . . .). The first series is compatible with either of two rules: "to extend the series add three to the preceding number in the series" and "to extend the series double the preceding number in the series." Each of

⁸⁸ See DWORKIN, *supra* note 21, at 23.

⁸⁹ I owe this analogy to Jack Cobetto. The fact that this kind of mathematical example can be used as the occasion for profound reflection on the problem of skepticism need not concern us here. Within the enterprise of mathematics, the identification of the correct rule in the cases described in the text is easy. The use of such examples to explore general philosophical problems of meaning and/or skepticism is a different matter. See SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982); COLIN MCGINN, *WITTGENSTEIN ON MEANING* (1984); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 201-43 (1953); LUDWIG WITTGENSTEIN, *TO FOLLOW A RULE* (Steven H. Holtzmann & Christopher M. Leich eds., 1981).

For a brief discussion of why philosophical skepticism should not concern us, see *supra* text accompanying note 56.

the latter two series extends the first series, but in a way which is compatible with only one of the two rules that "fit" the first series.

These are the arguments that must succeed if the construction of ideal theories is to perfect decision in accordance with general, pre-existing public norms. Criteria of fit must filter out a correct ideal conception for any given stock of legal rules, or the final choice of a governing ideal must rest on grounds other than those supplied by the pre-existing law. Before we consider the success of the arguments for the right answer thesis, however, it is worth our while to summarize the links between the components of ideal theory construction as Dworkin specifies them and the enterprise of deciding cases in accordance with general, pre-existing public norms.

C. *The Idea of Legality and Ideal Legal Justification*

There is a widespread suspicion that ideal argument's invocation of the ideal of decision in accordance with pre-existing norms is something of a fake, nothing more than rhetorical claim.⁹⁰ In fact, the idea of decision in accordance with pre-existing law is powerfully expressed by the four essential components of ideal theory construction as we have reconstructed them. Those components are: (1) the doctrine of political responsibility; (2) the coherentist and constructivist conception of legal justification; (3) the rights thesis; and (4) the right answer thesis. We can link the components of ideal theory construction to the precepts of the rule of law in its thin and formal sense.⁹¹ Formal justice finds expression in both the constructivist and coherentist facets of legal justification. The link to the coherentist conception of justification is plain enough: formal justice requires articulate consistency and thus a demonstration that legal decisions fit together into a coherent whole. The link to constructivism is less obvious. Here the connection lies in the irrelevance of the question of whether the law really is a seamless web. The judge must treat it as one and so construct, rather than discover, a set of justifying principles because formal justice demands that she weave the fabric of the existing legal materials into a coherent whole.

90 Even Dworkin himself feels required to defend Hercules from charges of fraud. See DWORKIN, *supra* note 55, at 260-62.

91 The "precepts of the rule of law" stem from the formal elements of the rule of law referred to earlier. See *supra* note 13 and accompanying text.

Precepts of publicity and prospectivity ("no penalty without a law") find oblique expression in the publicity condition built into legal constructivism. Constructivism "demands that decisions taken in the name of justice must never outstrip an official's ability to account for these decisions in a theory of justice"⁹² and so insists on decision "in accordance with a program that can be made public."⁹³ Publicity and prospectivity find more direct expression in the rights thesis and the right answer thesis, which criticize discretionary conceptions of legal decision in hard cases for creating rules, rights, duties, and liabilities retroactively, and on the basis of private preference.

Finally, the doctrine of political responsibility, and the emphasis on the obligation of the judge which infuses the whole of Dworkin's theory, are expressions of the idea that the judicial role is to deliver decisions in accordance with pre-existing public norms. The mutual support among these precepts and elements is apparent upon a moment's reflection. For example, the publicity condition supports the rights thesis (because the rights thesis applies pre-existing public standards), and the requirement of articulate consistency supports the public character of the constructive model (because *articulate* consistency is, by its nature, visible).

Reconstructed this way, an ideal form of legal reasoning embeds the ideal of decision in accordance with pre-existing law in the practice of legal justification and the workings of adjudication. Legal idealism meets certain conditions (articulate consistency, generality, impartiality, prospectivity, and publicity) which are themselves plausible specifications of the conditions that legal reasoning must meet if it is to render decisions in accordance with pre-existing norms. Idealism gains additional power from the fact that the familiar, widely accepted precepts which find expression in the idealist conception of legal rationality are shown to undercut some of the more prominent tendencies of realism and positivism. The extreme instrumentalism latent in realism, and the purely preferential choice pictured in the positivist doctrine of discretion, cannot be squared with the precepts associated with the rule of law. However, the principled decision-making of legal ideal-

92 See DWORKIN, *supra* note 21, at 162; DWORKIN, *supra* note 55, at 165-66. In *LAW'S EMPIRE*, the requirement of articulate consistency and the doctrine of political responsibility are to some extent subsumed beneath the more inclusive concept of "integrity." See generally *id.* at 225-75.

93 *Id.*

ism can be. Idealism, therefore, trumps both positivism and realism.

Or so it would seem. The full success of the idealist version of decision in accordance with pre-existing norms, however, hinges on idealism's ability to settle hard cases without recourse to criteria other than those supplied by reconstructing the unique morality that fits and justifies the general, public, pre-existing laws of the legal system. This is why criteria of fit are so essential. Criteria of fit filter out legal ideals from the background of general moral conceptions, thereby distinguishing legal from non-legal norms, and thereby grounding decisions in hard cases on distinctively legal reasoning. Should criteria of fit prove insufficiently discriminating, idealism would be forced to fall back on extra-legal considerations. The rule of pre-existing norms, then, would not be perfectly realized.

The filtering power of criteria of fit is thus the linchpin of any coherentist and constructivist conception of legal justification which invokes only the authority of pre-existing norms. The adequacy of its discriminating power is the issue that we must now address.

V. CRITERIA OF FIT AND THE CONFLICT OF IDEAL CONCEPTIONS

In defending his "right answer" thesis, Dworkin insists that the only sort of skeptical challenge that counts is one whose skepticism is internal—that is, one made from within the enterprise of adjudication itself.⁹⁴ Skeptical arguments that seek to undermine all claims of right answers to moral questions have no special bite against theories of legal reasoning. So, too, skeptical arguments that purport to show that all rules are subject to insurmountable skeptical doubt are likewise unpersuasive.⁹⁵ Despite their stric-

94 See *supra* note 84.

95 See Radin, *supra* note 22; Unger, *supra* notes 6, 60. Both Radin and Unger tie their skepticism to the popular view that formalism requires an untenable theory of language. As applied to Hartian positivism, this argument appears to be diametrically wrong. Hart's work is deeply influenced by Wittgenstein. See MARMOR, *supra* note 85, at 129-35. Contemporary extensions and revisions of Hart's work that draw on the philosophical conception of convention likewise involve a sophisticated theory of language. See, e.g., Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982). So, too, Frederick Schauer, who may be the leading current proponent of legal reasoning as rule-application, develops an account of rule-application which purports to incorporate Wittgensteinian insights into language and rule-following. See SCHAUER, *supra* note 14, § 4.3.

tures, we persist in following and applying innumerable rules of games, manners, and mathematics (to take only a few examples) with relative ease. Furthermore, these arguments cut the wrong way. General skepticism implies that legal reasoning is no more determinate than, for example, addition or subtraction. No one, however, ever presumed that legal reasoning was more determinate than addition or subtraction. Raising doubts about the certainty of application of mathematical rules may only make the uncertainties surrounding the application of legal norms appear less acute and less threatening.

Let us then accept the proposition that the right answer thesis must be undermined from "within the institution [of adjudication, not] by external philosophical considerations."⁹⁶ The materials for undermining the right answer thesis on its own terms lie at hand. Rigorous application of criteria of fit leads not to the immanent triumph of a single moral ideal but to the dialectical clash of opposed ideals. Criteria of fit filter out an enormous number of ideals available to unfettered moral reflection, but they do not yield a uniquely correct ideal theory. Instead, they yield competing ideals equally well-rooted in settled law (because each ideal fits most of that law) but "in unarbitrable conflict with one another, critical of different doctrines and transformative in different directions."⁹⁷ *Pace* Dworkin, the complexity of modern, mature legal systems, makes them fertile ground indeed for competing legal ideals. Complex legal systems provide a rich body of materials which can be organized in fundamentally different ways. The prob-

Radin appears to invoke Wittgenstein in support of her view that formalism is incompatible with a sophisticated contemporary conception of language. *Cf.* GREENAWALT, *supra* note 67, at 71-73 (objecting to general skepticism).

96 Dworkin, *No Right Answer?*, *supra* note 76, at 83.

97 Lewis D. Sargentich, *Theories About Law* (Course Handout, Harvard Law School, 1984) (on file with author). Sargentich understands this claim to be a form of critical legal studies. Roberto Unger makes a similar argument. *See* UNGER, *supra* note 60, at 57-75.

In one sense, Sargentich and Unger certainly are right. The exposure of conflict and contradiction in primary legal materials is one of the great achievements of critical legal history. (The work of Horwitz, Duncan Kennedy, Frug, James Atleson's and Kathy Van Wezel Stone's work on labor law, and Jack Beerman's work on 42 U.S.C. § 1983 come to mind as examples).

But in another sense the connection with critical legal studies is contingent. If I am right, the inescapable logic at work is not critical but liberal, namely, the inner logic of the liberal ideal of decision in accordance with pre-existing norms. Jeremiah Smith saw the inescapability of conflict so precisely because he was straining so hard to achieve coherence.

lem is not that "ties" are common but that legal materials can be organized into very different wholes.

To show that complexity breeds a plurality of competing, equally well-fitting theories, we must test Dworkin's arguments against some developed body of legal doctrine. Before we do so, however, we must tackle two preliminary difficulties. First, Dworkin's account of "fit" is too sketchy to do phenomenological justice to the intricacies of any developed legal field. This difficulty can be met, however, by refining the criterion of fit as we construct our test case.

The second difficulty is presented by the abstractness of Dworkin's account of legal decision. The concepts of "principle" and principled doctrines, which play major roles in Dworkin's argument, can be construed in very different ways. Principles come in varying levels of generality. Some principles stay very close to the materials that they purport to "fit and justify;" others hover far above those materials. For example, the claim that reciprocity of risk (or the lack thereof) fits and justifies accident law⁹⁸ invokes a much more highly general principle than does the claim that fault, understood as the failure to exercise due care, is the cornerstone of accident law.⁹⁹

Dworkin's account of principled theory construction is open to using principles of either level of generality. Unfortunately for our purposes, principles of different levels of generality function in different ways and are vulnerable and impervious to different kinds of criticism. To test whether some criterion of fit can filter out a single ideal conception for any complex body of legal doctrine, we must engage the enterprise of ideal theory construction at several different levels of abstraction.¹⁰⁰ Consequently, I propose to begin by testing the filtering power of the "fit" criterion against an example of the relatively low level ideal theory construction. Thereafter, I shall explore whether the criterion of fit

98 This claim has been advanced by Charles Fried and George Fletcher. See CHARLES FRIED, *AN ANATOMY OF VALUES*, 177-93 (1970); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

99 Ames' description and justification of the late 19th century negligence regime—"[t]he ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril"—appeals to the idea of fault as a kind of moral primitive. James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908).

100 I am grateful to James Fleming and Barbara Herman for emphasizing this and persuading me that I need to address the enterprise of ideal theory construction at several levels of generality.

filters more stringently once ideal theory construction is taken to a higher level of generality.

A. *Low-Level Theory Construction*

Let us then turn to our example—turn-of-the-century tort law.¹⁰¹ On its face, tort law is the natural home of cases involving accidental harms. At the turn of the century, the dominant principle of tort law was fault (liability for harm caused through insufficient care). Strict liability (liability for harm caused by a risk characteristic of the actor's conduct¹⁰²) was drained of generative force and confined to discrete pockets of the law.

The operation of this confinement, however, cannot be adequately captured by using only Dworkin's categories of principled and mistaken law. Some tort law doctrines were treated as mistaken in Dworkin's second sense.¹⁰³ Although not overruled, some doctrines were drained of gravitational force and their principles were narrowly limited to the core cases that they covered. Direct trespass exemplified this phenomenon. Nonfault liability doctrines were also "repressed"¹⁰⁴ in ways that cannot be captured by Dworkin's categories. Tort doctrines, such as the doctrine of strict liability for ultra-hazardous activities, were still governed by strict liability principles but were not regarded as "mistaken." These were exceptional doctrines.¹⁰⁵ Exceptional doctrines are not governed by the dominant principle of a field but by "counter-principles."¹⁰⁶

101 To be precise, we shall be focusing on the law of non-intentional torts. To anticipate a discussion in the text, we begin with an exclusion. My discussion of this example of low-level theory construction owes much to conversations with Lewis D. Sargentich, Morton J. Horwitz, and James E. Fleming.

102 For a good discussion of exactly what strict liability is, see ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 159-64 (1969).

103 See *supra* note 64 and accompanying text. Confinement—mistakenness in Dworkin's second sense—played a critical role in the construction of the late 19th-century negligence regime. The distinction between trespass and case was, for example, drained of its power by being construed not as a matter of substantive liability rules, but as a matter of archaic procedural distinctions. This was done so well that much older law was effectively overruled—treated as mistaken in Dworkin's first sense. See, e.g., *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).

104 I borrow this term and part of the following analysis from Roberto Unger. See UNGER, *supra* note 60, at 58. My analysis also is deeply indebted to lectures by and conversations with Lewis Sargentich.

105 Both Unger and Sargentich employ this term. *Id.*

106 See *id.* at 59-60. Again, my understanding of this phenomenon is indebted to Sargentich's lectures.

Fully generalized, counter-principles are antagonistic to dominant principles. Suitably constrained, however, counter-principles complement dominant principles. Counter-principles, then, are subordinated to dominant ones but are nonetheless allowed to hold sway in certain subfields of the legal subject in question. They are not "mistaken" in Dworkin's sense because they are perfectly appropriate for the particular subset of problems that they govern. The key to their exceptional status lies in the fact that they must be allowed to control only a subset of some field. They are not wrong in principle, as mistaken doctrines are, but subordinate in principle.

Finally, and most importantly, nonfault liability was cabined by excluding¹⁰⁷ workmen's compensation from the general law of torts.

107 Unger uses the term. *See id.* at 58. Sargentich also has used this term and emphasized the phenomenon in his unpublished lectures at Harvard. Andrew Altman describes exclusion well when he likens it to gerrymandering. *See* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 216-22 (1986). *Cf.* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 261-64* (1977) (describing the exclusion of the Mill Acts from the general law of eminent domain and insurance contracts from the general law of contracts). About the latter, Horwitz writes:

In 1800 most lawyers regarded the marine insurance Contract as the most prominent subcategory of Contract. By 1850, however, the law of insurance had become entirely isolated from the main stream of contract law and was by then considered a separate, technical body of law. The source of this crucial change seems to be traceable to the fact that the economic and moral premises that underlay insurance law were becoming increasingly subversive of the newer economically dominant contract of sale. Marine insurance doctrine had developed during the eighteenth century in a homogeneous economic setting of reciprocal business relationships among merchants of relatively equal bargaining power. The clearly proseller contract doctrines developed early in the nineteenth century for the law of sales, by contrast, seem to reflect the fact that this branch of law reached maturity in a period when economic relations between economically sophisticated "seller-insiders" and relatively unsophisticated "buyer-outsiders" were becoming dominant.

The assumptions underlying these two radically different models of business dealings first began to clash in a battle over adopting the rule of caveat emptor early in the nineteenth century. Every time that a court adopted the caveat emptor rule for sales contracts, it was confronted with the argument of counsel that the "true" common law contract rule that had already emerged from insurance law required the full disclosure of all material facts necessary to rationally judge the level of risk in a bargain. As a result, during the first half of the nineteenth century, judges first "distinguish" sales from insurance contracts, then later claim that the "true" paradigm of contract is the sale of goods and not the insurance contract, and finally they end all contradiction by treating the law of insurance as a separate and autonomous area of the law whose "principles" have nothing to do with the general law of contract. Contract law, in short, achieved [coherence] by "purifying" itself through the expulsion of legal doctrines that had become alien to the norms of nonintervention underlying the market economy

On the surface, industrial accidents are a part of the general law of accidents. The "principled" basis for their apparently artificial and arbitrary expulsion from the law of torts lies in the fact that the statutorily mandated workmen's compensation schemes which applied to such accidents were undeniably organized around an (exceptional) principle of nonfault liability and simply could not be reconciled with the main body of tort law, which was organized around the dominant principle of fault liability.¹⁰⁸ Inclusion threatened the internal coherence of tort law. Exclusion promised to preserve that coherence.

The turn of the century may well have represented the historic high tide of fault-based liability. The dominance of that principle hardly could be questioned. Yet even that dominance was not sufficient to rule out the radical reconstruction of tort law. The competing principle of nonfault liability was not dead but dormant. Precisely because criteria of fit and the materials that they organize are complex, the triumph of any particular ideal conception is precarious. Principles are matched by counter-principles, and the latter represent standing resources which can be deployed to criticize and transform seemingly settled bodies of law.

In the case of turn-of-the-century tort law, the collision of nonfault liability in the worker's compensation statutes with the fault principle of accident law provided the materials for radically reshaping the entire body of accident law. As Jeremiah Smith foresaw, the seemingly vanquished principle of nonfault liability was on the verge of reawakening and reconstructing the law of torts:

There is a movement now going on in this country for the enactment of legislation based upon the principle of the English Workmen's Compensation Act. This legislation is founded largely upon a theory inconsistent with the fundamental principle of the modern common law of torts. As to a considerable number of the accidents covered by some of the recent statutes, the results reached under the statute would be absolutely irreconcilable with results reached at common law in cases

of the nineteenth century.

Id. at 264. Dworkin's notion of "departments of law" and "local priority" recognize the influence of such classifications of cases and doctrines into legal fields and subfields, but fail to recognize the fluidity of these categories and the way that legal reasoning restructures them. See DWORKIN, *supra* note 55, at 250-54.

108 For a helpful overview of this period of tort history, see G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 12-19, 37-56, 60-62, 92-110 (1980). White situates both doctrine and leading scholarship in useful ways.

outside the scope of the statute. This incongruity must inevitably provoke discussion as to the intrinsic correctness of the modern common law of torts; and is likely to lead, either to a movement in favor of repealing the statutes, or to a movement in favor of making radical changes in the common law.¹⁰⁹

Contemporary commentators sought to deflect the subversive force of the workmen's compensation statutes by excluding those statutes from tort law proper.¹¹⁰ Because the statutes displaced the common law and reversed its conclusions, these efforts were disingenuous and doomed to fail:

[N]otwithstanding these modes of characterizing this kind of legislation [as outside the law of torts proper], two stubborn facts remain. First: the statute imposes upon an employer a duty of compensation, which did not exist under the modern common law of torts. Second: the theory underlying the statute, its basic principle, is in direct conflict with the fundamental doctrine of the modern common law of torts. The statute shows "a distinct revulsion from the conception, that fault is essential to liability." It is "a distinct reversion to the earlier conceptions that he who causes harm, however innocently, is, as its author, bound to make it good."¹¹¹

With remarkable foresight, Smith asserted that a fundamental shift in the common law of torts, a reversal of principle and counter-principle, was all but inevitable, and that a change of this magnitude could be effected by reconstructing a handful of strategic doctrines:

By a very liberal construction of the *res ipsa loquitur* doctrine; by a broad view of what constitutes *prima facie* evidence of negligence; and by inverting the burden of proof (putting on defendant the burden of proving that he was not negligent),—the court could go far towards practically reversing the

109 Jeremiah Smith, *Sequel to the Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1913) (footnote omitted). Worker's compensation statutes had the generative power that they did partly because they were recent legislative innovations. They therefore expressed the trend of history and spoke with the voice of popular authority. These contextual determinants of a principle's generative power are critical but beyond the scope of this Article.

110 *Id.* at 245. See also Jeremiah Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 HARV. L. REV. 241, 319, 409 (1917) (proposing a reorganization of the legal landscape so that only "fault based" forms of non-contractual liability would be included in tort. Tort was to be saved from being torn apart by internal conflict by purging nonfault doctrines from its domain).

111 Smith, *supra* note 109, at 245-46 (emphasis added) (footnotes omitted).

common law of A.D. 1900 in a large proportion of cases.¹¹²

We can generalize Smith's insight. Settled legal rules always straddle competing ideal conceptions and the canons of legal rationality permit the radical reconstruction of large and seemingly settled bodies of doctrine.

At least as far as theory construction at a low level of generality is concerned, then, the argument from complexity fails. The complexity and density of developed legal systems do not constrain theory construction in the way, or to the extent, that Dworkin supposes, because the complex data that ideal theories must fit is not fixed but fluid. Contending legal theories reshape the primary legal materials that they purport merely to interpret, remaking those materials in their own images. Competing theories quarrel not over which theory best fits a neutrally defined set of cases and doctrines, but rather over the cases and doctrines ideal theories must fit, the internal structure of the law's various fields, and the boundaries among those fields.¹¹³

By reshaping the materials that they purport merely to fit, competing legal ideals escape from the straight jacket that the criterion of fit seeks to impose on them. The fit test thus rules out numerous possible ideals, but it does not rule in only a single ideal. This plurality of equally well-fitting ideals yields cases where there is no "right answer" because it invites a conflict among legal principles. Once the canons of ideal theory construction permit a plurality of ideal conceptions to enter legal argument, ideal principles are less likely to have generally accepted weights. Indeed, competing legal principles gather their weights not just from our

112 *Id.* at 367. For a glimpse of the unfolding of this process, see WHITE, *supra* note 108, at 108-10.

113 Compare the discussion of contract damages in CHARLES FRIED, CONTRACT AS PROMISE 17-27, 58-73 (1981) with Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936-37).

Fuller and Fried draw the boundaries between contract and tort, and render the internal structure of contract law very differently. Fried classifies reliance-based recovery as recovery in tort, not contract, and classifies doctrines such as mistake and frustration as gap-plugging doctrines bearing only on contract performance. Reliance-based recovery is thus excluded, and mistake and frustration are exceptional. Consequently, these doctrines, and the principles they embody, have no generative power. Fuller, by contrast, includes reliance-based recovery within the law of contract and integrates mistake and frustration with the law of contract remedies, thereby making them generative of contract principles. These competing classifications of the primary legal materials serve competing claims about contract's dominant moral principle, buttressing in one case the argument that autonomy is the life of contract as we know it, and, in the other, the argument that reciprocity is contract's guiding moral ideal.

judgments about their weight in particular contexts, but also from the ideal conceptions in which they are embedded.¹¹⁴

Different ideal conceptions can, and frequently do, assign different weights to competing principles. Proponents of different ideals may therefore disagree over cases not because they view those cases as virtual "ties" and take positions on opposite sides of a fine line, but because they assign priority to different principles which endorse very different conclusions. From the vantage point of two equally well-fitting theories, a case may be quite easy. Yet each theory will find it "easy" to decide the case in different ways. Some "hard cases," at any rate, are not cases where the balance of competing considerations is all but even, but cases where equally well-fitting ideal conceptions conclude that different considerations are decisive. Those different considerations call for different results.

Conflicts between equally well-fitting ideal conceptions can be powerful and pervasive: powerful because idealism takes various moral conceptions to be the essence of law, and once invoked, those conceptions can criticize and transform substantial chunks of legal doctrine; pervasive because the competing conceptions that fit our law can, and frequently do, disagree across entire legal fields. For example, proponents of individual freedom and proponents of fairness (or, at least, proponents of certain conceptions of each) disagree across the whole of product liability law.¹¹⁵ Though the filtering effected by the fit criterion is genuine, it leaves room for substantial and systemic disagreement.

B. High-Level Theory Construction

The issue then becomes whether the criterion of fit can be made more discriminating by pushing the enterprise to a higher

114 General agreement on the relative "weights" of competitive principles is assumed by the variant of the right answer thesis that invokes the argument from complexity. Dworkin tends to attribute that agreement to the fact that the power of principles depends on the context in which their application is considered. See *supra* text accompanying notes 86-87.

115 Compare Alan Schwartz, *Proposals for Product Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988) (arguing that the norm of individual autonomy requires returning to a quasi-contractual regime of warning liability for product accidents) with KEETON, *supra* note 102, at 108-12, 161-64 (1969) (suggesting that fairness requires the beneficiaries of profitable but risky activities to bear the accident costs that those activities engender, and so requires strict liability for product accidents). Note also Horwitz's observations about the conflicting principles of 19th century sales and insurance contracts. See HORWITZ, *supra* note 107.

level of generality. This is an attractive strategy. Dworkin's own work frequently invokes a highly abstract right to "equal concern and respect"¹¹⁶ as its master principle. The reconciliation of competing legal principles seems to be a task for which abstract ideal argument is well-suited. And, finally, a move to a higher level of abstraction connects legal reasoning to political philosophy in a singularly intimate way. To be sure, H.L.A. Hart has persuasively argued that Dworkin's principle of equal concern and respect is so abstract as to be empty,¹¹⁷ but the failings of Dworkin's favorite principle do not discredit the entire strategy. Academic legal literature is rife with arguments that certain high level principles fit and justify the various low-level principles expressed by legal doctrines.¹¹⁸ The effect of these arguments is to make a certain division of labor among legal principles itself a matter of principle.

To assess whether the move to a higher level of generality can render the fit test more constraining, we must examine an instance of such a theory which fits and justifies turn-of-the-century tort law. One such theory, at least roughly speaking, is the reciprocity of risk theory. That theory, sketched twenty years ago by George Fletcher and Charles Fried,¹¹⁹ invokes the idea of the social contract to determine the terms of reasonable risk-imposition. Boiled down, the theory holds that reciprocal risk-imposition¹²⁰ is fair. When risks are reciprocally imposed, actors receive implicit in-kind compensation for their exposure to risks in the form of a right to impose equivalent risks on others. This is a valuable right

116 DWORKIN, *supra* note 55, at 221-22, 297-99 (speaking of equality slightly more generally); RONALD DWORKIN, *Liberalism*, in A MATTER OF PRINCIPLE 181, 190 (1985); Ronald Dworkin, *What is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part II: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Ronald Dworkin, *What is Equality? Part III: The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Ronald Dworkin, *What is Equality? Part IV: Political Equality*, 22 U.S.F. L. REV. 1 (1987); RONALD DWORKIN, *What Rights Do We Have?*, in TAKING RIGHTS SERIOUSLY 266, 272-73 (1977).

117 H.L.A. Hart, *Between Utility and Rights*, in THE IDEA OF FREEDOM 77, 86-97 (Alan Ryan ed., 1979). *But see* RONALD DWORKIN, *Do We Have a Right to Pornography?*, in A MATTER OF PRINCIPLE 335 (1985). Hart's criticisms precede Dworkin's four part series on equality, *supra* note 116.

118 Richard Posner's early work is instructive here. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). Posner uses efficiency to justify the general dominance of negligence over strict liability, but also uses efficiency to explain the correctness of using strict liability in certain exceptional areas. For a good discussion of vicarious liability, *see id.* at 42-44.

119 *See supra* note 98.

120 Risks are reciprocal when they are equal in the probability and magnitude of the prospective harm that they threaten and imposed for equally good reason.

because the imposition of risks of injury and death on others is the inevitable by-product of engaging in many of the activities essential to leading a normal human life.¹²¹

Reciprocity of risk thus provides a criterion for dividing the labor of tort law between negligence liability and strict liability.¹²² Negligence is the appropriate liability rule for those activities which are characterized by reciprocal risk-imposition. When, in the course of nonnegligent conduct, the risks of such activities eventuate in harm, no compensation is required because the victim has already received *ex ante* compensation in the form of her right to impose equal risks on others by engaging in the very same activity. Negligent conduct breaks this reciprocity of risk and so entitles its victim to compensation. Strict liability is appropriate when actors impose nonreciprocal risks of injury on their prospective victims. The "disparate pockets of strict liability" found in turn of the century tort law are quite plausibly characterized as unusual areas of nonreciprocal risk imposition.¹²³

This theory is a plausible account of why tort law should be divided between areas of strict liability and areas of negligence, and it produces an account according to which both of these lower-level principles are, so to speak, principled. The dominant principle of tort law is the principle of reciprocity. (That principle itself is an expression of a conception of fairness rooted in social contract theory). Negligence and strict liability faithfully express the implications of the reciprocity principle under circumstances of reciprocal risk imposition and nonreciprocal risk imposition, respectively. In this sense, the move to a higher level of theory construction escapes the criticisms to which the lower level of theory construction, examined earlier, succumbed.

121 To take a truly mundane example, we would be unable to drive to work if we could not impose risks of injury and death on others. Reciprocal risk theory holds that we may do so without compensating those we injure because they receive an equal right to impose risks on us. That is, until we drive carelessly. Careless driving breaks the equilibrium of risk that reciprocity establishes and entitles the victim of careless conduct to compensation.

122 This is more Fletcher's contribution than Fried's. See Fletcher, *supra* note 98, at 541-48.

123 *Id.* To justify the predominance of negligence, reciprocal risk theory also needs the idea of the "risk pool" introduced by Fried. The "risk pool" holds that certain non-reciprocal risks—such as those imposed on pedestrians by drivers—become, over time, reciprocal because everyone takes turns at driving and walking. See FRIED, *supra* note 98, at 187-89.

Indeed, if the move to a higher level of abstraction were to succeed in increasing the filtering power of the fit criterion so that it selected a single abstract philosophical ideal for any complex field of law, legal idealism would have succeeded in an astonishing way. The fullest sort of fidelity to pre-existing law would be married to the greatest kind of critical power in the service of moral ideals. Ideal theory might be used not just to seal the gaps and settle the conflicts that plague formal law, but also to criticize and revise legal rules whenever they fail to do justice to the law's deep moral ideals.

Two properties of highly abstract principles produce extraordinary critical and revisionary power with respect to black-letter legal rules: their abstractness and their invocation of powerful moral and political ideals. Because abstract principles are abstract, they can be specified in many different ways. Seemingly settled bodies of law can be radically reshaped by abstracting and then recasting their deepest principles. Precisely because they embody powerful moral and political ideals (fairness, equality, or utility, for instance), the favored principles of abstract idealism easily can criticize and revise large chunks of legal doctrine.

These properties of abstract ideal argument are on full display in some of the great transformative common law cases. Consider Cardozo's opinion in *MacPherson v. Buick Motor Co.*,¹²⁴ which overturned the requirement of privity of contract as a condition for suit against manufacturers of defective products. Cardozo justified that rule revision on the ground that the privity requirement no longer institutionalized the deep principles of foreseeability of harm and respect for the freedom and security of other persons¹²⁵ that are the cornerstones of negligence law. These principles criticize the privity of contract requirement instead of justifying it because the rise of twentieth century technology has

124 111 N.E. 1050 (N.Y. 1916).

125 See *id.* at 1053-54. Cardozo puts the connection between foreseeability and respect for the integrity and security of other persons even more forcefully in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928):

The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all *Affront to personality is still the keynote of the wrong.*

Id. at 100-01 (emphasis added) (citations omitted).

increased the destructive power of machines, and the rise of mass production and distribution have extended the sphere of those endangered by poorly manufactured products and altered the economic relationships among them. Social change has turned the immutable core principles of tort law¹²⁶ into levers of criticism and revision:

Precedents drawn from the days of travel by stage-coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization requires them to be If [the manufacturer] is negligent, where danger is to be foreseen, a liability will follow. There injury to persons other than the lessee is to be foreseen, and foresight of the consequences involves the creation of duty.¹²⁷

If criteria of fit alone can select a single moral ideal as the ideal of any legal field, then the most heroic and bold exercises in judicial innovation can be legitimated solely by the ideal of decision in accordance with pre-existing law. At its core, law is a web of moral principle, not a system of positive rules. Rule revision is justified whenever fresh moral insight into those principles, or social change in the world they govern, makes a new set of rules more faithful to those principles.¹²⁸

The success of highly general ideal argument in perfecting decision in accordance with pre-existing norms depends on the

126 Recall Shaw's claim in *Norway Plains* that "the common law consists of a few broad and comprehensive principles, founded on reason, natural justice and enlightened public policy . . ." See *supra* note 38 (emphasis added).

127 *MacPherson*, 111 N.E. at 1053-54 (I have rearranged the order of the sentences). *MacPherson* is hardly unique. Similar forms of justification can be found in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074, 1077 (D.C. Cir. 1970); *Henningsen v. Bloomfield Motors*, 161 A.2d 69, 86 (N.J. 1980); *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. (1 Gray) 253 (1854); and *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49 (1842).

128 *Li v. Yellow Cab*, 13 Cal. 3d 804 (1975), is an example of a case which revises rules on the basis of a new and ostensibly better understanding of the "principle" informing them. Contributory negligence must yield to comparative negligence because "the doctrine [of contributory negligence] is inequitable in its operation because it fails to distribute responsibility in proportion to fault." *Id.* at 810 (footnote omitted). I am indebted to Scott Bice for emphasizing to me how *Li* depends on rejecting an older understanding of fault, one vesting on starker notions of blameworthiness and moral virtue and adopting a less judgmental modern conception.

The decisions cited *supra* note 127 all combine the appeal to (pre-existing) deep common law principles and point to fundamental social change to justify extensive revisions of legal rules.

discriminating power of fit at this level of abstraction. The flight to a high level of abstraction in fact coarsens the fit criterion. The additional test it now imposes is whether or not the ideal invoked can account for the division of labor among less general legal principles, such as fault and strict liability. (These lower-level principles would then be used to "fit and justify" the details of doctrine in the manner described in the preceding section).

Clearly, more than one abstract ideal can explain the division of labor between negligence and strict liability. For example, no less a torts theorist than Oliver Wendell Holmes thought that social utility justified the pride of place held by the fault principle.¹²⁹ In a move which parallels the move made by the reciprocity of risk theory, Holmes also explained why utility called for strict liability under certain special conditions. Holmes writes:

Cases [imposing strict liability] do not stand on the notion that it is wrong to keep cattle, or to have a reservoir of water It may even be very much for the public good that the dangerous accumulation should be made . . . [but] it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken.¹³⁰

To be sure, this passage is bursting with ambiguity. Quite different modern economic justifications for strict liability can be extracted from it. Perhaps Holmes thinks strict liability justified because only unilateral precautions are available in such cases; or perhaps he thinks it justified because it is important to regulate the incidence of the pertinent activities as well as the care with which they are undertaken; or perhaps he believes that, in this restricted class of cases, the decision about precautions should be placed in the hands of the party best able to make that decision.¹³¹ For our purposes, however, the point is clear and simple: utility can serve as well as fairness as a principle governing the choice between negligence and strict liability. Moreover, the conflict between utility and fairness may be the most intractable of all.

129 See OLIVER WENDELL HOLMES, *THE COMMON LAW*, LECTURE 77 (Little Brown ed., 1963) (1881).

130 *Id.* at 93.

131 For a discussion of unilateral precautions, levels of activity, and strict liability, see STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5-32 (1987). For a discussion of placing the decision over precautions in the hands of the party best able to make that decision, see Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055 (1972).

It is quite possible that we are now in the domain of insoluble conflict between competing normative criteria.¹⁹²

Once again, though, we should leave moral philosophy to moral philosophers and train our gaze on legal philosophy. The point is this: no criterion of fit with the primary legal materials can rule out either utility or fairness as a dominant ideal for tort law. Either principle can be made to explain the critical division of labor between strict liability and negligence that such principles must explain. Either principle fits turn-of-the-century accident law. In short, the move to a higher level of generality creates conflict, not consensus. The character of this conflict is more obviously moral but it may, for that very reason, also be more deeply embedded and more intractable. Insofar as they push and pull in different directions, each principle will be critical and transformative in different ways.

VI. LEGAL DECISION AT AN IMPASSE

Neither of the conceptions of legal discourse analyzed in this Article, positivism and idealism, is capable of yielding decisions determined by pre-existing law. Construed to require as much from legal reasoning, the ideal of decision in accordance with pre-existing law is unrealizable. Sensibly construed to require only the possible, however, the ideal is realized by either of the conceptions of law and legal reasoning examined here. Indeed, sensibly construed, the ideal of fidelity to pre-existing norms leaves considerable latitude for a variety of conceptions of legal decision. The high philosophizing of Dworkin's Hercules, and the most slavish rule-following of a pure and rigid positivism, are polar extremes between which other conceptions of legal rationality are suspended.

The account of legal reasoning proposed by Edward H. Levi,¹⁹³ for example, endorses a practice of modest analogizing. As Levi fittingly describes it, the effort to adhere to prior decisions requires the construction of low-level generalizations specifying the bearing of prior cases on the case at hand. Courts thus construct the rules that they follow. This, plainly, is an enterprise that grants them a certain leeway. They are bound by their own generaliza-

192 For an argument to this effect, see THOMAS NAGEL, *The Fragmentation of Value, in MORTAL QUESTIONS* 128 (1979).

193 See LEVI, *supra* note 17, at 1-4. Cf. Sunstein, *supra* note 57.

tions, not by the generalizations of the courts that they ostensibly follow. It also imposes a certain constraint. More than one generalization usually will fit the pertinent precedents, but not just any generalization will do. So, too, it generates a certain critical power: new values come in gradually, and, for the most part, evolve incrementally. Over time, however, these values can receive increasingly general articulation and broad scope.¹³⁴

As a practice, this is neither the most expansive nor the most constraining conception of decision in accordance with pre-existing norms. Its emphasis on following precedents and fashioning relatively concrete rules places it on the rule-like end of the continuum of practices that represent plausible renderings of decision in accordance with pre-existing norms. As a "rule-like" interpretation of the idea, however, it is less restrictive than some that can be imagined.¹³⁵

Conversely, there are accounts of legal rationality which stress its ideal character, but conceive of judging in a markedly less heroic way than Dworkin does. For instance, by stressing the idea of ideals "implicit" in black-letter legal rules, Lon Fuller tempers the generalizing, philosophizing, and criticizing dimensions of ideal argument.¹³⁶ Implicit ideals are not reconstructed out of legal doctrine by a flight to moral and political philosophy. They are fashioned by attending to "the practices and attitudes of the society in question."¹³⁷ Fuller's variant of idealism is therefore less critical and transformative than Dworkin's.¹³⁸

All of these¹³⁹ conceptions of legal discourse institutionalize

134 See LEVI, *supra* note 17, at 8-27 (discussing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

135 More constraining practices would have to restrict judicial discretion in constructing the general significance of prior rulings. Prior courts might then bind their successors. See SCHAUER, *supra* note 14, at 181-87. For a clear statement of how a practice of analogical reasoning might employ and satisfy a distinctive set of criteria of coherence, see Sunstein, *supra* note 57, at 775-78.

136 LON L. FULLER, *ANATOMY OF THE LAW* 57-69 (1968).

137 *Id.* at 58.

138 Cf. Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981) (expressing doubts about appealing to abstract moral philosophy in law and calling for a practice that makes more use of analogical reasoning and less general moral norms).

139 Not all conceptions of legal reasoning satisfy the constraints of the ideal, by any means. Some conceptions (mostly variants of legal realism or critical legal studies) are denials of the possibility or desirability of deciding cases in accordance with pre-existing norms. The hallmarks of these conceptions are either (or both) of the following claims: (1) that legal norms are fully indeterminate; and (2) that legal decisions can be legitimated only by the moral or political goodness of their outcomes.

the ideal of decision in accordance with pre-existing law, albeit in different ways. Undoubtedly, each conception has its virtues and vices, and each conception can be criticized and defended for expressing the ideal in the way that it does. But it seems fruitless to suppose (or insist), as Justice Scalia does,¹⁴⁰ that any one of these conceptions can be shown to be decisively superior on the ground that it realizes the ideal of decision in accordance with pre-existing law better than any other.

Consider, for example, the highly abstract form of ideal argument reconstructed in Part V.2. Its invocation of highly general, morally saturated ideals like fairness and utility endows it with uncommon critical power. The concrete implications of abstract principles are protean and essentially contestable. No single specification of individual freedom, or equality, or fairness, can ever capture or exhaust their meaning. Precisely because abstract principles can be specified in so many different ways, their revisionary power is enormous. Seemingly settled bodies of law can be radically reshaped by abstracting, and then recasting, their deepest principles.

If this Article is correct, it is wrong (though illuminating) to advocate this conception of legal justification on the ground that it perfects the idea of decision in accordance with pre-existing norms. This conception can meet the reasonable requirements of that ideal, but so too can other conceptions. The case for preferring this conception must be made on other grounds: perhaps because it holds out the most promise of reconciling law with morality; or because it enacts the best conception of human equality; or because it vindicates individual rights.

Mark Tushnet has expressed both ideas in their purest form. He has written that "the legal realists taught us that there never was a 'fellow servant rule'" and that there are no specific rules or doctrines. Mark V. Tushnet, *Marxism as Metaphor*, 68 CORNELL L. REV. 281, 283 (1983) (reviewing HUGH COLLINS, *MARXISM AND LAW* (1982)). He also has suggested that the right way for a judge to decide a case "is to make an explicitly political judgment: which result is, in the circumstances now existing, likely to advance the cause of socialism." Mark V. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1982). Cf. Mark V. Tushnet, *Following the Rules Laid Down*, 96 HARV. L. REV. 781 (1983).

The first of these ideas (radical indeterminacy) renders decision in accordance with pre-existing law impossible. The second (extreme instrumentalism) renders this kind of decision undesirable. The evaluation of these theories is beyond the scope of this Article.

140 Scalia, *supra* notes 1 and 22. Cf. *Planned Parenthood v. Casey*, 120 L. Ed. 2d 674, 794 (1992) (Scalia, J., dissenting); *Maryland v. Craig*, 497 U.S. 836, 861, 870 (1990) (Scalia, J., dissenting).

VII. THE LEGITIMACY OF LEGAL DECISION

At the outset of this Article, I observed that legal decision could bypass difficult questions of legitimacy if legal theory could show how legal decision might be nothing more than the application of pre-existing norms to present cases. In fact, that notion fails to favor one conception of law and legal rationality over other conceptions, much less to determine outcomes in concrete cases. This places the legitimacy of legal decision in doubt and prevents theories of legal decision from avoiding the difficult issues of political legitimacy that lie at the heart of liberal theory. Courts are political institutions exercising the coercive power of the state. This authority must either be legitimated or be suspected. The inescapable task facing the theory of legal decision is to show how the authority of courts might be legitimate.

Theoretically, at any rate, this task is fairly urgent. If the requirement that cases be decided in accordance with pre-existing norms constrains and legitimates the practice of legal reasoning as incompletely as this Article argues, then the critical work of constraint and legitimation must be done by other ideals. Practically, the task is not trivial. Our conclusion leaves the question of how best to discharge judicial duty wide open. It is not only unclear whether judges should seek to render the legal materials into a model of rules or a "forum of principle;"¹⁴¹ it is also unclear whether they should struggle after coherence as arduously as legal theory tends to suggest.¹⁴²

However deeply embedded in judicial psychology, the pursuit of a "right answer" may be not only vain but deeply mistaken. The pursuit of coherence ends by showing the law to be torn between competing moralities. So, too, the contrasts between reflective equilibrium and legal justification show the law to be torn between its achievements and its aspirations, between fit and justice.

141 See RONALD DWORIN, *The Forum of Principles*, in *A MATTER OF PRINCIPLE* 33 (1985).

142 The pull of coherence is evident in Cass Sunstein's "suggestion" that "correct answers in law might consist precisely of . . . our considered judgments about particular cases . . . once they have been made to cohere." Sunstein, *supra* note 57, at 775 (I have rearranged the order of the clauses). That pull is also evident in Ernest Weinrib's variant of formalism. See John Stick, *Formalism as the Method of Maximally Coherent Classification*, 77 *IOWA L. REV.* 773, 782-88 (1992); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 *COLUM. L. REV.* 472 (1987); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949 (1988).

The pursuit of coherence implicitly denies these conflicts, and implicitly ignores the fact that fit alone cannot legitimate our legal decisions. Perhaps legal justification should flush out and acknowledge conflict, and explicitly balance fit against other political values. Only an account of other grounds of decisional legitimacy can supply guidance here.

In thinking about the legitimacy of legal decision, we must bear two fixed points in mind. First, we should not (and probably cannot) simply discard the requirement of fidelity to pre-existing norms. That requirement sits at the core of our understanding of law, and its achievement is a necessary, minimum condition of a just legal order. The arbitrary willfulness of despotism and the strategic arbitrariness of totalitarianism are both incompatible with faithful adherence to pre-existing law.¹⁴³ Formal equality before the law is achieved by the faithful application of pre-existing norms and such equality is part, though only part, of a decent legal order.¹⁴⁴ Decision in accordance with pre-existing norms is likewise a part, but only a part, of legitimate legal decision and a just legal order.

Second, we must bear in mind that democratic sovereignty resides in the hands of free and equal citizens bound only by their free, rational and public consent.¹⁴⁵ The great challenge facing the theory of legal decision is to show how the exercise of political authority in accordance with, but not determined by, pre-existing norms can be reconciled with that sovereignty.

143 The contrast between faithful application of pre-existing norms and despotism is taken from Rawls. The contrast with totalitarianism is drawn from Bruno Bettelheim. See BRUNO BETTELHEIM, *THE INFORMED HEART* 141-42 (1961) (discussing the role of deliberate arbitrariness in the exercise of authority in concentration camps).

144 See *supra* note 5 and accompanying text.

145 See RAWLS, *supra* note 4; RAWLS, *supra* note 8.

