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KENNETH EINAR HIMMA

FINAL AUTHORITY TO BIND WITH MORAL MISTAKES: ON THE EXPLANATORY POTENTIAL OF INCLUSIVE LEGAL POSITIVISM★

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While every positivist accepts that there can be legal systems without moral criteria of legality, exclusive and inclusive positivists disagree on whether there can be legal systems *with* moral criteria of legality. Exclusive positivists accept the Sources Thesis, according to which it is a conceptual truth that the existence and content of law can always be determined by reference to its sources without moral argument. Inclusive positivists accept the Incorporation Thesis, according to which there are conceptually possible legal systems in which the legality criteria "incorporate" substantive moral norms in the following sense: satisfaction of those norms is a necessary or sufficient condition for a proposition to count as law.

The Incorporation Thesis appeals to many positivists because it seems to provide the most perspicuous positivist framework for understanding the role that moral principles play in judicial decision-making in developed legal systems. In particular, the inclusivist framework seems to permit a more natural explanation

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of the role moral principles play in adjudicating hard issues of law. Whereas the exclusive positivist must explain those principles as constraints on judicial discretion, the inclusive positivist can explain them as defining necessary or sufficient conditions for law. Given that the inclusivist explanation fits better with what lawyers and judges say and do, many positivists believe that the conceptual framework afforded by the Incorporation Thesis facilitates a superior understanding of the role moral norms play in judicial decision-making in hard cases.[1]

In this essay, I argue that this framework does not help us to understand legal practice in any developed legal system we are likely to encounter. In particular, I argue that a moral norm *N* cannot function as a necessary or sufficient condition of legality if the rule of recognition grants a court general legal authority to bind officials with either of two conflicting decisions on whether a proposition is law in virtue of satisfying *N*. But since, as a practical matter, it would be very difficult for beings like us to produce a viable legal system that doesn't afford some court such authority, genuinely inclusive legal systems are very unlikely in worlds that resemble ours in salient respects.

[1] I think it is fair to say that Wilfrid Waluchow accepts the Incorporation Thesis largely because he believes it provides a more accurate explanation of Canadian judicial practice. Indeed, Waluchow devotes a good part of his important book on the topic to identifying those elements of Canadian legal practice that presuppose moral criteria of validity. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994). In contrast, Jules Coleman rejects this view: "[T]he dispute between exclusive and inclusive legal positivists cannot be resolved on descriptive grounds, for the simple reason that the dispute is not a descriptive one." Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), p. 109. Though Coleman acknowledges that the inclusivist explanation of the relevant legal practices is more perspicuous than the exclusivist explanation, the central issue for Coleman is whether there is a coherent framework that includes the Incorporation Thesis. In conversation, Matthew Kramer stated to me that he is neutral on the issue, believing that empirical studies need to be done to fully assess the character of the relevant legal practices. For his influential views, see Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Oxford University Press, 1999).

I. THE NATURE OF FINAL AUTHORITY

There are a number of controversial issues regarding the authority courts have to decide various issues of law. Normative theorists, for example, disagree about whether courts in a democratic society *should*, as a matter of political morality, have final authority to invalidate a duly promulgated legislative act on the ground that it violates some moral or constitutional principle. Conceptual legal theorists disagree about the nature of existing legal constraints on courts with final authority. Constitutional theorists disagree about whether, as a descriptive matter of law, the constitution of some particular state explicitly grants a court final authority over such matters.

But this much, I think, is largely unchallenged among legal theorists and academic lawyers: in most developed legal systems like those in Britain, Canada, and the U.S., the courts are vested with final authority to decide substantive issues of law. This has been taken for granted by legal theorists whose commitments range from critical legal theory to mainstream positivist and anti-positivist theories. Indeed, it is hard to imagine how one could plausibly deny, for example, that the U.S. Supreme Court "has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office."[2] Someone has to have the "last word" on substantive disputes about the content of law; and courts are usually granted that responsibility.[3]

In the following sections, I attempt to explain the nature of final authority. Some of this analysis would probably be accepted by mainstream theorists of every stripe, but some of it is explicitly grounded in positivism's core commitments. While I am tempted to think that at least some of the latter analysis would be accepted by

[2] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), p. 2.

[3] As Dworkin puts the point, "[since] political morality is inherently uncertain and controversial,... any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative." Ronald Dworkin, *Freedom's Law* (Cambridge, MA: Harvard University Press, 1996), p. 2.

other mainstream theorists like Dworkin, nothing in my argument concerning inclusive positivism turns on such claims.

A. *The Capacity to Create Legal Obligations that Bind Other Officials of the System*

While final authority involves having the last word on substantive legal disputes, it is more than that. A court has *authority* to decide a substantive legal issue only insofar as its decision creates, at the very least, presumptive *obligations* on the part of other officials to apply and enforce its decision in relevant cases. To have authority is, as a conceptual matter, to have the capacity to issue directives that are *authoritative* over some relevant class of individuals; and a directive is authoritative in virtue of its binding or obligating the relevant class of individuals. Since a court's decisions are authoritative with respect to officials (and citizens), its authority over officials amounts to the capacity to bind officials with its directives.

It is true, of course, that an authority's capacity to create obligations might be limited in the sense that the authority's directives can be overruled on appeal to an agency with higher authority. The fact that an agency has authority, by itself, does not preclude there being higher authorities that can nullify the agency's decisions along with any obligations to which those decisions give rise; that is why the obligations to which authoritative directives give rise should be characterized as "presumptive." But an agency's decision on an issue is authoritative only to the extent that it binds some class of individuals in the absence of an appeal that overturns the decision. Thus, if a court has authority to decide a particular issue, then its decision binds the other officials until an appeal to a higher agency overturns the court's decision.

A court's authority to decide a substantive issue of law is *final*, however, if and only if there is no official agency with authority to overrule the court's decision. As Dworkin puts this point, "[an] official has final authority to make a decision [when her decision] cannot be reviewed and reversed by any other official."[4] Accordingly, if a court has final authority over a decision, then its decision creates an obligation that, all things considered, binds officials in the

[4] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), p. 32.

jurisdiction; since there is no possibility of reversal, the obligation is final.

It is crucial to note that the obligations created by the decisions of a court with final authority are legal in character. To the extent that the court has authority over the other officials in the jurisdiction as a matter of law, its authority is legal in character. Of course, the claim that a court has legal authority does not imply that it has morally legitimate authority; the mere fact that an agency's capacity to bind is established by law does not imply that its capacity is morally legitimate. Accordingly, while the claim that the court has legal authority does not imply that its directives result in moral obligations, it does imply that its directives result in *legal* obligations that bind those over whom it exercises authority – which includes both citizens and the other officials in the jurisdiction.

This has a very important consequence. Insofar as a court has final authority to decide a substantive issue of law, it can legally bind the other officials in its jurisdiction, other things being equal, with either of two conflicting decisions on that issue. For example, if a court has final authority to decide whether abortion rights can be restricted by legislation, then its decision creates legal obligations that bind the other officials, other things being equal, regardless of how the decision comes out. As long as the court reaches its decision in an acceptable way, it can bind officials with a decision that abortion rights can be restricted and with a decision that abortion rights cannot be restricted. Thus, a court with final authority can legally bind other officials with a decision that is mistaken under a variety of standards that may include, as we will see, both moral standards and legal standards.

B. *The Possibility of Constraints on Final Authority*

Though the idea that the highest court with jurisdiction over an issue has final authority over the issue is largely uncontroversial among theorists, the implications of such authority have sometimes generated controversy. For example, many in the legal realist school believed that, as a conceptual matter, the court with final authority in a legal system is the ultimate lawmaking sovereign in the system. As John Chipman Gray put the point:

It has sometimes been said that the Law is composed of two parts – legislative law and judge-made law, but in truth all the Law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts.... To quote ... from Bishop Hoadly: 'Nay, whoever hath an absolute authority to interpret any written or spoken law, it is He who is truly the Law Giver to all intents and purposes, and not the person who first wrote and spoke them.'[5]

Since the court with final authority cannot be reversed on a decision, the court's decision-making discretion is free of any external legal constraint; accordingly, final authority to decide what the law is logically entails "absolute authority" that cannot be legally constrained in any way. On Gray's view, then, there is a literal sense in which the law *is* just what the court says it is.

There are a number of problems with this view, but of particular relevance for our purposes is Hart's observation that a court's authority over the content of the law is constrained by its determinate meanings. While Hart acknowledges that legal standards may have a penumbra of uncertain meaning, he argues that they always have a determinate core of settled meanings that constrain the decision-making authority of the court:

Whatever courts decide, both on matters lying within that part of the rule which seems plain to all, and those lying on its debatable border, stands till altered by legislation; and over the interpretation of that courts will again have the same last authoritative voice.... [But a]t any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision.[6]

The problem with Gray's view, then, is that it falsely equates final and absolute authority because it overlooks the point that rules have a determinate core of settled meanings. As Hart plausibly points out, "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" (*CL* 147).

Strictly speaking, however, the observation that canonical statements of legal norms have a determinate core of settled meanings

[5] John Chipman Gray, *The Nature and Source of Law* (New York: The MacMillan Company, 1924), p. 125.

[6] H.L.A. Hart, *The Concept of Law*, Rev. Ed. (Oxford: Oxford University Press, 1994), p. 145. Hereafter *CL*.

will not suffice to refute Gray's rule-skepticism. After all, the idea that terms have a determinate core of settled meanings is so uncontroversial among mainstream theorists that it would be uncharitable in the extreme to think that Gray intends to deny this. Gray's rule-skepticism is motivated not by doubts about the ability of legal statements to convey determinate meanings; rather it is motivated by doubts about the ability of those determinate meanings to constrain judicial decision-making in any theoretically significant way. What is needed to fully respond to rule-skepticism, then, is an account of the nature of these constraints.

As it turns out, conceptual theories of law disagree on the nature of these constraints. Classical natural law theorists, for example, argue that there are necessary moral constraints on the content of the law. These moral constraints on the content of the law function to define official duties that are legal in character. For example, if it is an objective moral principle that courts are obligated to decide issues falling under a legal rule in a manner that comports with the determinate meanings of that rule, then it follows that courts are, as a matter of law, duty-bound to decide cases falling under a legal rule in a manner that comports with those meanings. The legal constraints thus derive, in part, from moral constraints – and there is no mystery (at least not one that a legal theorist is obliged to resolve) about how moral constraints can obligate persons.

In contrast, positivists hold it is the conventional practices of officials that determine the second-order legal norms which constrain judicial decision-making by supplying standards of correct judicial decision-making. If the behavior of officials, including the courts, converge on a norm requiring courts to decide issues falling under a legal rule in a manner that comports with its determinate meanings *and* the officials take the internal point of view towards that norm, then it follows under Hart's practice theory that the rule of recognition includes a *legal* norm requiring courts to decide issues falling under a legal rule in a manner that comports with its determinate meanings. On the positivist view, then, second-order legal constraints derive from the behavior and normative attitudes of officials.

Such constraints need not be *causally* efficacious, of course, but this poses no problems for the idea that final authority can be – and

characteristically is – constrained by legal standards. It is always causally possible for a citizen to ignore the requirements of any first-order legal rule, but this doesn't imply that there are no legal constraints on citizen behavior. For example, the all-too-frequent failure of citizens to satisfy their legal duties under the criminal law does not imply their behavior isn't subject to legal constraints. Legally bound and causally bound are two very different ideas.

Even so, there is good reason to think that legal standards that constrain judicial decision-making will usually be casually efficacious in at least the minimal sense that the judge will attempt to conform her decision to those standards. For starters, it is reasonable to hypothesize that most judges want to serve the public and believe *in* the legitimacy of the systems in which they serve;[7] such judges are committed in virtue of their own motivations and convictions to satisfying the legal standards governing judicial decision-making. But even judges motivated only by personal ambition who are indifferent about whether the system is legitimate will surely realize that they are more likely to advance their careers if their decisions conform to the relevant second-order standards. In either case, there is good reason to think that judges typically strive to satisfy the legal norms that constrain judicial decision-making.

C. *Final Authority and the Criteria of Legality*

If the preceding discussion of final authority is largely uncontroversial among non-rule-skeptics, it is not as clear how the final authority of courts bears on the content of the legality criteria. While it is natural to think that the holdings of the court with final authority are legally binding because they establish the content of the law, this is not necessarily true. It is both logically and causally possible for

[7] I say "hypothesize" here to call attention to the fact that this is an empirical claim. The empirical claims I make here, strictly speaking, should be thought of as hypotheses that purport (at least) to be grounded in uncontroversial observations about legal practice. Legal philosophers sometimes engage in armchair sociology without realizing that they are making empirical claims that may ultimately need empirical support. From here on, I use the term "hypothesize" to signal that I am making an empirical, sociological claim. While I believe such claims are sufficiently uncontroversial to be accepted without detailed empirical study, the reader should keep in mind that they are empirical, rather than philosophical, claims.

officials to be legally bound to enforce the content of a norm that does not have the status of law – something that frequently happens in disputes that implicate the law of some other nation, state, or jurisdiction.

But this is not how officials in developed legal systems understand the holdings of a court with final authority. Consider, for example, the controversial *Roe v. Wade* decision in the United States.[8] Many people believe that the *Roe* decision is *incorrect* as a matter of constitutional law and interpretation. While some believe *Roe* is inconsistent with the Constitution's protection of persons – construed to include fetuses – against infringements to the right to life, others believe it illegitimately created a new constitutional right. And it is important to realize that such critics of *Roe* include congressional representatives, the attorney general, and a number of Supreme Court Justices – the very officials whose practices, on Hart's view, ultimately determine the content of the legality criteria.

Despite the continuing controversy, however, federal, state, and local officials, as a rule, treat the *Roe* holding as law – regardless of whether they agree with it. Every federal and state enforcement agency enforces the Court's holding with the same coercive mechanisms used to enforce any other legal norm. Though many states attempt to enact laws that place conditions on getting an abortion, those states grudgingly allow considerable access to abortions. Even those officials who believe the *Roe* decision is mistaken as a matter of constitutional law nonetheless regard the decision as establishing the content of the law.

This is not surprising since lawyers are trained to regard the holdings of the court with final authority as establishing the content of the law. There is probably not a comprehensive casebook or treatise on constitutional law in the United States that does not contain an excerpt or discussion of the *Roe v. Wade* case. Indeed, one could not satisfactorily answer a bar question having to do with the permissibility of a law restricting abortion without mentioning the *Roe* holding. It is taken for granted among legal practitioners, students, and officials of the legal system that, for better or worse, the Court's decision in *Roe* established the content of the law on abortion in the U.S.

[8] *Roe v. Wade*, 410 U.S. 113 (1973).

There is nothing particularly unusual about the U.S. in this regard. Law students, legal practitioners, and officials in other developed legal systems also speak and behave in ways that suggest they understand the holdings of a court with final authority as establishing the content of the law. Regardless of whether they agree with the court's decisions, officials typically refer to its holdings as "law" and enforce them against citizens (and other officials) with whatever coercive mechanisms are used to enforce any other norm fairly characterized as "law" until they are overruled either by the court itself or by a legislative body authorized to enact rules that pre-empt the court's holdings. Law professors teach even the most controversial court decisions as establishing the content of the law. If students, practitioners, and officials in developed legal systems frequently disagree about the rectitude of the court's decisions, they seem clearly to converge in regarding them as establishing the content of the law.[9]

Of course, a classical natural law theorist need not accede to the understanding that officials have of their practices. To the extent that it is true as a conceptual matter that a proposition is law only if consistent with some set *S* of moral norms, any norm inconsistent with *S* is conceptually disqualified as law. If *n* is a norm inconsistent with *S*, then it does not matter whether officials treat and refer to *n* as constituting law: *n* violates conceptually necessary legality criteria and hence is not law. Indeed, it is conceptually possible under classical natural law theory for every official in a legal system to be mistaken about the content of a first- or second-order law.[10]

[9] Indeed, I think it would be very difficult, as an empirical matter, to find an official who argued as follows: "Although we are legally bound by the content of the court's holdings and hence are obligated to enforce those holdings against citizens, those holdings do not automatically establish the content of the law in the jurisdiction. If the court's holding is correct under the relevant standard of legal correctness, the content of that holding is law. If the court's holding is incorrect under the relevant standard of legal correctness, then the content of that holding is not law. Sometimes we punish citizens or require them to pay someone compensation even when their behavior comports with the law simply because the court's holding requires it. Regardless of whether the content of the court's holdings count as law, we are legally obligated to enforce those holdings." I think it is reasonable to hypothesize that officials would be every bit as appalled by such reasoning as citizens would be. Officials simply do not talk this way.

[10] I am indebted to Connie Rosati for this point.

But while a classical natural law theorist can argue that official practice and legality can come apart in this way, this line of reasoning is not available to a positivist who accepts Hart's view that the criteria of legality are determined by the conventional practices of officials.[11] If the officials of a legal system converge in accepting and satisfying a norm that requires them to treat even the mistaken holdings of the court with final authority as "law," then it follows under Hart's practice theory that the system's rule of recognition includes that norm and that the conventional criteria of legality recognize even the court's mistaken holdings as establishing the content of the law. Since it is the convergent rule-governed practices of officials that determine what counts as law, what officials collectively treat as the law under some recognition norm *is* the law in that legal system.

On Hart's view of the legality criteria, it seems clear that officials in developed legal systems are practicing a recognition norm that requires them to treat the holdings of the court with final authority as establishing the content of the law. Notice that it is not just that officials happen to behave this way: they believe they are required to do so by fundamental principles governing the structure of the legal system. An official who refused to enforce some holding of the court with final authority on the ground that it was mistaken and hence not law would surely bring upon herself a cascade of criticism and a court order to enforce the holding or face sanctions for contempt. Insofar as these expectations are both institutional and normative, as is typically the case in developed legal systems, officials are practicing a recognition norm that makes certain court holdings determinative of the *content of the law* – a fact that determines the content of the legality criteria.

None of this, however, poses any problem for the idea that courts with final authority can be constrained by other second-order recognition norms. The fact that the holdings of such courts establish the content of the law does not rule out the possibility of legal constraints on judicial decision-making – any more than the fact that officials regard themselves as under a general legal duty to enforce

[11] For a discussion of how similar considerations impact Dworkin's views, see Kenneth Einar Himma, 'Trouble in Law's Empire: Rethinking Dworkin's Third Theory of Law,' *Oxford Journal of Legal Studies* 23, (3) (Fall 2003): 345–377.

those holdings rules out such constraints. Lawmaking discretion of any kind can be constrained under Hart's practice theory so long as the appropriate officials instantiate the right attitude and behavior. If officials criticize judges for failing to decide cases according to some norm *N* and judges routinely strive and expect each other to decide cases according to *N*, then it follows under Hart's practice theory that officials are practicing a norm that requires judges to decide cases according to *N*. *N* thus functions as a legal constraint on the decision-making of judges – even if officials routinely enforce the court's decisions without regard to whether those decisions really do satisfy *N*.

But to the extent that officials are practicing a rule that constrains judges to decide substantive issues of law according to *N*, they will not enforce a decision that isn't putatively grounded in an attempt to satisfy *N*. There is, of course, considerable incentive for the other officials to enforce the holdings of the court with final authority; in our dangerous world, any sign of a breakdown between the various branches of government can have grave consequences for national security. Even so, it is reasonable to hypothesize that in most developed legal systems there are limits to the cooperation of the other officials that are expressed in the recognition norms they practice.[12] For this reason, the authority of the court to establish the content of the law will usually be circumscribed by a second-order requirement to attempt to satisfy the relevant second-order norms – a requirement that will also find expression in a description of the legality criteria.

By way of illustration, it would be helpful to consider an example of a simple legal system in which courts are granted final authority over the content of the law but are required to exercise that authority by deciding cases according to the best interpretation of the relevant legal materials that comports with the institutional history, which includes the court's past precedents as well as the legislature's past enactments. In such a system, officials, including judges, are converging in attitude and behavior on two norms: (1) officials are legally obligated to treat the holdings of the court with final

[12] For example, I would guess that a court decision that was explicitly grounded in a coin-flip would precipitate a breakdown between that court and the other officials.

authority as having established or determined the content of the law; and (2) judges (including those belonging to the court with final authority) are legally obligated to decide substantive issues of law according to the best interpretation of the relevant legal materials that comports with the institutional history. If these two rules exhaust the relevant recognition norms, then the criteria of legality in this society are fairly characterized as including the following:

> A proposition is a law if the court with final authority holds that it represents the best interpretation of the relevant legal materials that comports with the existing institutional history.

There are three important points worth making about this criterion. First, a judicial decision is sufficient, but not necessary, for legality because a duly enacted norm might be treated by officials as law for an extended period without any sort of explicit affirmation by the court. Indeed, if citizens are very diligent in obeying the norm (or behaving in a manner that conforms to its requirements), then the relevant propositional content constituting the norm is fairly characterized as law even without an official affirmation by the court with final authority. This feature of legal practice, which is common to most existing legal systems, greatly complicates the task of summarizing the necessary and sufficient conditions for law.

Second, the legality criterion above is a conditional statement that lacks properly deontic structure and hence does not even purport to guide the behavior of judges. As a logical matter, statements of norms deploy deontic terms such as "ought," "should," "is obligated to," or "has a duty to" in order to bind a particular class of agents to a particular class of acts. The logical effect of such language is to express the claim that it is a (socially, morally, or legally) valuable state of affairs that some person or class of persons perform some act or class of acts – which purports, by those very terms, to have normative force. But notice that the legality criterion expressed above contains nothing that would logically mark it as a norm: it neither incorporates deontic terminology nor purports to identify either a class of subjects who ought to do something or a class of acts that ought to be done. Thus, the formulation above does not even purport

to state a propositional *norm* or standard and hence does not purport to guide behavior or deliberations.[13]

This is as it should be. Conditional or biconditional statements of legality criteria are simply empirical descriptions that are extrapolated from the empirical facts about which recognition norms are practiced by officials. The content of the legality criteria is determined by the content of the recognition norms that are practiced by officials, but it is critical to realize that the content of the legality criteria is purely descriptive and hence does not even purport to be normative. The statement of the legality criterion in this legal system is an empirically descriptive statement extrapolated from the assumption that officials are practicing the recognition norms described in (1) and (2) above.

Finally, the reference in the legality criterion to the best interpretation of the relevant legal materials that comports with existing institutional history is needed to give expression to the fact that officials will not enforce court decisions that do not purport to be grounded in the best interpretation of those materials that comports with the existing institutional history. While the facts of official practice are such that officials characteristically treat judicial mistakes as establishing the content of the law, they will not allow the court with final authority, for example, to decide a substantive issue of law on the strength of a coin-flip. Judicial decisions not explicitly justified in terms that make it clear that the court was attempting to satisfy its duty under (2) do not establish the content of the law.

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[13] This is generally true of statements of validity criteria. For example, Brian Leiter describes the U.S. rule of recognition in such terms: ''[a] rule is a valid rule of law in the United States if it has been duly enacted by a federal or state legislature and it is not inconsistent with the federal constitution.'' Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered,' *Ethics* 111(1) (January 2001): 278–301. Likewise, Jules Coleman describes the following as possible inclusive validity criteria: ''Only legal rules that treat individuals fairly can be legally valid,'' and ''A rule is a legal rule provided it is a moral rule.'' See Jules Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis,' *Legal Theory* 4(4) (December 1998): 381–426, at 414, 420. The same is true, of course, of Hart's classic statement of the British validity criteria: ''What the Parliament enacts is law'' incorporates none of the formal elements that are essential to express norms (*CL* 102).

II. FINAL AUTHORITY AND MORAL CRITERIA OF LEGALITY

A. *The General Problem*

Once the nature of final authority is understood from a general positivist framework, it is fairly easy to see why the conceptual framework defined by inclusive positivism might be of limited value in helping us to understand judicial practice in nations like Britain, Canada, and the United States. Consider a legal system that grants final authority to the highest court *HC* over all substantive issues of law and let *p* be some moral principle that purports to define either a necessary or sufficient condition of legality (i.e., a necessary or sufficient condition for a proposition to count as law). If *HC* has final authority to determine whether a proposition satisfies *p*, then the officials of that system are legally obligated, other things being equal, to enforce *HC*'s decisions on whether some proposition satisfies *p* regardless of which direction they go. If, in addition, the officials of that system regard themselves as under a duty to enforce *HC*'s decisions because they accept those decisions as establishing the content of the law, then *HC*'s decisions on whether some proposition satisfies *p* establish the content of the law regardless of which direction they go.

It seems to follow from these claims that *p* does not function as a moral criterion of legality in this society. Since officials converge in attitude and behavior on a norm that requires them, *as a rule*, to treat as law *HC*'s decisions on whether some proposition satisfies *p* regardless of which direction they go, they are practicing a rule that requires them to treat as law *HC*'s mistaken decisions regarding whether some proposition satisfies *p*. If, on the one hand, *HC* mistakenly holds that some proposition *n* satisfies *p*, then officials treat *n* as law despite the fact that, as an objective moral matter, *n* does not satisfy *p*; since satisfaction of *p* is hence not necessary for a norm to count as law in the system, *p* does not function as a necessary condition of legality. If, on the other hand, *HC* mistakenly holds that some proposition *m* does not satisfy *p* and further holds that not-*m*, then officials treat not-*m* as law despite the fact that, as an objective moral matter, *m* satisfies *p*; since satisfaction of *p* is hence not sufficient for a norm to count as law in the system, *p* does not function as a sufficient condition of legality. Officials are

therefore self-consciously practicing a recognition norm that treats *p* as neither a necessary nor sufficient condition of legality.

Again, this is not to deny that the decisions of *HC* are subject to second-order legal constraints. To begin with, it is clear that the judges of *HC* are required to decide substantive issues of law, at least in part, on the strength of whether relevant propositions satisfy *p* and are thus legally bound by a second-order recognition norm to decide substantive issues of law by reference to *p*. In addition, if ordinary legal practice is any indication, the judges of *HC* are probably required to decide substantive issues of law by determining whether they satisfy certain interpretations of some canonical formulation of *p*.

These second-order constraints define standards of legal correctness that *HC* is legally obligated to meet in deciding substantive issues of law. On the assumption that the officials of the system take the internal point of view towards these standards, they view decisions that deviate from these standards as legally incorrect and hence as justifiably criticized. Indeed, since the judges of *HC* are included among the officials who take the internal point of view towards such standards, they also view deviant decisions as legally incorrect and subject to exactly the kind of criticism that characteristically appears in judicial opinions and dissents in legal systems like those of Britain, Canada, and the U.S.

But it is important to realize that these second-order standards of legal correctness do not function as criteria of legality in this society. As long as the officials of the system regard themselves as legally obligated to treat *HC*'s mistakes under these standards as establishing the content of the law, they function as neither necessary nor sufficient conditions on legality and hence do not state criteria of legality. Since officials are practicing a rule that counts *HC*'s mistakes as law, *HC*'s failure to satisfy these standards of correctness in a particular instance does not invalidate the content of its decision.

And this is true regardless of whether *HC* ever makes a mistake under *p*. Norm-following dispositions are defined not only by one's commitments in circumstances that one actually encounters, but also by one's counterfactual commitments. If officials in the system are committed to accepting the mistaken decisions of *HC* under *p*, then

it does not matter whether *HC* ever makes a mistake regarding *p* because the officials are practicing a norm that makes the decisions of *HC* regarding *p* – and not *p* itself – determinative of the content of the law. As long as the officials in the system are characteristically prepared to treat *HC*'s mistakes about *p* as establishing the content of the law, they are practicing a norm that implies that *HC*'s decisions under *p* establish the content of the law. Thus, regardless of whether *HC* ever makes a mistake, *p* does not function as a legality criterion in the example above.

B. *An Example: The Supreme Court and the U.S. Constitution*

The preceding analysis glosses over the fact that there are two ways in which a court with final authority can establish the content of the substantive law.[14] First, and most obviously, a court with final authority can determine the content of the law with its substantive decisions about what the law requires in adjudicating particular disputes. For example, the court's holding in *Riggs v. Palmer* that a murderer may not take under the will of his victim establishes the content of the law on wills.[15] Second, in legal systems with written constitutions asserting substantive constraints on the content of law, a court with final authority can determine the content of the law with its decisions about whether a duly enacted norm satisfies those substantive constraints. For example, the Supreme Court's holding in *ACLU v. Reno* that the First Amendment is violated by a federal statute prohibiting the transmission to minors of sexually indecent materials over the Internet establishes the content of the law. While the analysis above is sufficient to handle both cases, it would be helpful to show how it applies to a legal system with such constitutional practices.

Let us consider, then, the popular view that the procedural and substantive norms of the U.S. Constitution directly defineconven-

[14] This distinction is frequently overlooked in the literature. For an excellent discussion, see Matthew Adler and Michael Dorf, 'Constitutional Existence Conditions and Judicial Review,' 89 *Virginia Law Review* 1105 (2003).

[15] *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188, 192 (1889). It is worth remembering in this context that the court could have gone the other way on the issue – as did courts in other jurisdictions. See, e.g., *Bird v. Plunkett*, 95 A.2d 71 (1953). If the *Riggs* court had done so, its decision would have established or determined the content of the law.

tional legality criteria in the U.S.[16] On this natural view, officials accept the procedural provisions of the Constitution as defining second-order constraints on what federal acts have the presumptive force of law and accept the substantive guarantees of the amendments as defining second-order constraints on the content of duly enacted federal norms. Officials are therefore practicing a recognition norm that invalidates federal enactments which fail to satisfy either the procedural provisions or the substantive guarantees. Accordingly, while a complete specification of the criteria of legality would include criteria that take into account a variety of other considerations (e.g., state constitutions), the criteria of legality include something like the following:

Traditional Formulation (TF): A duly enacted federal norm is law if and only if it conforms to the substantive norms of the Constitution (properly interpreted).[17]

As it turns out, the view that the substantive norms of the Constitution operate as necessary and sufficient conditions for duly enacted federal norms to count as law is problematic from a positivist standpoint because it conflicts with the empirical fact that officials, *as a rule*, treat any norm that satisfies the procedural provisions of the Constitution as law until it is struck down by some court authorized to review statutes for constitutionality. This means, at the very least, there can be duly enacted federal norms that, as an objective matter, violate some substantive norm of the Constitution (properly interpreted), but are nonetheless treated *as law* by the officials of the system for a period of time long enough to warrant characterizing them as "law." Indeed, given the pervasive criticism

[16] For a more detailed discussion of this view, see Kenneth Einar Himma, 'Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States,' *Journal of Law in Society* 4(2) (Winter 2003): 149–218; and Kenneth Einar Himma, "The Conventionality Thesis, the U.S. Constitution, and Dworkin's Semantic Sting," *Proceedings of the First Annual Hawaii International Conference of Arts and Sciences*, January 2003 (ISSN #1541–5899); available from http://www.hichumanities.org/AHproceedings/Kenneth% 20Einar%20Himma.pdf.

[17] The Constitution consists of a set of linguistic symbols that must be interpreted to be understood. The traditional view, as I understand it, is that there is some correct interpretation of the substantive provisions of the Constitution that directly constrains what counts as law in the U.S. I am indebted to Leslie Green for suggesting the inclusion of the parenthetical clause above.

of past and present congressional and federal court decisions, it is reasonable to think that there have been many duly enacted federal norms that should be characterized as "law" despite violating the substantive norms (properly interpreted).

Notice that there are two distinct problems here. First, an objectively unconstitutional norm (i.e., one that, as an objective matter, violates the Constitution properly interpreted) might be treated as law by judges and other officials because it is never challenged in court and is hence never declared unconstitutional. Second, the Supreme Court might wrongly decide a constitutional challenge by producing an interpretation of some substantive provision of the Constitution that is inconsistent, as an objective matter, with the proper interpretation of the Constitution – on any construction of "proper" that doesn't simply make the Court's interpretation, by definition, the proper interpretation. It seems clear, for example, that the Equal Protection Clause was improperly interpreted in either *Plessy v. Ferguson* or *Brown v. Board of Education*, but each decision was treated by officials as establishing the content of the law.

Such behavior on the part of U.S. officials (including judges) suggests that they (1) generally regard themselves, other things being equal, as under a second-order legal duty to treat duly enacted federal norms as law *until* they are struck down by an appropriate court; and (2) generally conform to that duty. But if this is correct, then officials are practicing something like the following recognition norm:

Principle of Presumptive Legislative Validity (PLV): Officials have a duty, other things being equal, to treat any federal norm that satisfies the clear meanings of the procedural provisions of the Constitution as law until some appropriate court holds that it violates the substantive norms of the Constitution.

As such officials include judges, *PLV* implies that a court is obligated to *either* treat a duly enacted federal norm as law when applicable *or* declare that norm unconstitutional on the ground that it violates the substantive norms of the Constitution.[18]

[18] Notice that *PLV* does not imply that officials have an *absolute* duty to treat duly-enacted federal norms as law until struck down. The point of the "other things being equal" clause is to acknowledge the possibility that the duty to enforce legislative enactments is subject to additional practice-based

Additional elements of such behavior suggest, further, that officials are committed to treating the decision of the highest court to hear a constitutional challenge to a duly enacted federal norm as establishing whether it is law in the U.S. – no matter which way it goes. As an empirical matter, officials frequently enforce norms they believe are mistakenly upheld and frequently treat norms they believe have been mistakenly struck down as having no legal effect. As noted above, U.S. officials are frequently divided over judicial decisions on constitutional issues, but are nonetheless committed to treating those decisions as having established the law for as long as they stand. If officials are as divided as citizens on the merits of the Supreme Court's holdings on abortion, affirmative action, federalism, criminal procedure, and the death penalty, they always converge in treating these holdings as establishing what the law is in the U.S.[19]

It is somewhat startling to be reminded of how much power the doctrine of judicial review affords the Supreme Court, but there is little here that officials would regard as news. I imagine that most officials

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constraints on officials. It seems reasonable to think, for example, that a procedurally valid act of Congress that makes it illegal to read the Bible would reach the outer limits of what the other officials of the legal system believe they are obligated to treat as law. While a complete analysis of the rule of recognition in the U.S. would have to identify these additional limits, it suffices here merely to gesture in this direction since my point is just to sketch the general shape of the relevant recognition norm to illustrate the arguments of the last section.

[19] It is true, of course, that Supreme Court decisions in the fifties and sixties on school prayer and public school segregation produced pockets of resistance among various classes of public agents, but I do not think that such resistance ever rose to a level that is inconsistent with the claim that officials of the legal system converged in treating such decisions as establishing the law. First, most of such resistance occurred among public school officials – and not agents plausibly characterized as officials of the legal system in the sense Hart intends. Second, even if we characterize school officials as officials in the relevant sense, the class of officials resisting was simply too small to call into question the empirical claim that officials generally converge; unanimity is not necessary for a population to converge on a norm. In any event, the strongest conclusion that can be drawn from such examples is that officials *have not always* converged on such a norm; these examples tell us little about whether officials at this point in time are fairly characterized as converging on a norm that treats Supreme Court decisions as establishing the law. I am indebted to Matthew Kramer for raising this worry.

and judges (including Supreme Court Justices) would explain their legal duties regarding the courts and the Constitution in something like the following way: "The Constitution is the standard that legislators and courts must abide by; but when the highest court to hear the issue has spoken on the legality of a particular statute, its holding establishes the law. If that court has mistakenly upheld a statute, the statute counts as law and we are obligated to enforce that statute as law until it is repealed, reversed, or overruled by a higher court. If that court has mistakenly struck down a statute, the statute has no legal effect. We may not enforce it as law. Indeed, as far as we are concerned, it is not the law – no more so than those statutes that have been rightly struck down by the highest court to address the issue."

There is, of course, considerable disagreement about whether the courts *should* have such sweeping authority, but the empirical facts are pretty clear: officials are practicing a rule that currently gives the courts authority to review duly enacted federal norms for constitutionality. It seems clear, then, that the behavior and attitude of U.S. officials (including judges) converge on something like the following recognition norm:

Principle of Judicial Review (JRev): Officials have a duty, other things being equal, to treat as law those duly enacted federal norms that are upheld by the highest court to hear the issue as conforming to the substantive norms of the Constitution and have a duty not to treat as law duly enacted federal norms that are struck down by the highest court to hear the issue as not conforming to the substantive norms of the Constitution.[20]

As is readily evident, *JRev* grants the courts final authority over whether a duly enacted norm satisfies the substantive norms of the Constitution: officials are characteristically bound to follow the decisions of the highest court to decide such issues regardless of which way they go.

Although the doctrine of judicial review thus affords considerable authority to the courts in deciding the constitutionality of federal enactments, it is clear as a matter of legal practice that such authority is not unlimited. To begin with, the doctrine of judicial

[20] As before, the point of the "other things being equal" clause is to acknowledge the probability of other constraints on what officials are prepared to enforce. It is reasonably clear, for example, that officials would balk at treating as law a Supreme Court decision that was based entirely on the outcome of a coin-toss.

review as expressed in *JRev* requires, at the very least, that the court's decisions be grounded in some plausible reading of the relevant constitutional norms. After all, a court cannot determine whether a duly enacted norm conforms to the substantive norms of the Constitution without producing something that counts as an "interpretation" of those norms; and an interpretation of a norm must be grounded, at the very least, in a plausible reading of the language in which those norms are expressed.

This, of course, is not the only limit on the authority of the courts to review duly enacted federal norms for constitutionality. If a court's interpretive duties were exhausted by *JRev*, then it would be appropriate for one judge in a constitutional case to criticize another *only* for taking a view that isn't logically grounded in one of the prevailing interpretative standards.[21] While such criticism undoubtedly occurs in constitutional opinions, it is far more common that one judge will criticize another for applying the wrong interpretive principle[22] or for failing to take due account of existing precedent.[23] In every such case, however, the criticism is that the particular interpretation, even if plausibly grounded in some prevailing interpretive standard, is not – in some sense – the *best* interpretation of the Constitution that comports with due regard for precedent.[24]

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[21] For example, one originalist judge might criticize another on the ground that the latter's view is inconsistent with the historical evidence pertaining to the intent of the framers.

[22] Originalists, for example, frequently criticize evolutionists for inappropriately reading their political preferences into the Constitution, while evolutionists criticize originalists for rigidly adhering to an understanding of constitutional text that lacks contemporary relevance.

[23] It is true, of course, that lower courts are more stringently bound by precedent; "due regard" for precedent requires more of lower courts than it does of the Supreme Court.

[24] While I do not wish to consider the issue here, I think Dworkin is correct in maintaining that the relevant sense of "best" is *moral*. Supreme Court opinions and dissents frequently challenge each other's arguments and interpretive principles on what appear to be grounds of political morality. Likewise, other officials frequently criticize Supreme Court decisions as being democratically illegitimate. See Himma, "Making Sense of Disagreement," Note 16, for more discussion on this issue.

The proliferation of *this* kind of criticism suggests, under Hart's practice theory, that judges (and, for that matter, the other officials) are practicing a recognition norm that requires a court to ground a decision about the legal status of a duly enacted federal norm in the best interpretation of the Constitution that comports with due regard for precedent. The most coherent explanation for the fact that judges routinely criticize each other for failing to produce the best interpretation of the Constitution is that they regard themselves as bound by that interpretation in assessing the status of federal enactments. Accordingly, officials (including judges) seem, as an empirical matter, to be converging in behavior and attitude on something like the following recognition norm:

Principle of Interpretive Constraint (IntC): Authorized courts have a duty to decide whether a duly-enacted federal norm is law according to whether that norm satisfies the best interpretation of the substantive norms of the Constitution with due regard for precedent.

It is true, of course, that judges will frequently disagree about which interpretations are "best" and how much regard for precedent is "due," but it should be clear that they converge with the other officials in believing that they have a duty to decide these cases in accordance with the best interpretation that comports with due regard for precedent.

But notice that, on this analysis, it is neither a necessary nor a sufficient condition for a duly enacted federal norm to be law that it satisfies the best interpretation of the substantive norms of the Constitution with due regard for precedent. Assuming that *JRev* is roughly correct in describing the relevant recognition norm, a duly enacted federal norm that is declared constitutional by the Supreme Court counts as law even if it is, as an objective matter, inconsistent with the best interpretation of the substantive norms of the Constitution with due regard for precedent. Similarly, under this assumption, a duly enacted federal norm that is, as an objective matter, declared unconstitutional by the Court does not count as law even if the Court is objectively mistaken in thinking the norm does not satisfy the best interpretation of the substantive norms of the Constitution with due regard for precedent. Despite being utterly central to judicial practice, these favored interpretations define neither necessary nor sufficient conditions for legality.

This suggests that the following statement is a fairly rough but reasonably plausible extrapolation of a legality criterion from *PLV*, *JRev*, and *IntC*:

Legality Criterion (LC): A duly enacted federal statute *S* is law, other things being equal, until declared inconsistent with the best interpretation of the Constitution that comports with due regard for precedent by the highest court to consider the constitutionality of *S*.[25]

LC coheres nicely with all three recognition norms (and hence with the empirical social practices that give rise to them) because it incorporates elements of each. According to *PLV*, officials have a duty to treat duly enacted federal norms as law until some court strikes them down. According to *JRev*, officials have a duty to treat duly enacted federal norms that are upheld by the courts as law (including norms they believe are mistakenly upheld), and a duty not to treat duly enacted federal norms that have been struck down as law (including norms they believe are mistakenly struck down). According to *IntC*, the courts have a duty to decide the status of duly enacted federal norms according to the best interpretation of the Constitution that comports with due regard for precedent.

It is crucial to note, however, that *LC* is not a genuinely inclusive criterion of legality because the best interpretations of the substantive norms of the Constitution with due regard for precedent do not function as necessary or sufficient conditions for legality. Assuming that the best interpretations construe the relevant provisions as incorporating moral norms, these moral norms function as neither necessary nor sufficient conditions for legality. A duly enacted federal norm that is declared constitutional by the Supreme Court does not count as law even if that norm is inconsistent, as an objective matter, with the relevant moral content. Similarly, a duly enacted federal norm that is declared unconstitutional by the Court counts as law even if that norm is required, as an objective matter, by the relevant moral content. The moral content of such norms, if any, functions neither as necessary nor sufficient conditions of legality.

[25] It should be recalled that legality criteria are usually expressed in purely descriptive statements, like *TF*, that have the logical form of conditionals or biconditionals and lack explicit reference to deontic concepts, like "duty" or "obligation." They are descriptive extrapolations from recognition norms and do not even purport to guide behavior.

What explains this is that *LC* gives expression to the idea that the courts have final authority to determine whether duly enacted federal content counts as law in the U.S. If officials converge in making the decision of some court – and not the logical relationship of norm to the objectively best interpretations of the relevant constitutional norms – the determinant of whether a duly enacted federal norm is law, the best interpretations of these norms are not functioning as necessary or sufficient conditions of legality. As discussed in the last section, final authority to bind the other officials with either of two conflicting decisions on whether some proposition is law under some norm *N* implies, together with Hart's practice theory, that *N* does not function as a necessary or sufficient condition for legality.

Nevertheless, it is important to emphasize that while the best interpretation that comports with due regard for precedent does not operate as a moral condition of legality, it does furnish a standard of legal correctness for judicial decision-making. Though the Supreme Court's mistakes generally count as establishing the content of the law, the Court can rightly be criticized under *IntC* for failing to reach a decision that accords with the best interpretation of the relevant provisions that comport with due regard for precedent. And this is as it should be; to quote Joseph Raz on this uncontroversial but crucial point: "some courts' decisions set precedents. They create law that may be difficult to overturn. As always where courts' decisions set precedents they do so even when they are mistaken or misguided" (*TVI* 278). If the Supreme Court's decision does not satisfy *IntC*, then the decision is a mistake that nonetheless establishes the content of the law.

While it is undoubtedly possible to improve on the formulations offered here, any plausible formulation will reflect the conclusions of the last section. To minimally cohere with empirical practice in the U.S., an adequate formulation of the relevant recognition norms and legality criteria will have to reflect the facts that (1) the courts are duty-bound to decide the status of duly enacted federal norms in a way that satisfies some standards for interpreting the substantive norms of the Constitution; (2) the other officials are bound to treat even mistaken decisions on the part of the courts as establishing the content of the law; and (3) the Supreme Court has final authority

to decide whether a duly enacted federal norm counts as law. Any formulations that cohere with these facts will look far more like *LC* than like *TF*. Since a moral norm *N* cannot function as a necessary or sufficient condition of legality if officials are practicing a rule that requires them to treat the decisions of some court with respect to whether a proposition counts as law in virtue of satisfying *N*, the resulting formulations will, like *LC*, state source-based, rather than genuinely inclusive, legality criteria.

C. *The Relevance of Judicial Authority Being Limited to Hard Cases*

1. *Can the Criteria of Legality Incorporate the Full Content of the Norm?*

One might still think that it is possible for the criteria of legality to incorporate a moral norm *N* in legal systems where as is true in many developed legal systems, the officials practice a norm granting a court final authority to decide whether a proposition counts as law in virtue of satisfying *N* in only hard cases. On this line of analysis, as long as officials are practicing a norm that makes *N* a condition of legality in easy cases, the criteria of legality can incorporate the full content of *N*. After all, since hard cases represent a very small percentage of cases that arise under a norm, unmediated recourse to *N* by officials is sufficient to dispose of the vast majority of cases that might arise under *N*. If, as seems clear, one need not always get a norm's requirements right to practice that norm, the mere fact that officials follow the court's holdings on *N* rather than *N* itself in hard cases shouldn't preclude characterizing them as practicing a norm that makes *N* a necessary or sufficient condition of legality.

As it turns out, there is one possible state of affairs in which officials can grant final authority to some court over *N* while still practicing a norm that makes *N* a determinant of legality. Insofar as officials generally regard the relevant court as an epistemic authority regarding the requirements of *N*, the fact that they treat the court's determinations regarding *N* as law is consistent with their practicing a norm that makes *N* – rather than the court's decisions regarding *N* – a determinant of legality. To be committed to satisfying *N* does not preclude following the counsel of someone who is more likely to correctly identify the requirements of *N*. Thus, as long as officials

converge in attitude and behavior on satisfying the requirements of *N*, it does not matter that they take some court's holdings as the most epistemically reliable way to identify the requirements of *N*; on Hart's practice theory, it is sufficient to justify characterizing the officials as practicing *N* that they converge in attitude and behavior on *N*.

Although this line of analysis shows that it is possible for officials to practice a norm *N* while following a court's determinations about what *N* requires, it will not help us to understand legal practice in the developed legal systems with which we are familiar for two related reasons. First, it is reasonable to hypothesize that most officials in developed legal systems do not regard the courts as epistemic authorities with respect to the requirements of some putatively moral recognition norm *N*. If the partisan politics surrounding the appointment and confirmation of appellate judges in the U.S. is any indication, most officials realize that the tendencies of any particular appellate court in hard cases are largely conditioned by the pre-existing political commitments of the judges who sit on that court. But any official who believes this is not likely to think that the court with final authority is, as a general matter, better able or more likely to identify the requirements of *N* because the members of that court – and hence its tendencies – are subject to change over time. Although there might be officials who regard the relevant court as being an epistemic authority over the relevant norms, it is likely that they comprise a small percentage of the officials; what probably explains the acceptance of this norm in most cases is simply that it is an entrenched requirement of the legal system.[26]

[26] In this connection, it is worth noting that Hart does not conceptually ground the *legal* authority of the court with final authority to bind officials with its determination in hard cases arising under *N* in the court's being more likely than officials to correctly ascertain the requirements of *N*. Of course, it might be true that whether the court's legal authority to bind citizens and officials with its holdings on *N* is *morally legitimate* depends, as a conceptual matter, on its being more likely than citizens and officials to discern what *N* requires as an objective matter of morality; if so, then the court's ability to bind citizens and officials with content-independent *moral* obligations turns on its being an epistemic authority with respect to what *N* requires. But its capacity to bind citizens and officials with *legal* obligations (which constitutes it as a legal authority) does not, as a conceptual matter, depend on its being an epistemic authority. As far as Hart's practice theory is concerned, officials need not take the internal point of view towards a rule

Second, and more importantly, officials in these legal systems are simply not plausibly characterized as converging in attitude and behavior on treating satisfaction of the relevant moral norm *N* as a necessary or sufficient condition of legality. If the arguments in the preceding sections are sound, the officials in these systems regard themselves as bound in principle by court decisions in hard cases regarding *N* because those decisions *establish* – rather than merely *identify* – the law. If so, then officials are taking the internal point of view towards a norm that makes court decisions about the requirements of *N* in hard cases – rather than the objective requirements of *N* – a necessary or sufficient condition of legality.

However, this attitude precludes characterizing the officials as practicing the full content of *N* under Hart's practice theory of rules. It is a necessary condition for officials to practice *N* that they take the internal point of view towards *N* as a standard that defines their obligations as officials. An official can, as noted above, take the internal point of view towards *N* but commit herself to following the decisions of some court insofar as she regards the court as an epistemic authority about the objective requirements of *N*. But an official cannot consistently take the internal point of view towards *N* as establishing the content of the law and take the internal point of view towards the court's holdings regarding *N* as establishing the content of the law. If I am correct in thinking that officials in developed legal systems typically instantiate the latter attitude with respect to moral recognition norms, then this precludes them under Hart's practice theory from practicing such norms as necessary or sufficient conditions of legality. In such systems, then, the criteria of legality are incorrectly characterized as incorporating the full content of the relevant moral norms as necessary or sufficient conditions for legality.

2. *Can the Criteria of Legality Incorporate the Easy Content of the Norm?*

While the foregoing analysis rules out the idea that the full content of *N* defines a moral criterion of legality if courts have final authority

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that grants final authority to the courts over *N* on the strength of a belief that the courts are more likely than officials to get the requirements of *N* correct.

to decide the requirements of *N* in hard cases, one might argue that the easy, uncontroversial content of *N* defines a moral criterion of legality in such circumstances.[27] On this line of reasoning, the characteristic authority of the courts to bind officials in hard cases with either of two conflicting decisions precludes incorporation of the hard, controversial content of *N*, but does not preclude incorporation of *N*'s easy, uncontroversial content. If officials decline, as a general rule, to treat the court's incorrect decisions in easy cases regarding *N* as establishing the law, they are practicing a rule that makes the uncontroversial content of *N* a legality criterion. In such cases, it is reasonable to conclude that the easy content of *N* functions as a moral criterion of legality.[28]

At the outset, it is worth noting that this reasoning, if successful, implicitly acknowledges that the explanatory utility of the inclusive framework is limited in an important way. As a historical matter, inclusive positivism arose in response to Dworkin's observation that judges typically decide hard cases by recourse to moral principles that have the status of law despite lacking a social source of the kind he believed is both necessary and sufficient for law under positivism. While some inclusive positivists respond by claiming no more than that such practices are not inconsistent with positivism because there *can be* legal systems with moral criteria of legality that constrain judicial decision-making in hard cases, others go further

[27] I am indebted to Joseph Raz for this objection.

[28] One might object to this line of reasoning on the ground that there is no bright-line difference between an easy case and a hard case. For example, the issue presented in *Riggs v. Palmer* struck the dissenting judges as being an easy case: "The statutes of this state have prescribed various ways in which a will may be altered or revoked; but the very provision defining the modes of alteration and revocation implies a prohibition of alteration or revocation in any other way. The words of the statute are: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise," etc. Where, therefore, none of the cases mentioned are met by the facts, and the revocation is not in the way described in the section, the will of the testator is unalterable." *Riggs*, 22 N.E. at 192. Nevertheless, it is important to realize that while there can be controversy among judges about whether a case is easy or not, the argument above characterizes as "easy" only those cases about which there is no significant controversy among judges.

and argue that such practices in developed legal systems typically *are* constrained by moral criteria of legality.[29]

But insofar as the line of reasoning described above assumes that developed legal systems incorporate, at most, uncontroversial moral content as criteria of legality, it precludes an inclusivist explanation of judicial decision-making in hard cases. Although this will not bother positivists who claim only that inclusive positivism provides a logically coherent framework for understanding law, it will bother positivists who believe that Dworkin's analysis of appellate practice in developed legal systems is largely correct *as a matter of fact* and who gravitate towards inclusive positivism as a means for incorporating this analysis into a conventionalist framework for understanding law. Of course, the argument above would rescue an inclusivist account of easy cases, but explaining easy cases was never a problem for positivism since those can easily be explained in terms of shared understandings among officials. Even if the argument is sound, then, it does nothing to rescue the viability of inclusive positivism as an explanation of judicial practice in hard cases, which are the practices that are most in need of theoretical explanation.

In any event, there is some reason to think that even this modest argument fails. As a first step towards seeing the problem, it is helpful to note that a moral norm cannot always be partitioned into more specific standards that are fairly characterized as being moral norms. While the proposition that it is wrong to intentionally kill moral persons is a paradigmatic instance of a moral norm, partitioning this norm according to race results in "standards" that are not fairly characterized as moral norms. There is neither a moral rule that prohibits the killing of *only* white people nor a moral rule that prohibits the killing of *only* people of color. It is true, of course, that the moral norm prohibiting murder implies that it is wrong to kill white people and also implies that it is wrong to kill people of color, but the result of parti-

[29] For example, Waluchow argues that the best explanation for appellate practice in deciding charter challenges (which, like any appellate case, present hard issues of law) is that the substantive provisions of the Canadian Charter define moral criteria of legality. As Waluchow puts the point, "inclusive positivism is a better theory of law than exclusive positivism because it offers a better theoretical account of charter challenges." Wilfrid Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994), 142.

tioning the content of the moral norm prohibiting murder results in two standards that are not plausibly characterized as norms of morality.

This, however, is not always true. The moral norm prohibiting the intentional harming of moral persons can be partitioned into two more specific pieces that are plausibly characterized as being standards of morality. In particular, this moral norm can, so to speak, be cut into a standard that prohibits murder and a standard that prohibits theft – and it is clear that both of these standards constitute moral norms. While there is no moral standard that prohibits killing white people but does not prohibit killing people of color, there is a moral norm that prohibits murder but does not prohibit theft *and* a moral norm that prohibits theft but does not prohibit murder. One can sensibly talk of violating the prohibition on theft, but not of violating the prohibition on killing white people.

But if we can sometimes partition moral norms into mutually exclusive pieces that also constitute moral norms, it seems clear that we can't do this by partitioning the content of a moral norm into easy content and hard content. After all, whether a case is easy or hard is determined by whether or not we happen to disagree in a principled way – and this depends on contingent facts about our particular limitations that are irrelevant with respect to whether a particular standard is a moral norm. It should be clear, for example, that whether there is moral rule that prohibits killing white people but not people of color cannot depend on whether, as a contingent empirical matter, most of us have figured out that white people aren't the only moral persons in the world.[30]

This does not mean that officials cannot practice only the easy content of a moral norm in a way that constitutes that content as a recognition norm,[31] but it does mean that the easy content of a moral norm does not define a *moral* criterion of legality. The fact that a social norm and a moral norm agree on some set of cases is not

[30] It is worth noting that if the proposition that it is wrong to intentionally kill innocent white people constitutes a moral norm, then a legal system in which officials practice a rule that makes consistency with this rule a necessary condition of legality would be genuinely inclusive.

[31] As far as Hart is concerned, any coherent normative content consistent with minimum content of the natural law can constitute a recognition norm that operates as a criterion of legality in the legal system.

sufficient to warrant characterizing the former as being a standard of morality; put otherwise, the claim that there is overlap between a social norm and a moral norm does not imply that the former is also a moral norm. The mere fact, for example, that a social recognition norm and a moral norm agree on the set of cases that implicate the easy content of the moral norm does not imply that the social recognition norm is also a moral norm that defines a moral criterion of legality. When officials have committed to practicing only the easy implications of a moral norm, they are practicing a social norm that has some content in common with the moral norm but is not fairly characterized as *being* a moral norm because the practice deliberately diverts from the moral norm in a theoretically significant class of cases.

III. MORAL OBJECTIVISM AND THE LIMITS OF INCLUSIVIST EXPLANATIONS

A. *Objectivism, Relativism, and the Incorporation Thesis*

Hart had reservations about the Incorporation Thesis because he believed that a moral recognition norm could constrain judges only if its content were objective. It is a conceptual truth that legal norms figure into adjudication by constraining judicial decision-making in circumstances to which they apply. But a norm can serve this function, on this view, only if it has objective content; a non-objective norm cannot constrain judicial behavior because what that norm means is purely a matter of what the judge believes it means. Thus, the argument concludes, a rule of recognition can incorporate moral norms only to the extent that such norms are objectively true. For this reason, Hart believed that the Incorporation Thesis presupposed moral objectivism.[32]

It is not difficult to see, however, that this view is false. Consider a rule of recognition in society *C* that validates all and only duly enacted norms consistent with morality, and assume that normative

[32] As Hart put the matter: "[I]f it is an open question whether moral principles and values have objective standing, it must also be an open question whether 'soft positivist' provisions purporting to include conformity with them among the tests for existing law can have that effect or, instead, can only constitute directions to courts to make law in accordance with morality" (*CL* 254).

cultural relativism is true. If, as normative cultural relativism asserts, the content of morality in *C* is constituted by *C*'s social conventions regarding what is praiseworthy and blameworthy, then the rule of recognition in *C*, in effect, simply validates all and only duly enacted norms that are consistent with that set of social conventions. Thus conceived, the rule of recognition in *C* can bind judges in exactly the way that Hart believes legal norms must be capable of binding them: judges in *C* are required by the recognition norms practiced by officials to decide substantive issues regarding duly enacted norms in a manner that is consistent with *C*'s social conventions.[33]

The Hartian worry arises only to the extent that there is no *non-subjective* fact of the matter about the content of a moral norm. While an extreme subjectivism that makes the content of morality turn on the beliefs of the individual implies that there is no non-subjective fact of the matter about *the* content of a moral norm, normative cultural relativism does not have this consequence. Since, according to normative cultural relativism, the moral content is *intersubjectively* fixed by a convergence of beliefs among members in the culture, which is an empirical matter of fact, there is a non-subjective fact of the matter about the content of a moral norm and hence about the content of any law that incorporates that norm.

Moderate versions of subjectivism, like normative cultural relativism, pose no logical problems for the Incorporation Thesis, then, because judges can be – and frequently are – legally constrained by norms that are purely conventional in character.[34] It is

[33] Notice that a legal system will not be inclusive under normative cultural relativism if the court with final authority can bind officials with holdings in hard cases that depart from the society's conventional morality.

[34] One might think that exclusive and inclusive positivism collapse into each other on the assumption that normative cultural relativism is true, but this is incorrect. Norms that count as law under inclusive rules of recognition would not be valid because they have been posited or because they have a particular social source; rather they would be valid because they conform in the right way to the relevant moral norms. The fact that the relevant moral norms are determined by social conventions in such systems does not change the fact that the legality of a norm is determined by whether it conforms to some set of moral norms – and not by whether it has a social origin. While it might be that a recognition rule that requires officials to treat as law those norms that satisfy certain moral standards is *extensionally* equivalent under normative cultural relativism to a recognition rule that requires officials to treat as law those norms that are accepted under certain

uncontroversial that judges are sometimes constrained as a matter of law by the customary practices of some business community; in such cases, the judge is legally obligated to identify and apply the relevant practices and conventions. Indeed, if positivism is correct, then judicial practice is at its very foundation constrained by conventions; the rule of recognition is a social convention that defines the legal obligations of judges and thereby constrains judicial practice. Moderate versions of subjectivism are easily reconciled with the existence of moral criteria of legality because it is clear that judges can be constrained by social conventions of any kind – regardless of whether some subset of those conventions exhaust the content of morality, as the normative cultural relativist believes.

As it turns out, genuinely inclusive legal systems would be easy to achieve if we knew normative cultural relativism were true. Assuming that normative cultural relativism implies that moral epistemology is largely a matter of determining what people in the relevant cultural group generally believe about moral norms, officials (including judicial officials) would have little problem agreeing on what a moral recognition norm requires of judges in substantive disputes about the content of law; judges would simply have to poll the relevant cultural group.[35] Since it would be easy for officials to converge on the correct answer to substantive issues of law under moral recognition norms, it would also be easy for officials to converge on refusing to recognize as law court decisions that are incorrect under those moral recognition norms. In such legal systems, judges would have final authority over substantive issues of law in the trivial sense that they have the last official word, but such authority would not include the characteristic capacity to bind officials with either of two conflicting decisions in morally hard cases – because, under these assumptions, there are no morally hard cases. Thus, legal systems with this viable structure would be genuinely inclusive because the relevant moral recognition

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conditions by the culture, those two rules are *intensionally* (or analytically) distinct. And the intensional difference is sufficient to sustain a theoretical distinction between inclusive and exclusive positivism.

[35] Of course, this would require constructing poll questions that will elicit accurate and reliable answers from respondents – which is not necessarily an easy matter.

norms function directly as criteria that determine what counts as law in the system.

As we will see in the next section, it is considerably more difficult, if moral objectivism is true, for officials to converge on a practice that succeeds in making satisfaction of moral requirements a necessary or sufficient condition of legality. This greatly limits the explanatory potential of the inclusivist framework under such assumptions because it ensures that we will rarely, if ever, encounter a legal system that is genuinely inclusive. Though both moral objectivism and moderate subjectivism are consistent with the Incorporation Thesis, the inclusivist framework has far more limited explanatory potential if moral objectivism is true than if moderate subjectivism is true.

B. *Moral Objectivism and the Improbability of Inclusive Legal Systems*

I have argued that a moral norm *N* cannot function as a necessary or sufficient condition for legality if some court has characteristic legal authority to bind officials and citizens with either of two conflicting decisions under that norm.[36] If officials regard themselves and each other as being under a general legal duty to treat even the court's mistaken decisions under *N* as establishing or determining the content of the law and usually conform to that duty, then they

[36] It bears reiterating that it doesn't matter whether, as a matter of fact, the court ever decides mistakenly under *N*. As discussed above, a commitment to a rule involves a disposition to comply with the rule in a variety of circumstances that one never encounters. As long as officials *would* characteristically accept decisions that are mistaken under *N*, it follows that *N* is not a conventional validity criterion in *S* – even if the highest court is utterly infallible with respect to the requirements of *N*. Accordingly, it is not enough that officials in *S have* accepted only substantive decisions by the highest court that conform to *N*; nor is it enough that they *will* accept only those substantive decisions that conform to *N*. For *N* to belong to the conventional criteria of legality, it must also be the case that officials *would not* characteristically treat mistaken decisions under *N* as establishing the content of the law. While it is not clear just how much wiggle room, so to speak, the court has to make mistakes about the content of the relevant norms, as long as the other officials in a system allow the court an appreciable degree of freedom to make mistakes under some putatively inclusive recognition norm, the relevant norm does not define a conventional criterion of legality. See pp. 16–17 above for further discussion of this point.

are practicing a recognition norm that makes the court's decisions about what *N* requires – rather than what *N* actually requires – a necessary or sufficient condition of legality. Since *N* defines a criterion of legality, according to Hart's practice theory, just in case officials converge in treating *N* as a necessary or sufficient condition for legality, *N* cannot define a criterion of legality in a legal system that grants characteristic authority to a court to bind the officials of the system with either of two conflicting holdings regarding whether some proposition counts as law in virtue of satisfying *N*. In such systems, it is the substantive decisions of that court about what *N* requires – and not what *N* actually requires – that determine what counts as law.

This suggests that there is an important condition that must be satisfied, on the assumption that moral objectivism is true, by a conceptually possible legal system to be genuinely inclusive. If the preceding analysis is correct, then a legal system can be genuinely inclusive only if officials converge in refusing to treat as law morally mistaken court decisions in all but a theoretically insignificant class of actual and possible cases. Moreover, since a group of persons cannot converge in practicing the requirements of a rule without having some sort of reliable means of identifying those requirements, it is a necessary condition for a conceptually possible legal system to be genuinely inclusive that officials have some way of correctly identifying the objective requirements of morality as they relate to the criteria of legality in all but a theoretically insignificant class of cases. But since, as we have seen, the class of hard cases under a moral norm is *not* theoretically insignificant, it is a necessary condition for a conceptually possible legal system to be genuinely inclusive that officials are able to correctly identify the relevant moral requirements in the majority of hard cases.[37]

[37] Intriguingly, this by itself doesn't entail that officials intend or even understand that the inclusive legality criterion *N* incorporates a moral norm. It might be that the officials practice *N* without knowing that *N* is a moral norm – as would be the case in a conceptually possible world in which officials falsely believe some form of moral skepticism. In such a world, officials might accept a rule of recognition that incorporates some norm *N* and be nearly infallible in discerning the requirements of *N* without ever believing that *N* is a moral requirement. Thus, this analysis is agnostic with respect to whether or not it makes sense to say that a rule of recognition

It is clear that we lack a general methodology that enables us to reliably determine in any given case what morality objectively requires. Reasonable people of considerable intellectual ability disagree passionately on many important substantive issues of morality. For example, the moral norms regarding murder give rise to a number of passionately contested issues: (1) whether assisted suicide is murder; (2) whether capital punishment is murder; and (3) whether abortion is murder. The fact that there is so much moral disagreement among very smart people not only shows that we do not have a general "test" for determining the correct answer to questions about what morality requires, but also justifies some skepticism about whether we will ever produce such a test.

Strictly speaking, however, this does not show that genuinely inclusive legal systems are impossible for intellectually limited beings like us. Although we struggle to understand what many moral norms require of us, we have a very good handle on the content of some moral norms. If the moral rule prohibiting murder gives us difficulty because it is not clear whether fetuses are moral persons or whether murderers forfeit their rights to life, the moral rule prohibiting theft does not seem to give rise to hard cases. While we might have some trouble figuring out how to give due regard to mitigating factors like extreme hunger, it is comparatively easy to figure out what constitutes a theft: if an agent intentionally takes property she knows belongs to someone else without the owner's express or implied permission, she has committed theft.

Accordingly, genuinely inclusive legal systems remain *possible* even for us. If officials, for example, (1) accept a recognition norm that makes consistency with the moral rules prohibiting theft a necessary condition of legality and (2) converge in recognizing only judicial decisions that satisfy that recognition norm as establishing the content of the law, then the legal system will be genuinely inclusive. And this will be true regardless of whether officials consider themselves bound by the court's mistaken determinations on other putatively moral recognition norms purporting to establish conditions of legality. One moral criterion of legality is all that is needed to warrant characterizing a system as genuinely inclusive.

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incorporates moral content if officials don't believe the relevant content expresses a moral norm.

Of course, a logically isolated standard (i.e., one that is not explained in terms of its logical relation to some more general moral norm) that makes consistency with the moral rules prohibiting theft a necessary condition of legality would be a very odd and improbable recognition norm. While it is true that most developed legal systems have laws prohibiting theft and attempt to formulate and enforce other laws in a manner that is consistent with existing laws, it is simply not the case that officials see themselves as practicing a recognition norm that explicitly specifies consistency with the theft prohibition as a necessary condition of legality. Officials typically practice recognition norms that purport to make satisfaction of more general standards of morality (like fairness) a necessary condition for legality. These recognition norms might imply that legal content should cohere with the moral prohibition regarding theft, but it would nonetheless be extremely misleading to describe the officials as practicing a recognition norm that makes conformity with that prohibition a necessary condition of legality.[38]

This suggests that, assuming the truth of moral objectivism, the existence of genuinely inclusive legal systems in worlds like ours will be comparatively rare – even among systems purporting to be inclusive. As a practical matter, putatively inclusive legal systems strive to incorporate general moral norms having to do with what is fair, just, and morally legitimate. The content of these general moral norms will be controversial in worlds like ours precisely because beings with limits like ours lack a reliable means for identifying what these norms objectively require.

Accordingly, the conceptual framework provided by inclusive positivism is not likely to help us understand official practices in systems that resemble the developed legal systems in Britain, Canada, and the U.S. in salient respects. It is a salient fact about these systems that the moral norms most likely to figure into the practices that

[38] While it might be true, for example, that a norm that is inconsistent with the moral prohibition regarding theft would also be inconsistent with the morally best interpretation of the Constitution, it is false that U.S. officials are practicing a recognition norm that makes conformity with the theft prohibition a necessary condition of legality. Whatever second-order moral recognition norms that U.S. officials take themselves to be constrained by, they do not include some logically isolated instance of the norm prohibiting theft.

determine what counts as law are general standards having to do with fairness, justice, and moral legitimacy. It is a further salient fact about us that we do not have a reliable means for determining what these general standards require in hard cases. If these standards cannot function as necessary or sufficient conditions for legality unless officials have a reliable means of determining what they require in hard cases, then legal systems that incorporate such standards as moral criteria of legality will be exceedingly rare among worlds resembling ours in these salient respects.

For what it's worth, this should not be thought to imply that there are only a few genuinely inclusive legal systems in logical space. Strictly speaking, if the Incorporation Thesis is true, there are nondenumerably many conceptually possible legal systems incorporating moral criteria of validity.[39] The proof is trivial. Let W be a conceptually possible legal system that incorporates moral criteria of validity and let P be some person on that world. Then, for every real number n between 0 and 1, there is a possible world W_n which resembles W in every respect that is consistent with P's being n inches taller. Since the set of real numbers between 0 and 1 is nondenumerably infinite and since there is no reason to think that P's height in any way bears on the viability of moral criteria of legality, it follows that the set of W_ns is nondenumerably infinite. Thus, if the set of conceptually possible inclusive legal systems is non-empty, then it is nondenumerably infinite.

What the above analysis does imply, however, is that this nondenumerably large class of conceptually possible worlds will not include any that resemble ours in all salient respects. For this reason, the possibility expressed by the Incorporation Thesis represents a largely formal possibility that has little cash value for theorists who wish to gain a practical descriptive understanding of law in modern municipal legal systems like ours. It is not just that the Incorporation Thesis sheds no light on legal practice as it exists in the developed legal systems with which we are familiar; it sheds no light on legal practice as it *could* be – in any practical sense of "could" – in these systems.

[39] For a discussion and mathematical justification of the distinction between the notions of nondenumerably infinite and denumerably infinite, see Paul R. Halmos, *Naïve Set Theory* (Amsterdam: Springer Verlag, 1987).

C. *The Relevance of the Minimum Content of the Natural Law*

One might think, however, that there is a sense in which most, if not all, conceptually possible legal systems are inclusive. Hart argues that there are some rules that must be law in every conceptually possible legal system. On Hart's view, law must conduce to the "minimum purpose of survival which men have in associating with each other" (*CL* 193), and there could not be a society in which theft and violence are not prohibited:

> Reflection on some very obvious generalizations—indeed truisms—concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization *must* contain if it is to be viable.... Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law (*CL* 192-3; emphasis added).

On Hart's view, then, every conceptually possible legal system must contain laws that prohibit certain morally reprehensible acts like murder. Accordingly, one might conclude that the legality criteria in every conceptually possible legal system are inclusive because they incorporate the moral principle prohibiting murder in the following way: in each such legal system, the legality criteria include the principle that "norms inconsistent with the moral prohibition on intentional killings are not law."

The problem with this reasoning is that the minimum content of the natural law does not – and *could* not if the Separability Thesis is true – comprise conceptually necessary moral criteria of legality. Rather, the norms expressing the minimum content of the natural law are first-order norms that are law in virtue of satisfying the conventional criteria of legality, which may or may not include moral norms. Here it is important to realize that the failure of a normative system *N* to include such rules does not, as a conceptual matter, defeat the claim that *N* has a conventional rule of recognition that sets out criteria for making, changing, and adjudicating the relevant rules. Rather, the failure of *N* to include such rules defeats the claim that *N* gives rise to a normative system that is sufficiently efficacious to satisfy the minimum conditions for the existence of a legal system. On Hart's view, if *N* exhausts the rules of law, then behavior in that

society would be so unruly that it would not even be clear that there is a unified society there – much less a legal system.

Consider, for example, the United States Chess Federation's (USCF) rules of chess. Despite the fact that these rules lack a murder prohibition, they comprise an institutional system that is conventional in exactly the sense that any other institutional system of social rules, including law, is conventional: the rules are manufactured and adjudicated according to recipes articulated in some sort of conventional recognition norm. The fact that the set of USCF rules lack norms expressing the minimum content of the natural law doesn't defeat its claim to be a conventional system of rules. Rather, on Hart's view, it defeats the claim that the USCF rules give rise to a legal system. No institutional normative system containing only the USCF rules could efficaciously do the job that Hart believes legal systems are designed to do. Legal systems *must*, on Hart's view, conduce to the "minimum purpose of survival which men have in associating with each other" (*CL* 193) – and the USCF rules, though obviously useful for other purposes, *could not* conduce to this minimum purpose. Accordingly, no institutional normative system containing only such rules could, as a conceptual matter, give rise to a *legal system*.

It is, of course, true that any other legal norms must be consistent with the legal norms expressing the minimum content of the natural law, but this is again because, on Hart's view, no system that lacked protection of the relevant interests could do what legal systems are supposed to do – and not because there are necessary moral criteria of legality. Of course, this is not to deny that there are conceptually possible legal systems in which the minimum content of the natural law is legally binding because it satisfies moral criteria of legality; it is simply to deny that this is necessarily the case. Thus, in conceptually possible legal systems in which officials practice exclusively source-based recognition norms, the minimum content of the natural law is legally binding because officials enacted that content in accordance with the relevant conventional recognition norms. Where there are legal systems, the rules expressing the minimum content of the natural law are ultimately law in virtue of satisfying conventional criteria of legality that can, but need not, incorporate moral criteria – which

is, of course, what distinguishes Hart's view about such rules from a genuine natural law view.[40]

IV. MORAL OBJECTIVISM AND MORAL EPISTEMOLOGY: THE IDENTIFICATION OF INCLUSIVE SYSTEMS

Assuming the truth of moral objectivism, the utility of an inclusivist framework for explaining legal practice in modern municipal legal systems (in worlds like ours) is limited by yet another consideration. While it is easy to verify that a particular legal system purports to be an inclusive system, purporting to be inclusive is not enough to warrant characterizing a system as actually inclusive. If moral objectivism is true, then it is a necessary condition for a legal system to be inclusive that, for the most part, officials treat as law all or only norms that conform to the relevant moral requirements. Thus, in order for us to be justified in characterizing a rule of recognition as inclusive, we need to be able to verify, assuming moral objectivism is true, that the laws being enforced *actually* satisfy – as opposed to *are thought by officials* (or citizens) to satisfy – the relevant set of objective moral requirements.

But given that people frequently disagree about the content of morality and are hence fallible with respect to morality, it is not clear how we could be justified in claiming that a particular legal system is genuinely inclusive. The problem arises because we are not, in most instances, in an epistemic position to verify that this is indeed the case; even if we can feel confident about more general moral judgments and uncontroversial specific judgments, there is too much

[40] Indeed, even if we assume (incorrectly, I think) that the criteria of legality of every conceptually possible world imply that only norms consistent with the minimum content of the natural law are law, it doesn't follow that officials are practicing a norm that makes consistency with such content a necessary condition for legality. As we saw in the last section, what norms officials practice is determined, in part, by what norms they believe they are practicing. If they regard themselves as practicing a more general recognition norm that happens to imply that all legal norms are consistent with the minimum content of the natural law and do not regard themselves as practicing an independent norm that makes consistency with the minimum content of the natural law a necessary condition of legality, then they are fairly characterized as practicing *only* the more general norm.

disagreement about harder moral issues (e.g., abortion, same-sex sexual relations, the death penalty, etc.) for us to be confident that we can reliably evaluate the practices of any particular legal system.

Notice that the epistemic problem does not arise if normative cultural relativism were known to be true. Assuming that all we have to do to identify the content of the relevant moral principles on some issue is to determine what the culture believes about the issue, it will be fairly straightforward to determine whether any particular enacted norm is consistent with morality: simply take a well-constructed poll of the culture; if the answers are sincere and the poll soundly constructed, the poll will reliably identify the content of the relevant moral norms.[41] If these epistemological assumptions are correct, we are in a better epistemic position to determine whether any particular legal system is inclusive under normative cultural relativism than under moral objectivism.

Accordingly, if moral objectivism is true, then the utility of an inclusivist framework in explaining legal practice in modern municipal legal systems in this world is doubly limited. First, as we have seen, it is limited because the conceptual possibility of a legal system with an inclusive rule of recognition approaches a mere formality (that is, the probability of finding one in worlds like ours is theoretically insignificant) if moral objectivism is true. While there are many conceptually possible worlds in which the rule of recognition incorporates moral norms, such worlds will bear little resemblance to ours. Second, and equally importantly, if moral objectivism is true, we lack a means to reliably distinguish genuinely inclusive systems from purportedly inclusive systems. Thus, even if a genuinely inclusive legal system were a realistic possibility for us, we are not in an epistemic position to determine that we have achieved one.

While it may be tempting to think that this analysis implies, assuming the truth of moral objectivism, that efforts to legitimize our legal practices are futile and even pointless, this is not the case. As far as I can see, no objectivist would dispute that human beings are morally fallible in hard cases. But the claim that it is inevitable

[41] It is true, of course, that polls can be misleading in a variety of ways, but they need not be. Well-constructed polls are generally regarded as reliable indicators of what people believe on a variety of matters – including moral issues.

that human beings make mistakes in difficult cases obviously does not imply that it is futile or pointless to try to do the objectively correct thing. After all, fallibility does not imply total unreliability; if we had reason to believe we are, assuming the truth of moral objectivism, completely unreliable in discerning the objective requirements of morality, *that* would be a good reason to think that it is pointless to try to do the objectively correct thing because, if it is true that "ought implies can," objective morality would not be binding on us. But the claim that we lack an epistemically reliable means for identifying the correct answer to hard moral questions doesn't have such implications.

The explanatory problem with the inclusivist framework arises because the characterization of any particular legal system as genuinely inclusive depends on three stringent conditions that cannot be satisfied in this world given our limitations. First, the officials of that legal system have to have a reliable means for identifying the correct moral answer to hard issues (and, of course, they have to be guided in their decisions by those hard cases). Second, *we* have to have a reliable means for determining that the first condition is satisfied. Third, and equally importantly, we have to believe, and justifiably so, that we have a reliable means for determining that the first condition is satisfied; that is, we must be epistemically justified in thinking that we have a methodology that generally results in our reaching the right answers on difficult moral issues.

These disabilities, however, are relevant with respect to only a very small, albeit theoretically significant, class of cases – namely, the difficult ones on which philosophers, lawyers, and citizens spend so much time arguing about. These difficulties do not exempt us from the requirements of morality because they involve a class of cases that is comparatively small; after all, there is nothing in this analysis that implies that our shared judgments about theft, murder, etc. are mistaken. But these disabilities are substantial enough to render the Incorporation Thesis of little practical help in understanding our own situation since, although the Incorporation Thesis makes a very weak modal claim, the occurrence of these disabilities *in us* precludes our being justified in characterizing our own system, or any other, as genuinely inclusive.

Again, it is important to reiterate that the comparative rarity of objectively inclusive legal systems can't refute inclusive legal positivism because, strictly construed, the Incorporation Thesis asserts only that there are conceptually possible legal systems incorporating moral criteria of legality. But it does mean that the Incorporation Thesis has little practical application. To the extent that (1) inclusive legal systems are extremely rare among conceptually possible legal systems, and (2) we are not in a position to verify that any particular legal system is inclusive except under the most unusual circumstances, the Incorporation Thesis has little, if any, practical value in the analysis of existing legal systems.

Department of Philosophy
University of Washington
345 Savery, Box 353350
Seattle, WA 98195-3350
USA
E-mail: himma@u.washington.edu