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Legal Positivism and American Case Law

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LEGAL POSITIVISM AND AMERICAN CASE LAW

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Legal positivism is a theory about the nature of law. Primarily British in origin, the theory has survived competition with Legal Realism and natural law doctrine. Its widespread influence in American legal circles is acknowledged by its most vigorous critics. One such critic, Ronald Dworkin, has even suggested that legal positivism is part of our "ruling theory of law" and is accepted "by most working and academic lawyers who hold views on jurisprudence."[1] The

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1. R. DWORKIN, TAKING RIGHTS SERIOUSLY vii, 16 (rev. ed. 1978). Dworkin may exaggerate the influence of legal positivism in America, but American jurisprudential writing contains numerous indications of acceptance of one or more of the positivist theses discussed in this article. *See, e.g.*, D. LYONS, ETHICS AND THE RULE OF LAW 104-05 (1984) (indicating acceptance of the Separation Thesis); S. MUNZER, LEGAL VALIDITY 3-4, 65 (1972) (indicating acceptance of the Validity Thesis); R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 101, 112, 122-25 (1982) (indicating acceptance of the Validity Thesis and Separation Thesis and possible acceptance of the Legal Obligation Thesis); Munzer, *Validity and Legal Conflicts*, 82 YALE L.J. 1140, 1172 (1973) (indicating acceptance of the Validity Thesis) [hereinafter *Validity and Legal Conflicts*]; Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1075, 1095-96, 1111-12 (1977) (indicating acceptance of the Separation Thesis). One observer has noted that the jurisprudential work of H.L.A. Hart (one of the three leading contemporary positivists discussed in this article) "has made a strong impression in the United States

purpose of this article is to show that contemporary positivism is incompatible with the realities of American case law and should be rejected by American lawyers.

Section I of this article examines three central theses in the works of the leading contemporary positivists, H.L.A. Hart, Joseph Raz, and Neil MacCormick. The three theses distinguish contemporary legal positivism from other analytical philosophies of law and may be stated as follows:

(1) by applying criteria contained in a rule of recognition generally accepted by the courts, one can usually ascertain whether a rule is legally valid (the "Validity Thesis");

(2) the criteria for legal validity need not include moral criteria, and so far as they do not, the legal validity of a rule and the moral quality of the rule are two separate issues (the "Separation Thesis"); and

(3) a citizen has a strict legal obligation to comply with any legally valid rule that requires or forbids specified conduct, and judges have a strict legal obligation to apply any legally valid rule that covers the legal issue being decided (the "Legal Obligation Thesis").[2]

In advancing these theses, the contemporary positivists purport to describe the "legal point of view," a distinctive viewpoint of judges who work within any legal system.[3]

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and has gained him many adherents among the younger generation of jurists interested in legal theory." Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion*, 11 GA. L. REV. 1143, 1150 (1977).

2. Two additional theses are common to Hart, Raz, and MacCormick. The "Social Sources Thesis" asserts that legal rules have social sources, that rules become law through the social activities of human beings. *See* N. MACCORMICK, H.L.A. HART 20, 25, 159 (1981) (summarizing Hart's belief that rules have social sources) [hereinafter N. MACCORMICK]; N. MACCORMICK & O. WEINBERGER, AN INSTITUTIONAL THEORY OF LAW 4 (1986); N. MACCORMICK, *supra*, at 6, 29, 30, 33 (showing MacCormick's agreement with Hart); J. RAZ, THE AUTHORITY OF LAW 37-40, 46-47 (1979) (Raz's "sources thesis" combines the Separation Thesis and Social Sources Thesis) [hereinafter AUTHORITY OF LAW]. The "Discretion Thesis" asserts that in some cases, legal standards do not dictate a particular decision and that judges sometimes have discretion from the legal point of view. *See* H. HART, THE CONCEPT OF LAW 124, 132 (1961) [hereinafter THE CONCEPT OF LAW]; H. HART, ESSAYS ON BENTHAM 148, 161 (1982) [hereinafter ESSAYS ON BENTHAM]; N. MACCORMICK, *supra*, at 130; N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 249-51 (1978) [hereinafter LEGAL REASONING]; AUTHORITY OF LAW, *supra*, at 113; Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 845-48 (1972) [hereinafter *Legal Principles*].

Neither the Social Sources Thesis nor the Discretion Thesis distinguishes legal positivism; non-positivists generally accept both theses. If the Social Sources Thesis is interpreted as a thesis about the immediate sources of law rather than the ultimate sources or inspiration, it is acceptable to anyone who recognizes that norms are introduced into legal institutions only through the social actions of human beings. Only those who believe in an authoritative and pre-existing legal answer for every legal issue that arises reject the Discretion Thesis. Few, if any, hold such an extreme view, although Dworkin comes close. *See* Dworkin, *No Right Answer?*, in LAW, MORALITY AND SOCIETY 58, 83-84 (P. Hacker & J. Raz eds. 1977) (suggesting that for practical purposes, there is always a right answer).

3. The positivists recognize that the truth, if any, of answers to legal questions or other normative questions is always relative to some point of view. Positivist theory focuses on the legal point of view, the point of view of judges and other legal officials. In attempting to describe this point of view, the positivists engage in a hermeneutic enterprise. MacCormick defines the "her-

Section II of this article surveys American judicial attitudes concerning case law and shows that the Validity Thesis and Legal Obligation Thesis are disproved. These two theses suggest a judicial point of view that is not prevalent in the realm of American case law. The survey confirms some of the observations made by the Legal Realists in their attacks on systematic models of law. As section III suggests, the Validity Thesis and Legal Obligation Thesis probably cannot be modified to conform to the realities of American case law without sacrificing the positivists' basic model of a system of rules. Legal positivism should, therefore, be rejected as an analytical approach to American law.

I. Three Theses of Contemporary Legal Positivism

This portion of the article examines the Validity Thesis, Separation Thesis, and Legal Obligation Thesis and notes certain relationships among them. First, however, a preliminary matter involving the distinction between rules and principles must be considered.

A. *Rules and Principles*

This article considers the three theses only as they apply to rules. In their treatment of rules, Hart, Raz, and MacCormick are on common ground. The three positivists have not, however, developed a common position regarding the legal status of what are frequently called "principles."[4] Hart often gives the

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meneutic" approach as one that seeks to explain human actions and practices through an interpretation of the meaning they have for those who take part in the actions or practices. N. MacCormick, *supra* note 2, at 29-30; *see also* H. Hart, Essays in Jurisprudence and Philosophy 13 (1983) (need for hermeneutic method portraying rule-governed behavior as it appears to its participants who share certain standards); N. MacCormick & O. Weinberger, *supra* note 2, at 134-35 (hermeneutic approach recognizes "the intimate interconnection of the rules people in social groups observe and the attitudes they have on the basis of the values to which they adhere," but does not necessarily subscribe to the same values). This hermeneutic approach gives contemporary positivism greater explanatory power than the earlier positivist theories of Bentham, Austin, and Kelsen.

The MacCormick-Hart approach is not the only possible hermeneutic (interpretive) approach; one could interpret social practices without restricting the focus to the meanings attached by the participants. However, this article uses "hermeneutic" in the MacCormick-Hart sense.

4. The positivists have not even agreed on the distinction between "rules" and "principles." Hart does not offer any such distinction. Raz suggests that rules prescribe relatively specific acts, whereas principles prescribe highly unspecific actions. *Legal Principles*, *supra* note 2, at 838. MacCormick, on the other hand, indicates that rules are norms designed as means to bring about end-states expressed in legal principles. Legal Reasoning, *supra* note 2, at 156; *see also* N. MacCormick & O. Weinberger, *supra* note 2, at 73-74 (principles express the underlying purposes of detailed rules). But MacCormick offers another distinction when he states that rules can conclusively justify judicial decisions, whereas principles cannot. Legal Reasoning, *supra* note 2, at 180. This latter distinction is reminiscent of Dworkin's suggestion that legal rules are absolute, conclusive reasons for judicial decisions, while legal principles are merely prima facie reasons which must be weighed. *See* R. Dworkin, *supra* note 1, at 24-27.

A simple rule-principle dichotomy is inadequate to classify the many uses of legal norms. Norms guide mental inferences leading to decisions, and the way one uses a norm determines how it should be classified. *See* G. Gottlieb, The Logic of Choice 35, 37 (1968). The same norm-

impression that a legal system includes only rules and not principles.[5] For MacCormick, law includes rules and principles, but unlike legal rules, legal principles are not directly identified by a rule of recognition. Legal principles are principles that could explain and justify the valid legal rules identified by the criteria in a rule of recognition.[6] MacCormick, therefore, words his Validity Thesis (a thesis about the validating function of a rule of recognition) so that it refers only to rules.[7] Raz acknowledges that law includes both rules and principles and suggests that a test can be constructed to identify legally valid principles. The test is not found, however, in any rule of recognition.[8] Like Hart and MacCormick, Raz advances a Validity Thesis that focuses on rules of recognition and thus applies to rules, but not principles.

To state the Validity Thesis, Separation Thesis, and Legal Obligation Thesis so they apply to the same domain of legal norms and are also acceptable to all three contemporary positivists, each thesis is worded to apply only to rules. This article attacks contemporary positivism only with respect to its theses concerning the validity and binding status of rules.

Dworkin's attack on contemporary positivism is different from this article's attack. Dworkin argues that Hart's positivism is defective because it focuses on legal rules and ignores legal principles, which impose additional constraints on judges and thus render law more determinate and less discretionary than Hart

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formulation may be used in a number of different ways, including at least the following four: (1) the person using the norm may regard the norm as providing sufficient grounds for his decision, and regard the decision indicated by the norm as mandatory, *see* R. DWORKIN, *supra* note 1, at 24-25 (concept of rule); (2) the person using the norm may regard the norm as providing sufficient grounds for his decision, and regard the decision indicated by the norm as required except when the reasons for not following the norm outweigh the reasons for following it, *see* W. ROSS, THE RIGHT AND THE GOOD 19-20 (1930) (concept of prima facie duty); (3) the person using the norm may regard the norm as providing insufficient grounds for his decision, which grounds must, however, always be given weight, *see* Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138, 151, 155-56 (1984) (concept of principle); (4) the person using the norm may regard the norm as a mere guideline or rule-of-thumb and feel free to treat the norm as providing sufficient grounds for his decision, or to completely disregard the norm, whichever seems appropriate in the circumstances, *see* Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 19-24, 28 (1955) (summary view of rules). In uses (1), (2), and (4), the norm provides (or can provide) sufficient grounds for a decision; in use (3), it does not. In uses (1), (2), and (3), the norm always has force; in use (4), it does not always have force. In use (1), the decision indicated by the norm is regarded as mandatory. (If the norm has exceptions, they would be enumerated in a complete statement of the norm, and the norm so stated would be mandatory.) In uses (2), (3), and (4), the decision indicated by the norm is not mandatory. Accounting for each of these four distinctive uses requires something more than a rule-principle dichotomy.

This article assumes that the word "rule" refers to some non-empty set of norms that Hart, Raz, MacCormick, and those evaluating the positivists' theses would regard as rules.

5. *See* THE CONCEPT OF LAW, *supra* note 2, at 97-107. *But see id.* at 121; ESSAYS ON BENTHAM, *supra* note 2, at 160 (mentioning principles). Some commentators suggest that Hart's concept of rules is broad enough to include what others call "principles." Bodenheimer, *supra* note 1, at 1153; *Legal Principles*, *supra* note 2, at 845.

6. LEGAL REASONING, *supra* note 2, at 232-35, 238, 240.

7. *Id.* at 54, 244.

8. *Legal Principles*, *supra* note 2, at 852-54.

recognizes.[9] This article will attack contemporary positivism without mentioning legal principles. This article suggests that the positivists do not even give an accurate account of the identification and binding status of legal rules and that, contrary to Dworkin, the law is even less determinate and more discretionary than the positivists are willing to admit.

B. *The Validity Thesis*

The Validity Thesis asserts that by applying criteria contained in a rule of recognition generally accepted by the courts, one can usually ascertain whether a rule is legally valid. MacCormick provides a concise statement of the thesis. According to MacCormick, a central tenet of positivist legal theory is

> that every legal system comprises, or at least includes, a set of rules identifiable by reference to common criteria of recognition; and that what constitutes these criteria as criteria of recognition for a legal system is shared acceptance by the judges of that system that their duty is to apply rules identified by reference to them.[10]

MacCormick refers to this tenet as the "validity thesis."[11] He suggests that legal validity is established by means of the criteria of recognition and uses the term "rule of recognition" in referring to the rule containing these criteria of recognition.[12]

The concept of a rule of recognition originated with Hart. According to Hart, "[i]f the question is raised whether some suggested rule is legally valid, we must, in order to answer the question, use a criterion of validity provided by some other rule."[13] That other rule is the rule of recognition, which

> will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule . . . to be supported by [social pressure]. . . . [W]hat is crucial is the acknowledgment of reference to the [rule of recognition] as *authoritative*, i.e., as the *proper* way of disposing of doubts as to the existence of the rule. Where there is such an acknowledgment there is . . . a rule for conclusive identification of the primary rules of obligation.[14]

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9. R. DWORKIN, *supra* note 1, at 16-17, 28-44.

10. LEGAL REASONING, *supra* note 2, at 54. The quoted passage combines the Validity Thesis and part of the Legal Obligation Thesis.

11. *Id.* at 53.

12. *Id.* at 53, 240, 244.

13. THE CONCEPT OF LAW, *supra* note 2, at 103.

14. *Id.* at 92. For Hart, "primary rules of obligation" regulate the duties of citizens and differ from "secondary rules" which govern the identification, alteration, and enforcement of primary rules; a rule of recognition is a secondary rule of identification. *Id.* at 78-79, 91-93, 97. For purposes of simplification, this article generally ignores other secondary rules and focuses on the relationship between rules of recognition and primary rules.

Assume that the courts accept and use a rule that any ordinance signed by the Chief of Public Safety is valid law. Assume that Robert Parish, the incumbent Chief, signs an ordinance prohibiting doctors from shooting birds within the city limits. In the positivists' model, the ordinance is a primary rule of obligation and is legally valid because it meets the criterion provided in a rule of recognition (or a rule that is part of a more complex rule of recognition) accepted by the courts.

Hart acknowledges that a rule of recognition, like any other rule, has a fringe of vagueness or open texture; thus a few cases will exist where it cannot be clearly ascertained whether a given primary rule is legally valid.[15] Accordingly, the word "usually" is used in stating the Validity Thesis. Hart maintains, however, that the criteria in the rule of recognition generally leave no doubt as to the validity or invalidity of a given primary rule.[16]

Hart believes that valid primary rules can be identified by means of a rule of recognition and that a rule of recognition is identified by empirical observation of the actual practices of courts. Hart states that a rule of recognition exists if it is accepted and used as a practice by legal officials; its existence is a matter of fact.[17] Acceptance of a rule of recognition provides a necessary empirical foundation for the existence of a legal system; it makes law systematic. In the absence of an accepted rule of recognition, there would be general uncertainty as to which rules are rules of the legal regime. However, when a rule of recognition has been accepted, we can identify a legal system consisting of a rule of recognition and all the other rules it validates.[18]

Raz presents the Validity Thesis as a thesis about the limits of law. According to Raz, "the law has limits: it does not contain all the justifiable standards (moral or other) . . . . It comprises only . . . those standards having the proper institutional connection."[19] Raz assumes that any rule is either legally valid or legally invalid.[20] He asserts that the test for validity is found in a rule of recognition: "The legal validity of a rule is established . . . by showing that it conforms to tests of validity laid down by some other rules of the system which can be called rules of recognition."[21] Raz suggests that the ultimate rules of recognition can be identified as a matter of social fact: "[T]hose ultimate rules of recognition are binding which are actually practised and followed by the courts."[22]

Thus, for Raz, Hart, and MacCormick, the legal validity of a putative rule depends upon whether the rule conforms to criteria contained in a rule of recognition generally accepted as a judicial practice. It is important to note that the contemporary positivists apply their Validity Thesis not only to the realms of constitutional, statutory, and administrative law, but also to the realm of case law.[23] In his discussion of case law, Hart notes "the acknowledgment of

15. *Id.* at 119-20.

16. *Id.* at 148-49.

17. *Id.* at 97-98, 107, 112-13.

18. *Id.* at 89-90, 92, 97, 107, 112-13.

19. AUTHORITY OF LAW, *supra* note 2, at 45. *See generally id.* at 111-15 (discussing the limits of law).

20. *Id.* at 146 n.1.

21. *Id.* at 150-51. Raz has slightly modified Hart's doctrine of the rule of recognition. Whereas Hart conceives of a legal system as having one rule of recognition that is neither valid nor invalid, but simply accepted, Raz conceives of a legal system as having a hierarchy of rules of recognition, each of which is valid. *Id.*

22. *Id.* at 151.

23. In this article, the term "case law" refers only to judicial rulings on legal issues not governed by any constitution, statute, or administrative regulation.

precedent as a criterion of legal validity" and claims that "the result of the English system of precedent has been to produce . . . a body of rules of which a vast number . . . are as determinate as any statutory rule."[24] Hart regards the doctrine of precedent as a rule of recognition component that enables us to identify certain case law rules as valid. In a modern legal system, "the rule of recognition is . . . complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents."[25]

Raz claims that judge-made law is legally valid and binding, just as much as enacted legislation.[26] In both realms of law, validity is determined by a rule of recognition. "A rule becomes binding by being laid down in one case as a precedent. It does not have to wait until it is accepted in a series of cases to be binding. It is binding because of the doctrine of precedent which is part of our rule of recognition."[27] Because Raz uses "valid" and "binding" as equivalent terms,[28] he can be understood to claim that a case law rule becomes valid by being laid down in one case as a precedent, pursuant to the English rule of recognition. MacCormick suggests that common law legal systems have rules of recognition that identify certain case law rules as valid,[29] and that valid case law rules are identified by discovering *ratio decidendi* in precedent cases.[30]

The Validity Thesis is widely regarded as one of the defining characteristics of legal positivism.[31] As a thesis about what counts as valid law from the legal point of view, it plays a central role in positivist theory. But what does "valid" mean? Raz uses "legally valid" interchangeably with "legally binding."[32] Raz states that "[a] legally valid rule is one which has the normative effects (*in law*) which it claims to have."[32] To say a rule is legally valid is to say that from the legal point of view, the rule ought to be followed. MacCormick also

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24. THE CONCEPT OF LAW, *supra* note 2, at 131-32.

25. *Id.* at 98.

26. AUTHORITY OF LAW, *supra* note 2, at 113-14, 195.

27. *Legal Principles*, *supra* note 2, at 852-53.

28. *See* AUTHORITY OF LAW, *supra* note 2, at 149.

29. *See* N. MACCORMICK & O. WEINBERGER, *supra* note 2, at 57; LEGAL REASONING, *supra* note 2, at 133-34, 243-44.

30. *See* LEGAL REASONING, *supra* note 2, at 214-16.

31. *See id.* at 54, 61-62; Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 985-86 (1977). Non-positivists also recognize the central role of the Validity Thesis in positivist theory. Fuller suggests that "the quest of positivism is for some test which will designate plainly the law *that is* and distinguish it from the law that is merely becoming or merely ought to be." L. FULLER, THE LAW IN QUEST OF ITSELF 34 (1940). Dworkin lists three key tenets of positivism, the first of which is that the law is a set of rules identifiable by specific criteria, by tests that distinguish valid legal rules from spurious legal rules. R. DWORKIN, *supra* note 1, at 17.

32. AUTHORITY OF LAW, *supra* note 2, at 149. Raz acknowledges that he has drawn his notion of validity from Hans Kelsen's. *Id.* at 150. According to Kelsen, to say that a norm is "valid" means that it ought to be obeyed and applied (is binding). *See* H. KELSEN, PURE THEORY OF LAW 10-11, 193 (M. Knight trans. 1967) [hereinafter PURE THEORY OF LAW]; Kelsen, *On the Basis of Legal Validity*, 26 AM. J. JURISPRUDENCE 178, 180 (1981) [hereinafter *On the Basis of Legal Validity*].

33. AUTHORITY OF LAW, *supra* note 2, at 149 (emphasis added).

seems to use "valid" and "binding" interchangeably;[34] "legally valid" means binding from the point of view of those who work within the legal system.[35] Therefore, according to Raz and MacCormick, "legally valid" means binding from the legal point of view.

For Hart, on the other hand, "legally valid" seems to mean satisfying the criteria specified in the legal system's rule of recognition.[36] Although a rule acquires obligatory status by satisfying these criteria, Hart apparently does not regard this status as part of the meaning of "legally valid." Hart's concept of legal validity seems to focus exclusively on the preconditions a rule must satisfy in order to enjoy the status of validity, and seems to ignore the deontological significance of that status (the bindingness of the valid rule). Raz's and MacCormick's concept, in contrast, seems to focus exclusively on the deontological significance of the status of validity, and ignores the preconditions a rule must satisfy in order to enjoy that status.

These two different concepts merely capture two different aspects of one, more complete, notion of "legally valid."[37] We call something "valid" when, by virtue of its satisfying certain accepted criteria, it qualifies for a status that entitles it to be respected and given effect in a particular way. Any status has a dual aspect: the criteria that must be satisfied to attain the status, and the appropriate way to treat things that have attained the status.[38] "Valid" is thus a Janus-word[39] which looks backward to the satisfaction of criteria and forward to the practical significance of having satisfied the criteria.[40]

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34. *See* LEGAL REASONING, *supra* note 2, at 139.

35. *See id.* at 62.

36. To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition. This is incorrect only to the extent that it might obscure the internal character of such statements. . . .

THE CONCEPT OF LAW, *supra* note 2, at 100.

37. Dworkin interprets Hart's concept of legal validity as follows: "[R]ules binding because they have been created in a manner stipulated by some secondary rule are called 'valid' rules." R. DWORKIN, *supra* note 1, at 20. Dworkin's interpretation combines both aspects of legal validity (satisfying legal criteria and being legally binding).

38. Status words are modal words. Unlike purely indicative or descriptive adjectives (e.g., "orange," "perpendicular," "earlier"), which simply state what is the case, modal adjectives (e.g., "impossible," "obligatory," "valid") suggest appropriate attitudes in the light of accepted criteria. A modal concept like "impossible" or "valid" combines the criteria for its use with the practical force of its use (a suggested attitude). Purely indicative adjectives, on the other hand, have only criteria. To understand the meaning of "impossible," one must consider not only how one concludes that something is impossible (namely, by applying criteria that vary from one field of endeavor to another), but also what one does as a consequence of reaching that conclusion (namely, rule something out). Similarly, to understand the meaning of "valid," one must consider both the criteria to be met and the practical force or significance of a finding that those criteria have been met. For discussions of this dual aspect of modal concepts, see S. TOULMIN, THE USES OF ARGUMENT 30-35 (1958); A. WHITE, MODAL THINKING 174-79 (1975).

39. *Cf.* P. NOWELL-SMITH, ETHICS 146 (1957) (Janus-words do at least two logically connected jobs at once).

40. *See Validity and Legal Conflicts*, *supra* note 1, at 1149-50.

When we attribute legal validity to something, we acknowledge that it satisfies certain legal criteria and is thus entitled to be treated as legally effective.[41] For example, when we say that a testamentary will is legally valid, we indicate that it satisfies certain legal criteria, and we also suggest that it ought to be admitted to probate and enforced by the court. Similarly, when we say that a particular statutory rule is legally valid, we indicate that the rule satisfies certain legal criteria and is thus entitled to be treated as legally binding. The contemporary positivists should therefore acknowledge that "legally valid" signifies both "satisfying the rule of recognition criteria" and "binding from the legal point of view."[42] The positivists' Legal Obligation Thesis provides a more precise notion of the binding nature of valid rules and will be examined after the Separation Thesis.

C. *The Separation Thesis*

The Separation Thesis asserts that the criteria for legal validity need not include moral criteria, and so long as they do not, the legal validity of a rule and the moral quality of the rule are two separate issues. Hart suggests that the criteria of legal validity used in a legal system need not include an explicit or tacit reference to morality.[43] The criteria might merely specify by whom, and by what procedures, valid rules may be created. All rules that are valid under the legal system's criteria of validity should be regarded as law, even though some of these rules may offend society's morality or what we hold to be an enlightened or true morality.[44] Therefore, a distinction exists between

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41. Dictionary definitions of "valid" (in legal contexts) emphasize both aspects of validity. "Valid" means executed with the proper formalities or authorized by law; "valid" also means having legal strength, having binding force, incapable of being rightfully overthrown or set aside. BLACK'S LAW DICTIONARY 1390 (5th ed. 1979). "Valid" means having legal efficacy or force and executed with the proper legal authority and formalities. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1302 (1984).

42. Whether both notions are included in the meaning of "legally valid" might seem to depend on one's concept of "meaning." Assume that the meaning of an expression like "legally valid" is its contribution to the meaning of utterances in which it occurs. Some philosophers restrict the meaning of an utterance to the fixed, context-independent sense (and the resulting reference) of the sentence being uttered, and distinguish meaning from illocutionary force (the kind of speech act intended by the speaker, e.g., informing, ordering, warning). *See* J. AUSTIN, HOW TO DO THINGS WITH WORDS 94, 100, 109 (2d ed. 1975); H. HART, *supra* note 3, at 2, 4-5. Other philosophers use a wider notion of meaning that includes the illocutionary force of the utterance, as well as sense and reference. *See* M. DUMMETT, TRUTH AND OTHER ENIGMAS 448-50 (1978); R. HARE, PRACTICAL INFERENCES 75, 95, 109-10 (1972); Alston, *Meaning and Use*, in NEW READINGS IN PHILOSOPHICAL ANALYSIS 243, 246-50 (H. Feigl, W. Sellars & K. Lehrer eds. 1972). Whichever concept of meaning is adopted, "satisfying legal criteria" and "legally binding" are both included in the meaning of "legally valid" because both notions are part of the fixed sense of "legally valid." *See* the dictionary definitions summarized *supra* note 41. A "sense" is something a sentence has, independent of context and without even being uttered. The "legally binding" notion, like the "satisfying legal criteria" notion, contributes to the sense of the uttered sentence, regardless of what the illocutionary force of the utterance is; it signifies being binding from the legal point of view.

43. THE CONCEPT OF LAW, *supra* note 2, at 181.

44. *Id.* at 205.

the immorality of a rule and the legal invalidity of the rule; these are two separate issues.[45] Raz and MacCormick accept this thesis and regard it as a characteristic feature of legal positivism.[46]

The Separation Thesis distinguishes the legal point of view from moral points of view. Legal validity is to be assessed only from the legal point of view, the viewpoint of judges who accept the rule of recognition as the determinant of what counts as valid law. If a rule satisfies the rule of recognition criteria, it should be regarded as legally valid, no matter how immoral it is believed to be.

It is important to note what the Separation Thesis does not assert. It does not assert that there is no connection between law and morality, as some critics have charged.[47] Hart recognizes a number of important connections. For example, lawmakers use moral ideas in deciding what content legal rules will have, and judges consider the moral purposes behind the rules they have to interpret.[48] The Separation Thesis also does not assert that moral standards are never incorporated into rules of recognition. The Separation Thesis does not suggest, despite the claims of some critics, that the criteria for validity always refer to a rule's "pedigree" or manner in which it was adopted, and never to its content.[49] Hart acknowledges that a rule of recognition might explicitly incorporate moral principles as criteria of validity, and cites the United States as an example, apparently referring to the United States Constitution.[50] Fur-

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45. *Id.* at 207. *See generally* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (defending the Separation Thesis against the assertion that rules that violate fundamental moral principles cannot be valid law).

46. *See* N. MACCORMICK, *supra* note 2, at 6, 158-59; N. MACCORMICK & O. WEINBERGER, *supra* note 2, at 128, 129; LEGAL REASONING, *supra* note 2, at 61-62, 239-40, 258; AUTHORITY OF LAW, *supra* note 2, at 37, 150-51, 158; MacCormick, *A Moralistic Case for A-moralistic Law?*, 20 VAL. U.L. REV. 1, 7-11, 30 (1985).

The Separation Thesis, or something similar, is often regarded as a defining characteristic of legal positivism. *See* THE CONCEPT OF LAW, *supra* note 2, at 181-82, 253; N. MACCORMICK & O. WEINBERGER, *supra* note 2, at 128; Hart, *Legal Positivism*, in 4 THE ENCYCLOPEDIA OF PHILOSOPHY 418, 419 (P. Edwards ed. 1967). The thesis is prominent in the works of earlier positivists. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 233-34 (2d ed. 1861); PURE THEORY OF LAW, *supra* note 32, at 66-69, 198-205, 217-19; *On the Basis of Legal Validity*, *supra* note 32, at 185, 188, 189. *See generally* Hart, *supra* note 45, at 594-600 (discussing Bentham and Austin).

47. For apparent suggestions that positivists deny any connection between law and morality, see P. SOPER, A THEORY OF LAW 37 (1984); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 656-57 (1958).

48. *See* THE CONCEPT OF LAW, *supra* note 2, at 189-95, 198-202.

49. Dworkin suggests that the key positivist tenets include the proposition that the criteria for validity relate only to the pedigree of a rule. *See* R. DWORKIN, *supra* note 1, at 17. Soper attributes to Raz the view that moral standards can never be sources of law in the sense of constituting criteria of legal validity. *See* P. SOPER, *supra* note 47, at 101-02, 102 n.1. Raz makes the different claim that where the law is unsettled, the moral notions judges use in developing the law are not part of the law until expressly incorporated into it. *See* AUTHORITY OF LAW, *supra* note 2, at 45-52.

50. *See* THE CONCEPT OF LAW, *supra* note 2, at 199. Hart suggests that the United States Constitution contains rule of recognition criteria that impose limitations on what qualifies as legally valid legislation. *See id.* at 103.

thermore, the Separation Thesis does not deny that a judicial decision is a moral decision for which the judge is morally responsible and owes a moral justification.[51] The Separation Thesis merely asserts that it is not contradictory for someone to say that Rule *A* is legally valid and also say that Rule *A* is unjust and should not be enforced or obeyed.

This assertion seems unassailable if the positivists' advice is followed and legal validity is assessed solely from the legal point of view. There is good reason for following the positivists' advice. In many situations, it is useful to preserve the distinction between the institutional point of view and our own moral point of view. This distinction permits us to say that a particular rule is valid and binding from the institutional legal point of view and yet not morally justified. The Separation Thesis merely provides this useful distinction. Critics who attack the Separation Thesis are therefore barking up the wrong tree. The assault on contemporary positivism should be directed against the Validity Thesis and the Legal Obligation Thesis.

D. *The Legal Obligation Thesis*

The Legal Obligation Thesis asserts that a citizen has a strict legal obligation to comply with any legally valid rule that requires or forbids specified conduct, and a judge has a strict legal obligation to apply any legally valid rule that covers the legal issue being decided. The following discussion focuses on the second part of this thesis, the clause dealing with the judge's legal obligation. It will be assumed that a citizen has a legal obligation to comply with a rule requiring or forbidding conduct if and only if courts have a legal obligation to apply that rule. Thus, the first part of the thesis stands or falls with the second part.

MacCormick suggests that as a consequence of appointment to judicial office, a judge must apply every valid rule of law whenever relevant.[52] This judicial duty is properly called a "legal obligation."[53] Raz asserts that a legal system consists of legally valid laws that the courts are bound to apply regardless of their view of the laws' merits.[54] The courts' obligation to apply valid law is a "legal obligation."[55]

Hart uses the term "legal obligation" to refer to the requirements of legal rules.[56] With respect to rules of recognition, the most fundamental legal rules,

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51. Detmold suggests that the Separation Thesis denies this. *See* M. DETMOLD, THE UNITY OF LAW AND MORALITY 21-22, 154 (1984).

52. LEGAL REASONING, *supra* note 2, at 54, 57.

53. *See* MacCormick, *Legal Obligation and the Imperative Fallacy*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 100, 127-28 (A. Simpson ed. 1973).

54. AUTHORITY OF LAW, *supra* note 2, at 113, 148; *see* J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 211-12, 214 (2d ed. 1980) [hereinafter CONCEPT OF A LEGAL SYSTEM]; J. RAZ, PRACTICAL REASON AND NORMS 143 (1975) [hereinafter PRACTICAL REASON].

55. *See* AUTHORITY OF LAW, *supra* note 2, at 153 (an obligation is a "legal obligation" if it is an obligation in virtue of a legally valid rule); *id.* at 96-97 (a court's obligation to apply valid rules is imposed by a rule of recognition); *id.* at 150-51 (operative rules of recognition are valid law).

56. *See* THE CONCEPT OF LAW, *supra* note 2, at 166.

Hart states: "Rules of recognition accepted in the practice of the judges require them to apply the laws identified by the criteria which they provide . . . ."[57] Hart, like MacCormick and Raz, seems to indicate that judges in any legal system have a legal obligation to apply any relevant rule identified as valid by the criteria contained in a rule of recognition.

Positivists attach particular meaning to the term "legal obligation." An "obligation" is a duty or requirement that arises from certain rules[58] or relationships[59] embedded in social practices. The adjective "legal" indicates the criteria or point of view relative to which something is obligatory.[60] When a contemporary positivist states that *A* has a legal obligation to do *X*, he is making a hermeneutic statement about what *A* is obligated to do from the legal point of view.[61] The legal point of view is the point of view of judges and others who have committed themselves to rules of recognition and thus to the other norms of the legal system.[62] The legal point of view is the institutional point of view established by the social practices of legal officials.

The most important social practice, of course, is the courts' acceptance and use of a rule of recognition. According to the positivists, every area of law in every legal system is governed by a rule of recognition that not only provides criteria for identifying valid law, but also requires courts to apply legally valid rules whenever relevant.[63] Since the legal point of view is the point of view of those who accept this rule of recognition, legally valid rules are binding from the legal point of view.[64]

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57. ESSAYS ON BENTHAM, *supra* note 2, at 156; *see also id.* at 158:

> When a judge of an established legal system takes up his office he finds that though much is left to his discretion there is also a firmly settled practice of adjudication, according to which any judge of the system is required to apply in the decision of cases the laws identified by specific criteria or sources. This settled practice is acknowledged as determining the central duties of the office of a judge and not to follow the practice would be regarded as a breach of duty . . . .

58. *See* THE CONCEPT OF LAW, *supra* note 2, at 83-85.

59. N. MACCORMICK, *supra* note 2, at 59, 68-69.

60. "Obligatory" is a modal word. See *supra* note 38.

61. To say that a man has a legal obligation to do a certain act is . . . to assess his acting or not acting in that way from the point of view adopted by at least the Courts of the legal system who accept the law as a standard for the guidance and evaluation, of conduct. . . .

ESSAYS ON BENTHAM, *supra* note 2, at 144; *see* PRACTICAL REASON, *supra* note 54, at 175-77.

The positivists take a hermeneutic point of view. A hermeneutic statement about legal obligation uses normative language to assert what is obligatory from the point of view of those who accept the law; the speaker purports to understand the committed point of view of those who accept the legal standards, but does not necessarily accept those standards himself. *See* H. HART, *supra* note 3, at 14; N. MACCORMICK, *supra* note 2, at 43; AUTHORITY OF LAW, *supra* note 2, at 155-57; CONCEPT OF A LEGAL SYSTEM, *supra* note 54, at 235-38; PRACTICAL REASON, *supra* note 54, at 176-77; *supra* note 3.

62. *See* ESSAYS ON BENTHAM, *supra* note 2, at 144; PRACTICAL REASON, *supra* note 54, at 142-43, 171.

63. *See* ESSAYS ON BENTHAM, *supra* note 2, at 156; PRACTICAL REASON, *supra* note 54, at 146.

64. The positivists do not agree that both the notions "satisfying the rule of recognition criteria" and "binding from the legal point of view" are included in the meaning of "legally

What is the normative force of the word "binding?" Do the positivists regard valid rules as being absolutely binding from the legal point of view? In stating the Legal Obligation Thesis, this article uses the term "strict legal obligation." Hart, Raz, and MacCormick often seem to suggest that in all legal systems, courts adopt rules of recognition that make valid primary rules, including valid case law rules, either absolutely binding, or binding unless exceptions specified in rules of recognition apply. In this article, the terms "strict legal obligation" and "strictly binding" are used to refer to the more rigid sense of binding.

Raz asserts that rules of recognition obligate the courts to apply certain laws, "leaving them no choice which laws to apply."[65] Raz suggests that legal systems, like other institutionalized systems,

> consist of . . . norms which the courts are bound to apply regardless of their view of their merit . . . norms which the [courts] are bound to apply and are not at liberty to disregard whenever they find their application undesirable, all things considered. . . .[Courts] are allowed to act on their own views only to the extent that this is allowed by those norms.[66]

With respect to valid case law rules, Raz asserts that although some courts have the power to overrule established precedents, they are permitted to do so only in certain legally specified situations. No common law court has the power to discard binding common law rules simply because it seems the best approach under the circumstances.[67]

Hart seems to agree with Raz that from the legal point of view, valid rules are strictly binding. Hart asserts that in any legal system, a firmly settled

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valid." *See supra* text accompanying note 42. They should, however, acknowledge that the phrase "primary rules satisfying the rule of recognition criteria," the phrase "legally valid primary rules," and the phrase "primary rules binding from the legal point of view" are extensionally equivalent. All three phrases refer to the same rules. The Validity Thesis asserts that a primary rule is legally valid if and only if it satisfies the rule of recognition criteria. The positivists also assert that a primary rule is binding from the legal point of view if and only if it is legally valid. *See* N. MACCORMICK, *supra* note 2, at 21 (summarizing Hart's Legal Obligation Thesis).

65. AUTHORITY OF LAW, *supra* note 2, at 96-97.

66. PRACTICAL REASON, *supra* note 54, at 139; *see also* AUTHORITY OF LAW, *supra* note 2, at 113.

67. AUTHORITY OF LAW, *supra* note 2, at 113-15; *see also* PRACTICAL REASON, *supra* note 54, at 140-41. In certain passages, Raz suggests that courts might adopt a rule of recognition with a very broad exception permitting departure from a valid case law rule if the rule is unjust. *See* AUTHORITY OF LAW, *supra* note 2, at 114; PRACTICAL REASON, *supra* note 54, at 140. The suggestion seems inconsistent with Raz's statement that courts cannot change valid case law rules "whenever they consider that on the balance of reasons it would be better to do so." AUTHORITY OF LAW, *supra* note 2, at 114; *see also* PRACTICAL REASON, *supra* note 54, at 140. If courts are free to depart from any rule they regard as unjust, they are free to depart from a rule if the reasons for departure outweigh the reasons for adherence. For many judges, such a rule is unjust. Since Raz's basic position appears to be that courts are not at liberty to disregard legal rules whenever they find them undesirable, all things considered, *see infra* note 151, Raz probably meant to suggest that courts might adopt a rule of recognition permitting departure from a valid case law rule if the rule is unjust in one or more specified ways. Otherwise, the rule of recognition would not really limit a court's discretion.

practice requires judges to apply the laws identified by specific criteria. Hart also suggests that

> judges not only follow this practice as each case arises but are committed in advance in the sense that they have a settled disposition to do this without considering the merits of so doing in each case and indeed would regard it not open to them to act on their view of the merits.[68]

Thus, from the judicial point of view, judges are obligated to apply any legally valid rule without considering the merits of the rule. This interpretation finds support in other passages in which Hart indicates that although the open texture of legal rules provides considerable discretion, courts regard themselves as strictly bound to follow the settled core meaning of these rules.[69] With respect to case law rules, Hart claims that a vast number of rules established by the English system of precedent can be altered only by statute.[70]

Although MacCormick seems to equivocate on this issue,[71] he sometimes indicates that from the judicial and legal points of view, valid rules are strictly binding on courts. According to MacCormick, there is a fundamental commandment to judges: "Thou shalt not controvert established and binding rules of law."[72] MacCormick suggests that this commandment, which appears to be absolute and unconditional, applies to case law as well as to the other realms of law.[73]

In the passages cited in the three previous paragraphs, the positivists seem to assert that from the legal point of view, legally valid rules are either absolutely binding on the courts or binding unless legally specified exceptions apply. This is merely another way of stating the second part of the Legal Obligation Thesis, that a judge has a strict legal obligation to apply any legally valid rule that covers the issue he is deciding. According to the positivists, this obligation is imposed by a rule of recognition generally accepted by the courts and applies to case law rules as well as to rules in other realms of law.

E. *Relationships Among the Three Theses*

When the Validity Thesis, Separation Thesis, and Legal Obligation Thesis are considered together, certain relationships among them are apparent. First, the Separation Thesis presupposes the truth of the Validity Thesis. The Separation Thesis addresses the nature of the criteria of validity contained in rules

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68. ESSAYS ON BENTHAM, *supra* note 2, at 158-59.

69. *See* THE CONCEPT OF LAW, *supra* note 2, at 143 (courts regard legal rules as "standards to be followed in decision, determinate enough, in spite of their open texture, to limit, though not to exclude, their discretion," suggesting that when an issue is covered by a legally valid rule, judicial discretion is afforded only by the open texture of the rule); *see also id.* at 140 (law is like a game in which officials are not free to depart from the core of settled meaning in the scoring rules).

70. *Id.* at 131-32.

71. *See infra* note 151.

72. LEGAL REASONING, *supra* note 2, at 195.

73. *Id.* at 214.

of recognition: criteria of validity need not include moral criteria. If the Validity Thesis is false, and there are no criteria of validity generally accepted by courts, there is no place for the Separation Thesis or any other thesis about the nature of such criteria.

Second, the Legal Obligation Thesis presupposes the truth of the Validity Thesis. The Legal Obligation Thesis asserts that citizens have a strict legal obligation to comply with legally valid rules and judges have a strict legal obligation to apply such rules. If the Validity Thesis is false, and legally valid rules cannot be identified, the Legal Obligation Thesis has no palpable rules and cannot yield conclusions about particular legal obligations.

Third, without the Legal Obligation Thesis or some similar thesis concerning the binding nature of legally valid rules, the Validity Thesis has no practical significance. Unless legally valid rules are in some sense binding from the legal point of view, establishing the validity of rules is a futile exercise. The second and third relationships reflect the dual nature of the concept of legal validity. For the concept to be useful, there must be criteria of validity, and the status of validity must have some practical significance.

If the Validity Thesis is disproved, contemporary legal positivism will have nothing significant and distinctively positivist to say. The Separation Thesis and Legal Obligation Thesis will have no application, and the positivists will be left with a Social Sources Thesis and a Discretion Thesis accepted by most non-positivists.[74] If the Legal Obligation Thesis is disproved and not replaced with a similar thesis about the binding nature of legally valid rules, the Validity Thesis and the Separation Thesis will lack practical significance, and positivism will again be left with a Social Sources Thesis and a Discretion Thesis that are not distinctively positivist.

II. The Realities of American Case Law

With respect to any legal system, the truth of the Validity Thesis depends on general acceptance by the courts of some rule of recognition providing conclusive criteria for identifying legally valid rules. The truth of the Legal Obligation Thesis depends on the courts' general acceptance of a rule of recognition that imposes on judges a strict legal obligation to apply any relevant and legally valid rule. The next inquiry is whether courts in American jurisdictions have generally accepted any rules of recognition performing these two functions with respect to case law.

A. *The Validity Thesis and Doctrines of the* Ratio Decidendi

The Validity Thesis asserts that in every realm of law, including case law, legally valid rules can usually be distinguished from spurious rules by means of criteria of validity contained in a rule of recognition accepted by the courts as a judicial practice. If there is an agreed-upon method for identifying valid case law rules, it undoubtedly involves extracting these rules from previous

74. *See supra* note 2.

court decisions. There would have to be some generally accepted method for extracting from a precedent case the *ratio decidendi* of that case, the reason for the decision, stated as a legal rule.

American and British commentators have suggested various methods, but American courts have not generally accepted any of them. As Karl Llewellyn, the leading American Realist, observed:

> [T]here are a number of recognized authoritative relations which prevail between the rule of law which rests on case-law and the past decisions on which the rule purports to rest . . . . And these recognized and authoritative relations are frequently semi-inconsistent, or wholly inconsistent with one another. Here lies the heart and juice of the matter: the various established and authoritative relations between the rule and the cases lead to *different* rules . . . and our going doctrine . . . about how to locate or build a rule gives no clear criterion at all about which rule is The Rule.[75]

Llewellyn's assertion that there is no single generally accepted method for extracting rules from precedent cases is echoed in Martin Golding's statement that "there is much debate on how to extract the *ratio decidendi* from an opinion"[76] and Gidon Gottlieb's observation that "English and American scholars now agree that the practice of courts with regard to the use of the concept of *ratio decidendi* is both unprincipled and inconsistent."[77]

Of course, the fact that no single doctrine of *ratio decidendi* is generally accepted throughout the United States does not preclude the possibility that in each state, some doctrine of *ratio decidendi* has been accepted as a judicial practice. If each state has a generally accepted rule of recognition providing conclusive criteria for identifying valid case law rules, then the Validity Thesis is true, at least with respect to the United States, even though the criteria for validity vary from state to state. But it appears that few, if any, states have a definitive doctrine of *ratio decidendi*, a generally accepted method capable of identifying the valid rule to be extracted from a precedent case. If judges in a particular state had adopted one such method as a judicial practice, presumably judicial opinions would acknowledge such an adoption. But a survey of judicial opinions in California, Texas, North Carolina, and New York indicates

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75. Llewellyn, *The Rule of Law in Our Case-law of Contract*, 47 YALE L.J. 1243, 1248 (1938).

76. M. GOLDING, LEGAL REASONING 101 (1984).

77. G. GOTTLIEB, *supra* note 4, at 78. Several British and Australian commentators, including Hart, have recognized the lack of agreement in common law legal systems as to the proper method for extracting case law rules from precedent cases. *See* M. DETMOLD, *supra* note 51, at 200; LORD LLOYD OF HAMPSTEAD & M. FREEMAN, INTRODUCTION TO JURISPRUDENCE 1119-20 (5th ed. 1985) [hereinafter LLOYD'S JURISPRUDENCE]; Hart, *Problems of Philosophy of Law*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 46, at 264, 269; Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE 148, 159, 168 (A. Guest ed. 1961). Detmold notes that a rule could require the use of *rationes decidendi* constructed from precedent cases, but suggests that such a rule is unlikely in the present state of Anglo-American legal thinking. "The reason for this unlikelihood is that the principles for the construction of . . . rationes decidendi . . . are extensively controversial, and controversy is incompatible with rule." M. DETMOLD, *supra* note 51, at 200.

that none of these states has a generally accepted method capable of isolating one valid rule from among the many possible rules that could be extracted from a precedent case.[78]

In California opinions, a number of judges state that language found in an earlier opinion should be understood in light of the facts mentioned in that opinion.[79] This seems to mean that a general rule stated in an opinion should not be taken literally, but should be narrowed to apply only to fact patterns similar to the case for which the opinion was written. The proper extent of the narrowing process is unclear. One California judge seems to suggest that the rule cannot be broader than the facts of the precedent case.[80] But this would yield valid rules inapplicable to subsequent cases, because no two cases present the same facts. A more useful suggestion is that the rule should be narrowed so as not to apply to subsequent cases having materially different facts.[81] But this requires some test for distinguishing materially different facts from materially similar facts. California opinions provide no such test. California case law provides no *ratio decidendi* doctrine precise enough to identify the valid rule to be extracted from a precedent case.

In a Texas case, the court stated that the *ratio decidendi* of a case cannot be determined independently of the facts upon which the decision was based.[82] There is no indication, however, of any generally accepted practice of how to use the facts in extracting the *ratio decidendi* and isolating it from the other rules that could be derived from these facts. Absent such a practice, there is no definitive rule of recognition for identifying valid case law rules.

Several North Carolina judicial opinions state that an earlier opinion should be interpreted in light of the facts of the case for which it was delivered.[83] The opinions also suggest that in analyzing a precedent case, the facts of the case are more important than the exact language used in the opinion.[84] These general guidelines are not sufficient, however, to isolate one valid rule from among the many rules that could be extracted from a precedent case. Different rules are obtained, depending on which facts are focused upon and how they are characterized. The North Carolina opinions suggest a variety of methods for extracting the *ratio decidendi*, and do not indicate that the courts have adopted any one particular method. One method identifies, as the *ratio decidendi* of a precedent

78. *See infra* notes 79-90 and accompanying text.

79. Ginns v. Savage, 61 Cal. 2d 520, 524 n.2, 393 P.2d 689, 691 n.2, 39 Cal. Rptr. 377, 379 n.2 (1964); Leblanc v. Coverdale, 213 Cal. 654, 660, 3 P.2d 312, 314 (1931); People v. Bank of San Luis Obispo, 159 Cal. 65, 79, 112 P. 866, 872 (1910); Uhlfelder v. Levy, 9 Cal. 608, 615 (1858); River Farms Co. v. Superior Court, 131 Cal. App. 365, 369, 21 P.2d 643, 645 (1933).

80. River Farms Co. v. Superior Court, 131 Cal. App. 365, 369, 21 P.2d 643, 645 (1933).

81. *See* Leblanc v. Coverdale, 213 Cal. 654, 660-61, 3 P.2d 312, 314 (1931).

82. Mitchell v. Town of Refugio, 265 S.W.2d 261, 267 (Tex. Civ. App. 1954).

83. Howard v. Boyce, 254 N.C. 255, 265, 118 S.E.2d 897, 905 (1961); Lane v. Dorney, 250 N.C. 15, 23, 108 S.E.2d 55, 60-61 (1959), *rev'd on other grounds*, 252 N.C. 90, 113 S.E.2d 33 (1960); Woodard v. Clark, 236 N.C. 190, 195, 72 S.E.2d 433, 436 (1952); Brown v. Hodges, 233 N.C. 617, 618, 65 S.E.2d 144, 144 (1951).

84. Howard v. Boyce, 254 N.C. 255, 265, 118 S.E.2d 897, 905 (1961).

case, the decision as applied to the particular facts of that case.[85] As noted above, this method would yield rules that are too narrow and specific to serve as major premises in subsequent cases. Another method infers a general rule from the specific facts and decisions of a series of precedents.[86] Presumably, the inferred rule captures, in general terms, the important features of the fact patterns in the precedent cases. A third method identifies, as valid case law rules, the rules expressly formulated in the opinions and headnotes of precedent cases, quoting the very words used in those opinions and headnotes.[87] Obviously, each of these methods would produce a different set of valid case law rules.

In a New York opinion, the court stated that a previous decision should be interpreted in light of the facts stated in the opinion.[88] As noted above, this general guideline inadequately identifies the valid rule to be extracted from a precedent. Another New York opinion suggested that an earlier opinion should be limited to its facts and should not be extended to cases having essentially different facts.[89] The court provided no test for distinguishing between similar facts and essentially different facts, and the formulation of the valid rule to be extracted was thus left undetermined. In the same case, the court actually used another method for extracting rules from precedent cases: the controlling rule was identified by simply quoting general statements of law contained in earlier opinions.[90] Nothing in New York case law indicates general acceptance of either of these methods for identifying valid case law rules.

Apparently, the courts in each of the four states surveyed have not generally accepted any single *ratio decidendi* doctrine capable of identifying the valid case law rules to be extracted from previous cases. A closer examination of possible methods to extract rules from precedents reveals why it is unlikely that any one of them would isolate valid rules from spurious rules and also be accepted as the judicial practice in any state.

1. Constructing a Rule Consistent With the Facts in a Series of Precedents

One possible method for extracting rules from precedent cases is to construct a rule consistent with the facts and decisions in all previous cases involving the legal issue to be decided. This method attempts to harmonize a series of precedents by identifying the common fact elements in cases in which a similar decision was rendered.[91] This method would eliminate any rule that is not consistent with all precedents involving the legal issue to be resolved. In formulating the valid rule, a particular fact characteristic A would be mentioned as a necessary condition for legal conclusion T if and only if all precedent cases

85. *See* Dennis v. City of Albemarle, 243 N.C. 221, 223, 90 S.E.2d 532, 533 (1955).
86. *See id.* at 225, 90 S.E.2d at 535.
87. *See, e.g.*, Brown v. Hodges, 233 N.C. 617, 618-22, 65 S.E.2d 144, 145-47 (1951).
88. Moriarty v. City of New York, 132 A.D. 10, 12, 116 N.Y.S. 323, 324 (1909), *aff'd*, 197 N.Y. 544, 91 N.E. 1110 (1910).
89. Crane v. Bennett, 177 N.Y. 106, 112, 69 N.E. 274, 276 (1904).
90. *See id.* at 113-16, 69 N.E. at 276-77.
91. *See supra* text accompanying note 86.

having outcome *T* exhibited fact characteristic *A* and all precedent cases failing to exhibit fact characteristic *A* had outcome non-*T*. The various fact characteristics constituting necessary conditions would be regarded as jointly sufficient conditions for outcome *T*.

For example, suppose Judge Present must decide whether a particular contractual offer was accepted by silence. Judge Present discovers six earlier cases dealing with this issue as follows:

CASE	FACT PATTERN	LEGAL CONCLUSION
1	A, B	Offer Accepted
2	A, B, C	Offer Accepted
3	A, C	Offer Accepted
4	B, C	Offer Not Accepted
5	A, D	Offer Accepted
6	B, C, D	Offer Not Accepted

Using the method under discussion, Judge Present could construct the rule that an offer is accepted by silence if and only if facts of type *A* are present. *A* is a necessary condition for acceptance by silence because *A* was present in all precedent cases in which the court decided that silence was acceptance, and in all precedent cases where *A* was absent, the court decided that silence was not acceptance. Furthermore, *A* is the only necessary condition for acceptance by silence. *B* is eliminated as a requirement because it was absent in cases 3 and 5, in which silence was determined to be acceptance. *C* is eliminated as a requirement because it was absent in cases 1 and 5, in which silence was acceptance. *D* is eliminated as a requirement because it was absent in cases 1, 2, and 3, in which silence was acceptance. Similarly, non-*B*, non-*C*, and non-*D* are eliminated as requirements because each was absent in at least one precedent case in which silence was determined to be acceptance.

This method of extracting rules from previous cases suffers from two major flaws. First, a judge deciding the present case must assume that all of the material facts in the precedent cases have been correctly identified. In the above example, Judge Present must assume that *A, B, C,* and *D* are the only fact characteristics that could possibly be material. Yet it is possible that one or more of the six previous decisions depended upon the presence or absence of some additional fact (*E, F,* or *G*). Each previous case exhibits many fact characteristics, and Judge Present could never be certain all material facts were identified.

Second, even assuming the judge has correctly identified all material facts in the precedent cases, it will usually be possible to construct more than one rule consistent with the previous decisions. In the above example, two different rules are consistent with the six precedents. The first rule was discussed above. The second rule is that an offer is accepted by silence if and only if facts of type *A* are present and facts of type *B*, type *C*, or type *D* are also present. Even when there is only one material fact characteristic common to all previous cases decided the same way, if each case contains other material facts, it is

possible to add a disjunctive requirement, such as "*B* or *C* or *D*," referring to the other material fact characteristics present in those cases. When there are two or more material fact characteristics that were present in all precedents decided the same way, more than two rules can be constructed.[92] When a judge can construct two or more rules consistent with all the precedents, which rule is regarded as the valid rule? The method under discussion merely eliminates rules inconsistent with one or more precedents and does not enable the judge to choose among rules consistent with all precedents. Because of the two problems mentioned above, the method under discussion fails to identify the valid rule to be extracted from a series of precedent cases and thus fails to isolate valid case law rules from spurious rules.

2. Constructing a Rule From the Material Facts of a Single Precedent

Some commentators have suggested that a judge can decide a case by applying a rule constructed from the material facts of a single precedent.[93] This method of extracting rules from earlier cases poses problems similar to those presented by the method discussed previously.

First, various rules can be extracted from a given precedent, depending on which facts are deemed to be material. A.L. Goodhart suggests that the material facts are the facts regarded as material by the judge who decided the precedent case. If that judge treated facts *B* and *C* as material and reached legal conclusion *T*, the rule is that in any case with facts *B* and *C*, the court must reach conclusion *T*.[94] But the opinion in the precedent case usually fails to distinguish between material and immaterial facts. How does one ascertain that the judge regarded only facts *B* and *C* as material, and not fact *A*? Goodhart asserts that all facts

92. In the above example, suppose that fact characteristic *B* had been present in all six precedents.

CASE	FACT PATTERN	LEGAL CONCLUSION
1	A, B	Offer Accepted
2	A, B, C	Offer Accepted
3	A, B, C	Offer Accepted
4	B, C	Offer Not Accepted
5	A, B, D	Offer Accepted
6	B, C, D	Offer Not Accepted

Three different rules would be consistent with the precedents: (1) an offer is accepted by silence if and only if facts of type *A* are present; (2) an offer is accepted by silence if and only if facts of type *A* and facts of type *B* are present; and (3) an offer is accepted by silence if and only if facts of type *A* are present and facts of type *B* or type *C* or type *D* are also present.

93. *See* E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-3 (1948) (basic pattern of legal reasoning is reasoning by example). *See generally* Goodhart, *Determining the* Ratio Decidendi *of a Case*, 40 YALE L.J. 161 (1930) (prescribing method for finding rules in precedent cases). Judges often suggest that in extracting the *ratio decidendi* from a precedent case, one should focus on the facts of that case. *See supra* notes 84, 88 & 89 and accompanying text.

94. *See* Goodhart, *supra* note 93, at 173, 179.

set forth in the opinion must be considered material except those immaterial on their face. Unless a fact is expressly or impliedly held to be immaterial, it must be considered material.[95] But substantial doubt may exist as to whether some facts were impliedly held to be immaterial. So long as there is doubt about the material facts, there will be doubt about the rule to be extracted from the precedent case.[96]

The second problem is that even if there were some determinative method for identifying the material facts in the precedent case, there would still be a number of rules that could be extracted from that precedent. As Julius Stone observes, "each [fact] is usually . . . capable of being stated at various levels of generality, all of which embrace 'the fact' in question in the precedent decision, but each of which may yield a different result in the different fact-situation of a later case."[97] For example, if the agent of harm in the earlier case was a dead snail, how is this fact to be stated in the rule derived from that case? A dead snail? A snail? A noxious tangible foreign body? A noxious foreign element? A noxious element?[98] Each level of generality produces a different rule.[99] "[T]he reach of the [rule], even after each 'material fact' seen by the original court is identified, will vary with the level of generalization at which 'the fact' is stated. How then is the 'correct' level of statement of Fact A to be ascertained by the later court?"[100] No one has provided a satisfactory answer to this question.[101]

Because of these problems in identifying the material facts and establishing the level of generality at which a material fact should be stated, the method under discussion fails to isolate one rule as the *ratio decidendi* of a precedent case. It does not provide a determinative method for distinguishing the valid rule from spurious rules.

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95. *Id.* at 178.

96. Levi suggests that a judge deciding a present case uses personal judgment in identifying the material facts in an earlier case: "[T]he judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important." E. Levi, *supra* note 93, at 2. This implies that the judge in the present case can effectively choose among a number of possible rules by making up a personal list of the material facts in the earlier case; thus an objectively determinative method does not exist for identifying the valid rule to be extracted from a precedent case.

97. Stone, *The Ratio of the* Ratio Decidendi, 22 MOD. L. REV. 597, 603 (1959).

98. *Id.* (referring to Donoghue v. Stevenson, 1932 App. Cas. 562 (Scot.)); *see also* K. LLEWELLYN, THE BRAMBLE BUSH 48 (1951 ed.) (discussing similar problem involving Buick motor car and concluding that no one case gives any guidance).

99. If three material facts exist, and fact A can be stated at five different levels of generality, fact B at three different levels, and fact C at four different levels, then 60 different rules can be formulated based on these facts.

100. Stone, *supra* note 97, at 606; *see also* Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 205-09 (1933) (noting the same problem).

101. Hart notes that some theories assert that the rule for which a precedent is authority is the rule that a later court would select from the logically possible alternatives after weighing moral and social factors. Hart, *supra* note 77, at 269. This approach gives a later court discretion to choose the rule it considers best on moral grounds and thus fails to provide an objective and determinative method for identifying the *ratio decidendi* of a precedent.

3. Recognizing Rules Formulated in Judicial Opinions

A third method of extracting case law rules from previous cases recognizes as valid the rules explicitly formulated in judicial opinions.[102] American judges frequently quote case law rules expressly set forth in earlier opinions and then apply these rules in deciding cases.[103] Of course, many opinions contain no explicitly stated rule that could serve as the major premise for the court's decision on a particular issue. Under this third method, a case involving such an opinion may be regarded as a case that yields no valid rule on that particular issue. Instead of trying to construct rules from the material facts of one or more precedent cases, judges would recognize as valid case law only those rules enunciated in judicial opinions.[104]

This seems to be a determinative method of identifying valid case law rules. Judges deciding a present case need not worry about any distinction between material facts and immaterial facts. So long as the rule formulated in an earlier opinion is one from which the decision in that case could be derived, and so long as the rule disposes of the issue to be decided, judges apply it as a valid rule. Assuming the earlier opinion explicitly formulated the rule in only one form, judges do not have to choose among a number of possible rules. If judges find that their own court or a higher court has, on separate occasions, formulated two or more conflicting rules dealing with the same issue, they could regard as valid the rule formulated in the most recent opinion.

American courts, however, have not generally accepted this third method. Indeed, it is unlikely this third method has been adopted as the official doctrine of the *ratio decidendi* in any American state.[105] Many judges would agree with Edward Levi that an explicit rule formulation in an earlier opinion is not

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102. *See* G. GOTTLIEB, *supra* note 4, at 81, 82, 85-86; LLOYD'S JURISPRUDENCE, *supra* note 77, at 1115; R. WASSERSTROM, THE JUDICIAL DECISION 35-36 (1961); *see also supra* notes 87 & 90 and accompanying text.

To qualify as a valid rule under this method, a rule formulated in an earlier opinion must be one from which the decision in that case could have been derived; mere dicta would not count as valid case law rules.

103. For examples in the law of contracts, see National Presto Indus., Inc. v. United States, 338 F.2d 99, 108 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965); Elsinore Union Elementary School Dist. v. Kastorff, 54 Cal. 2d 380, 386, 353 P.2d 713, 717, 6 Cal. Rptr. 1, 5 (1960); Lawrence v. Fox, 20 N.Y. 268, 271 (1859); Ardente v. Horan, 117 R.I. 254, 259-60, 366 A.2d 162, 165 (1976).

104. This method has some advantages. The judge who wrote the opinion in an earlier case may have justified the decision by means of a norm whose scope is barely wider than the facts of that case, and may have been unwilling to commit to any rule having sufficient scope to be useful in deciding future cases. In writing the opinion, the judge may therefore have refrained from prescribing any general rule. Alternatively, the judge who wrote the earlier opinion may have refrained from enunciating a general rule because no rule was used in justifying the decision. Perhaps mere intuition led to the conclusion that the reasons for deciding in favor of one party outweighed the reasons for deciding in favor of the other party. Whatever the reason for the abstention, it seems inappropriate for a court deciding a subsequent case to insist on extracting a rule from the earlier case when no rule was intended by the author of the opinion in that earlier case.

105. *See supra* notes 79, 84 & 89 and accompanying text.

controlling law, but mere dictum.[106] This reluctance to recognize the explicitly formulated rule as the valid rule is probably due in large part to the notion that a court should merely decide the case before it and not legislate for future cases by means of broad rules.[107] The typical judge wants some leeway in extracting case law rules from previous cases. The judge wants to be able to select, from a number of possible rules, the most appropriate rule for the case at bar. Possibly, the more a *ratio decidendi* doctrine satisfies the quest for a determinative method of identifying valid case law rules, the less likely American courts will accept the doctrine as part of a rule of recognition.

One may conclude that the Validity Thesis has been disproved by the realities of American case law. The Validity Thesis asserts that in every realm of law, including case law, valid rules can usually be distinguished from spurious rules by means of criteria contained in a rule of recognition generally accepted by the courts. The survey of case law in four American states indicates, however, that none of these states has a generally accepted rule of recognition capable of identifying the valid rule among the many rules that could be extracted from precedent cases. Furthermore, the examination of various methods for extracting rules from precedent cases suggests that it is unlikely any state has a rule of recognition that isolates valid case law rules. Each method either fails to isolate valid rules or is unlikely to be generally accepted as a judicial practice.[108]

B. *The Legal Obligation Thesis and Doctrines of Stare Decisis*

The positivists' Legal Obligation Thesis asserts that a judge has a strict legal obligation to apply any legally valid rule that covers the issue being decided. Valid rules, including valid case law rules, are strictly binding from the legal point of view, the point of view of judges who accept the legal system's rules of recognition. The positivists claim that judges regard valid rules as either absolutely binding or binding unless specific exceptions apply, and this article designates "strict legal obligation" and "strictly binding" as terms of art to convey this rigid sense of bindingness.

The evidence indicates that even if valid case law rules are identified, our appellate courts do not generally regard them as being strictly binding. American judges have not accepted as a judicial practice any doctrine of stare decisis that makes a valid case law rule strictly binding on the court that developed the rule. American judges have not generally accepted any rule of recognition that makes valid case law rules absolutely binding or binding unless specified exceptions apply.

In his survey of American appellate opinions, Llewellyn noted a number of different techniques for dealing with precedent. Many of these involve altering

106. E. LEVI, *supra* note 93, at 2.

107. *See, e.g.*, Bingham, *What Is the Law?* (pt. 1), 11 MICH. L. REV. 1, 18 (1912); Levi, *The Nature of Judicial Reasoning*, 32 U. CHI. L. REV. 395, 403-06 (1965).

108. Absent a rule of recognition, although some case law rules are more likely to be used than others, case law rules are neither legally valid nor legally invalid.

or discarding pre-existing case law rules.[109] According to Llewellyn, this multiplicity of techniques

> disposes of all question of "control" or dictation by precedent . . . . [T]o the judge or court each individual precedent technique speaks thus: As you search for the right rule of law to govern the case in hand, *I* am *one* of the things which, respectably, honorably, and in full accordance with the common law tradition as inherited and as currently practiced among your brethren of the high bench — I am *one* of the things you are *formally* entitled in and by your office to do to and with any prior relevant judicial language or holding as it comes before you.[110]

There are indeed a number of respected techniques for dealing with precedent, and most of them do not treat pre-existing case law rules as absolutely binding. According to one court, "We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice . . . we abdicate our own function . . . when we refuse to reconsider an old and unsatisfactory court-made rule."[111] Max Radin observed that in America, overruling of precedent is rare, but occurs more often than following a decision that goes against the court's notion of right and wrong.[112] Of course, most decisions are consistent with precedent. Judges tend to share common notions of the requirements of justice, and would render similar decisions even if no one had suggested that precedent is binding. Radin asserts that when an absolute rule of stare decisis would be significant, i.e., when a court is tempted to reject precedent on moral grounds, such a "rule" is broken more often than followed.

Moreover, judges generally do not adhere to a doctrine of stare decisis that makes case law rules binding unless some exception specifically enumerated in a rule of recognition permits deviation. The more prevalent view is that a court is free to depart from an established rule of case law whenever it determines that all things considered, this would be the best thing to do. Courts are free to consider any reasons based on sincerely-held notions of justice. Chief Justice Robert von Moschzisker of the Supreme Court of Pennsylvania described this flexible notion of stare decisis:

> [A]t times, prior decisions conceived to be wrong must be departed from . . . . [If the controlling authorities cannot really be distinguished] and the court is convinced, practically beyond a reasonable doubt, that they

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109. *See* K. LLEWELLYN, THE COMMON LAW TRADITION 75-91 (1960).

110. *Id.* at 76.

111. Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951); *accord* Haney v. City of Lexington, 386 S.W.2d 738, 739 (Ky. 1964); Kabatchnick v. Hanover-Elm Bldg. Corp., 328 Mass. 341, 345-47, 103 N.E.2d 692, 694-95 (1952); Hungerford v. Portland Sanitarium & Benevolent Ass'n, 235 Or. 412, 414-15, 384 P.2d 1009, 1010-11 (1963) (it is inconsistent with the common-law tradition to wait upon the legislature to correct an outmoded rule of case law; rejects the contention that stare decisis binds courts absolutely to the past). Several commentators have observed that American courts do not generally regard existing case law rules as absolutely binding. *See, e.g.*, L. CARTER, REASON IN LAW 185 (2d ed. 1984); R. CROSS, PRECEDENT IN ENGLISH LAW 17 (3d ed. 1977); M. GOLDING, *supra* note 76, at 99; 20 AM. JUR. 2d *Courts* § 186, at 522 (1965).

112. Radin, *supra* note 100, at 204.

> were wrongly decided and the ends of justice require their overruling, it should depart from them .... [T]he proper American conception comprehends *stare decisis* as a flexible doctrine, under which the degree of control to be allowed a prior judicial determination depends largely on the nature of the question at issue, the circumstances attending its decision, and, perhaps, somewhat on the attitude of individual participating judges.[113]

Various commentators have noted similar judicial attitudes.[114]

As Llewellyn observed, no single rule can be regarded as the American rule of stare decisis. However, two notions have gained considerable support. According to the first notion, an established case law rule should be followed unless the injustice of the rule exceeds the undesirable consequences of changing the rule; for example, harming the interests of persons who have relied on the established rule.[115] According to the second notion, a pre-existing case law rule is a mere guideline to be used only when a court finds that it provides sound guidance.[116] Neither of these views regards case law rules as strictly binding.

The fact that American courts do not generally regard case law rules as strictly binding does not preclude the possibility that in each state, the courts have generally accepted some doctrine of stare decisis. Perhaps the Legal Obligation Thesis merely misdescribes the rules of recognition adopted in the var-

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113. von Moschzisker, Stare Decisis *in Courts of Last Resort*, 37 HARV. L. REV. 409, 411, 412, 414-15 (1924).

114. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 17 (1973) (American judges have always assumed power to overrule an earlier case if they considered it egregiously wrong); Bingham, *supra* note 107, at 16 (courts follow precedents for reasons which do not include an authority in courts to dictate even within limits the disposal of future litigation); Wise, *The Doctrine of* Stare Decisis, 21 WAYNE L. REV. 1043, 1045, 1046 (1975) (American appellate courts have usually felt free to depart from a previous decision when it appears right to do so). Hughes suggests that distinctions between valid rules and invalid rules help little in analyzing judicial decisions and that arguments about justice are regarded as acceptable reasons for decisions, whether or not they are based on valid rules. *See* Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411, 430-31, 433 (1968). Many judges recognize that justice has a tacit dimension that cannot be reduced to rules. Such judges are unwilling to regard case law rules as absolutely binding or to accept any rule of recognition that purports to specify an exclusive list of situations in which pre-existing case law rules may be departed from.

115. *See, e.g.*, Fox v. Snow, 6 N.J. 12, 25, 76 A.2d 877, 883-84 (1950) (Vanderbilt, C.J., dissenting); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-13, 149-52 (1921); R. WASSERSTROM, *supra* note 102, at 171; von Moschzisker, *supra* note 113, at 413-14.

This approach presumes that an established rule should be followed; this presumption can be overcome, however, in a utilitarian balancing of social consequences. This approach exemplifies the second of the four uses of norms mentioned *supra* note 4.

116. *See, e.g.*, K. LLEWELLYN, *supra* note 109, at 179 (rules are not to control, but to guide decision; the influence of a case law rule depends upon its wisdom and not its status as a rule of law); R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 59 (1922) (courts largely use the rules of law as a general guide, wrenching the law no more than necessary to render a judgment according to the equities of the case); Corbin, *Sixty-eight Years at Law*, 13 U. KAN. L. REV. 183, 188 (1964) (if well-constructed, rules constructed from appellate opinions can be useful guides for courts).

This approach does not even presume that any pre-existing case law rule should be followed. This approach corresponds to the fourth of the four uses of norms mentioned *supra* note 4.

ious states. Although few, if any, states have a rule of recognition making valid case law rules strictly binding, is it not possible that courts in each state have generally accepted a rule of recognition that accords some kind of binding status to valid case law rules? The evidence, however, suggests this is unlikely. One would expect judicial opinions to reflect such a rule. The survey of judicial opinions in California, Texas, North Carolina, and New York indicates that none of these states has a rule of recognition making valid case law rules strictly binding, and that none of these states have any rule of recognition that concerns the binding status of case law rules. A generally accepted doctrine of stare decisis does not exist in any of these states.

In the California opinions,[117] a number of statements indicate that the judiciary has not generally regarded case law precedent as strictly binding. The California opinions suggest that previous decisions are not absolutely binding,[118] that following precedent is a matter of discretion,[119] and that previous decisions provide only persuasive authority.[120]

No single doctrine of stare decisis seems to have gained general acceptance among the California judges. The opinions express a number of different doctrines:

(1) an established rule is inviolable, even if erroneous;[121]

(2) a court should adhere to precedent unless the disadvantages of doing so greatly outweigh the advantages;[122]

(3) a previous ruling should not be upset unless it is clearly erroneous and adhering to the ruling would produce more evil than overruling it;[123]

(4) an earlier decision is presumed to be correct;[124]

(5) a previous decision should not be followed if error would be perpetuated and wrong would result;[125] and

(6) crude decisions should be revised without reluctance.[126]

This variety of judicial expression indicates that California judges have not

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117. The California cases cited *infra* notes 118-26 include not only case law cases, but also cases involving statutory or constitutional construction where the opinions express views about precedent that apparently apply to case law precedent as well as precedent in the realms of statutory or constitutional construction.

118. Houghton v. Austin, 47 Cal. 646, 668 (1874).

119. County of Los Angeles v. Faus, 48 Cal. 2d 672, 679, 312 P.2d 680, 684-85 (1957); Hart v. Burnett, 15 Cal. 530, 607 (1860); Welch v. Sullivan, 8 Cal. 165, 189 (1857).

120. Alferitz v. Borgwardt, 126 Cal. 201, 208, 58 P. 460, 462 (1899).

121. Santa Cruz Portland Cement Co. v. County of Santa Clara, 191 Cal. 578, 578-79, 217 P. 520, 520 (1923); Sacramento Bank v. Alcorn, 121 Cal. 379, 382, 53 P. 813, 814 (1898); Hart v. Burnett, 15 Cal. 530, 619-20 (1860) (Cope, J., dissenting); Aud v. Magruder, 10 Cal. 282, 291-92 (1858); Darsie v. Darsie, 49 Cal. App. 2d 491, 495, 122 P.2d 64, 66 (1942).

122. Welch v. Sullivan, 8 Cal. 165, 200-01 (1857).

123. Alferitz v. Borgwardt, 126 Cal. 201, 209, 58 P. 460, 462 (1899); Houghton v. Austin, 47 Cal. 646, 667 (1874); Wright v. Carillo, 22 Cal. 595, 604-05 (1863); Hart v. Burnett, 15 Cal. 530, 600-01 (1860).

124. Hart v. Burnett, 15 Cal. 530, 601 (1860).

125. County of Los Angeles v. Faus, 48 Cal. 2d 672, 679, 312 P.2d 680, 685 (1957).

126. Houghton v. Austin, 47 Cal. 646, 667 (1874) (quoting Kent).

generally accepted as part of a rule of recognition any single doctrine concerning the binding status of pre-existing case law rules.

In the Texas opinions, various judicial statements suggest that established rules of case law are not strictly binding. Such rules are not generally regarded as being absolutely binding. One judge opined that courts may depart from the rules whenever this is necessary to accomplish the ends of justice.[127] Another judge stated that a court may depart from a prior ruling when there are cogent reasons for doing so.[128] No particular ends of justice and no particular cogent reasons are specified in these opinions. Similarly, a number of opinions indicate that case law rules establishing property rights may be altered only in unusual circumstances, but do not specify the circumstances.[129] Thus, it appears that the Texas courts have not adopted any rule of recognition enumerating the specific circumstances in which courts are free to reject pre-existing rules of case law.

Indeed, Texas courts have not generally accepted any single rule of recognition that deals with the binding status of case law rules. Some opinions can be interpreted as indicating that case law precedent is always binding without exception.[130] Another opinion suggested that courts may alter the rules whenever it is necessary to make the rules conform to the prevailing customs and precepts of the legal profession and the community.[131] Yet another opinion expressed the familiar doctrine that courts are free to depart from precedent whenever cogent reasons exist and the general welfare will suffer less from such a departure than from a strict adherence to precedent.[132] Finally, another opinion asserted that a court may depart from case law rules whenever justice requires.[133] If the Texas courts have generally accepted any single doctrine of stare decisis, it is not reflected in their judicial opinions.

Members of the North Carolina Supreme Court have not generally treated established rules of case law as strictly binding. The court has stated that previous decisions affecting vital interests should not be disturbed except for the most cogent reasons.[134] This suggests that pre-existing case law rules are not absolutely binding. Nor is there any enumeration of the cogent reasons that justify departure from previous rulings. Apparently, the North Carolina justices have not adopted any rule of recognition containing specific exceptions to a general duty to adhere to valid case law rules. In fact, broad discretion

127. Brokaw v. Collett, 230 S.W. 790, 791-92 (Tex. Civ. App. 1921).

128. Benavides v. Garcia, 290 S.W. 739, 740 (Tex. Comm'n App. 1927).

129. *See* Southland Royalty Co. v. Humble Oil & Ref. Co., 151 Tex. 324, 328, 249 S.W.2d 914, 916 (1952); Tanton v. State Nat'l Bank, 125 Tex. 16, 18-19, 79 S.W.2d 833, 834 (1935); Mitchell v. Town of Refugio, 265 S.W.2d 261, 267 (Tex. Civ. App. 1954).

130. *See* Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964); Uvalde Rock Asphalt Co. v. Hightower, 140 Tex. 200, 205, 166 S.W.2d 681, 683-84 (1942).

131. Davis v. Davis, 521 S.W.2d 603, 608 (Tex. 1975).

132. Benavides v. Garcia, 290 S.W. 739, 740 (Tex. Comm'n App. 1927).

133. Brokaw v. Collett, 230 S.W. 790, 792 (Tex. Civ. App. 1921).

134. Potter v. Carolina Water Co., 253 N.C. 112, 117-18, 116 S.E.2d 374, 378 (1960); Williams v. Randolph Hosp., Inc., 237 N.C. 387, 391, 75 S.E.2d 303, 305 (1953), *overruled on other grounds*, Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 152 S.E.2d 485 (1967).

to abandon earlier rulings is suggested in *Rabon v. Rowan Memorial Hospital, Inc.*[135] In *Rabon*, the majority indicates that the court abandons pre-existing rules whenever their application would result in injustice.

The various opinions in *Rabon* dispel any notion that the North Carolina judiciary has generally accepted one particular doctrine of stare decisis. As noted, the majority opinion indicates that a rule may be abandoned whenever it works injustice. One dissenting opinion, however, suggests that an established case law rule should be changed only by the legislature.[136] Another dissenting opinion asserts that an earlier decision may be overruled, but only if it was erroneous when made,[137] which precludes overruling antiquated case law rules because of changed social conditions. *Rabon* thus presents three very different doctrines of stare decisis.

The New York opinions indicate that pre-existing case law rules are neither absolutely binding nor binding unless some specific rule of recognition exception applies.[138] Some opinions suggest that a court may depart from its prior rulings if there are compelling circumstances or cogent reasons;[139] however, the circumstances or reasons that would justify departure are not specified. Other opinions indicate that case law rules may be discarded whenever justice requires.[140] It is difficult to imagine a less specific exception or one that affords more discretion. New York judges apparently have not generally regarded case law rules as strictly binding.

The New York judiciary has not adopted any single doctrine of stare decisis for case law. The opinions reveal a number of different doctrines:

(1) a court should not depart from its previous rulings except when there are compelling circumstances or most cogent reasons;[141]

(2) a court may depart from precedent whenever the need for predictability is outweighed by the need for a more just rule;[142] and

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135. 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967). The opinion notes, however, that in matters involving title to property, changes in the law are left to the legislature. *Id.*, 152 S.E.2d at 498.

136. *Id.* at 23, 152 S.E.2d at 503 (Parker, C.J., dissenting).

137. *Id.* at 29, 152 S.E.2d at 502 (Lake, J., dissenting). A third dissenting judge filed no opinion. Four judges joined the majority. Even assuming that all four members of the majority shared the same doctrine of stare decisis, acceptance by four of seven judges is not "general acceptance."

138. The New York cases cited *infra* notes 139-43 include some statutory construction cases wherein the court pronounces a doctrine of stare decisis explicitly or impliedly applicable to case law.

139. *See* Cenven, Inc. v. Bethlehem Steel Corp., 41 N.Y.2d 842, 843, 362 N.E.2d 251, 252, 393 N.Y.S.2d 700, 700 (1977); *In re* Estate of Eckart, 39 N.Y.2d 493, 498-99, 348 N.E.2d 905, 908, 384 N.Y.S.2d 429, 432 (1976).

140. *See* Bing v. Thunig, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 11 (1957); Woods v. Lancet, 303 N.Y. 349, 354-55, 102 N.E.2d 691, 694 (1951).

141. *See* Cenven, Inc. v. Bethlehem Steel Corp., 41 N.Y.2d 842, 843, 362 N.E.2d 251, 252, 393 N.Y.S.2d 700, 700 (1977); *In re* Estate of Eckart, 39 N.Y.2d 493, 498-99, 348 N.E.2d 905, 908, 384 N.Y.S.2d 429, 432 (1976).

142. *See* Higby v. Mahoney, 48 N.Y.2d 15, 21-22, 396 N.E.2d 183, 186, 187, 421 N.Y.S.2d 35, 38, 39 (1979) (Fuchsberg, J., dissenting); *id.* at 25, 396 N.E.2d at 188, 421 N.Y.S.2d at 41 (Meyer, J., dissenting); *In re* Estate of Eckart, 39 N.Y.2d 493, 499, 348 N.E.2d 905, 908, 384 N.Y.S.2d 429, 432 (1976).

(3) regardless of the need for predictability, a rule should be discarded if it is contrary to concepts of justice or contrary to reason.[143]

Although these doctrines overlap to a considerable extent, they are not equivalent, and one may conclude that New York's judges have not generally accepted any particular rule of recognition component concerning the binding status of valid case law rules.

The Legal Obligation Thesis asserts that valid case law rules are strictly binding from the legal point of view. The survey of judicial opinions in four states indicates, however, that judges in none of these states generally regard case law rules as strictly binding. The survey also indicates that in none of these states have the judges generally accepted any single doctrine of stare decisis. If these four states are typical, few, if any, American states have a rule of recognition making valid case law rules strictly binding on appellate courts. Furthermore, few, if any, states have a rule of recognition assigning any particular kind of binding status to valid case law rules. The Legal Obligation Thesis does not merely misdescribe the binding status assigned to valid case law rules by rules of recognition; in most American states, no rule of recognition even deals with this status.

C. *Legal Systems and Social Practices*

The absence of a rule of recognition governing either the identification of valid case law rules or their binding status disproves both the Validity Thesis and the Legal Obligation Thesis, and thereby impairs the positivists' model of a legal system of rules. In this model, legal systems include case law, and are actually systematic. They owe their systematic nature to rules of recognition that perform two functions. First, rules of recognition determine which primary rules are valid members of the normative system. Second, rules of recognition determine when application of these valid rules is required in the resolution of legal issues. Judicial acceptance of the rules of recognition thus makes selection of primary rules a truly systematic process.

Although this model fits American statutory law rather well, it does not accurately depict American case law.[144] The evidence indicates that few, if any, states have a generally accepted rule of recognition that effectively identifies valid case law rules and determines their binding status. Absent such a rule of recognition, case law is not part of a normative system. It is normative, but not systematic.[145] A more accurate model would depict case law as an evolving

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143. *See In re* Estate of Eckart, 39 N.Y.2d 493, 498-99, 348 N.E.2d 905, 908, 384 N.Y.S.2d 429, 431-32 (1976); Bing v. Thunig, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 11 (1957); *In re* Liberman, 279 N.Y. 458, 466, 18 N.E.2d 658, 661 (1939).

144. *See* L. FULLER, ANATOMY OF THE LAW 114 (1968).

145. Simpson's remarks about common law apply to American case law:

> How then are we to view the positivists' notion of the common law as a body of rules, forming a system in that the rules satisfy tests of validity? We must start by recognizing what common sense suggests, which is that the common law is more like a muddle than a system, and that it would be difficult to conceive of a less systematic body of law. The systemization of the common law — its reduction to a code of rules which satisfy accepted

body of guiding ideas, some of which have been accepted as judicial custom, while others are upstart innovations struggling for wider recognition. The ideas accepted as custom enjoy this status because judges have agreed that they are good ideas, and not because they satisfy some mediating rule of recognition.[146]

To understand why the positivists' model breaks down in the realm of case law, it must be noted how that this model makes the existence and scope of a legal system dependent upon actual social practices. The existence and scope of legal systems depend upon the existence and content of rules of recognition. The existence and content of rules of recognition depend upon what judges actually accept as a social practice.[147] The assertion that a given rule of recognition exists is thus an empirical assertion subject to empirical falsification. The Validity Thesis and Legal Obligation Thesis are empirical hypotheses concerning the existence and content of rules of recognition in all legal systems of rules. Both theses have been disproved because judges in many American states have not accepted, as a social practice, any rule of recognition that effectively identifies valid case law rules or makes them strictly binding. The Validity Thesis and Legal Obligation Thesis must be rejected because they are defective as descriptive sociology.[148]

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tests provided by other rules — is surely a programme, or an ideal, and not a description of the *status quo*.

Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 77, 99 (A. Simpson ed. 1973).

146. For the notion that case law (in common law countries in general) is best viewed as a body of customary norms, each of which is accepted by courts for reasons independent of any rule of recognition, see Simmonds, *Legal Validity and Decided Cases*, 1 LEGAL STUD. 24, 34-36 (1981); Simpson, *supra* note 145, at 91-99.

147. *See supra* text accompanying notes 17 & 22.

148. A dilemma confronted the contemporary positivists in constructing their theory of law. They could either base their concepts of legal validity and legal obligation on *a priori* notions of law or morality (in which case, these concepts would often not reflect the legal point of view prevailing within actual legal institutions), or they could base their concepts of legal validity and legal obligation on the actual social practices of courts (in which case, these concepts would be vulnerable to empirical falsification). In choosing the latter approach, the positivists have followed Wittgenstein. For Wittgenstein, the existence and material content of a rule depend upon an actual practice, a customary use of the rule (a matter of empirical fact). *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (pt. 1) §§ 190, 198, 202 (3d ed. G. Anscombe trans. 1958); *see also* G. BAKER & P. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY 102, 150 (1985) (summarizing Wittgenstein) [hereinafter G. BAKER & P. HACKER, WITTGENSTEIN]. The key concept in Wittgenstein's notion of a rule-following practice is normative regularity, a regular pattern of behavior in which a rule is used as a guiding norm. *See id.* at 138, 151, 153, 155-56, 162. In the case of a social rule, the existence and content of the rule obviously depend on an agreed-upon social practice. *See* L. WITTGENSTEIN, *supra*, at §§ 241, 242 (concerning language rules); *see also* G. BAKER & P. HACKER, SKEPTICISM, RULES AND LANGUAGE 21 (1984); G. BAKER & P. HACKER, WITTGENSTEIN, *supra*, at 243-44, 249-50; C. MCGINN, WITTGENSTEIN ON MEANING 53-56 (1984). Hart's notion of a social rule closely resembles Wittgenstein's; for Hart, a social rule is contingent upon a social group's behavioral conformity to the rule and acceptance of the rule as a social norm (i.e., normative regularity). *See* THE CONCEPT OF LAW, *supra* note 2, at 54-56. Accordingly, a particular rule of recognition exists as a social rule only if it is actually accepted by courts as a norm in a regular judicial practice. *See supra* note 17 and accompanying text. Since the contemporary positivists' Validity Thesis and Legal Obligation Thesis rest upon the premise that certain rules of recognition exist as social rules, these theses are vulnerable to empirical falsification.

III. The Prospects for Conformity

Can the Validity Thesis and the Legal Obligation Thesis be modified so as to conform to the realities of American case law? If the contemporary positivists can make such modifications without sacrificing the essential features of their model of legal rules, an obituary for legal positivism may be premature.

A. *Modifying the Validity Thesis*

The Validity Thesis asserts that by applying criteria contained in a rule of recognition generally accepted by the courts, one can usually ascertain whether a primary rule is legally valid. This thesis has been disproved. In many American states, judges have not generally accepted any rule of recognition that effectively identifies valid case law rules. The contemporary positivists could acknowledge this and modify their Validity Thesis so that it does not apply to case law, but only to constitutional, statutory, and administrative law. So modified, the thesis would seem to conform to American judicial practices.

It is unlikely, however, that the positivists would be willing to make this modification. It would entail conceding that their model of legal rules does not fit all the realms of law in which rules are used. The positivists' only model of legal rules is a model of a legal system, and for the positivists, a legal system exists only to the extent that there is a rule of recognition providing authoritative criteria of legal validity. If the positivists accept the proposed modification and acknowledge that some states do not have rules of recognition containing authoritative criteria of validity for case law rules, then the positivists must concede that case law rules are not included in the legal systems of those states. The positivist model of legal rules, a model of a system of rules, would then fail to account for the many rule-based judicial decisions that are rendered in the realm of case law. It is unlikely that the positivists would accept any modification of the Validity Thesis that puts case law beyond the reach of their only model of legal rules. It is difficult to conceive of any other viable modification, and one may conclude that the Validity Thesis is doomed.[149]

B. *Modifying the Legal Obligation Thesis*

The Legal Obligation Thesis asserts that a judge has a strict legal obligation to apply any legally valid rule that covers the legal issue being decided. From the legal point of view, the point of view of judges who accept the rules of recognition, legally valid rules are strictly binding. This thesis has been disproved. Even if it is assumed that valid case law rules can be identified, judges in many American states have not generally accepted any rule of recognition that makes such rules strictly binding. Although there are a number of ways in which the contemporary positivists might modify their Legal Obligation Thesis, none seems viable.

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149. A realistic theory of law would recognize that case law is law but is unsystematic, and that case law rules are neither legally valid nor legally invalid. *See supra* note 108 and accompanying text.

First, contemporary positivists could modify the Legal Obligation Thesis to assert that case law rules established by superior courts are, from the legal point of view, strictly binding on inferior courts but not on the superior courts that established the rules. Assuming that judges indeed generally regard such rules as being strictly binding on inferior courts, this modified thesis would comport with the realities of American case law. However, it is unlikely that positivists would accept this modification. The modified thesis implies that in each state, there is a rule of recognition making certain case law rules strictly binding on inferior courts, but no rule of recognition concerning the binding status of case law rules in the highest court. If the highest court accepts no such rule of recognition as binding upon itself, then the highest court is legally free to discard established case law rules whenever it desires. Thus, case law is not part of that state's legal system of rules,[150] and is therefore beyond the scope of the positivists' model of legal rules.

Second, the positivists might acknowledge that courts do not generally regard case law rules as being strictly binding, and modify their Legal Obligation Thesis to assert merely that in each state the courts have generally accepted some rule of recognition concerning the binding status of valid case law rules in all courts of that state. Such a rule of recognition need not provide that case law rules are strictly binding. In some states, the rule might provide that a valid case law rule is prima facie binding and must be applied unless the reasons for rejecting the rule, whatever they may be, outweigh the reasons for applying the rule. Even if the positivists could reconcile this modified thesis with their model of legal rules,[151] it must be rejected because it is not consistent with the realities of American case law. The preceding survey of judicial opinions in four states indicated that the courts in each state have not generally

150. In the positivists' model, a legal system of rules exists only to the extent that a generally accepted rule of recognition identifies valid rules and attributes binding status to such rules. *See supra* text accompanying notes 18, 54, 57 & 63; *supra* § II.C. If no such rule of recognition concerning case law is accepted by the highest court as binding upon itself, there is no *generally accepted* rule of recognition making case law systematic. If inferior courts must follow case law rules provided by the highest court, while that highest court is free to disregard those rules whenever it wants to, the realm of case law is governed by arbitrary authority and not by a legal system.

151. In certain passages, MacCormick suggests that courts might regard case law rules as merely prima facie binding. *See* LEGAL REASONING, *supra* note 2, at 215-16, 227, 243. Raz, however, would presumably reject the proposed modification as incompatible with his concept of a legal system and his concept of a legal rule. In Raz's legal system, no rule of recognition can make valid primary rules less than strictly binding. From the legal point of view, a legal system consists of norms that are not merely prima facie binding; they are strictly binding in the sense of being binding except when some legally specified exception applies. *See* PRACTICAL REASON, *supra* note 54, at 139 (institutionalized systems consist of norms that courts must apply and cannot disregard whenever they find their application undesirable, all things considered); *id.* at 145 (the norms of a normative system exclude the application of reasons, standards, and norms that neither belong to the system nor are recognized by it); *see also* AUTHORITY OF LAW, *supra* note 2, at 113. For Raz, all legal rules are "exclusionary reasons" for disregarding all reasons not allowed by specific legal doctrine. *See id.* at 30, 31; PRACTICAL REASON, *supra* note 54, at 144. Raz seems to suggest that if a "rule" is regarded as merely prima facie binding, it is not even being used as a rule. *See id.* at 60-61, 73. For Raz, legal rules exemplify the first of the four uses of norms mentioned *supra* note 4.

accepted any single rule of recognition concerning the binding status of case law rules. A variety of conflicting judicial opinions as to the binding nature of pre-existing case law rules is likely to be found in any American state.[152]

Third, the positivists could acknowledge that many states do not have any rule of recognition concerning the binding status of case law rules, and modify their Legal Obligation Thesis so that it does not apply to case law, but only to rules expressed in constitutions, statutes, and administrative regulations. But this modification, like the analogous modification of the Validity Thesis, would put case law rules outside the scope of a legal system[153] and thus leave the positivists with a model of legal rules that does not account for the numerous rule-based case law decisions of our courts. The modification would therefore probably be unacceptable to the positivists.

Since no other viable modification is conceivable, it must be concluded that the Legal Obligation Thesis cannot be saved. Like the Validity Thesis, the Legal Obligation Thesis cannot be reformulated so as to conform to American case law and also accord with the contemporary positivists' model of a legal system of rules that accounts for all rule-based judicial decisions.

IV. Conclusion

Contemporary legal positivism is distinguished from other analytical philosophies of law by its three central theses: the Validity Thesis, the Separation Thesis, and the Legal Obligation Thesis. These theses provide a model of systems of legal rules, systems founded upon rules of recognition that courts generally accept and that (i) effectively identify legally valid rules (the Validity Thesis), (ii) need not contain moral criteria for legal validity (the Separation Thesis), and (iii) make legally valid rules strictly binding from the legal point of view (the Legal Obligation Thesis).

The Validity Thesis and the Legal Obligation Thesis have been disproved with respect to American case law. The courts in many states have not generally accepted any rule of recognition criteria capable of effectively identifying valid case law rules and have not generally accepted any rule of recognition provision concerning the binding status of case law rules. Furthermore, it appears unlikely that the Validity Thesis or the Legal Obligation Thesis could be modified to conform to the realities of American case law without sacrificing the positivists' model of a system of legal rules.

The positivists are thus left with the Separation Thesis. The Separation Thesis, however, addresses the nature of the validity criteria contained in any rule of recognition, and therefore presupposes the truth of the Validity Thesis.

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152. Even if it were established that every state has a generally agreed-upon rule concerning the binding status of valid case law rules, such a rule would have nothing to operate on if valid case law rules cannot be identified. The Legal Obligation Thesis presupposes the truth of the Validity Thesis. *See supra* § I.E. To be efficacious, a rule of recognition must contain criteria of validity as well as a provision determining the binding status of valid rules. This article's survey of case law opinions in four states indicated that in many states, no generally accepted criteria are capable of effectively identifying legally valid case law rules.

153. *See supra* note 150.

If there are no generally accepted criteria of validity for case law rules, the Separation Thesis cannot apply in the realm of case law. Thus, with respect to American case law, each of the three central theses of contemporary positivism is either false or inapplicable.

Any theory that fails to adequately deal with case law should be rejected as an analytical approach to American law. The volume of statutory and administrative law has greatly expanded in recent decades, and American case law no longer plays as large a role as it once did. Nevertheless, case law still plays an important role and should be accounted for in any analysis of the nature of law. Contemporary legal positivism offers a model of legal rules in which all rules belong to some normative system regulated by a rule or rules of recognition. In the realm of case law, however, one usually finds no rule of recognition and no system. Instead, there exists a diffuse and constantly changing body of rules, regulated only by a judicial commitment to justice. This discovery may induce in some a mild case of vertigo. Balance is regained, not by seeking repose in some illusory model of law, but by accepting case law as it is, in all its variety and mystery.