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Dworkin vs. Hart Revisited: The Challenge of Non-Lexical Determination

Mitchell N. Berman*

July 1, 2021

Abstract: A fundamental task for legal philosophy is to explain what makes it the case that the law has the content that it does. Anti-positivists say that moral norms play an ineliminable role in the determination of legal content, while positivists say that they play no role, or only a contingent one. Increasingly, scholars report finding the debate stale. This article hopes to freshen it by, ironically, revisiting what might be thought its opening round: Dworkin's challenge to Hartian positivism leveled in *The Model of Rules I*. It argues that the underappreciated significance of Dworkin's distinction between rules and principles is not that Hart's model cannot allow for the *existence* of legal principles, but that it cannot make sense of their *operation*. Hart's model posits that legal rules are determined in a rule-like ("lexical") way, whereas legal principles contribute to rules in a manner that is at least partly non-lexical. The upshots of this reinterpretation are: first (against most positivists) that Dworkin's challenge *does* require some reworking of Hart's positivist theory; and second (against most anti-positivists) that the reworking required to meet Dworkin's challenge *does not* necessitate positivism's abandonment.

1. Introduction

What gives law the content that it has? What makes it the case that *q* is a legal norm, when it is? Many people working in analytic jurisprudence agree that answering this question remains the central challenge of legal philosophy.¹ Elsewhere I offer a new answer to that foundational question,

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a novel general account of the determination of legal content, or what is sometimes termed a “constitutive” theory of law.² I call this theory “principled positivism.”³ It maintains: (1) against Ronald Dworkin, that the weighted contributory norms that he called “principles” can be fully determined or constituted by social practices; and (2) against H.L.A. Hart, that such positivist principles participate in the determination of legal rules by a function or mechanism distinct from the determination mechanism he called “validation.” The bumper sticker summary: legal practice grounds legal principles, and legal principles partially ground legal rules.

But that article is not this one. When discussing my affirmative view, I have been struck by the pronounced bimodality of the reactions it has provoked: some scholars think the view obviously right but already close to standard wisdom, while just as many think it obviously wrong, plainly incapable of meeting the objections already leveled by Dworkin. To see more clearly why both responses are mistaken, it proves necessary, I have

Hanoch Dagan, John Deigh, Mike Dorf, Oran Doyle, Ben Eidelson, David Enoch, John Golden, Mark Greenberg, Alex Guerrero, Brian Hutler, Jeffrey Kaplan, Guha Krishnamurthi, Brian Leiter, Errol Lord, Andrei Marmor, Stephen Perry, David Plunkett, Connie Rosati, Gideon Rosen, Larry Sager, Fred Schauer, Scott Shapiro, Rebecca Stone, Kevin Toh, Mark van Roojen, Daniel Wodak, two anonymous referees for this journal, and workshop audiences at Cornell Law, University College London, UCLA Law, Penn Philosophy, and the Surrey Centre for Law & Philosophy. I started work on this paper while serving as a Laurance S. Rockefeller Fellow at Princeton’s University Center for Human Values, and gratefully acknowledge the Center’s support.

¹ See, e.g., Mark Greenberg, *How Facts Make Law*, 10 *LEGAL THEORY* 157 (2004), reprinted and revised as SCOTT HERSHOVITZ ED., *EXPLORING LAW’S EMPIRE* 225, 225 (2006) (“a central—perhaps the central debate in the philosophy of law is a debate over whether value facts are among the determinants of the content of the law”); Scott Hershovitz, *The End of Jurisprudence*, 124 *YALE L.J.* 1160 (2015) (acknowledging the centrality of this dispute, and proposing that it can be escaped); Nicos Stavropolous, *The Debate That Never Was*, 130 *HARV. L. REV.* 2082, 2090 (2017) (“The standard question in legal theory asks: does the law ultimately depend only on institutional facts or do moral factors also play some fundamental role?”); cf. David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 128 *ETHICS* 37, 56 (2017) (noting that a “complete metalegal theory . . . should spell out the nature and grounds of legal facts”).

² See generally Greenberg, *supra* note 1; David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 *LEGAL THEORY* 139, 149-50 (2012). I use the term “constitutive” guardedly, for it has metaphysical connotations that expressivists may resist, and I intend my account to be congenial to expressivists who ascribe truth or correctness conditions to propositions of law, hence are “minimal realists” about the domain. See *infra* note 25 and accompanying text. Be that as it may, the constitutive terminology is much preferable to some prominent alternatives. Contrast, e.g., Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. LEG. STUD.* 139, 141 (1982) (distinguishing epistemic from “semantic” theories).

³ Mitchell N. Berman, “How Practices Make Principles, and How Principles Make Rules.” (ms, dated 6/14/21).

discovered, to revisit afresh the very first chapter of the “Hart-Dworkin Debate”: Dworkin’s extraordinary 1967 paper, *The Model of Rules I* (as it has come to be known).⁴

The central argument of that paper—call it Dworkin’s *challenge from principles*—is that rules and principles are logically distinct norm types and that positivism (or at least Hart’s version) cannot make sense of the use of principles in legal decisionmaking. Although the historical significance and influence of Dworkin’s article is widely acknowledged, the challenge itself is much misunderstood. Many positivists underestimate the challenge, thereby missing what remains un rebutted of its force. At the same time, many anti-positivists overestimate it, thereby overlooking the as-yet unexplored space for a positivist rejoinder. This article offers a reinterpretation of Dworkin’s challenge, aiming to clarify its continued but underappreciated jurisprudential and metanormative importance. The payoff is independent of any support it might provide for the particular version of positivism I develop and peddle elsewhere. The payoff is in highlighting and refining a longstanding challenge that Hartian positivism has yet to meet.

I develop these arguments over three sections. Section 2 engages in brief table-setting. It introduces Dworkin’s challenge in *The Model of Rules I* (henceforth “*TMR I*”) in broad strokes that are mostly uncontroversial and then identifies the two main positivist responses to Dworkin’s challenge: the “hard” or “exclusive” positivism defended by Joseph Raz, and the “soft” or “inclusive” version favored by many other positivists, including Hart.

The hard work begins in Section 3, which fleshes out the *challenge from principles*, arguing that Dworkin was correct that Hart’s version of positivism cannot accommodate distinctly *legal* principles, albeit for reasons that Dworkin’s exposition obscures and, therefore, that previous scholars have largely missed. The crux of the challenge is less about the difference between rules and principles as normative notions, and more about the difference between the kinds of determination structures with which these normative notions are associated. I will call the two structures or functions “lexical” and “non-lexical.” (For lexical determination, think algorithms, necessity, and sufficiency; for non-lexical determination, think balancing tests, W.D. Ross, and cluster concepts.) Validation is a quintessentially lexical determination function. Dworkin’s key contention is that, because fundamental legal principles contribute to the non-lexical determination of

⁴ Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), *reprinted and revised as The Model of Rules I*, in RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* ch. 2 (1977). Subsequent citations are to the book.

derivative legal rules, Hart is mistaken to maintain that rules arise by validation. The problem is not, quite, that Hart's account can't deliver legal *principles*, but that, insofar as it can, it can't deliver legal *rules*.

The implication of Section 3 is that positivists could meet Dworkin's *challenge from principles* by modifying Hart's account to allow for determination of rules by non-lexical means, and not—or not only—by validation. In other words, on the interpretation of Dworkin's *challenge from principles* that Section 3 offers, the upshot is not (as Dworkin believed) that we must abandon positivism, but that positivists must grant that rules that do not arise by acceptance can emerge by non-lexical determination as well as by validation.

Section 4 considers objections, concentrating on two common readings of *TMR I* that would cast doubt on the interpretation of Dworkin's challenge that Section 3 presses. Many inclusive positivists read *TMR I* as premised on the assumption that the Hartian rule of recognition can include only "pedigree" criteria of validity. That Dworkinian assumption, these positivists say, is false, fatally undermining Dworkin's argument against Hart, and rendering unnecessary any effort to incorporate non-lexical determination of derivative legal norms into the positivist package. From the opposite side of the aisle, many anti-positivists read *TMR I* as having established that moral principles invariably participate in the determination of legal principles, in which case no positivist story regarding how fundamental principles jointly determine rules can adequately meet Dworkin's challenge, rendering the distinction between lexical and non-lexical determination pointless. Section 4 defends my reading of Dworkin's challenge against these alternatives, showing that each rests on a less persuasive understanding of the argumentative logic of *TMR I*, albeit readings that Dworkin's exposition reasonably invites. It concludes by addressing suspicion that the supposed difference between lexical and non-lexical determination could not possibly be of depth or intricacy sufficient either to help make sense of Dworkin's challenge or to justify the attention I lavish upon it. That skepticism, I explain, is unwarranted.

2. Dworkin's Challenge, and Positivist Rejoinders

In his pathbreaking 1961 monograph, *The Concept of Law*,⁵ the legal philosopher H.L.A. Hart demolished the reigning positivist theory of law — John Austin's conception of law as "the command of the sovereign backed

⁵ H.L.A. HART, *THE CONCEPT OF LAW* 110 (2d ed. 1994).

by force”⁶—and offered instead a novel positivist theory according to which ordinary rules of law trace back to a social norm accepted by judges that Hart termed the “ultimate rule of recognition.” Greeted with wide acclaim, the *Concept* ushered in a new age of positivism in Anglophone legal philosophy that continues to this day. Ronald Dworkin, however, was not persuaded. His central aim in the paper that would come to be known as the “The Model of Rules I” was to demonstrate that rules and principles are logically distinct norm-types, and to argue that the character and usage of legal principles causes difficulty for positivism, in Hart’s version and more generally.

On this much all agree. Many also believe that Dworkin’s *challenge from principles* (as I dub it) remains his most powerful and influential objection to Hart’s theory.⁷ What commentators widely disagree about is precisely *how* the challenge runs; they do not all agree on exactly *why* the rule/principle distinction is even *supposed* to threaten positivism, putting aside whether the challenge succeeds. Section 3 addresses that uncertainty. It elaborates on the *challenge from principles* in detail, concluding that it causes trouble for Hart’s account in a manner that few commentators have appreciated. But that is to come. This section presents an initial cut.

2.1. The challenge from principles: a first pass

The *challenge from principles* can be parsed as a six-step argument:

[1] For Hart, a norm is legally “binding,” “authoritative,” or “normative”—it “comes into being”—in only “two possible” ways: “(a) because it is accepted or (b) because it is valid.”⁸

⁶ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

⁷ See, e.g., Dennis Patterson, *Fashionable Nonsense*, 81 TEX. L. REV. 841, 867 (2003) (book review) (observing that *TMR I* “would set the terms of debate in analytic jurisprudence for the next twenty-five years”); Jules L. Coleman, *Constraints on the Criteria of Legality*, 6 LEGAL THEORY 171, 172 (2000) (“[I]t would be hard to find an essay that has been more influential in the development of contemporary jurisprudence.”); Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 553, 553 n.1 (1992) (calling *TMR I* “Dworkin’s most important early piece”); cf. Dale Smith, *Dworkin’s Theory of Law*, PHIL. COMPASS 267, 268 (2007) (“Dworkin’s arguments in [*TMR I*] had a profound impact on the development of positivism.”).

⁸ DWORKIN, *supra* note 4, at 20. It is not clear how Dworkin conceptualizes the three statuses or properties of being *binding*, *authoritative*, or *normative*, or the differences among them. I will treat them as interchangeable ways to describe the *existence* of a legal norm, i.e., that it has “come into being.” That is, on Hart’s rule-of-recognition account (says Dworkin), *q* is a legal norm if and only if *q* is either accepted as a legal norm or validated by a legal norm (that itself exists either by acceptance or by validation).

[2] Principles and rules are norms of distinct “logical” types. “Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”⁹ Principles, in contrast, bear on a decision with variable “weight or importance,” and do not purport to resolve the normative status of a fact pattern decisively. Principles “incline a decision one way, though not conclusively, and they survive intact when they do not prevail.”¹⁰ Genuine principles can and often do conflict, whereas apparent conflict between rules is *only* apparent, indicating that one or the other must contain an exception that permits reconciliation.

[3] “There are two very different tacks we might take” in explaining the role of principles (conceived as weighted norms) in legal decisionmaking: (a) “We might treat legal principles the way we treat legal rules and say that some principles are binding as law If we took this tack, we should say that . . . the ‘law’ includes principles as well as rules”; or (b) we might “deny that principles can be binding the way some rules are. We would say, instead, that . . . the judge reaches beyond the rules that he is bound to apply (reaches, that is, beyond the ‘law’) for extra-legal principles he is free to follow if he wishes.”¹¹

[4] Tack (b)—the denial that weighted norms are part of the law—fails because it is implausible that all principles are extra-legal, for that would require that whenever judges invoke principles in their legal decisionmaking (as is common), they are invariably exercising “strong” discretion, a form of discretion that positivist arguments have not established, and that is inconsistent with standard views of legal rights and duties.¹²

[5] Tack (a)—the effort to allow for weighted and conflicting *legal* norms—fails because principles cannot come into being in either of the two exhaustive ways that Hart’s theory allows:

(1) Principles cannot be validated by any “test that all (and only) the principles that do count as law meet”;¹³ and

(2) Principles cannot arise by acceptance because that “would very sharply reduce that area of the law over which [Hart’s] master rule held any dominion.”¹⁴

⁹ *Id.* at 24.

¹⁰ *Id.* at 35.

¹¹ *Id.* at 29.

¹² *Id.* at 31-39.

¹³ *Id.* at 40.

¹⁴ *Id.* at 43.

[6] Therefore, “Hart’s version of positivism” cannot accommodate the use of weighted norms (principles) in legal practice.¹⁵ The principles invoked cannot all be extra-legal [4], but nor can they arise by either validation or acceptance [5], which are the only routes that Hart’s account acknowledges [1].

2.2. Two positivist rejoinders: inclusive and exclusive

The argument just sketched is valid. Accordingly, positivists who resist Dworkin’s conclusion [6] must reject one or more of the premises. The first and third premises appear secure: Hart does argue that a legal norm obtains in virtue either of being accepted or of being validated (directly or indirectly) by criteria picked out by a convergent social rule (premise [1]);¹⁶ and the notion (premise [3]) that a given principle either is or is not a legal norm is unobjectionable.

Some positivists have rejected premise [2], arguing that one or another feature claimed to be unique to one type of norm can be possessed by norms of the supposed contrasting type. Notably, both Joseph Raz and Philip Soper argued decades ago that, contra Dworkin, rules can conflict and have variable weight or importance.¹⁷ For this and other reasons, there’s no doubt that, if Dworkin was on to something, he didn’t exactly nail it.¹⁸ More doubtful is what follows—whether to abandon Dworkin’s rule/principle distinction entirely or to continue entertaining it as a working hypothesis in need of refinement.¹⁹

Most scholars have chosen the latter course. As one commentator has observed, “While many positivists thought that [Dworkin] over-stated or misunderstood the difference between rules and principles, most accepted

¹⁵ *Id.*

¹⁶ See HART, *supra* note 5, at 110.

¹⁷ See E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Debate*, 75 MICH. L. REV. 473, 479-84 (1977); Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

¹⁸ In addition to the logical difference between rules and principles that we’re discussing, Dworkin also offers a substantive (or “normative”) difference: principles concern “justice or fairness or some other dimension of morality.” DWORKIN, *supra* note 4, at 22. “Unfortunately, Dworkin’s two accounts of principles do not mesh. Standards with the logical properties of principles need not be normative standards; conversely, normative standards need not have the logical properties of principles.” David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415, 423 (1977). With other commentators, I take the supposed logical difference discussed in the text to come closer to the pith of the matter.

¹⁹ To anticipate, I suspect that what is essential about principles, in contradistinction to rules, is less their weight than the fact that they are non-strict, and that they contribute to the strict in a quintessentially weighted, or aggregative, manner.

that there *is* a difference between these two types of norm.”²⁰ And recent metanormative work from outside legal philosophy strengthens that instinct. As Errol Lord and Barry Maguire have argued, any normative theory must recognize as fundamental “two central cross-cutting distinctions”: the distinction between “strict” and “non-strict” notions, and a second between “weighted” and “non-weighted” notions.²¹ Typically, they add, non-strict notions are weighted and weighted notions help explain the strict.²² Lord and Maguire are not legal philosophers and they don’t mention Dworkin. But affinities between Dworkin’s principles and the weighted, non-strict notions of the Lord and Maguire taxonomy are impossible to miss.

Rightly or wrongly, then, most positivists aiming to block the *challenge from principles* have accepted that some illuminating difference between norm types lies roughly where Dworkin located it, and have denied either proposition [4] or proposition [5] (but not both at once). Exclusive positivists take tack (b), thus deny claim [4]. Many follow Raz in maintaining that even though non-pedigree principles are not part of the law, judges can be legally required to follow them, thus are not “free to follow” or not, as they wish. Inclusive positivists take tack (a), and the first option especially: they argue that legal principles can be validated by a rule of recognition. Chiefly, inclusive positivists deny claim [5](1).

3. The Crux: Principles, and the Validation of Rules

This section argues that the *challenge from principles* succeeds against Hart’s version of positivism: Hartian positivism does not allow for *legal principles*—principles that are part of the law in the way that tack (a) promises. The argument depends upon parsing Dworkin’s challenge in terms that expand upon those provided in Section 2.1. My sketch there closely tracked the surface of Dworkin’s presentation. But to see the true force of the challenge will require that we dip below the surface, and

²⁰ Smith, *supra* note 7, at 268. See also, e.g., Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 745 (1997) (first published in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279 (Andrei Marmor ed. 1995) (describing the rule/principle distinction as central to “an entire jurisprudential tradition, a tradition that has shaped not only academic thought on these matters, but also how lawyers and judges think and operate”); HUMBERTO ÁVILA, THEORY OF LEGAL PRINCIPLES (2007).

²¹ Errol Lord & Barry Maguire, *An Opinionated Guide to the Weight of Reasons*, in WEIGHING REASONS 3 (Errol Lord & Barry Maguire eds. 2016).

²² *Id.* at 4.

disregard some of Dworkin's feints and false starts, to excavate its underlying logic.

The path toward understanding starts by clarifying the *function* that Hart's rule of recognition is supposed to serve,²³ and the *means* by which it purports to accomplish its ends. That clarification is provided in subsections 3.1 and 3.2, which together introduce two crucial distinctions: between "fundamental" and "derivative" legal norms, and between "lexical" and "non-lexical" modes of determination. The ultimate rule of recognition is a practice among legal actors that incorporates or gives rise to fundamental legal criteria that serve to determine derivative legal norms by validating them, which is a lexical mode of determination.

Subsection 3.3 deploys the distinctions introduced in subsections 3.1 and 3.2 to elaborate on Dworkin's reasons for concluding that Hart's account cannot accommodate legal principles. Subsection 3.4 rebuts those conclusions. It argues, against Dworkin, that Hart can accommodate the existence of genuine legal principles—weighted, contributory norms that are grounded in legal practice, hence are not irreducibly moral in character. Hart's system can allow for derivative legal principles that arise by validation, and for fundamental legal principles that arise by being accepted by participants in legal practice, paradigmatically judges. By this point, the dialectic will favor Hart.

Subsection 3.5 reverses fortunes. That fundamental and derivative legal principles can be determined by or grounded in acceptance and validation, respectively, is not enough to vindicate tack (a), the effort to accommodate principles within law. The problem for Hartians is that the relationship obtaining between legal principles and legal rules is not merely one of parallel coexistence. It is misleading to say that "principles supplement rules."²⁴ Rather, legal principles (at least the fundamental ones) play a role in determining or constituting legal rules (derivative ones). The relationship between (fundamental) principles and (derivative) rules is not tandem or parallel, but layered or structured. And principles do not determine rules by validation but by some form of non-lexical determination. The surprising upshot of the *challenge from principles*, then, is not that Hart's account can't accommodate legal principles; it's that,

²³ The rule of recognition serves many functions in Hart's theory. See, e.g., Scott J. Shapiro, *What is the Rule of Recognition (and Does it Exist)?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 235, 242-45 (Matthew Adler & Kenneth Einar Himma eds. 2009). I am focusing on the function pivotal to Dworkin's challenge: the function of helping to "determine"—or, in his terms, to cause to "come into being"—legal rules that are not independently accepted.

²⁴ Lyons, *supra* note 18, at 421.

thanks to the existence of fundamental legal principles and the determination relationship that obtains between principles and rules, Hart's account can't explain legal rules.

3.1. From social norms to legal norms

Start with relatively simple social norms, such as that one ought (in the West) to wear black at a funeral, or that one ought (in Oxford) to pass the port to the left.²⁵ There are many interesting metanormative observations to be made about social norms like these.²⁶ Yet insofar as a common wisdom obtains, it likely includes these three components: (1) *minimal realism* (the "metaphysically unambitious" thesis that "there really are ways that things might be . . . and that our thoughts and sentences do sometimes correctly represent that reality");²⁷ (2) *thin normativity* (the view that these norms exhibit or exert a type or grade of normativity of a different character or stringency than do other norms—paradigmatically moral norms as conceived by traditional or "robust" moral realists—and are not "really binding");²⁸ and (3) *positivism* (the idea that these norms are what they are in virtue of behaviors and mental states of members of the group to which they apply).

Let me offer a few words about this third aspect of social norms: positivism. Philosophers of social norms do not all agree upon just which behavioral phenomena determine social norms, and are perhaps a little loose about the nature of the determination relationship.²⁹ But the central shared idea is that social norms are metaphysically determined by some kinds of behaviors and mental states (or by *facts about* those behaviors and mental states) undertaken by some members of the social groups to which the norms apply.

²⁵ See GEOFFREY BRENNAN ET AL., *EXPLAINING NORMS* 3 (2013).

²⁶ I follow Plunkett and Shapiro in treating metanormative theory as concerned with explaining "how thought, talk, and reality that involve [normative notions] fit into reality." Plunkett & Shapiro, *supra* note 1, at 49. Thus understood, general jurisprudence is a branch of metanormative inquiry.

²⁷ MARK VAN ROOJEN, *METAETHICS: A CONTEMPORARY INTRODUCTION* 9-14 (2015).

²⁸ This is the type of normativity that attaches to rules of etiquette and rules of a club, as memorably captured in Philippa Foot, *Morality as a System of Hypothetical Imperatives*, 81 *PHIL. REV.* 305 (1972). A recent summary, including relevant citations, is at Plunkett & Shapiro, *supra* note 1, at 48-49. My "thin normativity" is not precisely congruent with their "formal normativity," but the nuances needn't detain us.

²⁹ See, e.g., BRENNAN ET AL., *supra* note 26, at 35 ("norms . . . are clusters of normative attitudes plus knowledge of those attitudes"); CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS* ix (2006) ("norms are supported by and in some sense consist of a cluster of self-fulfilling expectations").

To regiment discussion, and in accord with currently popular philosophical vocabulary, I will say that such norms are “grounded in”³⁰ behaviors and mental states that obtain in the relevant practice communities, where grounding is a relationship of metaphysical determination by which more fundamental facts or entities explain, non-causally, less fundamental ones. For example, physical, neurochemical states of the brain ground mental phenomena such as beliefs, intentions, and consciousness, and mental phenomena ground semantic phenomena such as word meanings.³¹ Macrophysical properties such as hardness and conductivity are grounded in microphysical properties such as molecular structure.

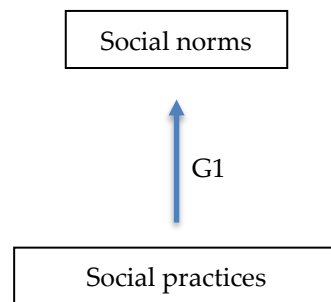
I will also often say that the grounds of social norms are the social practices by which members of the relevant practice communities “take up” the norms,³² such as by believing and stating that the standard a norm captures is normative, using it to guide and justify their own conduct, criticizing themselves and others for deviance, and so on. I’ll designate this grounding relationship G1, leaving its details entirely open at present. (See figure 1.)

³⁰ While a hot topic, grounding is also plagued by substantial uncertainty and dissensus. Entries to the debates include METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY (Fabrice Correia & Benjamin Schnieder eds., 2012); Michael J. Clark & David Liggins, *Recent Work on Grounding*, 72 ANALYSIS 812-14 (2012). Recent works in legal theory that conceptualize positivism as a claim about grounding include Samuele Chilovi & George Pavlakos, *Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence*, 25 LEGAL THEORY 53 (2019); Andrei Marmor & Alex Sarch, *The Nature of Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed.); Plunkett, *supra* note 2, at 151-52. I deploy the language of grounding gesturally and hoping to remain noncommittal on the most vigorously contested topics. The key claims are only that grounding facts or entities (the taking-up practices) are metaphysically more fundamental than the grounded facts or entities (social norms), and participate in making the latter the case.

³¹ I will generally take the grounding relata to be entities such as speech acts, practices and artificial norms, not *facts about* speech acts, practices, or artificial norms. On this point, I’m with Jonathan Schaffer as against, e.g., Gideon Rosen. Compare Jonathan Schaffer, *On What Grounds What*, in METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY 347 (David Chalmers, David Manley, & Ryan Wasserman, eds., 2009), with Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109 (Bob Hale & Aviv Hoffmann eds., 2010). I trust that those who view grounding as necessarily a relation among facts can effect the linguistic substitutions without changing the substance of my argument.

³² Cf. Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 166 (2002) (arguing that, for “common lawyers . . . , the law in its fundament was understood to be not so much ‘made’ or ‘posited’—something ‘laid down’ by will or nature—but rather, something ‘taken up,’ that is, used by judges and others in subsequent practical deliberation”).

Social norms model (fig. 1)



Turn now to complex institutionalized normative systems such as law, sports, and religions. One with a positivist sensibility is apt to think that the norms of these systems also exhibit the three properties that I have just ascribed to ordinary social norms: (1) they are minimally realist, (2) they are only thinly normative, and (3) they rest on contingent social-factual underpinnings.

But even if so, there is one crucial difference. All social norms are grounded *directly* in social facts:³³ q is not a social norm of community S if not “taken up” in S .³⁴ If, post-Covid-19, the members of S don’t return to a practice of shaking hands, or to thinking and speaking as though they ought to, then it will no longer be a norm in S to greet strangers and acquaintances by handshaking. Complex artificial normative systems are different. At least some norms of many or most such systems are *not* taken up by participants and might be entirely unknown to them. As Will Baude and Steve Sachs note, “we can be surprised by, mistaken about, or disobedient toward the law without it ceasing to *be* law.”³⁵ So if legal norms are

³³ By “directly,” I do not mean what the literature terms “immediate” grounding, a technical notion not relevant to our concern. See, e.g., Francesca Poggioli, *On defining the notion of complete and immediate formal grounding*, 193 SYNTHESE 3147, 3150 (2016) (defining mediate grounding as “the transitive closure of the relation of immediate grounding”). (Thanks to Sam Chilovi for encouraging this clarification.)

³⁴ As Cristina Bicchieri cautions, a social norm need not be *practiced* to exist. Even if all members of a normative community S secretly flout q , q can still be a social norm of S so long as the members engage in such norm-supportive behaviors as urging others to comply with q , or criticizing others (or themselves) for noncompliance. BICCHIERI, *supra* note 29, at 11.

³⁵ William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1473 (2019). For more extended treatment of long-term, global legal error see Brian H. Bix, *Global Error and Legal Truth*, 29 OXFORD J. LEG. STUD. 535 (2009); Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253 (2014).

grounded in social facts, the determination relationship between fact and law must be, in some or many instances, indirect.

One natural hypothesis is that, when it comes to complex normative systems, one or more “fundamental” norms that are directly grounded in social facts—by G1 or a close cousin—somehow participate in the determination of other “derivative” norms that are not so grounded.³⁶ Of course, “somehow” conceals an uncertain number of possibilities. The key thought is that if a positivist model of law is to prove viable, it would likely involve two levels of determination where the generic positivist model of social norms recognizes one. On this positivist model of law, social practices ground fundamental legal norms, by G1, and fundamental legal norms, together with whatever facts, practices, or phenomena the fundamental legal norms “point to” or make legally relevant, determine derivative legal norms, by a mechanism or relation D2. (Figure 2.) For example, suppose that a fundamental legal norm, F, of S provides that r is a legal rule of S if r corresponds to a specified type of communicative content of a specified type of text.³⁷ And suppose that T is a text of the specified type and that its relevant communicative content is q. Then q’s existence as

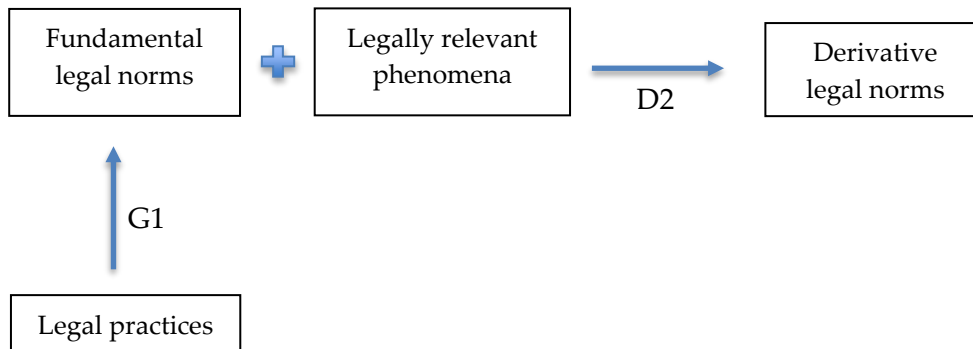
³⁶ On this picture, fundamental legal norms function as “cranes” not “skyhooks,” to borrow Daniel Dennett’s metaphors. DANIEL C. DENNETT, *DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* 73-80 (1995). Brian Epstein’s “frame principles,” and associated distinction between “anchoring” and “grounding,” BRIAN EPSTEIN, *THE ANT TRAP: REBUILDING THE FOUNDATIONS OF THE SOCIAL SCIENCES* (2015), is one recent effort to flesh this picture out.

As my references to complex artificial normative systems should suggest, my claims here apply not only to legal systems but to the larger class of artificial normative systems that also embraces, inter alia, religions and formally organized sports. I elaborate on this picture of our normative landscape in my *Of Law and Other Artificial Normative Systems*, in *DIMENSIONS OF NORMATIVITY* 137 (David Plunkett, Scott Shapiro & Kevin Toh eds., 2019). What distinguishes legal systems from other artificial normative systems, in my view, is that they are established and maintained by political communities and designed to serve a potentially limitless range of functions, characteristically including resolving disputes among community members and preserving public order. *Id.* at 148.

³⁷ In one narrow sense of the term, a notion must purport to have action-guiding character to count as a “norm”; all norms are *oughts*. Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 23, at 98; Eugenio Bulygin, *On the Rule of Recognition*, in *ESSAYS IN LEGAL PHILOSOPHY* 117 (Carlos Bernal et al. eds. 2015). Here and throughout, I intend a more comprehensive sense of “norm” that embraces elements or concepts within the normative domain, or that bear specified relationships to norms that have a directive or deontic character. In this familiar broader sense, Hart’s “power-conferring rules,” HART, *supra* note 5, at 38-42, John Searle’s “constitutive rules,” JOHN R. SEARLE, *SPEECH ACTS* 33-34 (1969), and Eugenio Bulygin’s “conceptual rules,” BULYGIN, *supra*, are all norms; legal rules that set forth the conditions that make for a valid will or treaty are “legal norms.”

a derivative legal rule of S is determined jointly by F and the communicative content of T.³⁸

Generic two-level legal positivism (fig. 2)



Sure enough, Hart’s account is easily understood—including, seemingly, by Dworkin—as one way to flesh out this generic positivist model. On this interpretation, Hart’s theory holds that it is the nature of a legal system that legal norms are what they are and have the contents that they do in virtue of being validated by a set of necessary and sufficient conditions or “criteria” that are grounded in a practice among judges and possibly other officials—the “ultimate rule of recognition” —whereby they converge on treating norms that satisfy those conditions as legal, and accept them from a critical reflective attitude that Hart dubs the “internal point of view.”³⁹ Schematically, this account can be understood as specifying

³⁸ Philosophers disagree about whether grounding is a single type of metaphysical determination, a group of related types, or just a comprehensive label for varied kinds of already recognized determination relationships, and thus nothing distinctive at all. See generally Selim Berker, *The Unity of Grounding*, 127 MIND 729 (2018). Current collective understanding of grounding is too underdeveloped to permit a confident judgment one way or another. I am myself more persuaded that grounding is a genuine type of determination, and that it obtains between practices and norms, than I am that the determination of derivative legal norms by fundamental legal norms and the phenomena (including practices) that they make relevant is also best conceived in terms of grounding. I signal the possibility of important differences in the two determination mechanisms by referring to the latter relationship as simply “determination”—denominated D2 rather than G2—and by representing D2 with a horizontal arrow rather than a vertical one, departing from the convention according to which grounding is always represented vertically.

³⁹ See generally HART, *supra* note 5, at 100-17. See also Grant Lamond, *The Rule of Recognition and the Foundations of a Legal System*, in READING HLA HART’S *THE CONCEPT OF LAW* 97, 114 (Luis Duarte D’Almeida, James Edwards & Andrea Dolcetti eds. 2013). (“Of course, the language of ‘recognition’ and ‘identification’ is not entirely apt: what the rule of recognition does is to *constitute* the rules as rules of the system, that is, it *makes* them rules of

generic two-level legal positivism in three respects. Hart's model replaces the generic placeholders (1) "fundamental legal norms," (2) "legal practices," and (3) "D2" with, respectively: (1a) the "ultimate criteria of validity," (2a) the convergent acceptance among officials (paradigmatically judges) that is the "ultimate rule of recognition,"⁴⁰ and (3a) the determination mechanism that is validation. (See figure 3.)⁴¹

the system."). This summary assumes that the criteria that the rule of recognition picks out validate legal *norms* themselves, not only their *sources*. Whether Hart understood his apparatus to perform this function is disputed. See, e.g., Jeremy Waldron, *Who Needs Rules of Recognition?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 23, at 327, 336. I'm indulging the assumption that is more charitable to Hart and to his followers: if his criteria of validity picked out only legal sources, without addressing the derivation of law from those sources, it would be patently inadequate as a theoretical account of legal content.

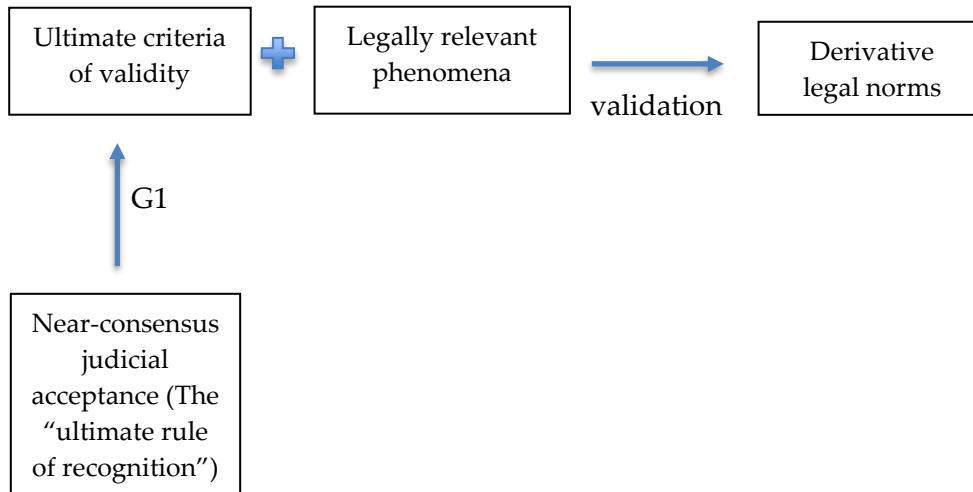
⁴⁰ One caveat: many writers use the term "rule of recognition" (often omitting the modifier "ultimate") to refer both to the social rule among judges of accepting criteria of legal validity and to the criteria themselves. Dworkin himself routinely speaks this way. See, e.g., DWORKIN, *supra* note 4, at 21 (supposing that "the United States Constitution . . . may be considered a single rule of recognition"), 36 (describing "Hart's rule of recognition" as "an ultimate test for binding law"). Many other Hart exegetes, however, object to this imprecision, emphasizing the importance of keeping separate the rule of recognition and the criteria of validity to which they give rise. For a helpful discussion (albeit one that unnecessarily denies, see *supra* note 38, that the criteria of validity can be "norms"), see Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 23, 95, at 96-99. See also Leslie Green, *Legal Positivism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward Zalta ed.) (maintaining that the rule of recognition "is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually practiced").

In fact, Hart is far from clear and consistent on the distinction between the practice and the criteria, and the *Concept* often describes the ultimate rule of recognition as a legal norm. See, e.g. *id.* HART, *supra* note 5, at 110 (describing "a mature legal system" as "a system of rules which includes a rule of recognition"); *id.* at 106 (noting that the U.S. legal system "of course contains an ultimate rule of recognition"). Moreover, a few years later, in responding to Lon Fuller's charge that the ultimate rule of recognition would be more aptly called "a political fact," Hart doubled down. "The propriety of this . . . description [does] not exclude the classification of this phenomenon as an ultimate legal rule." H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 359 (1983). See also Lamond, *supra* note 39, at 104-05.

Any ambiguity in Hart's own exposition aside, I believe that clarity is enhanced by keeping the notions separate, as I attempt to do here. (I am grateful to Brian Leiter for pressing me on this point.)

⁴¹ For a similar analysis of Hart's account in terms of grounding, see Chilovi & Pavlakos, *supra* note 31, at 71-74. My representation of Hart's account approximates Chilovi and Pavlakos's, differing in three respects. First, I am more agnostic regarding whether the determination of derivative legal norms by fundamental legal norms and the factors they make legally relevant is one of grounding. See *supra* note 39. Second, whereas they designate the phenomena that the rule of recognition makes legally relevant "law practices," I believe that the set of potentially relevant phenomena is broader; it could include moral values or

Hartian legal positivism: first pass (fig. 3)



3.2. Validation and alternatives: lexical and non-lexical determination

As we will see, Dworkin's challenge from principles turns ultimately upon the inadequacy, in his estimation, of Hartian validation as a means for determining derivative legal norms—i.e., legal norms that do not owe their existence, as both ordinary social norms and fundamental legal norms do, to being directly grounded in supportive contemporaneous behaviors. Accordingly, grasp of the challenge requires grasp of what validation is, and of what some alternatives to it might be. Unless we have an image of what D2 could involve if *not* validation, the full significance of Dworkin's challenge will elude us.

Let us start not with determination relationships that contrast with validation, but with validation itself. Hart's own description or definition of validation is abbreviated. "To say that a given rule is valid," he explains, "is to recognize it as passing all the tests provided by the rule of recognition [A] statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition."⁴² Consistent with this and other scattered remarks, many scholars treat Hartian validation as a process

probable consequences, among other things. *See, e.g.,* HART, *supra* note 5, at 258 (observing that, "in addition to . . . pedigree matters the rule of recognition may supply tests relating not to the factual content of laws but to their conformity with substantive moral values or principles"). Third, Chilovi and Pavlakos fail to distinguish the rule of recognition from the criteria of validity, as the preceding footnote recommends.

⁴² HART, *supra* note 5, at 103. *See also* HART, *supra* note 24, at 359.

or function by which resultants are determined by satisfaction of a set of necessary and sufficient conditions that the function picks out.⁴³

This is close but, for two reasons, not quite right. First, understanding validation in terms of *fully* sufficient conditions overlooks the role of defeasibility. A decade before *The Concept of Law*, Hart had proposed that sufficient conditions for some legal consequence (say, formation of a valid contract) could be “defeated” by exceptions under circumstances in which the negation of a defeater is not equivalent to a necessary condition.⁴⁴ Later, in the *Concept*, he would elaborate that defeaters are not always “exhaustively specifiable in advance.”⁴⁵ Relying on Hart’s embrace of defeasibility, critics charge that “Dworkin misreads Hart” when maintaining that validation involves fully sufficient—“logically conclusive”—criteria.⁴⁶

Second, validation does not depend upon necessary conditions either. It is by satisfying such conditions as are sufficient that a legal norm comes to exist, or “to be valid”; it is the *non-satisfaction* of any *necessary* conditions that *precludes* validation. Therefore, strictly speaking, validation does not depend upon necessary conditions: it is not inconsistent with the logic of validation for a non-validated result to obtain by other means. It is true that, on Hart’s account, the conditions grounded in the social practice that is the rule of recognition are also necessary, not only (defeasibly) sufficient, for any non-fundamental norm to be a norm of the system. But that’s not because of how validation operates or what validation is. It’s a consequence of the conjunction of the theses (a) that a putative norm can be a norm of the system only by being accepted or by being validated, not by other means, and (b) that a norm can be validated only by criteria that the rule of recognition picks out, not by other criteria.

Thus, validation is a process or function by which the truth of a proposition, or existence of a resultant, is entailed by satisfaction, and non-defeat, of any defeasibly sufficient criterion that the process or function picks out. As it operates in Hart’s account (and putting defeasibility aside), *q* is a norm of legal system *S* if *C*₁ or *C*₂ or *C*₃ or . . . *C*_{*n*}, where each condition *C* can itself be a complex combination of conjuncts and disjuncts and is

⁴³ See, e.g., Raz, *supra* note 17, at 851; Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 23, at 96; DWORKIN, *supra* note 4, at 62.

⁴⁴ H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 *PROC. ARISTOTELIAN SOC’Y.* 171 (1949).

⁴⁵ HART, *supra* note 5, at 139.

⁴⁶ Lyons, *supra* note 18, at 424.

grounded in the practices that make out the rule of recognition of S.⁴⁷ Simplified, a norm is validated, for Hart, in virtue of satisfying any criterion, however complex, that is sufficient to make it a norm of the legal system.

That's enough on validation to pose the question: if the determination relationship between fundamental and derivative legal norms does *not* involve validation, then what does it involve? How could any device designed to perform the function that the criteria of validity implicit in the ultimate rule of recognition performs—determining legal norms that are not directly grounded in legal practice—achieve that end by a means other than validation? What else is there?

Unfortunately, there is no standard vocabulary for determination mappings that do not involve validation, nor am I aware of any proposed classificatory scheme that locates validation within a network of alternatives. Nonetheless, if we expand our focus from validation *per se*, to the broader class or phenomenon that it plausibly exemplifies, a two-part distinction, even if rough, is plenty intuitive. A first stab: processes, functions, or mechanisms of determination are either rule-like, lexical, or algorithmic, on the one hand, or weighted, aggregative, or unspecifiable, on the other.

For legal theorists, the difference I aim to capture is manifest in the difference—familiar, if hard to crisply articulate—between multi-factor legal balancing tests and lexically ordered tests, often called “rules.” Whereas the conditions that make up a rule-like test dictate results by validation or something very similar, the factors that go into a balancing test combine or aggregate to dictate the legally proper result in a manner that seems to eschew sufficient conditions and to resist specification.

Or turn to moral philosophy. As Jonathan Dancy has observed, “there seem to be two ways of . . . getting a determinate answer to the question of what to do.” One way “is to rank our principles lexically.” The other way involves viewing the determinants “as having some sort of weight.”⁴⁸ The great champion of weighted determination in the moral domain was, of course, W.D. Ross. Here's Selim Berker's summary of the theory that Ross developed in his masterwork *The Right and the Good*:

⁴⁷ Readers have objected that this first-pass characterization of validation mistakenly omits the putative requirement that the criteria may refer only (says Dworkin) to matters of “pedigree,” not content. Section 4.1 addresses this objection. For now, note only that questions about content and pedigree do not concern the nature or character of validation as a determination operation; they concern the nearby question of what limits, if any, positivism must impose on the types of criteria that can validate.

⁴⁸ JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* 25 (2004).

According to Ross, (i) there are a small number of distinctive sorts of properties (such as being a breaking of a promise or contributing toward the improvement of one's own character) in virtue of which an act is either *prima facie* right or *prima facie* wrong, (ii) the degree of *prima facie* rightness or *prima facie* wrongness grounded in those properties depends on all the facts of the case at hand in an uncodifiable manner, and (iii) an act is either right (sans phrase) or wrong (sans phrase) in virtue of the overall balance of *prima facie* rightness and *prima facie* wrongness possessed by that act in comparison to its alternatives.⁴⁹

Berker's summation is particularly felicitous for our purposes because it makes clear two essential features of Ross's theory: first, the right (sans phrase)—that is, what one ought to do all things considered—is grounded in our *prima facie* duties (what most philosophers today would call *pro tanto* duties); and second, that the grounding function is not only weighted or aggregative, but also “uncodifiable.”

A third and final illustration of the proposed distinction between formulaic, non-aggregative determination and aggregative, non-formulaic determination is supplied by competing accounts of what has been called conceptual “structure”:⁵⁰ the “classical” account that views concepts as definable by a set of necessary and sufficient conditions, and the “cluster” account that does not.

The classical account, as the name suggests, dates back to antiquity. Famously, Socrates sought classical analyses of such concepts as JUSTICE, HAPPINESS, or BEAUTY. It remains the overwhelming default standard account today. Take this plausible analysis of CHAIR, per *genus et differentia*, as a piece of furniture designed to be sat on by one person at a time. This is a straightforward classical account that identifies two conditions that are individually necessary and jointly sufficient to instantiate the concept.

But philosophers' continued failure to provide successful definitions of many of the concepts that most interest us (think KNOWLEDGE, for instance) has spurred the development of several alternative theories of concept structure that are united in treating (some) concepts as “undefinable,” by which is meant they cannot be demarcated by a set of necessary and sufficient conditions. The “cluster” theory is, along with family resemblance and prototype theories, one non-classical account. According to it, a given concept is governed by multiple criteria that “count towards”

⁴⁹ Berker, *supra* note 38, at 742.

⁵⁰ See Eric Margolis & Stephen Laurence, *Concepts*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed.).

proper application, without any of the criteria being either necessary or sufficient. In Berys Gaut’s much-discussed cluster account of ART, for example, ten criteria bear on whether an artifact is a work of art—that it “possess[es] positive aesthetic qualities” such as beauty, that it is “expressive of emotion,” that it “exhibit[s] an individual point of view,”⁵¹ and so on—and that none is individually necessary or sufficient.

I am generalizing from these varied examples to propose two families of metaphysical determination relationships, two general ways that determinants map onto resultants, or that grounded facts are grounded in grounding facts. One family centrally involves such notions and operations as “if . . . then,” necessity, and sufficiency. The other revolves around different notions, prominently including “greater than/less than,” contribution, and thresholds. In the absence of a well-settled nomenclature for these contrasting classes, I’ll dub them “lexical” and “non-lexical.” The following chart (figure 4) suggests that diverse sets of dyads are potentially arrayable along this single cleavage, thereby providing further reason to believe that this initial taxonomic cut has promise, gestural though it is at present.

Lexical	Non-lexical
validation	aggregation
if, then	greater than, less than
necessary & sufficient conditions	contributions & thresholds
deductive reasoning	inferential reasoning
Algorithms	balancing
formula, test, rule	factors, values, principles
classical logic	fuzzy logic
classical concepts	cluster concepts
lexical ordering	multi-criteria analysis
digital	analog
digital computing	quantum computing
computational theory of mind	hydraulic theory of mind
Lego®	weather

Figure 4

⁵¹ See Berys Gaut, “Art” as a Cluster Concept, in THEORIES OF ART TODAY 25 (N. Carroll ed. 2000). Cluster accounts have also been given of SPECIES and SPORT. See Richard Boyd, *Homeostasis, Species, and Higher Taxa*, in SPECIES: NEW INTERDISCIPLINARY ESSAYS 141 (R. Wilson ed. 1999) (defining species by reference to “homeostatic property clusters”); Mitchell N. Berman, *Sport as a Thick Cluster Concept*, in GAMES, SPORTS, AND PLAY: PHILOSOPHICAL ESSAYS (Thomas Hurka ed., 2019).

To be sure, the admittedly impressionistic character of this proposed difference invites the worry that that it does not withstand scrutiny, that any supposedly non-lexical determination is nothing other than lexical determination, the details of which have yet to be codified. This is a commonly expressed worry about cluster theories of concept structure, for example, which critics charge are indistinguishable from disjunctive classical definitions, i.e., definitions that, like Hartian validation, involve alternative sufficient criteria.⁵² Although I find that criticism unpersuasive,⁵³ I cannot dispose of it in this space, either as applied to cluster concepts or more generally.

What I'd say instead is this. My proposed distinction between lexical and non-lexical determination and Dworkin's distinction between rules and principles are obviously close kin: rules are the normative notion at least *characteristic of* lexical determination, while principles are the normative notion at least characteristic of non-lexical determination. At this point in our investigation, our approach to both distinctions should be the same: while withholding judgment about the particulars, we should accept the distinctions, imprecise though they may be, as provisional working hypotheses. The remainder of this article begins to test those hypotheses by examining whether they help us make better sense of Dworkin's challenge or point toward potential ways to meet it.

To summarize: A legal system comprises both fundamental and derivative legal norms. Derivative legal norms are norms that include other legal norms among their metaphysical determinants; fundamental legal norms are norms that do not include other legal norms among their determinants.⁵⁴ For Hart, the rule of recognition gives rise to criteria that

⁵² See, e.g., Stephen Davies, *The Cluster Theory of Art*, 44 BRIT. J. AESTHETICS 297 (2004).

⁵³ In response to Davies' criticism, Gaut argued that even supposing, "for the sake of argument," that the constitutive criteria his cluster theory identified can be grouped into a finite disjunction of sufficient conditions, that disjunction will be so long and complex as to warrant our treating it as meaningfully different from any disjunctive definition short enough to be grasped by concept users. Berys Gaut, *The Cluster Account of Art Defended*, 45 BRIT. J. AESTHETICS 273, 284-88 (2005). I share that view and note that, if anything, Gaut conceded too much to his critics, even *arguendo*. In observing that his ten-criteria account leaves "1024 possible disjuncts to consider," *id.* at 285, Gaut assumes that satisfaction of a criterion is a binary matter, not a scalar. But this is doubtful. If a disjunction can depend for its sufficiency *on the extent* to which the criteria that comprise it are instantiated (as is surely possible), then the number of potentially sufficient disjuncts could exceed 1024 by orders of magnitude; it could be infinite.

⁵⁴ To forestall misunderstanding, the distinction between fundamental and derivative legal norms is orthogonal to Hart's distinction between primary and secondary rules. A legal norm is derivative if it has other legal norms among its grounds or determinants; a rule is secondary if it has other legal norms among its contents or referents. HART, *supra* note 5, at

serve to determine derivative legal norms by “validating” them. Validation is a determination function that depends upon the satisfaction of sufficient criteria. It is therefore a paradigmatic form of “lexical” determination.

3.3. The challenge elaborated

Subsection 2.1 explicated Dworkin’s *challenge from principles* as maintaining that legal principles, conceived as weighted, non-decisive norms that lack canonical formulation, cannot arise either by being validated or by being accepted. The differences, just introduced, between fundamental and derivative legal principles and between lexical and non-lexical determination functions enable us to better understand those contentions.

Consider first Dworkin’s argument that principles are not the products of validation. According to Hart, says Dworkin, “[m]ost rules of law . . . are valid because some competent institution enacted them.” But many or most principles in legal systems familiar to us are not enacted. Frequently, at least, legal principles originate “not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.”⁵⁵

It is true that, “if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument.”⁵⁶ But—and this is the key claim—“we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude.”⁵⁷ Dworkin’s conclusion:

We could not bolt all of [the considerations that speak in favor of a given principle] into a single “rule,” even a complex one, and if we could the result would bear little relation to Hart’s picture of a rule of recognition, which is the picture of a fairly stable master rule specifying “some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule . . .”⁵⁸

81. *But see* MATTHEW H. KRAMER, H.L.A HART 71-74 (2018) (noting that Hart distinguishes primary and secondary rules in inconsistent ways).

⁵⁵ DWORKIN, *supra* note 4, at 40.

⁵⁶ *Id.*

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Id.* at 40-41 (quoting HART, *supra* note 5, at 92).

Notice that this argument does not assert or assume that principles are inescapably moral in character. Dworkin believed that to be true, and would develop that contention in subsequent work. But the key claim for purposes of the *challenge from principles* is only that principles are not determined in a lexical manner: they do not emerge by “formula,” “test,” or “rule.” The claim is *not* (yet) that principles cannot be grounded solely in social facts (rather than being morally justified) just so long as the grounding relationship was not rule-like, i.e., non-lexical.

That’s Dworkin’s argument in support of the proposition I have denominated [5](1) (principles aren’t validated). What about proposition [5](2) (principles don’t arise by acceptance)? The preceding argument does more than contend that fundamental principles are not validated; it also strongly suggests that acceptance is a non-lexical mode of determination. It suggests, as Philip Soper put it, “that there are a large number of unrelated legal standards that are independently accepted as law and that can be discovered only by inspecting the current practices of lawyers, judges, and the public.” These fundamental legal norms emerge from “spontaneous, independent growth.”⁵⁹ But if this is broadly correct, why then can’t legal principles arise that way too? Why can’t principles be accepted even if not validated?

Early in *TMR I*, Dworkin had claimed that, for Hart, “The rule of recognition is the sole rule in a legal system whose binding force depends upon its acceptance.”⁶⁰ If it were essential to the Hartian package that the rule of recognition (or its associated validity criteria) is the only legal norm grounded in practice, that would answer our question: fundamental legal principles cannot be accepted because that honor is reserved for the criteria of validity. But Hart does not advance that strong contention, and Dworkin knows this. Twenty pages after the passage just quoted, Dworkin backtracks, acknowledging now that Hart allowed that the rules that make up “customary law” also arise by acceptance: “Hart’s treatment of custom amounts, indeed, to a confession that there are at least some rules of law that are not binding because they are valid under standards laid down by a master rule but are binding—like the master rule—because they are accepted as binding by the community.”⁶¹

If that’s so—if the Hartian framework allows that some rules of law in addition to the criteria of validity can arise by acceptance—why can’t the same be true of principles? Why can’t legal principles be fundamental, and

⁵⁹ Soper, *supra* note 17, at 484.

⁶⁰ DWORKIN, *supra* note 4, at 21.

⁶¹ *Id.* at 43.

grounded in their acceptance by judges in non-lexical fashion? Dworkin's answer is that the fact that rules of customary law arise by acceptance is only a small exception ("only a chip") to Hart's insistence that legal norms are validated by criteria baked into the rule of recognition "because the customary rules Hart has in mind are no longer a very significant part of the law." But, says Dworkin, "Hart would be reluctant to widen the damage by" allowing that the whole range of principles are grounded the same way.⁶²

In sum, argues Dworkin: [5](1) legal principles cannot be validated by a rule of recognition because they are not the product of lexical determination, [5](2) nor can they be grounded, non-lexically, in acceptance because that would unacceptably minimize the significance of Hart's signature device, the ultimate rule of recognition and its criteria of validity.

3.4. The challenge parried

Let us be clear about the burden imposed on Hartians by the Dworkinian arguments introduced thus far. Positivists need not establish either that all legal principles are derivative legal norms validated by criteria grounded in the practice that is the rule of recognition, or that all legal principles are fundamental legal norms directly grounded in their being accepted. What they must establish is that all *fundamental* legal principles can be grounded in *acceptance*, and that all *derivative* legal principles can be determined by *validation*. If each legal principle, taken singly, is either a validated derivative legal norm or an accepted fundamental legal norm, then the whole lot of them, taken collectively, are metaphysically explained one way or the other.

This dual showing is makeable. Take first Dworkin's contention that principles cannot arise by validation. Many critics cite principles that seem to be encoded in provisions of the U.S. Constitutions as proof to the contrary.⁶³ Suppose for sake of illustration that the ultimate criteria of validity provided in part that q is a norm of S if q is the ordinary semantic content of some provision in the enacted constitutional text. And suppose further that a provision in the enacted text read "the state must respect expressive freedoms" or "powers should not be unduly concentrated," or even "undertakers are due significant regard." If the norms that correspond to the semantic content of these utterances are weighted and contributory, not decisive, then it would follow that derivative legal norms can be

⁶² *Id.*

⁶³ See, e.g., Lyons, *supra* note 18, at 425; C.L. Ten, *The Soundest Theory of Law*, 88 MIND 522, 524 (1979); HART, *supra* note 5, at 261, 264-65.

determined by validation.⁶⁴ And there is no obvious reason why the texts could not in a like manner specify the principles' rough relative weights.

As for Dworkin's contention that Hart's scheme renders legal principles incapable of being accepted, the natural response must be that Dworkin has provided little argument for it. Why is it against interest, hence a "confession," for Hart to allow that customary law is grounded in acceptance? What is the "damage" that this allowance inflicts? Dworkin explains: "If he were to call [principles] part of the law and yet admit that the only test of their force lies in the degree to which they are accepted as law by the community or some part thereof, he would very sharply reduce that area of the law over which his master rule held any dominion."⁶⁵ But this is to restate the observation, not to explain its force. It is not yet clear why Hartians cannot respond that the law is the set of rules validated (directly and indirectly) by criteria picked out by a rule of recognition plus all rules and principles grounded directly—and non-lexically⁶⁶—in acceptance. Raz identified this possibility long ago, concluding that it represents the sole "modification" to his theory that Hart need make to accommodate *The Model of Rules I*.⁶⁷ Dworkin has offered freighted characterizations, but no argument to explain why Hart need have more than aesthetic reasons to resist this modification.

In sum, positivists responding on Hart's behalf have denied both parts of Dworkin's charge. Some have argued that legal principles can and do arise, as derivative legal norms, by being validated by criteria of sufficiency grounded in the ultimate rule of recognition. Others have argued that they can and do arise, as fundamental legal norms, by being accepted. By these two routes in combination, Hartian positivism can account for all legal principles in force in a given jurisdiction at a given time.⁶⁸ (See figure 5.)

⁶⁴ See Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1386-90 (2018).

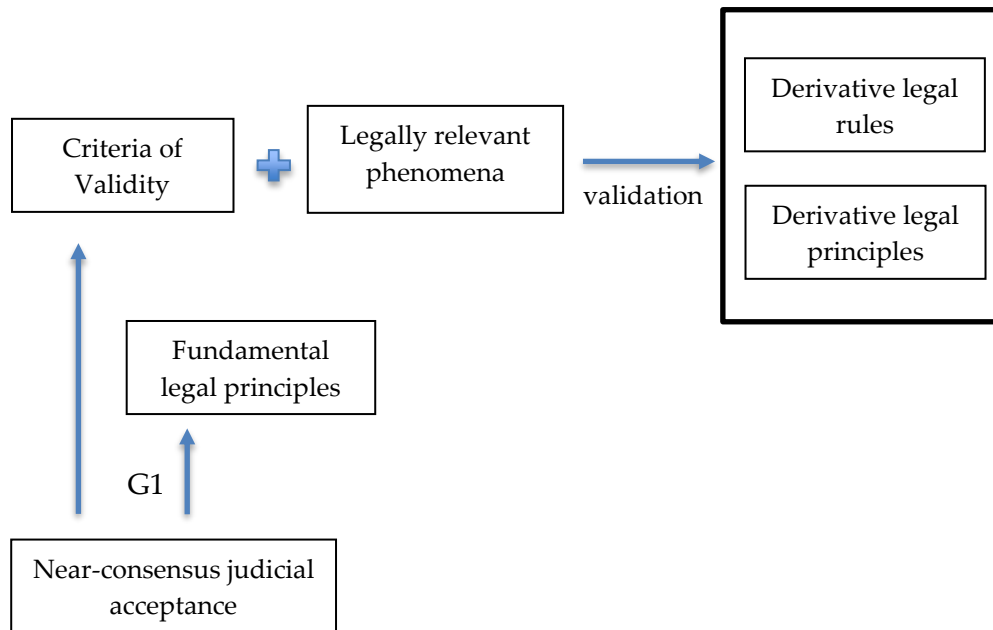
⁶⁵ *Id.*

⁶⁶ See GENARO R. CARRIÓ, *LEGAL PRINCIPLES AND LEGAL POSITIVISM* 23 (1971).

⁶⁷ Raz, *supra* note 17, at 853.

⁶⁸ This picture ignores the possibility that, the rule of recognition aside, some norms that arise by acceptance, i.e., that are directly grounded in taking-up behaviors, can have the decisive, unweighted character of rules. See, e.g., Soper, *supra* note 17, at 483 (arguing that Dworkin's argument for the proposition I have designated [5](1) "does not depend on the distinction" between rules and principles); Raz, *supra* note 17, at 852. I agree with Soper and Raz; the diagram in figure 5 modestly simplifies.

Hartian legal positivism: response to Dworkin (fig. 5)



3.5. The challenge revived

To review the bidding: Dworkin allows that positivists can meet his challenge from principles if they can establish either that the principles that judges deploy in decisionmaking are, in all cases, extra-legal (i.e., “moral”) in character, or that any genuinely legal principles can come into being either by validation or by acceptance. I have argued that Dworkin has not persuasively established either that no derivative legal principles can arise by validation or that no fundamental legal principles can arise by acceptance. Nor, therefore, has he established that the full set of genuine legal principles cannot be metaphysically explained by one means or the other. If the dialectic were to end here, Dworkin’s *challenge from principles* would be defeated, even without reaching tack (b).

But Hart is not yet out of the woods. The problem is not that he can’t have principles-grounded-in-acceptance. It’s that having such principles has implications as well for (derivative) legal *rules*: legal rules that do not themselves arise by acceptance cannot all be determined by validation. As Dworkin explains in the crucial passage:

It is not just that all the principles . . . would escape [the rule of recognition’s] sway, though that would be bad enough. Once these principles . . . are accepted as law, and thus as standards

judges must follow in determining legal obligations, it would follow that rules like those announced for the first time in *Riggs* and *Henningsen* owe their force at least in part to the authority of principles . . . , and so not entirely to the master rule of recognition.⁶⁹

This point can easily be missed due to its late placement. Worse, the prescriptive tenor of Dworkin's language here—contending that these principles are ones that “judges must follow”—can obscure the full force of his claim. Here as elsewhere Dworkin discusses the role of principles in terms that suggest an exclusive focus on how they fit and should fit into judicial reasoning;⁷⁰ his vocabulary naturally suggests a theory of adjudication.⁷¹ But many or most positivists today are seeking a “constitutive” theory of law, a general account of what gives legal norms their contents.⁷² Of course, Dworkin and Hart could be simply talking past each other, the latter offering a theory of legal content, the former propounding a theory of judicial decisionmaking.⁷³ However, we can preserve the idea that there is a real debate here—or we can generate a genuine disagreement out of a talking-past—by giving Dworkin's arguments a more explicit “constitutive” cast.

Here's what I mean. I assume that a rule can exist in a legal system even if not encoded in a promulgated text, and before being “announced” in a judicial decision. If so, then some decisions that are the first to *announce* a rule (plausibly including the decisions, *Riggs v. Palmer*,⁷⁴ and *Henningsen v. Bloomfield Motors, Inc.*,⁷⁵ on which Dworkin concentrates) are *merely* announcing it, not creating it. The task is to explain how this could be—how legal norms could exist prior to their being encoded in an authoritative promulgated text or by their being announced in a judicial opinion.⁷⁶ That's

⁶⁹ DWORKIN, *supra* note 4, at 43. I have omitted “and policies” throughout because the principle/policy distinction is a distraction that Dworkin would later abandon.

⁷⁰ Consider his remarks on how principles inform judges' decisions on whether to overrule judicial precedent. *Id.* at 37-38.

⁷¹ See, e.g., Lyons, *supra* note 18, at 418 (“Principles,” for Dworkin, “function . . . as reasons for deciding cases one way or another.”); Soper, *supra* note 17, at 489.

⁷² Although my remarks may suggest that I read Hart as a cognitivist, my point in this section applies to any expressivist reading of Hart, see especially Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 LEGAL THEORY 75 (2005), that is minimally realist.

⁷³ Famously, this was Hart's verdict in his Postscript. See HART, *supra* note 5, at 239-41. See also, e.g., Soper, *supra* note 17, at 496-97.

⁷⁴ 115 N.Y. 506 (1889).

⁷⁵ 32 N.J. 358 (1960).

⁷⁶ In truth, we need a constitutive explanation for rules even in the seemingly much simpler cases when they *are* “encoded in” statutes or judicial decisions, for rules and texts

what a constitutive theory aims to do. So the task is to translate Dworkin's prescriptive thesis about *how judges should reason* into a constitutive claim about the *determinants and determination of legal norms*.

Reinterpreted in constitutive terms, Dworkin's thesis is that principles participate in the (metanormative) determination of the rules; they bear constitutively on what the rules *are* (not only what judges should *do*). Thus, legal rules (or at least some of them) are determined or constituted by the net force of principles that are grounded in judicial practice.⁷⁷ Weighted norms that are directly grounded in social facts (especially judicial practices) participate in the determination of the derivative and decisive legal norms that we call "rules." As Stephen Perry encapsulated Dworkin's analysis, "the bindingness of a legal rule is nothing more than the collective normative force of the principles."⁷⁸ And because the net impact of weighty principles with diverse contents cannot be specified by a finite or tractable set of criteria, there are rules that exist within a legal system that are neither directly accepted nor conclusively (or even defeasibly) validated by any set of sufficient conditions that obtains in virtue of near-uniform practice.

The point is not that *principles* can't arise by validation, but that principles bear constitutively on what the rules are, in which case *rules* don't

are entities belonging to different ontological categories, *see, e.g.*, JOHN GARDNER, *LAW AS A LEAP OF FAITH* 56-59 (2012), a fact that originalists routinely miss, *see, e.g.*, Mark Greenberg, *Legislation as Communication: Legal Interpretation and the Study of Linguistic Communication*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* ch. 10 (Andrei Marmor & Scott Soames eds. 2011); Gideon Rosen, *Deferentialism and Adjudication*, in *THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY* ch. 10 (Brian Slocum ed. 2017); Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 *MICH. L. REV.* 783, 786-87 (2017). But the need is more salient and possibly harder to satisfy when specific tangible sources for rules are not readily identified.

⁷⁷ Cf. DWORKIN, *supra* note 4, at 77 ("the rules governing adverse possession may even now be said to reflect the principle [that nobody may profit from his own wrong] . . . because these rules have a different shape than they would have had if the principle had not been given any weight in the decision at all"); *id.* at 37 ("Unless at least some principles are acknowledged to be binding upon judges, requiring them as a set to reach particular decisions, then no rules, or very few rules, can be said to be binding on them either.").

To clarify, my claim is not that Dworkin believed that principles grounded in social facts determined rules in aggregative, non-lexical manner. I'm attributing this view to Dworkin *conditionally*. I've already argued that Dworkin has not *established* that legal principles cannot be grounded in judicial practice (even though he *believed* that they couldn't). The view I attribute to Dworkin runs: even assuming for sake of argument that principles can be grounded in judicial practice, those principles combine to constitute rules, and because the function that maps principles to rules is itself messy and un-rule-like, rules are not validated. (I'm grateful to Andrei Marmor for pressing for this clarification.)

⁷⁸ Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 *OXFORD J. LEG. STUD.* 215, 225 (1987).

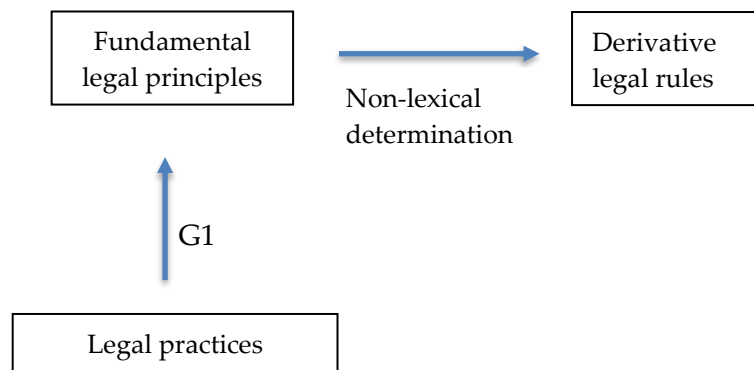
arise by validation—or by “lexical” determination more generally. Because the rule of recognition account posits that rules are validated by sufficient conditions, that account is incorrect or incomplete. The intended lesson of Dworkin’s *challenge from principles*, in short, is that Hart’s positivism cannot make sense of the apparent fact that *rules* (at least sometimes, perhaps often or always) are the non-lexical product of a multiplicity of underlying weighted norms. Timothy Endicott hit the nail on the head: “What really kills the model of rules in Dworkin’s theory is not the proposition that there are some legal standards not identifiable by reference to a rule of recognition, but the proposition that all legal standards depend on standards that are not identifiable by reference to a rule of recognition.”⁷⁹

4. Upshot and Objections

The preceding construal of Dworkin’s *challenge from principles* has two important upshots. First, scholars who have dismissed that challenge or treated it as already refuted, have been too quick: *TMR I* scored points against Hartian positivism that have not yet been effectively rebutted. Second, positivists could meet the remaining challenge if they could explain how weighted norms grounded in legal practices (fundamental legal principles) can participate in the determination of decisive legal norms by a mechanism or relationship that is both non-lexical and non-normative. (See figure 6.) This section addresses three objections.

⁷⁹ Timothy Endicott, *Are there any Rules?*, 5 J. ETHICS 199, 203-04 (2001) (emphasis omitted); see also MICHAEL D. BAYLES, *HART’S LEGAL PHILOSOPHY: AN EXAMINATION* 167 (1992) (contending that Dworkin’s “most telling argument for principles binding judges is that if they do not, rules cannot be binding either,” but also complaining that “Dworkin’s formulation of the issue is puzzling”). While substantially agreeing with Endicott, I’m uncertain that *TMR I* clearly maintains that “all” legal standards depend on standards that are not validated. It’s enough that some or many derivative norms that have the logical character of rules depend on the accrual of weighted norms, hence do not come into being by validation. But this is to nitpick.

Dworkin's demand of positivism (fig. 6)



The first objection maintains that the challenge from principles is *weaker* than I have made it out to be, and that I have in effect given Dworkin too *much* credit. On this view, Dworkin's argument founders because it is based on a fundamental mischaracterization of the Hartian rule of recognition. Due to this error, his challenge from principles doesn't score points against Hart's validation-based account, in which case a shift to an account that accommodates non-lexical determination is not needed to defend positivism from Dworkin.

The second objection is just the opposite. It submits that Dworkin's challenge is *stronger* than I have claimed, and that I have given Dworkin too *little* credit. On this view, Dworkin's challenge establishes that purportedly legal principles are necessarily moralized, in which case a positivist story about the grounding of legal principles is impossible. Therefore, any proposal to replace or supplement the Hartian validation with some kind of non-lexical determination is necessarily insufficient to preserve positivism. Subsections 4.1 and 4.2 flesh out these two objections to the argument of Section 3, showing that each rests on a misunderstanding of the argumentative logic of *TMR I*.

The third objection doesn't quarrel with my interpretation of the debate. It simply charges that *if* Dworkin's *challenge from principles* is as I've described it, it's not much of a challenge. Subsection 4.3 addresses that complaint. To be clear, I do think the challenge is meetable. I attempt to meet it—and to show the superiority of a (partly) non-lexical version of positivism to a strictly lexical one—in a sequel. Here I maintain only that the type of project I pursue elsewhere is worth undertaking, that we have reason to believe that the task is not nearly as simple as falling off a log.

4.1. Pedigree and substantive criteria in the rule of recognition

Dworkin does not unleash his *challenge from principles* straight out of TMR I's starting gate. Instead, he opens with some ground-clearing, introducing positivism and identifying what he deems its "key tenets." The first tenet of positivism, he says, holds that "the law of a community is a set of special rules . . . [that] can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed."⁸⁰ Inclusive positivists reject this characterization.

David Lyons's response, in a contemporary review of *Taking Rights Seriously*, is representative: "Dworkin's error can be understood as follows. He sees correctly that positivists regard social facts . . . as the ultimate determinants of law. He then assumes that positivists would restrict officials, in deciding upon the authoritative tests for law, to criteria that themselves incorporate such social facts about accepted practices."⁸¹ But this, Lyons says, "is not true of Hart, nor is it essential to the tradition. In Hart's theory, . . . the tests for law are whatever officials make them."⁸² Hart himself, in the posthumously published "Postscript" to the *Concept of Law*, explicitly endorsed inclusive positivism,⁸³ and contended that Dworkin's infirm understanding of the rule of recognition had "led him into a double error: first, to the belief that legal principles cannot be identified by their pedigree, and secondly, to the belief that a rule of recognition can only provide pedigree criteria."⁸⁴

This is not an effective response to the *challenge from principles*. As Scott Shapiro observes, but is too often overlooked, Dworkin's characterization of positivism is a "composite":⁸⁵ the law of a community is a set of rules (i) that can be identified by tests that set forth specific criteria, (ii) which criteria can refer only to pedigree, not to content. Thus, positivists' repudiation of claim (ii) is insufficient to defeat proposition [5] if claim (i) alone poses a sufficient obstacle to the validation of principles.

And the *challenge from principles* does depend on claim (i) alone. Notwithstanding Dworkin's several references to positivism's supposed commitment to "pedigree" criteria, we have already seen that his central reason for concluding that fundamental norms do not come into being by

⁸⁰ DWORKIN, *supra* note 4, at 17.

⁸¹ Lyons, *supra* note 18, at 425.

⁸² *Id.*

⁸³ HART, *supra* note 5, at 250. See also HART, *supra* note 24, at 361.

⁸⁴ HART, *supra* note 5, at 264.

⁸⁵ Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 25 (Arthur Ripstein ed. 2007).

validation is that “we could not bolt” all of a fundamental norm’s grounds “into a single ‘rule,’ even a complex one.”⁸⁶ It is the first claimed feature of the positivist account of validation, and not the second, that is doing the critical work in this passage—and in others to the same effect.⁸⁷ To remove any doubt, in his next volley in the debate (*The Model of Rules II*), Dworkin would summarize the central contention of *The Model of Rules I* in terms that conspicuously omit any reference to claim (ii). His encapsulation: “it is wrong to suppose, as [positivism] does, that in every legal system there will be some commonly recognized fundamental test for determining which standards count as law and which do not.”⁸⁸

In an influential article, Jules Coleman identified “Dworkin’s target” in *TMR I* as “that version of positivism one would get by conjoining the rule of recognition with the requirement that the truth conditions for any proposition of law could not include reference to the morality of a norm.”⁸⁹ This is a common reading of Dworkin’s argument.⁹⁰ I’m arguing that it’s mistaken. The logic of the *challenge from principles* does not depend on the supposed limitation of the rule of recognition to pedigree criteria notwithstanding Dworkin’s controversial “first tenet,” and Dworkin routinely (though not invariably) summarized his own argument in terms that make no reference to that limitation.

4.2. Morality and the determination of principles

The second objection to the reconstruction of Dworkin’s challenge offered in Section 3 is that it fails to accommodate the critical role that Dworkin attributes to morality in the grounding or justification of legal

⁸⁶ *Supra* note 56.

⁸⁷ See DWORKIN, *supra* note 4, at 36 (“Of course, if the positivists are right . . . that in each legal system there is an ultimate *test* for binding law like Professor Hart’s rule of recognition . . . it follows that principles are not binding law.”); *id.* at 41 (“So even though principles draw support from the official acts of legal institutions, they do not have a simple or direct enough connection with these acts to frame that connection in terms of criteria specified by some ultimate master rule of recognition”); *id.* at 44 (“if we treat principles as law we must reject the positivists’ first tenet, that the law of a community is distinguished from other social standards by some test in the form of a master rule”).

⁸⁸ *Id.*, at 46.

⁸⁹ Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEG. STUD. 139, 143-44 (1982)

⁹⁰ See, e.g., Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 24 (2003) (contending that “the question for Hart’s positivism” that emerges from *TMR I* “is whether it can make sense of the phenomenon of judges treating some principles as legally binding, not in virtue of their pedigree but simply in virtue of their content.”); Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852, 873 (2006) (same).

principles. Shapiro captures this common view succinctly when maintaining that “the point of Dworkin’s critique in ‘The Model of Rules I’ is to show that the law contains norms that are binding . . . because of their moral content.”⁹¹ If he’s right about that, then positivism’s fundamental commitments are erroneous, and nice distinctions regarding the character or structure of determination must be beside the point.

Shapiro is correct of course that Dworkin believed that legal norms were binding, or valid, because of their moral content. But I think he’s mistaken in believing that *TMR I* showed that to be true, or even that Dworkin thought that it had. Rather, the point of *TMR I* is to pave the way for Dworkin’s affirmative thesis by showing that there are norms that legally bind judges but that cannot be explained by Hart’s account. That showing is accomplished, thinks Dworkin, by his *challenge from principles*. And that challenge, Section 3 has shown, does not depend on the premise that legal principles must be determined or justified morally.

Shapiro’s chief evidence for his contrary contention is a brief passage that appears in that part of Dworkin’s argument designed to establish claim [5](1)—that fundamental legal principles do not arise by validation. There, after contending that many legal principles originate “in a sense of appropriateness developed in the profession and the public over time,”⁹² Dworkin adds that “Their continued power depends upon this sense of appropriateness being sustained. If it no longer seemed unfair to allow people to profit by their wrongs, or fair to place special burdens upon oligopolies that manufacture potentially dangerous machines, these principles would no longer play much of a role in new cases”⁹³

Yet this observation is not incompatible with positivism given the difference between causal and metaphysical determination or explanation. Whether a putative legal principle does in fact enjoy the requisite social-factual support may well depend, causally, on people’s (especially judges’) judgments or attitudes about its content. For this reason, it is not at all surprising that judges invoke moral arguments when trying to establish that a putative principle is a legal principle of the jurisdiction, or has this or that weight. It is belief in the attractiveness of a principle that usually causally explains its acceptance (at least initially), even while it is acceptance

⁹¹ Shapiro, *supra* note 82, at 30-31. See also *id.* at 29 (“According to Dworkin . . . , legal principles are sometimes binding on judges simply because of their intrinsic moral properties.”); *id.* at 27 (contending that, Dworkin argues in *TMR I* that “the legality of principles depends, at least sometimes, on their content.”). See also, e.g., Lyons, *supra* note 18, at 423.

⁹² *Supra* text accompanying note 55.

⁹³ DWORKIN, *supra* note 4, at 40.

itself (or, for some, the *fact* of its acceptance) that makes it a member norm within the legal system.⁹⁴ Compare trails. Trails are constituted by their actual usage (their being “taken up”), even though their usage is causally explained by the fact that some agents believed, and continue to believe, that the route the trail traverses is in some respect good or desirable.⁹⁵

To restate the point, Dworkin’s challenge to positivism does not rely on his own anti-positivist theory, but is designed to grease the skids for it. The argument is that positivism cannot make sense of extant features of legal practice that anybody should recognize—broadly, the centrality of weighted norms that arise out of practice. It’s the fact that Hartian positivism fails for reasons that do not assume the truth of anti-positivism that opens the door for the anti-positivist account that Dworkin would introduce and expound in subsequent work, from “Hard Cases” to *Law’s Empire*.⁹⁶

4.3. On the supposed ease of the challenge

The final objection I anticipate is less sharply formed. It is rooted in skepticism of any reconstruction of Dworkin’s challenge that would allow it to be rebutted by the seemingly modest expedient of replacing or supplementing supposedly lexical Hartian validation with any version of “non-lexical” determination that is less regimented and rule-like, and more aggregative and uncodifiable. If the Hartian account is otherwise in good order, one might suppose, it just couldn’t be that hard to supplement the lexical determination that is validation-by-rule with some kind of non-lexical determination that involves the weighted, contributory notions that are principles.

⁹⁴ Cf. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC. REV. 719, 720 (1973) (“The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.”).

⁹⁵ It might be helpful, if schematic, to imagine a two-stage process: (1) when judges are unsure about what the law provides, they consider extra-legal considerations—including moral principles—in exercising judicial discretion; (2) over time, and via repeated invocation, these extra-legal principles become domesticated into law. The difference between the stages is that extra-legal principles are legally available to judges only when the legal considerations underdetermine a legal conclusion, whereas legal principles help determine the correct legal conclusion in the first place. Extra-legal principles are lexically inferior to legal principles; domesticating an extra-legal principle eliminates that lexical inferiority.

⁹⁶ See “Hard Cases,” reprinted as chapter 3 in DWORKIN, *supra* note 4; RONALD DWORKIN, *LAW’S EMPIRE* (1986).

Of course, how hard or easy that challenge is remains to be seen. For now, it's enough to observe that, across varied contexts, more commentators have thought that going non-lexical is too hard, not too easy. That's one reason why many moral philosophers have resisted Rossian pluralism,⁹⁷ why many philosophers of concepts deem untenable all alternatives to classical analyses, and why many American constitutional theorists have rejected pluralist, non-originalist theories of constitutional interpretation. On the last, Will Baude and Steve Sachs formulate their doubts vividly, wondering how a large number of non-decisive norms with diverse weights can determine or constitute more determinate legal norms (rules) "rather than merely make soup."⁹⁸

So non-lexical determination is far from a gimme. And, lest there be doubt, defeasibility isn't up to the task. A large literature has developed on defeasibility, exploring both what Hart meant by it, and, Hart exegesis aside, what is the best sense to be made of it.⁹⁹ Fortunately, we needn't wade in, for no sense can be made of defeasibility that blunts the *challenge from principles* as I've construed it. As the name suggests, defeasibility involves "defeaters"—elements, often described as incapable of comprehensive specification, whose presence prevents realization of the normative state of affairs that would obtain in the defeater's absence. A defeater is an exception; it defeats conditions that would otherwise prove sufficient. It does not confer sufficiency that would otherwise be absent. As such, although I agreed earlier that satisfaction of a Hartian criterion of validity might not be as "conclusive" as Dworkin, relying on a single passage from Hart, believed,¹⁰⁰ this does not undermine Dworkin's challenge. Defeasibility denies that q is invariably a norm of S simply by satisfying a criterion that practice has picked out as sufficient; it does not provide that q can be a norm of S despite *not* satisfying any criterion that practice *has*

⁹⁷ Think, for example, of "the priority problem" that Rawls worries bedevils all forms of "intuitionism." JOHN RAWLS, *A THEORY OF JUSTICE* chs. 7 & 8 (1971).

⁹⁸ Baude & Sachs, *supra* note 36, at 1489. Cf. Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 521 (1998) ("No one—not even lawyers—can meaningfully "combine" fact and value, or facts of different types, except lexically Any non-lexical "combining" of text and intentions, text and justice, and so forth is just incoherent, like combining pi, green, and the Civil War. There is no process of reasoning that can derive meaning from such combinations.").

⁹⁹ For a sophisticated collection of essays, see JORDI FERRER BELTRÁN & GIOVANNI BATTISTA RATTI, *THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY* (2012); *see also* Luis Duarte d'Alemeida, *A Proof-Based Account of Legal Exceptions*, 33 OXFORD J. LEG. STUD. 133 (2013).

¹⁰⁰ *See supra* note 56 and accompanying text.

picked out as sufficient.¹⁰¹ And it's the latter failing of Hartian validation that Dworkin pounces on. If non-lexical determination of derivative legal norms is to be vindicated, defeasibility will be no more than a small step along the way.

Conclusion

What makes it the case that the law has the content that it does? Hartian positivism holds that norms are "validated" as legal by satisfying sufficient criteria that are grounded in a convergent social practice that Hart termed the ultimate rule of recognition. Over fifty years ago, in his first and still most profound attack on Hart's theory, Dworkin contended that it could not adequately accommodate legal principles—weighted, non-decisive, and potentially conflicting norms that contrast with rules. Although positivists have successfully refuted several elements of that attack, Dworkin's central thrust has been widely missed, and therefore remains unrebutted. If positivism is finally to overcome Dworkin's challenge from principles, its proponents must explain, as Hart's version does not, how derivative legal norms can be determined or constituted by fundamental legal norms in a weighted and aggregative fashion that cannot be fully captured by the language and machinery of validation.

¹⁰¹ Thus do Lord and Maguire caution that "the gravest sin in normative taxonomy is to confuse defeasibility with weightedness." Lord & Maguire, *supra* note 20, at 8.