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TAKING LAWS SERIOUSLY

Aleksander Peczenik†

What is "valid law"? The natural law tradition and legal positivism offer different answers to this question. According to the natural law tradition, immoral laws are not binding because the law derives validity either from natural law or from morality. This viewpoint also assumes that natural law is rationally cognizable.¹ The "valid law" concept requires a relationship between the law and the rationally cognizable natural law. Legal positivists, on the other hand, claim that law might be immoral and yet legally valid.² According to legal positivists, a fundamental test of "valid law" exists, which presupposes a relationship between the law and some social facts. For example, the law derives its validity either because the sovereign power can enforce its commands, or because the masses accept it.

Ronald Dworkin criticizes legal positivism, but without joining the central tradition of natural law. He points out that in addition to legal rules, there are legal principles,³ which, although not enacted in any sources of the law, nevertheless bind judges.

[Legal rules] are valid because some competent institution enacted them . . . [b]ut this test of pedigree will not work for . . . principles. The origin of . . . legal principles lies not in a particular decision of

† Professor of Jurisprudence, University of Lund. I am most grateful to many colleagues for extensive discussions and criticism, particularly Aulis Aarnio and Robert S. Summers. I did much of the work for this article from January through August 1981, while I held a fellowship from the American Council of Learned Societies and lectured at the Cornell Law School. I wish to acknowledge indebtedness to the professors and students of Cornell University for valuable discussions.

¹ *E.g.*, P. D'ENTREVES, *NATURAL LAW* (1951); L. FULLER, *THE MORALITY OF LAW* (1969); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958).

² *E.g.*, H.L.A. HART, *THE CONCEPT OF LAW* (1981); N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978); Hart, *Positivism And The Separation of Law And Morals*, 71 *HARV. L. REV.* 593 (1958).

³ "Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 24 (1977). Principles, however, differ. "A principle like 'No man may profit from his own wrong' . . . states a reason that argues in one direction, but does not necessitate a particular decision." *Id.* at 26; *see also id.* at 71-80 (Dworkin reaffirms distinction in response to Raz, *Legal Principles and the Limits of Law*, 81 *YALE L.J.* 823, 829-38 (1972)); *cf.* N.K. SUNDBY, *OM NORMER* 190-204 (1974) (guiding standards (retningslinjer, *Richtlinien*)). This distinction has many other definitions. *See, e.g.*, Alexy, *Zum Begriff des Rechtsprinzips*, 1 *RECHTS-THEORIE BEIHEFT* 63 (1979). A rule, for example, can be either fulfilled or violated, *tertium non datur*, and a principle can be fulfilled to a certain degree, more or less. *Id.* at 79-80.

some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.⁴

Individuals observe a principle "because it is a requirement of justice or fairness or some other dimension of morality."⁵

Dworkin simultaneously points out that legal principles require "a good fit" with "institutional history."⁶ "[N]o principle can count as a justification of institutional history unless it provides a certain threshold adequacy of fit, though amongst those principles that meet this test of adequacy the morally soundest must be preferred."⁷ On this ground, Dworkin launches "a general attack on positivism,"⁸ especially on its assumption that the "law of a community is a set of special rules [that] can be identified . . . by tests having to do not with their content but with their *pedigree*."⁹ "Positivism . . . is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles"¹⁰ of principles. Dworkin, in particular, attacks H.L.A. Hart's position that each community developed its own rule of recognition, a "fundamental secondary" rule that establishes how legal rules will be identified.¹¹

Several commentators have criticized Dworkin's views and have argued that one must apply a fundamental test of law to distinguish legal from nonlegal principles.¹² Dworkin responds to the criticism by arguing that it is not true that

some *social* rule or set of social rules exists within the community of its judges and legal officials, which rules settle the limits of the judge's duty to recognize any other rule or principle as law.¹³

The social rule theory fails because it insists that a practice must somehow have the same *content* as the rule that individuals assert in its name. But if we suppose simply that a practice may justify a rule, then while the rule so justified may have the same content as the practice, it may not; it may fall short of, or go beyond it.¹⁴

Moral reasoning bridges the gap between social practice and the

⁴ R. DWORKIN, *supra* note 3, at 40. Dworkin leaves unanswered the question of whether this difference of origin necessarily follows the semantical difference described in note 3.

⁵ *Id.* at 22; *cf.* R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 56 (rev. ed. 7th printing 1965).

⁶ R. DWORKIN, *supra* note 3, at 340.

⁷ *Id.* at 342.

⁸ *Id.* at 22.

⁹ *Id.* at 17.

¹⁰ *Id.* at 22.

¹¹ *Id.* at 21; *see* H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961) (defining rule of recognition).

¹² *See, e.g.*, N. MACCORMICK, *supra* note 2, at 238; Sartorius, *Social Policy and Legal Justification*, 8 AM. PHIL. Q. 151, 155 (1971).

¹³ R. DWORKIN, *supra* note 3, at 59-60.

¹⁴ *Id.* at 58 (emphasis in original).

processes of justification and identification of legal principles. The requirement of moral reasoning makes the fundamental-test-of-law idea unacceptable to Dworkin. Judges, according to Dworkin, do not merely apply an established test of law. They, instead, use their moral sense of appropriateness to *justify* some principles; principles so justified are principles of law. References to established social practices are merely part of this justificatory reasoning.¹⁵

Are these principles identifiable by morality alone and not by pedigree?¹⁶ Dworkin apparently requires a combination of both. Moral appropriateness is a necessary but not sufficient condition of legally valid principles; institutional "pedigree" is another.¹⁷ The overall character of legal justification, however, is morally evaluative rather than institutionally descriptive.

The primary objective of this article is to discuss the relationship between legal and moral justifications. I will contrast my theory with that of Ronald Dworkin.¹⁸

I

DISTINGUISHING THE CONTEXTUALLY SUFFICIENT FROM THE DEEP JUSTIFICATION

Simultaneous acceptance of moral and descriptive justifications gives rise to a serious analytical problem. How can a justification be moral overall if it involves descriptive components? The descriptive components *affect* the overall character of the normal, contextually sufficient legal justification. The contextually sufficient justification is more than a conglomerate of moral and descriptive components. In fact, even the evaluative components are not identical with ordinary moral reasoning. Dworkin overlooks this discrepancy.

If a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to *justify* the settled rules by identifying the

¹⁵ See *Id.* at 61-64.

¹⁶ "Pedigree," to Dworkin, is the test of law which examines the propriety of its enactment and the validity of the institutions giving rise to it. This test, distinguishing valid legal rules from spurious ones, is based not on their content but on the manner in which they were adopted or developed. *Id.* at 17.

¹⁷ This conclusion follows also from Dworkin's reference to the sense of appropriateness developed in the legal profession. *Id.* at 40. One cannot define the legal profession without referring to some factual criteria. One cannot, for example, identify "judges" without referring to their "pedigree," that is to the fact that they have been appointed or elected by *legal* procedure regulated by legal rules.

¹⁸ A word of warning against philosophical dogmatism is in order here. Dworkin and natural law proponents seem to assume that all people in all reasonable interpretations use the concept "valid law" in a manner that presupposes a given relation between "the law" and morality or natural law. Legal positivists seem to assume that all people in all reasonable interpretations use the concept "valid law" in a manner that indicates a relationship between the law and some social facts. Such presuppositions, however, are applicable only to some people in some contexts. Some people, for example, accept, and others reject, the thesis that if *N* is valid law then *N* cannot be entirely immoral. Legal positivism, natural law, and Dworkin's theory seem to be *too strong*.

political or moral concerns and traditions of the community which, in the opinion of the lawyer whose theory it is, do in fact support the rules. This process of justification must carry the lawyer very deep into political and moral theory.¹⁹

This process, however, need not carry the lawyer deep into moral reasoning. One must distinguish between the contextually sufficient and the deep justification in the law.²⁰ The contextually sufficient legal justification is based on the established tradition of legal thinking. Except in extraordinarily "hard" cases, lawyers rightly rely upon this tradition. While they may supplement it with their own moral evaluations, they may not doubt it. A lawyer, for example, would lose his professional reputation if he asked the Swedish or United States Supreme Court why lawyers should follow the Constitution. However, if one wishes to convince a nonjuristic audience of moralists, philosophers, or political opponents who question the entire legal tradition, the deep justification must support the contextually sufficient legal justification. Dworkin presents an outstanding theory of the deep legal justification but no satisfactory theory of the contextually sufficient legal justification. I will attempt to show that reasoning "by pedigree" or "institutional history" plays a greater role in the latter than in the former.²¹

A. The Three-Step Theory of Legal Justification

Any theory of legal justification must comport with the descriptive sociology of legal reasoning. When applying the contextually sufficient

¹⁹ R. DWORKIN, *supra* note 3, at 67 (emphasis in original).

²⁰ This terminology was suggested by Robert S. Summers.

²¹ Another kind of criticism is also applicable. According to Professor Lyons, Dworkin's error can be understood as follows. He sees correctly that positivists regard social facts, such as the facts of official practice, as the ultimate determinants of law. He then assumes that positivists would restrict officials, in deciding upon the authoritative tests for law, to criteria that themselves incorporate such social facts about accepted practices That may be true of Austin, but it is not true of Hart, nor is it essential to the tradition. In Hart's theory, the social facts that ultimately determine law are facts about official practice, but the tests for law are whatever officials make them.

Lyons, Book Review, 87 YALE L.J. 415, 425 (1977). Lyons thus saves legal positivism by moving it from the level of judicial thinking to a metalevel of thinking *about* judicial thinking. Judges might behave as Dworkin claims they do, but a legal positivist is not a judge, he is a theorist using the judge's practice as the test of law. This use of a metalevel is a standard tool of legal realists. See Aarnio, Alexy & Peczenik, *The Foundation of Legal Reasoning*, 12 RECHTS-THEORIE 133, 148 (1981).

Dworkin, of course, would not approve of this move. Dworkin claims that he does not view judges from the outside but that he formulates a theory from their perspective "to provide a basis for judicial duty." R. DWORKIN, *supra* note 3, at 67; see also Oker-Blom, *En enda riktig lösning trots allt?—Dworkin mot finländsk bakgrund*, TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND 251, 306, 312 (1978).

and the deep justifications, jurists assume the distinctions amongst three different stages involved in legal justification:²² first, establishing the law-character of a normative system as a whole; second, establishing the legal validity of the sources of law in a given legal system; and third, establishing the content of legal norms (rules and principles).²³

Each stage requires application of socially established criteria ("tests") and evaluative ("moral" *sensu largo*)²⁴ justification. The relationship between the law and evaluative justification is necessary to preserve the concepts of "a legal system," "a legal source," and "legal justification."²⁵ The relative importance of the established criteria is greatest in the first stage, while the relative importance of evaluations is greatest in the third.²⁶

B. Legal System, Legal Sources, and Legal Interpretation

This section contains more information than may be necessary for purely analytical purposes. The reader, therefore, should pay less attention to the details of the description than to the idea that the stages of legal justification differ greatly from one another. Moral justification, in particular, plays a different role in each stage. Few moral evaluations are required to identify which normative system, as a whole, constitutes the valid law of a given territory.

The law-character of a normative system is characterized by the presence of the following social facts. The system is essentially hierarchical; higher norms determine the proper method of creating lower

²² Jurists in the Continental (European) tradition assume these distinctions which British and American philosophies of the law often ignore.

²³ The contextually sufficient legal justification focuses on the second and third stages; it assumes the deep justification of the first stage.

²⁴ These evaluations are *moral sensu largo* because their task is to establish standards of action that account for the interests of others. They are not *moral sensu stricto* because legal criteria and legal-reasoning norms restrict them and because they are not used in free moral discourse. Some of these evaluations are also moral in the unusual, but possible, sense ascribable to Dworkin, that "moral" means "related to rights." See *infra* notes 52-61 and accompanying text.

²⁵ The absence of this relationship would change these concepts because many causal relations between the law and morality are present. Moreover, there is a derivative link between the law and morality. Even if the law is defined by reference to its nonmoral properties, these nonmoral properties give it, of necessity, moral worth. See J. RAZ, PRACTICAL REASONS AND NORMS 166 (1975). Dworkin would probably accept both this weak conceptual relation between the law and morality and the weak relations I discuss in this section. It is uncertain, however, which stronger relations he would accept. See Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFFAIRS 3, 6 (1977). One commentator attributes to Dworkin the thesis that immoral rules *cannot* be laws. Blackstone, *Law and Morality: The Hart-Dworkin Debate and An Alternative*, 11 ARSP BEIHEFT NEUE FOLGE (IVR X) 77, 85. This strong interpretation of Dworkin's theory, however, is difficult to reconcile with his distinction between institutional and background moral rights. See R. DWORKIN, *supra* note 3, at 326.

²⁶ A possible explanation for the differing weights is that one easily accepts established criteria of law because they are *vague and abstract* (stage 1), but insists that the *concrete content* of the law (stage 3) be better adapted to moral considerations.

norms.²⁷ Moreover, the norms of this system, for the most part, are observed. Some norms impose sanctions—usually enforced by a force-exercising organization—on violators.²⁸ By sanctioning diversions from societal norms, the legal system indirectly controls the society as a whole. The legal system claims to be the supreme system of norms in society;²⁹ it claims the sole right to exercise force in its territory;³⁰ and it claims authority to regulate behavior.³¹ The normative system is characterized by lawyers using technical methods, who frequently interpret statutes and judicial decisions. Moreover, the law is relatively precise, general, of longstanding duration, and possesses a high degree of institutionalization.³² Because of these characteristics citizens recognize its authority. The law is necessary in understanding such human actions as selling things, forming organizations, committing crimes, etc.³³

In ordinary situations, these characteristics are sufficient to establish the law-character of a normative system. No sane person, for example would doubt that either Swedish or United States law as a whole constitutes a legal system. In extraordinary situations, however, such characteristics provide an insufficient basis from which to conclude that the normative system in question is a legal system; in such a situation, one must choose whether to regard the system as a legal system. This problem occurs when the normative system embodies many attributes of law, yet is extremely immoral—for example, Hitler's or Pol Pot's "law." Personal gains may determine the choice,³⁴ but they do not justify it. One can still justify the choice with evaluative reasons, assuming that the normative system is legal only if it neither contains nor generates too many grossly immoral norms or practices.³⁵

Although these criteria of law are neither simple nor sufficient to establish the law-character of a normative system as a whole, they constitute an important component of the complex reasoning process which supports the idea that a normative system is a legal system. Moral reasoning *sensu largo* is another component necessary only in extraordinary situations. Anyone who argues that a given situation is extraordinary in this sense has the burden of justifying his thesis.³⁶ Furthermore, whether

27 See H. Kelsen, *REINE RECHTSLEHRE* 228-30 (1960).

28 *Id.* at 34-36. K. Olivecrona, *LAW AS FACT* 171-80 (1939), 271-73 (2d ed. 1971).

29 See J. Raz, *THE AUTHORITY OF LAW* 118 (1979).

30 See A. Ross, *ON LAW AND JUSTICE* 34 (1958).

31 See J. Raz, *supra* note 29, at 119.

32 See J. Finnis, *NATURAL LAW AND NATURAL RIGHTS* 218 (1980) ("definition, specificity, clarity and thus predictability"); cf. V. Black, Report for II International Congress of Legal Science, Amsterdam (Sept. 1980).

33 See H. Kelsen, *supra* note 27, at 3-4.

34 S. Stromholm, *RATT, RATTSKALLOR OCH RATTSTILLAMPNING* 38 (1981).

35 See J. Lucas, *ON JUSTICE* 123 (1980) ("*lex iniustissima non est lex*").

36 See R. Alexy, *THEORIE DER JURISTISCHEN ARGUMENTATION* 242-45 (1978) (Argumentationslast).

the total normative system of a given territory constitutes the legal system is an important question to philosophers, moralists, or politicians, but rarely troubles lawyers. The question belongs to the *deep* justification, not to the contextually sufficient legal justification.³⁷

Moral reasoning *sensu largo* plays a greater, but still limited, role in establishing the legal validity of the sources of law in a given legal system. The expression "sources of law" is ambiguous. In the broadest sense, all legal reasons are sources of law. In a more narrow sense, institutional legal-authority reasons³⁸ are sources of law. Finally, in the narrowest sense, mandatory sources—those that a lawyer "must" or "should" rely upon—are sources of law. The highest norms of a legal system, for example, the norms of its constitution, are certainly legitimate legal sources. To validate other sources of law, both constitutional authorization and additional "source-norms" which lawyers accept are required.³⁹ These norms determine the material one must, should, or may cite in judicial decisions that address legal questions. Swedish law presents an opportunity to examine some source norms of this kind.⁴⁰

Under Swedish law, all courts and authorities *must* use statutes, if any are applicable, to justify their decisions; they *should* use applicable precedents and legislative histories to justify their decisions; and they *may* use,⁴¹ among other things, custom, repealed statutes, foreign laws, and professional legal literature to justify their decisions.

The identification of a concrete material as a source of the law, however, is not always free of value judgments. In some "hard" cases, because the established source norms and criteria fail to solve the problem of identification, one must rely upon moral reasoning to decide whether a given material is a source of the law and, if so, to which class of sources it belongs. The concept of the "sources of the law" would change if one eliminated its evaluative openness and instead established criteria entirely free of value judgments to determine what is and is not a legal source. This concept, however, would also change if one eliminated the source norms and criteria, thereby making the identification of the sources totally a matter of judgment. Identification of the sources, after all, *might* in some cases simply follow from a combination of the constitution, the source norms, and established criteria.

Moral reasoning *sensu largo* is most influential in establishing the *content of legal norms* (rules and principles). Dworkin's theory is easily

³⁷ See A. PECZENIK, *THE BASIS OF LEGAL JUSTIFICATION* 13 (1983).

³⁸ Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

³⁹ See *infra* notes 40-41 and accompanying text.

⁴⁰ A. PECZENIK, *JURIDIKENS METODPROBLEM* 48-53 (1980).

⁴¹ Courts may also rely on precedents and legislative materials that do not directly address the legal text in question but give information on evaluations in adjacent or analogous areas of law.

applied to this problem. Moral reasoning must, however, be substantiated with references to the sources of the law. In the process of legal justification, the institutionalized sources of the law and the moral evaluations of the person performing the justification adapt to each other. Moreover, the justifier adapts the sources of the law to each other, thereby making them more consistent with each other than they would otherwise be. This two-step process of adaptation is bound, to some extent, by traditionally established reasoning norms implicit in legislative, judicial, and juristic practice. Use of a systematic and explanatory theory will reveal these reasoning norms. Although theory-laden and morally acceptable, these norms are, in a sense, social, that is, detectable by their social "pedigree"; their role in social practice.

An examination of Swedish legal thinking reveals, for example, that the following reasoning norms are implicit and acceptable. First, if a statute uses different words, one should assume that they relate to different situations, unless there are strong indications to the contrary. Second, only essential similarities between cases justify applying statutes by analogy, that is, applying a statutory rule to a case which technically is not covered by the language of the particular statute. Third, only very strong reasons justify reasoning by analogy to conclude that an error exists in the text of the statute. Fourth, a conflict among legal norms should be resolved either by reinterpreting the norms, or by ranking them. Fifth, when an earlier norm is incompatible with a later one, the later one should apply. Sixth, general norms should control only in cases not covered by more specific norms.

Reasoning norms, as a kind of legal principle, are useful not only in interpreting legal *rules*, but also in interpreting legal *principles*. Reasoning norms are embedded in legal practice, continually modified, and remade ad hoc to fit moral opinions generated in a Dworkinian manner by those who perform the legal justification function. Reasoning norms are vague, ambiguous, and open to evaluation.⁴² They do not solve particularly "hard" cases of legal interpretation; they apply only in situations where the statute does not expressly forbid them. Even then they may be disregarded only if important reasons for doing so exist. Whether or not to apply reasoning norms in concrete cases requires that one make a creative moral decision.

C. Which Principles Are Principles of Law?

Dworkin asserts that a legal principle must both fulfill the requirements of morality and provide a "good fit" with "institutional history."⁴³ This formulation can be improved upon. Initially, "the sources

⁴² See also Alexy, *Die Logische Analyse Juristischer Entscheidungen*, 14 ARSP BEIHEFT NEUE FOLGE 181, 190 (1980).

⁴³ R. DWORKIN, *supra* note 3, at 340; see *supra* text accompanying note 6.

of the law"—the traditional jurisprudential terminology—should replace "institutional history." Next, instead of using the words "good fit," one should address the complex system of legal-reasoning norms that warrant adapting the content of the law to the legal sources. Finally, one should address the different roles that "pedigree" and morality play in establishing the law-character of the norm system as a whole, the sources of the law, and the content of legal norms.⁴⁴

What is the precise role of legal *principles* in this context? They are connected with the legal-reasoning norms in two ways. First, they reflect the "sense of appropriateness developed in the (legal) profession and the public over time."⁴⁵ To know what moral principle is a principle of law, therefore, requires that the individuals belonging to the legal profession be identifiable. The identification process, in turn, requires reference to the legal sources and rules, and thus to the legal-reasoning norms upon which the interpretation of sources and rules is based. Second, legal principles must be constantly adapted to the interpretation of legal rules, and vice versa. They should be consistent and, to some extent, support each other. In this manner, all three stages of the legal justification of rules will affect the content of the principles.

How does our model apply to the controversy between Dworkin and legal positivists? According to Dworkin, a legal principle must fulfill requirements of morality and provide a "good fit" with "institutional history."⁴⁶ Because Dworkin does not intend to reduce *all* law to principles, he must acknowledge two classes of legal norms: rules, identifiable mainly by reference to factual criteria, and principles, identifiable by moral considerations combined with factual criteria. Many legal posi-

⁴⁴ See *supra* notes 22-42 and accompanying text. Our model is *richer* than Dworkin's. Because it can solve a greater number of problems, it embodies scientific progress in the sense that such progress means creating new theories that can say things the older theories could not. Cf. Aarnio, *On the Paradigm Articulation in Legal Research*, 3 RECHTSTHEORIE BEIHEFT 45, 56 (1981).

Dworkin might answer that our distinctions are fictitious. No one performs legal justification in six distinct steps: (1) following the criteria of law, (2) adapting them to morality, (3) following the source norms, (4) adapting them to morality, (5) interpreting the sources, and (6) adapting them to morality. All these operations certainly are intertwined and repeated many times.

[T]o understand law we have first to take a crude statement of all the rules in the statute book and all the precedents in the case books; then inquire into the motivating principles and values . . . ; then in the light of that modify our initial crude grasp . . . , and so on until we reach . . . "reflective equilibrium."

N. MACCORMICK, *supra* note 2, at 245. Our distinctions, however, are an idealized *model* of legal justification. All idealized models must be corrected by innumerable auxiliary hypotheses, but without idealized models science could not exist. To reject this model would be similar to rejecting a ballistic theory because it cannot foresee the exact movement of a missile in the air and must be corrected by considerations concerning friction.

⁴⁵ R. DWORKIN, *supra* note 3, at 40.

⁴⁶ R. DWORKIN, *supra* note 3, at 340; see also *supra* text accompanying note 6.

tivists agree.⁴⁷ Dworkin, however, attributes to legal positivists the false thesis that *all* legal norms are identifiable *solely* by factual criteria. Similarly, when legal positivists discuss Dworkin's theory, they attribute to Dworkin the false thesis that legal norms are identifiable solely by moral considerations and then refute the thesis. Examples of such misunderstanding abound.⁴⁸

Dworkin's language is too simple. It permits one to emphasize either the role of moral considerations or the role of the factual criteria. Emphasizing the former provokes accusations of ignoring factual criteria, while emphasizing the latter provokes accusations of ignoring morality. Our model, on the other hand, permits precise statements of what functions the moral considerations and factual criteria have in establishing the law-character of the norm system as a whole, the sources of the law, and the content of legal norms. A controversy between Dworkin and the legal positivists arises because the relative importance of moral considerations is greatest with respect to the content of legal norms⁴⁹ and the relative importance of factual criteria is greatest with respect to the law-character of the norm system.⁵⁰ Dworkin primarily addresses the third stage and *apparently* minimizes the importance of factual criteria,⁵¹ while the legal positivists primarily address the first and second stages and *apparently* minimize the importance of moral considerations. If Dworkin and the legal positivists accepted our more sophisticated model, a major part of the controversy would disappear.

⁴⁷ *E.g.*, N. MACCORMICK, *supra* note 2, at 233. A sophisticated legal positivist, MacCormick "thunderously proclaims [that] the law is not value free." He recognizes the importance of either "moral principles" or "principles" and emphasizes the point that "[t]he rules which are rules of law are so in virtue of their pedigree; the principles which are principles of law are so because of their function in relation to those rules." *Id.* Dworkin would answer that this relation is not one of criteria, but one of moral justification. He would assert that it is not true that legal principles must merely fulfill the factual criteria of law established in the rules; instead, the relation to rules must be considered when performing *moral* reasoning to identify the principles of law. MacCormick would probably agree. He would nevertheless also note that this relationship with rules dominates in this reasoning process, while the evaluative component is less important. The expanded model permits a more sophisticated explanation. The importance of the relationship between rules and principles varies at different stages of legal justification.

⁴⁸ *Cf.* Ten, *The Soundest Theory of Law*, 88 MIND 522, 537 (1979) ("[A]lthough it is certain that Dworkin strongly disagrees with the legal positivists, it is not as yet clear whether they should disagree with him.").

⁴⁹ *See supra* text accompanying note 42.

⁵⁰ *See supra* text accompanying notes 27-37.

⁵¹ *But cf.* R. DWORKIN, *supra* note 3, at 326. To some extent, Dworkin is aware of these distinctions. He states:

the judge . . . is faced with a familiar sort of conflict: the institutional right provides a genuine reason, the importance of which will vary with the general justice or wickedness of the system as a whole, for a decision one way, but certain considerations of morality present an important reason against it.

II

JUDICIAL DUTY TO FOLLOW MORAL PRINCIPLES: THE
"RIGHTS THESIS"

The controversy between Dworkin and the legal positivists is even more complex because it involves a *normative* element: the judicial *duty* to follow moral principles. Legal positivism, according to Dworkin, maintains that "[t]o say that someone has a 'legal obligation' is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something In the absence of such a valid legal rule there is no 'legal obligation'" ⁵² It follows that when a judge decides a case that is not governed by a valid legal rule, the judge exercises his discretion. He has no legal obligation to decide the case in any particular manner, because "he is simply not bound by standards set by the authority in question." ⁵³

Dworkin refutes this thesis. He argues that "[i]n most hard cases . . . , judges take [a] different posture They frame their disagreement as a disagreement about what standards they are forbidden or obliged to take into account, or what relative weights they are obliged to attribute to these" ⁵⁴ In their reasoning, judges heed both reasons of authority and moral principles. Judges regard themselves as bound—and according to Dworkin are, in fact, bound—by principles that cannot be discovered solely by "pedigree." The principles that bind judges, instead are justified by a complex reasoning process that seeks a "reflective equilibrium" of the sources of the law, ⁵⁵ traditional reasoning norms, ⁵⁶ and moral considerations.

Dworkin's argument, however, presents some philosophical problems. Assume, for example, that on Monday a judge begins an evaluative, moral, reasoning process that will not result in a formulated principle until Friday. The judge is bound on Monday, according to Dworkin's thesis, to follow his as yet unformulated principle. Evaluative, moral thinking gives the judge cognition of his preexisting duty. Another thesis of Dworkin—his "rights thesis"—asserts that "judicial decisions enforce existing political rights." ⁵⁷ Moral principles, not policies, typically justify judicial decisions in "hard" cases. ⁵⁸ The morally

⁵² *Id.* at 17.

⁵³ *Id.* at 32.

⁵⁴ *Id.* at 71.

⁵⁵ Yet, the courts are not *legally* bound when they rely on entirely "sourceless" considerations. Cf. Raz, *Legal Reasons, Sources and Gaps*, in *LAW AND THE FUTURE OF SOCIETY* 197, 202 (1979) ("When an action is neither legally prohibited nor legally permitted there is a legal gap."); Wellman, *Moral Judgments, Judicial Decisions and the Law*, IVR World Congress (1979) (Paper No. 092).

⁵⁶ See *supra* text accompanying notes 27-42.

⁵⁷ R. DWORKIN, *supra* note 3, at 87, 31-35, 68-71, 82-90.

⁵⁸ *Id.* at 96-97.

justified principles "are propositions that describe rights."⁵⁹ Rights, according to Dworkin, "are creatures of both history and morality: what an individual is entitled to have . . . depends upon both the practice and the justice of . . . political institutions."⁶⁰ Dworkin thus concludes that judges use evaluative, moral reasoning to discover preexisting rights.⁶¹ I will argue that this thesis presupposes a controversial epistemology and ontology.⁶²

Dworkin's "rights thesis" is controversial. Counter examples demonstrating that judges often base decisions in "hard" cases on policy

⁵⁹ *Id.* at 90. "Individuals have rights when . . . a collective goal is not a sufficient justification for denying them what they wish . . ." *Id.* at xi; *cf. id.* at 269. MacCormick, incidentally, has reconstructed rights as "goods normatively secured to individuals." MacCormick, *Children's Rights: A Test Case for Theories of Right*, 62 ARCHIVES FOR PHIL. OF LAW & SOC. PHIL. 305 (1976). Dworkin has denied that we have a general right to liberty. See R. DWORKIN, *supra* note 3, at 266-74. We have only the right to some specific, distinct liberties. "[T]he difference between cases covered and those not covered by our supposed right to liberty [is not] a matter of degree," because "the ordinary criminal code reduces choice for most men more than laws which forbid fringe political activity." *Id.* at 270. The central concept of Dworkin's argument is "the concept not of liberty but of equality." *Id.* at 272. He has proposed that "individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights." *Id.* at 273-74. These equality-based rights exist for Dworkin even when the democratic majority vote is against them, because "democracy cannot discriminate, within the overall preferences imperfectly revealed by voting, distinct personal and external components, so as to provide a method for enforcing the former while ignoring the latter." *Id.* at 276. One of Dworkin's central theses is that the government should pay attention to our personal preferences but ignore external preferences. *Id.* Preferences are personal if "they state a preference for the assignment of one set of goods or opportunities" to the individual, and external if "they state a preference for [the] assignment of goods or opportunities to others." *Id.* at 275.

I strongly disagree with the thesis that equality constitutes the most fundamental right.

Freedom of speech, for example, may need to be defended against those who would abridge or suppress it as dangerous to their prosperity, security, or other personal interests. We cannot escape, as Dworkin's purported derivation of such rights from equality seeks to do, the assertions of the value of such liberties as compared with advances in general welfare, however fairly assessed.

It is in any case surely fantastic to suppose that what, for example, those denied freedom of worship . . . have chiefly to complain about is not the restriction of their liberty . . . but that they are not accorded *equal* concern and respect [T]he word "equal" is playing an empty but misleading role The evil is the denial of liberty or respect; not *equal* liberty or *equal* respect

H.L.A. HART, *Between Utility and Rights*, in *THE IDEA OF FREEDOM: ESSAYS IN HONOR OF ISIAH BERLIN* 77, 96-97 (A. Ryan ed. 1979). The importance attached to a given liberty is the product of a reflective equilibrium of many individual and transpersonal values. This reflective equilibrium must be acceptable within a given culture. Acceptability can be based on a complex theory of rationality. A. PECZENIK, *supra* note 37, at 84-103.

⁶⁰ R. DWORKIN, *supra* note 3, at 87.

⁶¹ *But cf. id.* at 293 ("[A] plaintiff has a certain legal right without supposing that any rule or principle that already 'exists' provides that right."). This is a puzzle. If the right already exists and if the judicial obligation to enforce the right already exists, does not the principle that "describes" the right already exist as well?

⁶² See *infra* text accompanying notes 70-77.

grounds instead of on rights and principles abound.⁶³ The Swedish Supreme Administrative Court ("Regeringsrätten") relies on political considerations when it decides the extent to which a municipality may subsidize private enterprise.⁶⁴ Dworkin replies that the counter examples are, in fact, arguments of principle, not of policy.

The difference between an argument of principle and an argument of policy . . . is a difference between two kinds of questions that a political institution might put to itself, not a difference in the kinds of facts that can figure in an answer. If an argument is intended to answer the question whether or not some party has a right to a political act or decision, then the argument is an argument of principle, even though the argument is thoroughly consequentialist in its detail.⁶⁵

The key to understanding Dworkin's theory lies in the phrase "questions that a political institution might put to itself" and the word "intended." Dworkin apparently says that regardless of what argument judges present, their reasoning is based on what they presume or intend the principles to be. If they intend to discover rights, they discover rights.

A. Claims Based upon Conceptual Presuppositions versus Justificatory Procedure

Dworkin assumes that legal justification *is* what the lawyers who perform the analysis *claim* it is. They *claim* that certain rights and the judicial obligation to enforce those rights exist before the judicial decision that recognizes their existence is made; both the rights and the judicial obligation, therefore, *did exist* before the judge made his decision. Analysis of the *procedure* of legal justification, however, leads to a different conclusion.

1. *Claims Revealed by Judicial Attitudes and Legal Concepts: Judicial Decisions Reached by Applying Preexisting Law*

Courts and authorities must follow the law, which essentially consists of statutes, precedents, and other sources. Courts in many jurisdictions, therefore, have a legal duty to base their reasoning upon legal sources no matter how obscure.⁶⁶ If a court decided a case with neither explicit nor implicit references to preexisting sources of the law, then most lawyers would not consider the thinking underlying the decision to

⁶³ E.g., Greenawalt, *Policy, Rights and Judicial Decision*, 11 GA. L. REV. 991, 991-99 (1977).

⁶⁴ E.g., cases at RÅ 1975:44; RÅ 1972 C76; RÅ 1966:7; RÅ 1962:1; RÅ 1960:38; RÅ 1960:15; RÅ 1940:8. RÅ stands for "Regeringsrättens Årsbok," the Yearbook of the Supreme Administrative Court of Sweden.

⁶⁵ R. DWORKIN, *supra* note 3, at 297.

⁶⁶ Cf. A. PECZENIK, *supra* note 40, at 62-63. The most extreme example is the French exegetical school, which believed that all legal questions can and ought to be answered on the basis of enacted law. K. OLIVECRONA, *LAW AS FACT* 35 (2d ed. 1971).

be "legal."⁶⁷ Moreover, judicial decisions enforce, and ought to enforce, rights. Dworkin emphasizes the judicial function of enforcing preexisting rights and deemphasizes the requirement that they follow the legal sources. His theory, however, applies in principle to the lawyer's conceptual presuppositions and claims.

2. *Conclusions Based on Analysis of the Procedure of Legal Justification: Judicial Decisions Are Not a Mere Application of Preexisting Law*

To establish, or discover, the law—particularly the content of rights and the judicial duty to enforce those rights—and to justify decisions in the "hard" cases, courts must both identify the applicable sources of law and perform moral evaluations. Because of their evaluative role, *one cannot regard a court's legal justification as merely producing true or false descriptions of legal sources.* For the same reason, it is inaccurate to regard a court's legal justification as merely true or false descriptions of how individuals behave, what future courts will do, the content of established legal ideology, the social acceptance of the law, or the historical or hypothetical intent of the legislator.⁶⁸ But can one regard any of these as true descriptions of "the law" or of rights? The procedure of establishing rights, judicial duties, and, generally speaking, the valid law, has a special epistemological character. It presupposes a series of evaluative, moral considerations corresponding to the three justificatory stages: from the criteria of law to the law-character of a normative system; from the normative system to the legal validity of definite sources of the law; and from the sources to the determination of the content of legal rules and principles.⁶⁹ Can evaluative thinking give the judge cognition of the law?

Dworkin does not focus on the procedure of legal justification. Instead, he bases his conclusions on conceptual presuppositions and judicial claims. Although many modern philosophers also emphasize claims and presuppositions instead of procedures, in some cases, one cannot take their assertions seriously. If, for example, a witch doctor gives a patient herbs to exorcise a demon and the herbs cure him because they happen to be bactericidal, the truth is that the bactericidal herbs cured the patient, and not the driving out of the demon. The assumptions and beliefs of the witch doctor and his patient do not matter because we have independent proof that those presuppositions are wrong. Herbs exist, demons do not. In other words, the method of presupposition is a valuable tool for conceptual analysis, but its philosophical conclusions

⁶⁷ Cf. N. MACCORMICK, *supra* note 2, at 53.

⁶⁸ Cf. Aarnio, Alexy & Peczenik, *supra* note 21, at 430-34.

⁶⁹ See *supra* notes 27-42 and accompanying text.

must be checked by independent means, including among other things, an examination of the justificatory procedure.

B. Epistemology and Ontology of Rights and Judicial Duties

According to Dworkin, an evaluative, reasoning process makes judges cognizant of preexisting rights and of the preexisting judicial obligation to enforce those rights.⁷⁰ This thesis presupposes a controversial epistemology and a controversial ontology.

From the epistemological perspective, Dworkin's theory presupposes that *cognition can be evaluative*. Dworkin, in other words, implies that practical and evaluative, moral *considerations* can give us *knowledge* about preexisting rights and judicial duties. Furthermore, his theory presupposes the cognitivist view that value statements—those, for example, that reveal what rights we have—are true-or-false propositions, not merely expressions of subjective attitudes. If, on the other hand, one assumes that value statements are neither true nor false, one cannot conclude that legal justification simultaneously is evaluative and yields true knowledge.

Another epistemological problem arises because Dworkin's theses presuppose that the justifiability of knowledge depends on the knowing subject's institutional position. Agreement on rights and judicial obligations in concrete cases is often impossible to reach. Judges may have one view on this matter, while private individuals may have another. According to Dworkin, only the judge's view matters. But how can cognition of already existing objects depend solely upon whether the cognizing individual is or is not an authorized judge?⁷¹

From an ontological perspective, the Dworkinian rights and judicial duties are too *complex*. Some legal realists have written that even rights clearly established by the legal sources—my right, for example, to own my house—do not really exist, because the term "a right" is merely a word that lacks semantic reference; it fails to denote anything real.⁷² Whether unwritten rights in Dworkin's sense exist is even more doubtful, because they are more complex and more controversial than the clearly established legal rights. Their complexity is illustrated by examining their relationship with "collective goals," "sufficient reasons," "history," and "morality."⁷³ "Collective goals" presuppose complex relations amongst individual goals. "Sufficient reasons" presuppose precise justifications of specific acts. "History" and "morality" are also

⁷⁰ R. DWORKIN, *supra* note 3, at 87-88.

⁷¹ See also Munzer, *Right Answer, Pre-existing Rights and Fairness*, 11 GA. L. REV. 1055, 1060-65 (1977) (discussing point of "classifying rights as preexisting rather than newly created").

⁷² A. ROSS, *supra* note 30, at 174; see also K. OLIVERCRONA, *supra* note 66, at 177-81.

⁷³ See *supra* text accompanying note 60.

complex relational concepts. A "right" in Dworkin's sense thus presupposes complex relationships among many complex relationships, some of which involve values. Neither complexity nor involvement with values, however, *must* preclude the existence of "rights."

Are Dworkin's "rights" so complex or so intertwined with values that they are nonexistent? This ontological question defies a simple answer because each ontology is, or presupposes, an underlying theory that defines concepts such as "real" and "existence."⁷⁴ If the underlying theory is based on common sense and ordinary language, it is usually vague, and permits too many interpretations and too many ontological consequences to arise. Among these ontological doctrines, at least two must be considered. One is based on Hagerstrom's assumption that what cannot be placed in time and space does not exist. Because propositions concerning rights cannot be placed in time and space, they do not exist.⁷⁵ The second admits institutional facts such as chess, money, states, and rights, which can be defined only by reference to some underlying norm, such as chess rules or legal norms.⁷⁶

Dworkin's theory of preexisting rights is clearly incompatible with Hagerstrom's ontology. In fact, whether the ontology of institutional facts is complex enough to grasp their mode of existence is open to doubt. Preexisting rights are, after all, deemed to exist before the institutional sources of the law mention them. Dworkin, however, surprisingly states that his "characterization of a right . . . does not suppose that rights have some special metaphysical character . . ."⁷⁷ Given Dworkin's characterization, all the talk of preexisting rights and judicial duties is only a *metaphor* with which Dworkin says only that judges *claim* the preexistence of the rights and employ this claim in their reasoning; whether the claim is true or false is another question. If, on the other hand, Dworkin, despite his disavowal, really means that the claim is true, that the rights and judicial duties do exist before the judicial decisions, then he must admit that the rights are ontologically more complex than brute facts in space and time.

Adopting an evaluative epistemology and complex ontology, in any case, requires accepting a total philosophical system. Reasons concern-

⁷⁴ W.V.O. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 53-54 (1969); cf. W.V.O. QUINE, *FROM THE LOGICAL POINT OF VIEW* 19 (2d ed. 1961).

⁷⁵ *E.g.*, Hägerström, *Selbstdarstellung*, 7 *DIE PHILOSOPHIE DER GEGENWART IN SELBSTDARSTELLUNGEN* 111-54 (R. Schmidt ed. 1929).

⁷⁶ *E.g.*, N. MACCORMICK, *LAW AS INSTITUTIONAL FACTS* 2-6 (1973); J. SEARLE, *SPEECH ACTS* 50-53 (1969); Anscombe, *On Brute Facts*, 18 *ANALYSIS* 69, 69-72 (1958); Weinberger, *Tatsachen und Tatsachenbeschreibungen*, in *SOZIALPHILOSOPHIE ALS AUFKLÄRUNG, FESTSCHRIFT FÜR ERNST TOPITSCH* 173-87 (1979).

However, the validity of the norms on which institutional facts depend might presuppose some institutional facts; a problem thus arises of how to avoid a vicious circle.

⁷⁷ R. DWORKIN, *supra* note 3, at xi.

ing a practice as special as legal justification alone cannot support evaluative epistemology and complex ontology.

C. The Quasi-Cognitive Character and the Autonomy of Legal Justification

The theory of legal justification presented here is different; it avoids the epistemological and ontological difficulties inherent in Dworkin's model. Legal justification has a *quasi-cognitive* character. It *claims* to be a cognition of the law and in some cases it claims to be a cognition of rights, but an examination of its *procedure* reveals that it is not purely cognitive. Legal justification expresses an acceptable compromise between two distinguishable components. The first component is a true scientific description of the sources of the law and, therefore, is a true description of established evaluations. The second component is a continual process of creating new evaluations.⁷⁸ The regulative idea of truth undoubtedly governs the first component; the description should be true, not false. Whether the regulative idea of truth governs the second component is controversial. Cognitivists would argue that "evaluating" means discovering the truth about objective values; noncognitivists, however, would deny this assertion. Although I need not rely on any cognitivist or noncognitivist assumptions, this theory of legal justification would certainly be more attractive to noncognitivists than cognitivists.

The practical difference between this theory and Dworkin's is that Dworkin reduces legal justification to moral justification, while this theory emphasizes the autonomy of legal justification. Individual judicial decisions, as a rule, are justified only in a contextually sufficient manner. The contextually sufficient justification is a compromise between description and evaluation. Whether this compromise is right or wrong from the viewpoint of deep justification remains to be seen. While the description of the legal sources is deeply justifiable as an attempt to tell the truth, the creation of evaluations is deeply justifiable as a means to fulfill some demands of rationality and because it is so intertwined with

⁷⁸ Cf. A. PECZENIK, *supra* note 40, at 206; A. PECZENIK, WARTOŚĆ NAUKOWA DOGMATYKI PRAWA 72 (1966); Peczenik, *Empirical Foundations of Legal Dogmatics*, 12 LOGIQUE ET ANALYSE 32, 43 (1969), reprinted in A. PECZENIK, *ESSAYS IN LEGAL THEORY* 56 (1970); Peczenik, *Doctrinal Study of Law and Science*, 17 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 127, 138 (1967), reprinted in A. PECZENIK, *ESSAYS IN LEGAL THEORY* 36 (1970). This antinomy between the claim and the impossibility of fulfilling the claim is a common feature of epistemological problems. We claim, for example, that our beliefs are true, and the concept of knowledge presupposes this claim. We know, however, that we might be wrong; our knowledge is never certainly true, but only justified or corroborated. The juristic cognitive claims, on the other hand, are, for the reasons already discussed, even more controversial than the general claim regarding truth of knowledge.

our way of life.⁷⁹ The compromise itself between description and evaluation promotes the rule of law (*Rechtssicherheit*) which exists when legal decisions are simultaneously predictable and morally acceptable. The value of promoting the rule of law can be based on the "Hobbesian" idea that it is morally preferable for a society to establish an institutional legal order that sometimes leads to morally incorrect conclusions, than to require society's actors to individually evaluate each of the complex situations that arise in modern society. Because of human limitations, the second alternative would lead to less consensus, less rationality, less efficiency, and more violence. Consequentialist moral reasoning thus justifies imposing limits on individual morality and favors institutionalized law.⁸⁰ Accordingly, from this perspective, it is morally good to establish the sources of the law. It is also morally good to establish a legal discourse that expresses the compromise between adhering to the sources and creating new moral evaluations. Finally, it is morally good for a legal system to have authoritative judicial decisions because not even the most satisfactory legal discourse can solve all social conflicts.⁸¹ On its face, therefore, each legal norm, regardless of content, is justified morally in the following *weak* sense: it belongs to an institutional legal order, and any such order is, on its face, morally preferable to no such order at all.

These reflections elucidate the sense of the important assumption that, from the legal point of view,⁸² the norm ("*N*") ought to be observed. This expression presupposes two conditions. First, it assumes that one *has* performed a contextually sufficient legal justification of *N*, in light of the legal transformational norms such as the source norms and reasoning norms. Second, it presupposes that one *can* perform a deep justification of *N*. Because he neglects the contextually sufficient legal justification, Dworkin has not grasped the manner in which it serves as a compromise between the description of legal sources and the process of moral evaluation. As a result, Dworkin has not needed to address the deep justification of this compromise and has failed to see

⁷⁹ Cf. A. PECZENIK, *supra* note 37, chs. 4, 5; Aarnio, Alexy & Peczenik, *supra* note 21, at 257-59.

⁸⁰ Some reasons which are necessary to justify the *moral* obligation to observe norm *N* may thus be omitted in the context of its *legal* justification. Cf. Peczenik, *On the Nature and Function of the Grundnorm*, 2 RECHTSTHEORIE BEIHEFT 279, 286 (1981).

⁸¹ Cf. Alexy, *Die Idee einer Prozeduralen Theorie der Juristischen Argumentation*, 2 RECHTSTHEORIE BEIHEFT 177, 186-87 (1981); Aarnio, Alexy & Peczenik, *supra* note 21, at 257, 273-76.

⁸² This concept of the legal point of view is *stronger* than Joseph Raz's. Raz has pointed out that some "statements of legal rights and duties . . . are detached, that is they do not assert the existence of such rights or duties but only their existence from the legal point of view." Raz, *Legal Validity*, 63 ARCHIVE FOR PHIL. OF LAW & SOC. PHIL. 339, 352 (1977). Raz has also noted that "a detached [legal] statement does not carry the full normative force of an ordinary normative statement . . . I am not implying that lawyers . . . do not believe in the validity (i.e., justification) of the law with which they deal. Only that often they do not commit themselves to such beliefs when acting in their professional capacity." *Id.* at 346.

the very distinction between the contextually sufficient justification expressed *in* this compromise and the deep justification *of* this compromise. Furthermore, he has not needed to describe the different forms this compromise takes at the three different stages of legal justification. Dworkin's theory thus prevents one from seeing just how complex and how important legal justification is.

D. Rights, Legal Tradition, and Judicial Discretion: A Digression

Up to this point, I have ignored the institutional component of Dworkin's "rights thesis." In his opinion, if judges were not required to discover the preexisting rights, they would be free to act contrary to justice and to legislate retroactively.⁸³ Dworkin would be correct if the only alternative to his method of deep moral justification of judicial decisions in "hard" cases was unrestricted judicial discretion. The theory presented here, however, provides another alternative: the complex system of the contextually sufficient and deep justifications in the law.

While it is true that judicial reasoning has the structure of "reflective equilibrium," among the components of this equilibrium are some established source norms and reasoning norms⁸⁴ that Dworkin's theory more or less neglects. These norms concern the law-character of the norm system, the sources of the law, and legal reasoning. Although these norms do not eliminate the risks inherent in judicial discretion, they do keep the risks within acceptable limits. The psychological influence of the *claim* that there are preexisting rights is, of course, also an important factor.⁸⁵ I have already stated that confidence in the traditional juristic source norms and reasoning norms promotes the rule of law. Such confidence, in fact, promotes the rule of law more efficiently than confidence in Dworkin's rights-oriented method.

III

THE RIGHT-ANSWER THEORY

Another important concept in Dworkin's theory is that the question, what is the law on this issue, always has only one right answer.⁸⁶ Dworkin "condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right."⁸⁷ In his opinion, a judge should apply the "constructive

⁸³ R. DWORKIN, *supra* note 3, at 87-90; cf. MacCormick, *Dworkin as Pre-Benthamite*, 87 PHIL. REV. 585, 597, 601 (1978).

⁸⁴ See *supra* text accompanying notes 38-42.

⁸⁵ Cf. K. OLIVECRONA, *supra* note 66, at 135-40, 186-216.

⁸⁶ R. DWORKIN, *supra* note 3, at 81, 272-90. Moreover, the judge never has discretion in the strong sense; he always has a duty to decide the case one way rather than another. See *id.* at 31-35, 68-71.

⁸⁷ *Id.* at 87.

model"; that is, he must accept precedents "as specifications for a principle that he must construct, out of a sense of responsibility for consistency with what has gone before."⁸⁸ Only Hercules could accomplish so much. Yet, as MacCormick points out, Dworkin believes that "every judge can and should try to get as close to Herculean competence as he can."⁸⁹ Mackie explains the Herculean operation in the following terms:

Some parts of the law in a certain jurisdiction are settled and relatively uncontroversial, in the constitution or statutes or precedents. Hercules uses these as data, seeking the theory, in terms of further rights and principles, which best explains and justifies this settled law. Having developed this theory, he then applies it to the hard case.⁹⁰

Dworkin believes that Hercules would, in theory if not in practice, always find the one right answer. He says that the probability of "a tie"—a situation in which the reasons are perfectly balanced, thereby making a single best answer theoretically impossible—is so low that it can be ignored.⁹¹ This doctrine, however, is too simple.

Many legal *concepts*, "dispute," "reasons," and "justification," for example, presuppose legal discourse. The concept of "discourse" presupposes opinions that are right or wrong. Because our concepts show that a discourse on "hard" legal questions is possible, we assume that answers to such questions are right or wrong. This assumption, necessary for a meaningful legal discourse, is *weaker*, however, than Dworkin's right-answer thesis. All we need in each legal case is the opportunity to ask which, if any, solution is right. The answer may be strong (solution x is right); weak (one of the solutions x^1 through x^n is right, but one cannot tell which one); relative (solution x is right from the point of view of a given group of people, or in view of some reasoning norms); both weak and relative; or negative (no solution is right).

One cannot think about legal matters without admitting the *question* of a right answer, but one need not assume that a unique and absolutely right answer exists. Without the *question*, moral and legal discourse would be impossible, because if one does not argue that one's views are morally or legally right, discourse has no purpose. In this weak sense, all individuals, not only Hercules, possess the *regulative idea* demanding that one shall look for the right answer. In a similar, but stronger sense, the regulative concept of *truth* gives purpose to, among others, scientists, who assume that a scientific proposition is either true

⁸⁸ *Id.* at 161.

⁸⁹ MacCormick, *supra* note 83, at 593; *cf.* R. DWORKIN, *supra* note 3, at 105-23.

⁹⁰ Mackie, *supra* note 25, at 4; *cf.* R. DWORKIN, *supra* note 3, at 105-23.

⁹¹ R. DWORKIN, *supra* note 3, at 286. Dworkin believes that the probability is so low because "the legal system . . . is very advanced, and is thick with constitutional rules and practices, and dense with precedents and statutes." *Id.*

or false.⁹²

Although the presence of legal discourse presupposes an attempt to ascertain the right answer, the *procedure* of legal discourse shows that there are no effective mechanisms for *finding* the right answer to all "hard" legal questions. An *individual* often arrives at what he considers the best answer, given *his* perception at that point in time; he may also claim that the answer is "intersubjectively" right.

The validity of his claim, however, depends on whether sufficient criteria of acceptability for the answer are present. The sources of the law, the traditional source norms, and reasoning norms provide some criteria, but these criteria are not perfect. Several factors explain, in part, why two judges do not always reach the same "right" answer.

First, ordinary *language* is vague, ambiguous, and evaluatively open. The concepts that two different judges use might differ.

Second, legal justification presupposes *nondeductive* justificatory stages. It presupposes the sequence of arguments from establishing the law-character of a norm system, through recognizing the sources of the law that are valid in this system, to concluding what the content of the law should be. At each stage, both established criteria ("pedigree") and moral considerations are relevant. If the "pedigree" are viewed as premises of legal justification, moral considerations reveal that the sequence from establishing the law-character of the norm system to determining the content of the law is *not deductive*. The sequence, in other words, contains justificatory "jumps."⁹³ Although difficult to verify, one rea-

⁹² Cf. A. PECZENIK, *supra* note 37, at 93-95, 99; R. ALEXY, *supra* note 36, at 165-68, 264-68.

⁹³ A justificatory "jump," or a transformation, occurs from *p* to *q* if, and only if, the following conditions are fulfilled: (1) truth (or validity) of *p* is proffered as a sufficient reason for affirming *q*; and (2) *p* does not deductively entail *q*. See Aarnio, Alexy & Peczenik, *supra* note 21, at 136-58; cf. A. PECZENIK, *supra* note 37, at 3-4, 70-73; Peczenik, *Non-Equivalent Transformations and the Law*, RECHTSTHEORIE BEIHEFT 1, 163-76 (1979). In this article, I can only present a few of the main points of the complex theory of justificatory "jumps." Human knowledge and justified evaluations are often based on "jumps." The "jump" from propositions about individual facts to general theories is an example. Legal justification involves, not only the ordinary "jumps," but also specific "jumps" resulting from mutual adaptation of description and moral evaluation.

Not only are there regularly repeated acts of transformation, but there are also transformational norms, that is, *material-inference norms*. Cf. S. TOULMIN, *THE USES OF ARGUMENT* 98, 109-13 (1976). Material-inference norms are not analytical, so they cannot be justified solely on logical grounds and postulates of the legal language. The transformational norm for the justificatory "jump" into the law, that is, the "jump" from the (insufficient) criteria of law to a conclusion about the law-character of a normative system can be expressed as follows: If a number of social facts exist and certain normative, evaluative requirements are fulfilled, then the normative system *N* is a legal system. This transformational norm justifies the great step from a set of facts and a nonlegal "ought" (Sollen) to a legal "ought." The source norms and other reasoning norms are also transformational norms for two justificatory "jumps" *inside* the law: namely, the source transformation and the legal-norm transformation. None of these are analytic *sensu stricto*, but if one simultaneously refuted many of such norms and still tried to perform a *legal* justification, he would have to either think incoherently or change

sonably may hypothesize that the greater the number of nondeductive "jumps" in an inference process, the less certain are its conclusions.

Third, more than one right *political* ideology exists. Legal reasoning is "dense" not only with precedents, but also with competing ideologies. When each ideology suggests a different interpretation of precedents, which interpretation is best?⁹⁴ MacCormick states that

this is not a matter which can be decided in a theory-independent way, nor can the [subsequent] question which is really best among the theories which people think best be answered in a theory-independent way Hercules can finish his job only at the far end of an infinite regress[ion].⁹⁵

Because legal and political matters often are intertwined in "hard" cases, a liberal judge might find one right answer, a conservative judge another.

Fourth, *moral* discourse is based upon a balancing of considerations that constitute a "reflective equilibrium."⁹⁶ The balance, however, cannot be expressed convincingly in a precise priority order of values that is valid for all situations. Priority orders have limited and changing spheres of application. They are "heterarchies," irreducibly ad hoc, not hierarchies.⁹⁷ The "reflective equilibrium" of *general* and *individual*

many of the legal concepts he uses. The concepts "valid law" and "the legal ought" are related to established transformational norms and to ad hoc transformational norms, concerning (a) the law-character of a norm system, (b) the sources of the law, and (c) the content of legal norms. Some of these conceptual relations are logically necessary, while some are detectable only through justificatory "jumps."

Some logicians have proposed the thesis that if a transformational norm regulates the justificatory step in question, there is no "jump." I disagree. A corresponding premise might replace a transformational norm. See E. NAGEL, *THE STRUCTURE OF SCIENCE* 138 (1961). In this manner justificatory "jumps" are formally converted into logical deductions. From the *justificatory* perspective, however, the "jump" remains because, among other reasons, the conclusion of legal reasoning is often more acceptable than the premise, or transformational norm, supporting it. By constructing alternative sets of ad hoc premises or transformational norms of this kind, one can *formally* eliminate a "jump." When these alternative sets are mutually inconsistent, one may or may not be able to construct a nonarbitrary priority order. One can support a given construction of a statute, for example, by adding premises about either the "intent" of the legislator or about the statute's consequences. Adding premises which *formally* eliminate "jumps" creates some logical problems; a formal method solves these. See C. Alchourron & D. Makinson, *On the Logic of a Theory Change: Contraction Functions and Their Associated Revision Functions*, 58 *THEORIA* 14 (1982).

⁹⁴ Oker-Blom has pointed out that Dworkin's choice of the internal (judicial) point of view made the theory of a right answer plausible. See Oker-Blom, *supra* note 21, at 306, 312. Many of his critics, however, choose the external viewpoint of a commentator on the legal-reasoning process. The internal viewpoint, in my opinion, is a necessary, but not sufficient, condition of correctness of Dworkin's theory.

⁹⁵ See MacCormick, *supra* note 83, at 596. See generally N. MACCORMICK, *supra* note 2, at 254-55.

⁹⁶ See J. RAWLS, *A THEORY OF JUSTICE* 20 (1973).

⁹⁷ Cf. H.N. CASTANEDA, *THINKING AND DOING* 303 (1974) ("mostly unknown motivational hierarchy"); Heather, *Legal Structures for Law Machines*, 1 *ARTIFICIAL INTELLIGENCE AND LEGAL INFORMATION SYSTEMS* 117, 121-26 (C. Ciampi ed. 1983) ("heterarchies").

moral considerations is, to a degree, also ad hoc. One can advocate, therefore, general value propositions and norms by demonstrating that individual evaluations support them, *and* one can advocate individual evaluations by demonstrating their consistency with the general ones. If consistency is nonexistent, it is sometimes easier to modify an individual evaluation and sometimes easier to modify the general value propositions and norms. Similarly, in science, concrete data and individual theories also adapt to each other. Scientific paradigms, however, replace each other, while moral "paradigms" do not. Instead, they compete and coexist during long historical periods. Moreover, if counterexamples are avoided, one's moral "theory" tends to be imprecise; one's moral theory becomes, in fact, so imprecise that the individual does not know in advance when he must switch from one moral "theory" to another.⁹⁸ Because legal and moral matters are intertwined in "hard" cases, the legal justification inherits the ad hoc quality of moral justification, regardless of the existence of legal sources that confer *relatively* greater certainty. Consequently, different individuals at different times have different criteria of rightness.

Fifth, nothing in the moral sphere appears as certain as some theoretical certainties. (We can assume, for example, that one who denies that he is alive is even less sane than a person who denies that one ought not to kill.) Consequently, when the legal justification is intertwined with the moral one, it is not expected to be as certain as in the natural sciences.

Sixth, the class of factors relevant to the determination of the right answer to moral and legal questions is undefinable. Neither the class of relevant moral reasons nor the class of the sources of the law which *may* be used in the legal justification is precisely defined.

Seventh, the reasons for and against a given answer might be incommensurable. Even within a single ideology, "a single scale of measurable values" is unavailable. "[E]valuation," for example, "involves *multiple* criteria, which must include at least 'justice,' 'common sense,' 'public policy,' and 'legal expediency.'"⁹⁹

[Dworkin's] argument assumes too simple a metric for the strength of considerations, that such strengths are always commensurable on a linear scale, so that the strength of the case for one side must be either greater than that of the case for the other side, or less, or else they must be equal in the sense of being so finely balanced that even the slightest additional force on either side would make it the stronger.

⁹⁸ See also Nowell-Smith, *A Theory of Justice?*, 3 PHILOSOPHY OF SOCIAL SCIENCES 315, 316 (1973) ("The Aristotelian approach starts with the premise . . . that the world in which we act is a world of 'things capable of being otherwise than they are' In this untidy world . . . universal knowledge . . . is not to be had").

⁹⁹ N. MACCORMICK, *supra* note 2, at 252-53 (emphasis added); cf. MacCormick, *supra* note 83, at 588.

But in fact considerations may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other, and yet they are not finely balanced.¹⁰⁰

One must *weigh* the relevant factors against each other. The result of weighing a pair of factors depends on an everchanging influence of an *indefinite number* of other factors. The weighing of the plaintiff's and the defendant's rights in torts, for example, might depend on economic and social considerations. The result might also depend on *the order* in which the parties make their presentations. Finally, the result might depend on consequentialistic considerations regarding the *future* effects of the decision. The uncertainty of the future, however, creates more uncertainty when weighing morally and legally relevant factors.¹⁰¹

Eighth, *legal history* shows that the best answers, and indeed the best interpretative methods, change with time. This implies that a "right" answer on Friday may be wrong the following Monday.

Many legal concepts, in short, presuppose that one should search for "one right answer" in "hard" cases, but they do not presuppose that one can find it. But can one still say that *there is* only one right answer, even if nobody can find it? (Does not science, for example, assume that only one answer to all questions is true, even if it is impossible to determine?) If so, the whole controversy is *metaphysical* and cannot be definitively solved, either through analysis of legal concepts or a theory of legal justificatory procedures. We assume that only one answer to *descriptive* (theoretical or scientific) questions is true and, in my opinion, we must assume that the true answer corresponds to the actual, real world. Does Dworkin's assumption of the right answer to all *legal* questions imply that the right answer corresponds to actual (real and preexisting) rights? If so, I disagree because this view implies a controversial ontology.¹⁰² It seems more natural to assume that the claim of objectivity has less force in moral than in theoretical matters. The uncertainty inherent in the procedure of finding the right answer is not accidental. Philosophical analysis of the expression "the right answer to moral or legal questions" demonstrates that the right answer is the *acceptable* answer; we cannot imagine what else the right answer could be. The notion of acceptability, however, depends upon individual norms: acceptable means acceptable *to someone*, and different groups of people, and different people within these groups, may have different standards of acceptability.¹⁰³ Judges, for example, certainly *argue for the* answer

¹⁰⁰ Mackie, *supra* note 25, at 9.

¹⁰¹ R. Hilpinen, *Normative Conflicts and Legal Reasoning* (1982) (unpublished manuscript; can be obtained from author at Turun Yliopisto, SF 20500 Turku, Finland).

¹⁰² See *supra* notes 70-77 and accompanying text.

¹⁰³ Aarnio, *On Truth and the Acceptability of Interpretative Propositions in Legal Dogmatics*, 2 RECHTS THEORIE BEIHEFT 33 (1981).

they think the best.¹⁰⁴ Although judges may believe that they *discover* this answer, in fact, they "legislate";¹⁰⁵ they choose one of many equally justifiable alternative answers. Because Dworkin has not shown that all people share the same standards of acceptability, he has not shown that there is only one right answer to any legal question. While a right answer may exist in some cases, in others, many alternative answers are equally right. Only our form of life limits the variety of right answers.¹⁰⁶

CONCLUSION

Dworkin's theory is too simple from the jurisprudential viewpoint and too controversial from the philosophical viewpoint. From the perspective of jurisprudence, Dworkin fails to appreciate the importance of the distinction between the contextually sufficient and the deep legal justifications. Consequently, he overlooks the complexity of the former. In particular, Dworkin fails to realize that the contextually sufficient justification represents a compromise between the description of the legal sources and moral evaluation; the compromise is made at each of the three different stages of justificatory procedure. Moreover, Dworkin overemphasizes the importance of moral rights and neglects the importance of institutionalized laws.

From the philosophical perspective, Dworkin's theory is based on an oversimplified analysis of claims that concepts such as "legal justification" presuppose. Instead of merely claiming that legal justification presupposes the *question*, what is the right answer, he claims that it presupposes the *existence* of the right answer. Dworkin concludes that one right answer *exists*. Dworkin must, therefore, adopt the assumption of value-objectivism and, implicitly, a controversial ontology of rights.

¹⁰⁴ R. DWORKIN, *supra* note 3, at 282.

¹⁰⁵ Mackie, *supra* note 25, at 7.

¹⁰⁶ A. AARNIO, ON LEGAL REASONING 126-29 (1977) (Wittgenstein's concept introduced to legal theory).