RULES AND THE RULE OF LAW

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What is the connection between rules and law? My goal here is to address this question, and in doing so I will take up four particular questions that the general one subsumes. First, *must* law be an affair of rules? Does something about the nature of law necessitate that legal decisionmaking involve the application of preexisting rules? My second question is the mirror image of the first. *Can* law be an affair of rules? Is rule-based decisionmaking possible, and, if so, is *it* consistent with the idea of law? Third, if law need not but *can* be based primarily on the application of rules, then, descriptively, is it so? That is, are the legal systems with which we are most familiar usefully explained by focusing on rules? Finally, if law need not but can be based largely on rules, then, normatively, *should* it be? Ought legal decisionmakers to be constrained by rules, and, if so, when, and why?

Many contemporary debates in legal theory address one or more of these interrelated questions. The disputes about legal positivism as an account of law concern the place of a limited set of rules in legal decisionmaking. Traditional and modern versions of legal realism attack the view that legal decisionmaking involves the simple application of preexisting rules. Other theorists make the call to *context*, urging legal decisionmakers to consider more features of any event than is possible through the application of necessarily acontextual rules. Similarly, some see law as essentially *rhetorical*, focusing on the different arguments that prevail in cases rather than on the possibility that fixed rules predetermine the resolution of those cases. Most recently, American pragmatism[1] and Aristotelian practical reason[2] have inspired theorists to urge a decisionmaking mode

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1. *See, e.g.*, R. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

2. *See, e.g.*, Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988).

more sensitive to all relevant facts than is possible under supposedly "formalistic" styles of decisionmaking.

This list is hardly exhaustive, and even the aforementioned perspectives come in several variations.[3] Yet all of them share a preoccupation with the size of the categories within which legal decisions should be made, and a related concern with the rigidity of those categories in the face of moral, social, or political considerations indicating a contrary result. These are concerns about the place of rules within law, and my purpose is to address this family of issues.

I commence with a brief summary of the account of rules I have set forth at length elsewhere.[4] This account, focusing on rules as entrenched generalizations likely to be under- and over-inclusive in particular cases, enables us to contrast two forms of decisionmaking: rule-based decisionmaking, in which a generalization provides a reason for decision even in the area of its under- or over-inclusion; and particularistic decisionmaking, which aims to optimize for each case and treats normative generalizations as only temporary and transparent approximations of the better results a decisionmaker should try to reach.

After describing this account of rules, I take up the question whether every institution that is properly called law must necessarily make its decisions in rule-based fashion. I conclude that this is not the case, and that many existing and justifiable forms of legal decisionmaking are more particularistic than rule-based. I then address the opposite question, whether law *must* avoid the formal constraints of rules, instead seeking justice in the individual case. Again, I conclude that this is a poor account of the idea of law, and that rule-based decisionmaking, just like particularistic decisionmaking, has a place in any plausible account of what law is.

Having determined that both rule-based and particularistic decisionmaking are compatible with the idea of law, I pause for a brief polemic against those who would deny these alternatives, seeking to disguise their normative arguments for one by

3. There are, for example, close affinities between the focus on context in much of feminist jurisprudence and the focus on the particular case in the constitutional jurisprudence of Justice Stevens. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 35 (1986) (Stevens, J., dissenting); New York v. Ferber, 458 U.S. 747, 777 (1982) (Stevens, J., concurring).

4. F. Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decisionmaking in Law and in Life (forthcoming 1991).

claiming the impossibility of the other. With the alternatives then set out, I consider descriptively and normatively the place of rules within the legal system. The descriptive account elaborates the idea of *presumptive positivism,* combining features of rule-based and particularistic decisionmaking such that a limited set of pedigreeable rules possesses presumptive but nonconclusive force in the legal systems we know best.

That we have such a system, however, does not mean that it is the system we ought to have, and I go on to explore the arguments for and against constraint by rules. I avoid the frequently overstated arguments for certainty and predictability, and instead concentrate largely on rules as devices for the allocation of power. I conclude by addressing the dilemma of authority, exploring the way in which the question of authority looks quite different from the perspective of the imposer of authority than it does to those who are subject to it.

I.

Understanding rules requires grasping the distinction between the general and the particular. Although many of the items and events we see as particulars are themselves collections of even finer particulars, there is still a logical difference between trees and *this* tree, between words and *this* word, and between the activity of writing and my writing of this page. This distinction is a commonplace, undergirding our understanding of *de*scriptive rules purporting not to describe one event or observation, but to explain and generalize about a series of them.

It is equally a commonplace that descriptive and *pre*scriptive rules are logically distinct—the laws of gravity are different from the laws of New Jersey. Still, for all the differences, there are often-overlooked similarities, because prescriptive rules, just like descriptive ones, are necessarily general rather than particular. What distinguishes a rule from a command is the rule's generality, speaking to classes of events and not just *this* event. There are no rules for particulars.

Descriptive generalizations are commonly probabilistic rather than universal, as when we say that Swiss cheese has holes or German wine is sweet. And even when a descriptive generalization appears universal (all zebras have stripes), the phenomenon of open texture remains, ordinarily holding open the possibility that even the most seemingly precise and universal of descriptive generalizations may be false in some instances.[5] Rules, as prescriptive generalizations, have these same features. Frequently, their factual predicates are probabilistic rather than universal when measured against their background justifications. When we set the minimum age for driving at sixteen, we know that a generalization about age and responsible driving is both under- and over-inclusive. And even when some rule seems neither under- nor over-inclusive with respect to its background justification, the phenomenon of open texture persists. Even the rule that seems to fit its background justification perfectly may yet produce a bad fit in a particular circumstance neither imagined nor imaginable when the rule was originally crafted.

We are now able to distinguish two different forms of decisionmaking. Under *particularistic* decisionmaking, the prescriptive generalizations that purport to guide us are transparent heuristic guides. The rules are but rules of thumb, offering no independent reasons for decision when they indicate results other than those indicated by the direct application of the justifications lying behind those prescriptions, or indicated by the full range of justifications otherwise accepted by the decisionmaker.[6] When prescriptive generalizations are either under- or over-inclusive in individual cases, the particularistic

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5. I say "ordinarily" because the phenomenon of open texture appears inapplicable to closed sets, as when we say that all Supreme Court justices prior to 1981 were men. It also appears inapplicable to properties that are definitional, as when we say that all chess sets have pawns. These qualifications point to deep philosophical controversies, but I will only note the issue here.

6. The sentence in the text draws a distinction worthy of further elaboration. A prescriptive generalization (only 16-year-olds may drive) instantiates some background justification (only responsible drivers should drive). The one background justification lying behind one instantiation, however, does not represent the full array of background justifications available to some decisionmaker. When that full array is consulted in every case, we can call the process "all-things-considered" decisionmaking. By contrast, considering the justification behind one prescription is considering *one* justification and not "*all* things." Thus, to adopt a purpose- or justification-oriented approach to decisionmaking is not necessarily to adopt an all-things-considered decisionmaking mode. Still, the justification behind a prescription itself instantiates an even deeper justification, and thus a decisionmaking environment might but need not have its decisionmakers treating all instantiations, at whatever level, as transparent to the justifications lying behind them. When this is the case, starting with one prescription still turns into all-things-considered decisionmaking. If a decisionmaker treats a prescription as transparent to its background justification, however, without *that* background justification itself being treated as transparent to *its* background justifications, a purpose- or justification-oriented approach to rules need not be equivalent to all-things-considered decisionmaking. On all of this, see Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter *Formalism*]; and Schauer, *The Jurisprudence of Reasons* (Book Review), 85 MICH. L. REV. 847 (1987) [hereinafter *The Jurisprudence of Reasons*].

decisionmaker may cure that under- or over-inclusion by reaching what would, without the constraint of the prescription, be the correct result.

Alternatively, however, these prescriptive generalizations may be entrenched—opaque rather than transparent. Rule-based decisionmaking, consequently, exists just when and insofar as decisionmakers treat prescriptive generalizations as providing reasons for decision in accordance with the terms of the generalization *qua* generalization. The fact of entrenchment thus provides a reason for following the indications of a generalization in the area of under- and over-inclusion, even when following those indications produces the "wrong" result either from the perspective of the justification undergirding the single rule or from the perspective of the full array of justifications that would have produced the best "all-things-considered" result.[7] A rule, according to this account, is therefore not some entity, but rather a relationship or status. A rule exists when some generalization is entrenched vis-à-vis its background justifications, resisting efforts to pierce it in the service of those justifications.

This stark distinction between particularistic and rule-based decisionmaking, although a useful first cut, is defective in two ways. First, it omits a third possibility, one I refer to as *rule-sensitive particularism*. This type of decisionmaking, of which sophisticated act-consequentialism is an example, is particularistic because it expects decisionmakers to make the best all-

7. To treat under- and over-inclusion as equivalent is a potentially distorting over-simplification. When an over-inclusive generalization is "cured" in the area of its over-inclusion, such as when we admit a well-behaved seeing-eye dog to a restaurant despite a "No dogs allowed" rule, the narrowing of the generalization seems to involve less assertion of authority than when a rule is broadened to cure its under-inclusion, such as when the same rule is broadened to include bears and pigs. In law, there are likely to be important questions of jurisdictional legitimacy involved in determining when it is appropriate for some decisionmaker, such as a police officer or judge, to broaden a rule to cure its under-inclusion. The questions seem smaller when those same officials refuse to apply the same rule in the area of its over-inclusion. Things are not always what they seem, however, and this example is itself premised on a particular view about the comparative undesirability of potentially erroneous assertions or non-assertions of official power. Moreover, we might generate a different conclusion with a different view about the seriousness with which we take the maxim *expressio unius est alterio exclusius*. Indeed, much of the idea of under-inclusion is premised on issues raised by that maxim. How strongly should we presume that legislatures as speakers of law have excluded situations when they have not included them? When such implications are justified, curing what appears to be under-inclusion is less warranted. On the legitimacy of treating *expressio unius* as a maxim of conversational interpretation, see Grice, *Presupposition and Conversational Implicature*, in RADICAL PRAGMATICS 183 (P. Cole ed. 1981).

things-considered decision on each occasion, but also expects them to take into account as one of the all-things-to-be-considered the value of having a rule.[8] This form of decisionmaking thus differs from a pure particularism in which the value of having a rule is not part of the calculation. It also differs from a purer form of rule-based decisionmaking in which the existence of a rule precludes a decisionmaker from evaluating whether the reasons for having the rule are sufficient to justify following the rule on this occasion. At this point, I am not preferring one of these to the other, but only noting that rule-sensitive particularism is different from decisionmaking that does not allow the decisionmaker to determine whether the rule should be followed in a particular case.

In addition, I do not intend my distinction among three decisionmaking modes to suggest that these are three discrete forms representing the only alternatives. Rather, these three modes are distinguished artificially and heuristically. In truth, they represent points along a continuum rather than a trichotomy. What is therefore at stake is the size of the categories of decision, with larger categories being more likely under- and over-inclusive than smaller ones. Where the categories of decision are both large and opaque, the dimension of *ruleness* is

8. Gerald Postema attributes this form of decisionmaking to Bentham in BENTHAM AND THE COMMON LAW TRADITION (1986). For a similar perspective, see Gans, *Mandatory Rules and Exclusionary Reasons*, 15 PHILOSOPHIA 373 (1986). *See also* M.J. DETMOLD, THE UNITY OF LAW AND MORALITY: A REFUTATION OF LEGAL POSITIVISM (1984). I say that this is a type of decisionmaking of which sophisticated act-consequentialism is only a token because there are advocates of such an approach who start from non-consequentialist premises. *See* Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827 (1989). The traditional debates between act- and rule-utilitarians suggest that the act-rule issue is the exclusive province of the consequentialists, but this turns out not to be the case, for even in a non-consequentialist world there are important questions about the size of the categories within which decisions should be made. Although the decision to embody any rule is consequentialist in terms of that rule being adopted in order to serve some other end, the ends that rules serve might themselves be non-consequentially selected. Believing that all torture except the torture of torturers is irreducibly and non-consequentially wrong, for example, we might adopt as a rule a prohibition on all torture, period, in order to maximize compliance with the primary prohibition of torture of non-torturers. Although the selection of a rule-based rather than an act-based approach is consequentialist vis-à-vis the administration of the prohibition against torture of non-torturers, that prohibition is not itself a consequentialist one. None of this is to maintain, however, that my account of rules is an account of "ultimate" moral rules, and I thus have no quarrel with Moore's observation in this Symposium that those rules are quite different from the instrumental rules that are my exclusive concern. *See* Moore, *Three Concepts of Rules*, 14 HARV. J.L. & PUB. POL'Y 771 (1991). My concern is exclusively with rules that have a justification lying behind them, and with the relationship between rule and justification. When justification runs out, the particular relationship that concerns me is not at issue.

greatest, and where the categories are narrow and more transparent to background justifications, the constraints of ruleness are minimized. In all that follows, my reference to what seems to be an either-or choice between decisionmaking modes is only a useful way of simplifying the infinite alternatives lying along this continuum.

II.

Our first question, then, is whether it is necessarily the case that only rule-based decisionmaking is within the realm of law, properly so-called. Must law be an affair of rules, in the conceptual or definitional sense of "must"? Can we imagine something appropriately called a legal system that is not significantly rule-based in the sense just sketched.

The answer I want to offer is, quite simply, "yes." I will argue that a system of decisionmaking could rely very little on rules and still comport with a number of different views about the necessary and sufficient conditions for qualification as a legal system.

In order to sustain the argument, I must distinguish regulatory rules from rules establishing decisionmaking institutions. Although some aspects of the contrast between rule-based and particularistic decisionmaking are applicable to jurisdictional rules, and although the distinction between jurisdictional and substantive rules is less than commonly supposed, we can still usefully distinguish rules establishing decisionmaking environments from rules purporting to control or guide the decisions within them.

Rules establishing decisionmaking environments are likely a species of *powers*, but I will remain equivocal about the label because it is not necessary here to subscribe to one or another of the somewhat different accounts of powers offered by Bentham, Hohfeld, Kelsen, Hart, Raz, and others.[9] Whether we call them powers, power-conferring rules, or something else, I am referring to a cluster of rules serving interrelated purposes. Within this category are rules creating decisionmaking environments, such as the rules establishing courts or administrative agencies; rules delineating the jurisdiction for the created envi-

9. *See generally* Tapper, *Powers and Secondary Rules of Change*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 242 (A.W.B. Simpson ed. 1973).

ronments, such as rules specifying whose and what type of disputes may be decided; rules staffing an environment, delineating the qualifications and selection procedures for decisionmakers; and rules designating the procedures to be used, including, for example, rules requiring decisions to be in writing and permitting parties to be represented by counsel.

I make no claim that such empowering rules have neither substantive aim nor substantive effect. Despite the frequent substantive effects of procedural or jurisdictional rules, however, there remains an important contrast between rules establishing decisionmaking environments and rules determining the results within those environments. The very concept of jurisdiction is the useful distinction between the authority to decide and the substance of the decision made. Consequently, we can distinguish two types of decisionmaking environments: those having both empowering jurisdictional rules and substantive outcome-determining rules; and those having only the former, thus leaving the determination of the outcome to the non-rule-based judgment of the decisionmaker.[10]

When decisionmaking environments employ substantive outcome-determining rules, decisionmakers are charged with applying those rules to the cases at hand, exercising discretion only when the rules do not determine the result. In such an environment, decisionmakers will be most occupied with making those factual determinations necessary to apply the rules to specific cases. A rule empowering a police officer to give a citation to those and only those driving in excess of fifty-five miles per hour would be an example of an empowering jurisdictional rule combined with a substantive outcome-determining rule. Although the police officer is empowered both to issue citations and to determine the speeds of cars, she is empowered neither to determine what speed is unlawful nor the circumstances under which someone exceeding that speed should be absolved.

In decisionmaking environments employing only empowering jurisdictional rules, however, the substantive outcome-determining constraint is absent. The decisionmaker is empowered to do more than simply apply a concrete rule to specific cases. She must decide what ought to be done in those

10. On the distinction drawn in the text, see Paulson, *Material and Formal Authorisation in Kelsen's Pure Theory*, 39 CAMBRIDGE L.J. 172 (1980).

specific cases, based on a virtually unlimited array of social and moral principles and policies. Were the same police officer to be instructed simply to "keep the peace" or "ensure safe driving," her decisionmaking would be substantially less rule-based.[11] This form of decisionmaking is commonly referred to as "discretion" or the application of "standards." We could go one step further and consider the *cadi*, restricted by no standard at all, but empowered by jurisdictional rule to make the best all-things-considered decision for the controversy at hand.

Distinguishing these two types of decisionmaking environment is only the first step in the argument. It remains necessary to establish that forms of decisionmaking resembling the latter more than the former, forms in which only empowering but not outcome-determining rules are at work, are still conceptually and definitionally entitled to the label "law." That inquiry can be pursued in a variety of ways. First, the inquiry can be a definitional-empirical one, where by "empirical" I mean only the actual extensions of the terms "law" and "legal system" as those terms are used within and without the legal system. And when we engage in that inquiry, we observe that decisionmaking environments in which decisionmakers are under little outcome-determining constraint are still ordinarily referred to as existing within the "legal" system. One example is the traditional court of equity, historically—and to a lesser extent, currently—empowered to do justice in the particular case, the indications of some specific legal rule notwithstanding. Other

11. Much of this is a matter of degree, because even a mandate to "ensure safe driving" is more constraining than a mandate to "keep the peace," which is in turn more constraining than a simple mandate to make the best all-things-considered decisions. In this sense, any specification of mandate narrower than a mandate to make the best all-things-considered decision is a form of rule, because it precludes the decisionmaker from considering those factors that would be included in an all-things-considered mandate but are not included in the narrower mandate.

I resist the traditional rules-standards distinction because that distinction couches the degree of constraint on the decisionmaker solely in terms of the linguistic specificity of the applicable prescription. This is a potentially misleading oversimplification. If we define constraint as the proportion of rule-indicated results that differ from the results that a decisionmaker would have reached absent the rule, then a quite specific rule, such as "Do not eat bats," is not very constraining, while a much more general "maximize individual liberty" might appear quite constraining to a strong communitarian.

In addition, certain seemingly linguistically indeterminate prescriptions, such as "be honorable," may be quite determinate in practice if there is within some community or sub-community a shared understanding of what conduct counts as "honorable." When this is the case, one would again be mistaken in taking the linguistic vagueness or precision of the prescriptive term as an adequate marker for the degree of constraint imposed by the prescription on the decisionmaker who accepts it.

examples are the power of a judge in a custody determination to reach the result that is "in the best interests of the child," and the prevalence within administrative *law* of administrators or agencies empowered merely to exercise their discretion. Thus, insofar as we are asking only whether it is linguistically permissible in the 1990s to apply the word "law" to such substantially rule-free decisionmaking environments, the answer seems clearly to be "yes."

We can also ask the empirical question in a more sociological manner. In any differentiated society, institutions and individuals will group themselves into functional clusters like health care, construction, mass media, fine arts, higher education, heavy industry, financial services, and so on, with one of these functional clusters being the "legal system." Consequently, one method of determining whether an existing institution is "legal" is by asking whether its participants are members of the legal cluster of institutions, measured in terms of such indicia as type and place of education, self-identification, nature and locus of employment, and membership in professional organizations. And it does appear that the substantially rule-free decisionmaking environments I have described are part of the legal cluster of institutions. For example, lawyers who move in and out of more rule-based decisionmaking environments staff administrative agencies, family courts, and arbitration mechanisms. Moreover, such decisionmaking environments are studied in law schools and written about in law reviews. Commonly, these rule-free decisionmaking environments are also located in the same buildings and use the same staffs and rules of procedure as more rule-based decisionmaking environments. In this respect, many substantially rule-free decisionmaking environments still comprise part of the legal system. Thus, whether we look at the question definitionally as one of actual use and actual extensions of the word "law," or sociologically as one of locating a family of linked institutions, it appears that law need not impose a substantial array of outcome-determining rules sharply limiting the decisionmakers' judgment or discretion.[12]

12. I explicitly do not make the claim that the exercise of even all-things-considered judgment is or should be made free from constraint by moral or other non-legal rules. Contemporary American legal theory frequently refers to "ad hoc" decisionmaking in pejorative terms, and even those who willingly embrace fully contextualized judgment still distance themselves from what they call "ad hoc" decisionmaking. *See, e.g.*, Farber,

This definitional and empirical account, allowing largely rule-free forms of decisionmaking to "count" as law, also fits well with many modern versions of legal positivism. Starting with Kelsen and continuing to more contemporary versions espoused by Jules Coleman, David Lyons, and Philip Soper, some positivists have considered it consistent with the core of positivism to allow a society to recognize as law the societal empowerment of some officials (such as judges) to make decisions that are not based on specifically pedigreed legal norms.[13] To these

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Legal Pragmatism and the Constitution, 72 MINN. L. REV. 1331 (1988). This is possibly evidence of simple confusion or an unwillingness to acknowledge the implications of a particularistic perspective, but a more charitable interpretation would suggest that "ad hoc" is often used to refer to an unreasoned and intuitive "shoot-from-the-hip" form of decisionmaking. The process I describe as particularistic, however, need not be "ad hoc" in this pejorative sense. It could involve only the application of legally unmediated background principles of reason and morality to particular cases.

13. *See* Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703 (1991) [hereinafter *Rules and Social Facts*]; Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 424 (1977); Soper, *Legal Theory and the Obligation of the Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 511 (1977). Although not couched quite as explicitly in terms of a definition of "law," Kenneth Kress's account is compatible with this perspective. *See* Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989). Joseph Raz, however, takes issue with all of these accounts, arguing that a mandate to incorporate by reference non-legal considerations does not convert those considerations into legal ones. *See* J. RAZ, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37 (1979). At first, this looks like a definitional dispute, but it is more than that. When Raz challenges those holding the Kelsen-Coleman-Lyons-Soper position to provide "an adequate criterion" for distinguishing "legal references to morality" from "discretion," *id.* at 47 n.8, he makes clear that he considers it central to the positivist idea that the domain of non-law be recognized as different from the domain of law:

> Hence the law has limits; it does not contain all the justifiable standards (moral or other) nor does it necessarily comprise all social rules and conventions. It comprises only a subset of these, only those standards having the proper institutional connection. This is incompatible with the view that law does not form a separate system of standards and especially with the claim that there is no difference between law and morality or between it and social morality.

Id. at 45.

Raz appears to have the worse of the debate *if* positivism is considered only as a conceptual or metaphysical opponent of natural law. Yet Raz is correct in maintaining that views such as those held by Coleman, Kress, Lyons, and Soper fail to provide an adequate descriptive account of a society in which *law* appears to be different both to the citizen and to the judge, and in which such institutions as lawyers, law schools, and law professors occupy the foreground of legal and judicial phenomenology. Coleman may be correct that this question is not about positivism, and that positivism is compatible with a social decision not to have law exist as a limited domain. *See Rules and Social Facts*, *supra*, at 723-24. The limited domain question, however, remains for Raz, for Dworkin, and for me an important question simply (and perhaps appropriately) not addressed by Coleman's version of the questions that the debate about positivism does address. For present purposes, however, all I need is the claim, one about which Coleman and I do not differ one jot, that societies could choose to empower their legal officials to base their decisions on non-legal norms without calling into question the entitlement of those officials to a place in the legal system, positivistically conceived.

positivists, the existence of a social source of the appropriate kind for the empowerment of the decisionmaker is sufficient to justify the designation "law," and therefore a process emanating from social sources counts as law even if the decisions made within that process are not themselves substantially constrained by legal rules.

Finally, even some varieties of a Fullerian approach to the nature of law would accept as law various particularistic forms of decisionmaking. It is true that many of Fuller's procedural desiderata for the existence of a legal system might not exist in the more extreme versions of the particularistic decisionmaking environments I have just described. Fuller seems unwilling to recognize as law a decisionmaking system without "a published code declaring the rules to be applied in future disputes,"[14] and most of Fuller's requirements for the existence of something "properly called a legal system" presuppose the existence of rule-based decisionmaking.[15] At least some of Fuller's requirements, however, and arguably all of them, could be satisfied by the promulgation of largely transparent rules of thumb still providing predictive guidance for the normal case. Moreover, the Fullerian idea of morally necessary procedural conditions for the existence of law, if not Fuller's own list, might be satisfied by requirements designed to distinguish some forms of particularistic decisionmaking from others. For example, Margaret Radin implicitly, and Frank Michelman explicitly, believe that the necessary conditions for legality are satisfied by the procedural and deliberative features of judicial decisionmaking, such as (and the examples are mine) a public adversary process, notice to affected parties, decisionmakers unrelated to the litigants, a right of appeal, and written opinions justifying the result.[16]

This perspective provides an account of what is unique about law without maintaining that decisionmaking according to

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14. L. FULLER, THE MORALITY OF LAW 35 (1964). Fuller also declares that the most basic way to fail to make law would lie in "a failure to achieve rules at all, so that every issue would be decided on an ad hoc basis." *Id.* at 39.

15. For a richer elaboration of this interpretation of Fuller, see Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781 (1989). *See also* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 8-9 (1980).

16. *See* Michelman, *Justification (and Justifiability) in a Contradictory World*, in JUSTIFICATION: NOMOS XXVIII 71 (J. Pennock & J. Chapman eds. 1986). *See also* Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 28-36 (1986) [hereinafter Michelman, *Foreword*].

opaque legal rules is a necessary component of that uniqueness. If this account is successful, then law is distinguished from other forms of public or authoritative decisionmaking not by its heavy use of outcome-determining rules laid down in advance, but by the use of procedures designed to ensure that legal decisionmaking is not merely the ad hoc imposition of personal will or the practice of politics. Now the differences between these desiderata of law and those actually on Fuller's list may be sufficiently crucial that the particularistic forms of decisionmaking I have described ought not to be considered law from a Fullerian perspective. The view that decisionmaking according to entrenched rule is one of the factors necessary for a decisionmaking environment to count as law—a view most powerfully espoused these days by Justice Scalia[17]—now looks less definitional and more normative, however, and I will address the normative claims presently. But for now it is sufficient to note only that a system employing empowering rules but leaving substantive decisionmaking authority largely unconstrained by external legal rules seems both pragmatically plausible and accepted as "law" within the world in which we now exist.

III.

I now take up the converse claim. Although a largely particularistic decisionmaking environment is both empirically plausible and still "counts" as law, I must address the opposite: Is rule-based decisionmaking possible, and, if so, should *it* count as "law"?

Traditionally, the question has been thought to answer itself. That's what law *is*, so it has been said, most recently and forcefully by Justice Scalia,[18] and traditionally by countless others.[19]

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17. "A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law." Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting). *See also* Burnham v. Superior Court of Cal., 110 S. Ct. 2105, 2117-19 (1990) (plurality opinion of Scalia, J.); Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

18. *See* sources cited *supra* note 17; Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990); Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 895 (1988) (Scalia, J., concurring in judgment).

19. "The rule of law, sometimes called 'the supremacy of law,' provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application." BLACK'S LAW DICTIONARY 1196 (5th ed. 1979). For subtler but largely consistent accounts, see J. FINNIS, *supra* note 15, at 270-

But even if we reject the view that law *must* be about rules, then surely, at least law *can* be largely about rules, and can employ rule-based decisionmaking as its primary method.

Despite the lineage of this seemingly mild claim, it is not without its detractors. The first criticism is a version of legal realism commonly associated with Jerome Frank and Judge Joseph Hutcheson, but first appearing in the writings of Joseph Bingham.[20] This maintains that external rule-based constraint verges on being a psychological impossibility. To Bingham, Frank, Hutcheson, and others, the immediate parties, their problems, and the equities of their dispute are so much in the foreground of the judicial phenomenology that rules cannot prevent a decisionmaker from reaching the result consistent with those immediate equities.[21]

Even this caricatured version of the least guarded claims of the realists still depends, however, on a contingent fact about American law. Neither Bingham, Frank, nor Hutcheson supposed that judges could make their rule-independent decisions and then justify those decisions without reference to recognized legal materials (although one could plausibly imagine just such a legal realist claim about, say, law enforcement of-

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81; J. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1986); E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975); and Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195 (1977).

20. *See* J. FRANK, LAW AND THE MODERN MIND (1930); Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 109 (1912); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. REV. 274 (1929).

21. All these theorists, perhaps most explicitly Bingham and Frank, made a less psychological and more normative claim as well, urging the desirability of case-specific optimization. From this normative perspective, the intrusion by general rules, even if psychologically possible, is an evil to be avoided. Professor Coleman says that I

> argue[] that rules dictate or indicate results. This is precisely what realists deny. I do not deny that rules dictate results, but it is incumbent upon anyone who wants to emphasize a distinction between rule-based and other theories to show how rules generate results in ways that do not collapse rule-based theories into all-things-considered theories.

Rules and Social Facts, *supra* note 13, at 713. This is a larger assertion than I make. I claim that rules *indicate* results, which is a claim about language, and not that rules *dictate* results. This latter claim would be made by those who conflate the linguistic meaning of a rule with its authority. Rules that plainly indicate results may appear to dictate results to those decisionmakers who take the indications of a rule to be dispositive. But even if we accept the possibility that there could be decisionmakers who felt "dictated to" in this way, we would know nothing about the size or location of such a set of decisionmakers. The claim that there exist decisionmakers who follow the indications of a rule is an empirical claim, one that many of the realists are at pains to deny, or at least to deflate, and one that I believe (but do not purport to defend empirically here) is sometimes well-grounded for some decisionmakers in some decisionmaking environments. That is all I need in order to sustain the claim that rule-based and particularistic decisionmaking modes are both intensionally and extensionally divergent.

ficers at some times and in some places[22]). Rather, many legal realists claimed that the array of American legal materials, including conflicting canons of statutory construction, conflicting precedents, and conflicting legal rules themselves, always provided a judge with some non-laughable legal source to justify almost any result that the judge desired for reasons other than the existence of a rule to reach.[23]

If we limit our thinking to judges and courts, and if we recognize the effects of the selection hypothesis on the array of cases that wind up in court, the contingent empirical claim of realism is quite compelling.[24] Here, however, I am less concerned with the contingent empirical claim that most litigated cases have two or more mutually exclusive but legally justifiable answers than I am with the fact of that claim's very contingency. Although I make no claim that internal conflict could be totally eliminated, still the *extent* of conflict is contingent rather than necessary. In a system with fewer conflicting authoritative materials, the realist claim would be much less maintainable. Thus, we would be hard pressed at the outset to say that constraint by rule is impossible just because the existing array of rules in American law makes constraint by rule less constraining than it might be.

22. That is, nothing about the formal validity of a rule prevents some official from saying, in effect, "I don't care what the rule says. You're going to do what I tell you to and keep your mouth shut about it." Exploring the circumstances under which such explicit flouting of a rule would be socially or politically possible is far beyond my agenda here. I now make only the claim that this form of *judicial* behavior, although hardly impossible and hardly non-existent, is rare.

23. *See, e.g.*, Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). *See also* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

24. *See* Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988). *See also* Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 832 (1988). The selection hypothesis, maintaining that litigation is largely restricted to the unrepresentative sample of legal events in which plausible legal arguments can be made on both sides, is suggested by Llewellyn in THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 58 (1960), and in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 58 (1962), but owes its modern articulation and development to Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). *See also* R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5 (3d ed. 1986); Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985). If the selection hypothesis is correct, two conclusions follow. First, litigated cases will support the legal realist claim because if there were not plausible legal arguments on both sides, the case would not be in court in the first place. Second, it is a mistake to generalize about the nature of constraint by rule from this nonrepresentative sample, selected precisely on the basis of the characteristic that would reject the claim that legal events are or can be constrained by rule.

Moreover, the psychological component of the strongest version of the realist position has been repeatedly falsified by experience. If realism is committed to the position that it is not *possible* for legal decisionmakers to subjugate their own all-things-considered judgments to the external constraints of rules, then every case in which a legal decisionmaker does just that, and such cases are legion,[25] falsifies the realist position. But if the realist position is taken only to maintain that there are more ways of effectuating that decisionmaker's own best all-things-considered judgment than is often realized, then legal realism seems to me substantially correct. This contingent and probabilistic empirical claim, however, does not undercut the view that some decisionmakers and some decisionmaking environments will be significantly rule-constrained, and that is no more nor less than the claim I wish to make.

One variant on the realist position, most attributable to Duncan Kennedy,[26] holds that the decision whether to apply the rule remains open to the legal decisionmaker in every case. This decision is based not *on* the rule but on the full set of social, political, moral, cultural, psychological, and institutional norms that the decisionmaker would, absent the rule, use in making a decision. This claim, therefore, sees legal indeterminacy (which is not the same as indeterminacy *simpliciter*) as residing not in legal rules, or even necessarily in the nature of the array of legal rules, but in the status that one rule or the array of rules has for the decisionmaker. This claim, however, with

25. For example, there are instances in which the First Amendment, itself a rule to the core, generates the kind of protection of harmful speakers saying harmful things (Nazis, Klansmen, glorifiers of sexual violence against women, et cetera) that would be far less likely to exist under a more particularistic outlook. *See* Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989). Note as well the judicial willingness on occasion to follow literal language even when it produces an unjust result in furtherance of a legislative mistake, as in United States v. Locke, 471 U.S. 84 (1985), or creates a silly distinction, *see* Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989), or rewards the unworthy, as did the cases that, unlike Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), allowed heirs who had caused the death of the testator to inherit according to the terms of the will. *See* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 111-21 (1937).

Still, contrary to Kress, *supra* note 13, at 324-26, I do not see the existence of predictability of outcome as much evidence of the existence of constraint *by legal rule*; predictability would be compatible with the use of widely shared non-legal-rule factors to prefer one result to another.

26. *See* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973). Similar claims are offered in Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541 (1988); and Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985).

which I am in substantial agreement,[27] is agnostic about whether the decision to apply a rule is to be made wholesale or retail. If retail, if a decisionmaker is deciding *in every case* whether it is best, all things (including the existence of the rule) considered, to do what the rule requires, then the existence of the rule is only one member of a large array of reasons of equivalent status.[28] There is no reason, though, to suppose that this decision cannot be made wholesale. A decisionmaker might choose at the outset to follow the rule blindly in the next 10, 100, or 10,000 cases and then choose *not* to reexamine that choice.[29] Whether a decisionmaker should do so is another issue. The claim now is only that one of the choices open to a decisionmaker is one in which decisions are made according to rules of considerable generality, even when following those rules results in decisions that are suboptimal in individual cases.

It thus appears that a strong form of rule-based decisionmaking is conceptually and psychologically possible. But although decisionmaking according to rule is possible, one could still argue that this form of decisionmaking ought not to be considered *legal* decisionmaking. Law might arguably be something else, and its essence may lie in seeking to resolve particular cases according to all their unique features.[30] Many have asserted that law's chief concerns should be to reach the best re-

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27. It is important to distinguish the logical version of this claim from the psychological. I agree that the application of even the clearest rule logically presupposes a decision, not made by the rule itself, to apply the rule according to its linguistic indications. That logical presupposition, however, need not be perceived as a choice by the rule-applier. Thus, the logical existence of an alternative is compatible with some (or indeed all) decisionmakers seeing only one choice, and *feeling* compelled, whether they are or not. This explains, in part, the important critical legal studies focus on exposing the logically presupposed choices, for once the existence of choice is exposed, the denial of it becomes less psychologically possible.

28. *See supra* note 8 (discussing rule-sensitive particularism).

29. This sentence suggests the relevance of a rich literature in psychological decision theory. *See, e.g.*, J. ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (rev. ed. 1984); PERSPECTIVES ON SELF-DECEPTION (B. McLaughlin & A. Rorty eds. 1988); Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORGANIZATION 357 (1985).

30. *See, e.g.*, Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990). Seeing law as essentially particularistic, as necessarily placing great weight on reaching the right decision in the particular case, is a central theme in much of feminist jurisprudence. *See* Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115. It is also central to those perspectives that see law as largely an exercise in case-specific rhetorical practice. *See* Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988).

sult in the individual case, to do justice between the parties, and to make the best decision in each case on the basis of "all relevant factors." I have no quarrel with claims that such a form of decisionmaking is frequently morally desirable or instrumentally useful. The surprising claim, however, is that this is the *only* form of decisionmaking that anything rightfully called *law* can tolerate. I have sympathy with the argument that rule-based decisionmaking is a form of decisionmaking that ought to be rejected more often than it is. The argument that rule-based decisionmaking is not at all compatible with the idea of law, however, is much less plausible, for reasons I will now explain.

As a definitional and empirical question, the claim that law cannot tolerate rule-based decisionmaking, just like the claim that law can tolerate only rule-based decisionmaking, is false. Insofar as judges frequently see themselves as rule-appliers,[31] and insofar as that is what on occasion they are indeed doing, then it is plain that the word "law," as used in the United States and other English-speaking countries in 1991, is broad enough to encompass the activities of decisionmakers who do not claim to attempt to do justice in a case-by-case equitable manner, and whose actual practice of decisionmaking is consistent with that self-definition.[32] If this is so with respect to judges, then, *a fortiori*, it seems even more true with respect to various other people properly called "legal" officials, such as clerks of courts, functionaries in administrative agencies, and law enforcement officials.

Moreover, and again tracking (in reverse) the claim that law is necessarily rule-based, positivist theory points to the same conclusion. Whatever positivism may be at its fringes, at its core it acknowledges the ability of a polity to recognize as law some set of rules distinguished from the totality of social norms

31. *See, e.g.*, Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987).

32. *See* Newman, *Between Legal Realism and Neutral Principles*, 72 CALIF. L. REV. 200 (1984). As I hint in the text, I take self-reports, by judges or others, of their own behavior and their own motivations to be relevant, but hardly dispositive. People are often among the worst perceivers, explainers, or even reporters of their own behavior. As a result, decisionmaker reports of decisionmaker motivation must be subject to at least some skepticism, in part because those reports may be influenced, consciously or not, by some sense of which motivations are currently acceptable and which are not, and in part because they may represent insufficient self-awareness about actual choices and actual motivations.

by a source-based standard, to designate some group of officials as appliers of that limited set of rules, and to sanction officials who make decisions in any other way.[33] This is *not* to claim that positivism in this sense is a satisfactory account of American law. Claiming that law *can* be a system of rules does not mean that law *must* be a system of rules. The claim that law *must* involve the attempt to reach the best result in individual cases, however, cannot start from positivist conceptions of law.

Thus, one again returns to the Fullerian version of the normative-natural law-essentialist argument: Is it so wrong for legal decisionmakers to abjure justice between the immediate parties in the service of rigid application of rules that we should say that such a mode of decisionmaking simply cannot count as law at all? When put this way, the claim seems highly implausible. There are, of course, serious normative arguments about whether all or some legal officials ought to see themselves as rule-appliers. It seems counterintuitive to view this as a definitional question, though, or to see it as a question with so obvious a negative answer that those societies having rule-based adjudicatory systems ought to be thought of as having "no law" in the way that Fuller wanted to make that claim about Nazi Germany. As Robert Summers and Patrick Atiyah have pointed out, for example, legal decisionmaking in the United Kingdom is guided by a substantially more rule-based consciousness than exists in the United States.[34] The British adjudicatory mechanism may (or may not) be accordingly less morally desirable, or less pragmatically useful, but to argue that it is *eo ipso* less *law* seems to beg the question.

IV.

We have now established that both rule-based and particularistic forms of decisionmaking are conceptually and psychologically possible, and that both forms of decisionmaking meet the minimum requirements to qualify as *law*. Although I intend to go further and explore descriptively which of these options we have chosen and normatively which we ought to choose, we

33. *See* Gavison, *Comment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 21, 30-31 (R. Gavison ed. 1987).

34. *See* P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987). *See also* Summers, *Form and Substance in Legal Reasoning*, in LEGAL REASONING AND STATUTORY INTERPRETATION 11 (J. van Dunne ed. 1989).

should not underestimate the extent to which even this claim might be controversial.

In presenting the issue as a choice between two possible and law-compatible decisionmaking modes, I mean to reject an unfortunate and increasingly prevalent form of formalism. I have argued elsewhere that the term "formalism" admits of numerous contemporary uses, the least happy but most common of which is as an all-purpose term of condemnation in legal theory.[35] Beneath the purely epithetical use of the term, however, there exist two distinct forms of legal thought often designated as "formalistic." In the first, a decisionmaker reaches the result indicated by some legal rule, independent of that decisionmaker's own best judgment and independent of the result that might be reached by direct application of the justifications lying behind the rule. The second refers to a style of decisionmaking in which the decisionmaker denies having made a choice when in fact the decisionmaker did so. Formalism in this sense, treating as inexorable a decision that was in fact open, is ordinarily more deserving of opprobrium.[36]

I want to focus on this second sense of formalism as the denial of choice, because my main purpose thus far has been to demonstrate the availability of a choice between decisionmaking modes. My point is not that every decisionmaker in every decision has a choice whether to be rule-based or particularistic (although in a sense this is so), but rather that the process of creating a decisionmaking environment involves a choice about how rule-based that environment is going to be.[37] In making this point, I mean to reject as formalistic in this second sense those perspectives that would dismiss out-of-hand a rule-based or a particularistic decisionmaking style, or that would too easily label a form of decisionmaking as acontextually immoral,

35. *See Formalism*, *supra* note 6.

36. I append the qualification "ordinarily" because I do not take decisionmaker candor to have a lexical priority over all other values. Indeed, I am willing to be persuaded that decisionmaker candor is less important than we commonly take it to be, but have not yet been so persuaded. *See generally* Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

37. I refer to choice in an abstract way to keep off the present agenda an exploration of how a decisionmaking environment develops, especially with respect to the degree to which rules prevail. I touch on these issues briefly in the final sections of this Article, but a fuller examination would have to deal with, *inter alia*, patterns of decisionmaker selection, forms of post-selection decisionmaker education, techniques of rewarding and punishing decisionmakers for deciding in one or another way, and forms of social and professional stimuli likely to affect decisionmakers.

impossible, undesirable, or incompatible with the idea of law. Such perspectives deny the extent to which different forms of decisionmaking are possible, compatible with the idea of law, and even desirable. Insofar as part of my goal is to demonstrate the moral, conceptual, and psychological plausibility of two different forms of decisionmaking, my target is precisely those perspectives that would condemn one or the other *tout court*, and that deny the extent of the choice involved in establishing a decisionmaking environment.[38]

V.

Having recognized the conceptual possibility and actual occurrence of multiple forms of decisionmaking, what can we say about the forms of legal decisionmaking that actually character-

38. My claim about a choice between degrees of ruleness, either for a decisionmaking environment or for particular rules within that environment (that is, whether the rules will be precise and constraining or looser and less constraining) would be undercut to the extent that the *convergence hypothesis* turns out to be true. If there is within a given legal system a single prevailing view of the appropriate degree of ruleness (and the existence of such a prevailing view is logically independent of the content of that outlook), we might expect to see the style of legal decisionmaking converging on that view, regardless of the starting point. For example, Section 16 of the Securities Exchange Act of 1934, 15 U.S.C. § 78p (1988), and Rule 10b-5 promulgated pursuant to that Act, 17 C.F.R. § 240.10b-5 (1990), both deal, broadly speaking, with the problem of insider trading. The two provisions, however, seek to achieve the same goal in quite different ways. Section 16, with its use of such rigid and precise statutory boundaries as "six months" and "10 per centum," appears to be a rule-based approach to the problem, with all of the attendant advantages and disadvantages of rule-based decisionmaking. Rule 10b-5, by contrast, uses such terms as "device or artifice to defraud," and is a "standards" or "discretionary" approach, abjuring the virtues of ruleness in order to maximize the amount of individualized justice, with all the advantages and disadvantages of that approach. If the convergence hypothesis is correct, we would expect to see decisions pursuant to Rule 10b-5 creating a number of reasonably rigid rules (as we see with the development of per se rules under the equally indeterminate Sherman Antitrust Act), and decisions pursuant to Section 16 refusing to apply the rigid rules when doing so would be inconsistent with the underlying purposes of the statute. If this occurs, if decisions under Section 16 tend toward amelioration of its ruleness, and decisions under Rule 10b-5 tend toward the creation of rules, then the result might be a rough equivalence of ruleness in practice under the two provisions, even though the starting points were quite divergent.

As I indicated at the outset of this note, I hope that the convergence hypothesis turns out to be false. If true, the hypothesis would cast doubt on the projects of those of us who want to understand rules as contextually contingent tools in the short or intermediate term, available in a wide range of contexts but actually used only when there is a reason to believe that the particular decisions of a particular class of decisionmakers ought to be constrained. *See* Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENTARY 69 (1989); F. Schauer, Three Comments on Context (1988) (unpublished manuscript; available from author). If the convergence hypothesis is correct, however, the tendencies toward convergence will substantially undercut the ability of a rulemaker to use varying degrees of ruleness as variable constraint. It would not undercut, however, the ability of a society in the long term to change its prevailing view of the appropriate degree of ruleness applied in all its decisionmaking environments.

ize the legal systems with which we are most familiar? It is tempting to say nothing, for my argument about the plausibility of different decisionmaking modes suggests very strongly that it would be impossible to generalize about what kind of decisionmaking environment now "exists" in law. Given the wide range of possibilities,[39] it would be astonishing to discover that all legal systems had chosen the same one. Almost as astonishing would be the discovery that a single legal system had chosen similar styles with respect to the degree of ruleness for all its decisionmaking environments.[40] Still, some descriptive generalization is possible, at least with respect to the widely scrutinized domain of American appellate adjudication. I believe that much that I say applies outside that domain, but the existence of reported appellate cases makes it easier (usually too easy) to focus on that domain.

As I indicated above, many versions of legal positivism are conceptually compatible with the existence of legal systems employing substantially particularistic decisionmaking modes. Positivism, however, is not only a conceptual claim about the nature of law. It is also (to me, if not to Coleman) a descriptive claim, purporting to give an account of those legal systems in which a limited and pedigreeable set of norms is extensionally divergent from the non-pedigreed set of norms then accepted within a society and available to all of its decisionmakers. From this perspective, the distinction between law and non-law is a central feature of the positivist picture.[41]

39. As I indicated in Part I, my sharp distinctions between decisionmaking modes are heuristic simplifications, and are not designed to deny the existence of innumerable gradations between the distinguished poles.

40. *But see supra* note 38 (discussing the convergence hypothesis).

41. In saying this, I find myself in substantial agreement with the account of positivism set forth by Joseph Raz in THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (2d ed. 1980), and in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979). Moreover, this sense of positivism is the one Ronald Dworkin targets in both TAKING RIGHTS SERIOUSLY (1977) and LAW'S EMPIRE (1986). *See also* Gavison, *supra* note 33, at 30-31 (using the phrase "first stage law" to designate something quite close to what I mean by "law" in this sense of the distinction between law and non-law). This conception of positivism, however, seeing as central the question whether there is a limited domain of pedigreeable legal norms that is not extensionally equivalent to the totality of then-available social norms, is controversial. Other conceptions of positivism, conceptions more responsive to the traditional concern to distinguish positive law from natural law, are not nearly so concerned with the "limited domain" issue. Here I am referring in part to the arguments of Coleman, Lyons, and Soper, *see supra* note 13, each of whom in a different way maintains that a system contingently empowering judges to consider the totality of social norms still satisfies the central positivist aim of rejecting a non-socially-contingent standard for the existence of a legal system. I am referring as well to Kelsen, because his account of a dynamic or non-

Under the "limited domain" account, there is plainly a close affinity between legal positivism and rule-based decisionmaking. This affinity stems from the fact that both the idea of a rule and the idea of positivism as a limited set of norms entail some extensional divergence between the set of results indicated by a rule or set of rules, or the set of results indicated by a set of pedigreeable rules, and the set of results indicated by the full array of norms otherwise accepted by some decisionmaker. Just as a decisionmaker who follows a rule will on occasion make decisions other than those that she would have made absent the rule, so too will a decisionmaker constrained to take account of only a limited set of rules on occasion reach results other than those that she would have made were she not so restricted. Under both a single rule and law as a system of such rules, the rule-restricted decisionmaker may reach results different than those reached by an unrestricted decisionmaker.

Thus, both my account of decision according to a single rule and positivist accounts of decision according to a limited set of rules draw a distinction between the rule-indicated decision and the all-things-considered decision. It is just that distinction that most of the attacks on positivism, and most of the attacks on legal decisionmaking as rule-based decisionmaking, target. Many of the descriptive attacks sound a similar theme. Duncan Kennedy, for example, acknowledges that it would be possible to have a system of rigid rule-based decisionmaking, one in which decisionmakers simply apply the rules mechanically to the cases that come before them.[42] But this theoretically possible system, he argues, is not the American legal system, where the fact that a case falls within the plain indication of an unquestionably applicable and valid rule is not dispositive of the result. Under some circumstances, the result may be set aside in the service of other, larger values. No matter how applicable

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momentary legal system pays close attention to the fact that legal change can and does take place through the application of an unlimited set of social norms. *See* H. KELSEN, PURE THEORY OF LAW 193-278 (M. Knight trans. 1967). Such accounts of positivism serve important purposes, but one purpose they do not serve is that of explaining how a limited set of pedigreeable materials appears to dominate the legal consciousness. Dworkin's response, that things are not what they seem, may or may not be correct. That is not, however, to dispute the goal of one version of positivism as attempting to explain the phenomenon of limited domain. If this is a false version of what is "really" central to positivism, then so much the worse for positivism, for it still leaves us without an account of what does appear at first sight to be a phenomenon of a limited domain of legal materials.

42. *See* Kennedy, *supra* note 26, at 383-91.

and valid the rule appears to be, the judge may still legitimately[43] refuse to follow a rule where following it would conflict with moral or other socially accepted norms.

Kennedy acknowledges that the instances of such apparent non-following are statistically rare. But so long as there is at least one, he says, or at least the possibility of one, then *every* case offers the possibility that this is that case. How, then, is the judge to determine if this is the one? Kennedy argues that the judge must do so by consulting the same full array of considerations that would justify setting aside the rule *if* this were the one. The result, therefore, is that the full array of considerations is at work in every case, not just in those cases in which the array actually overrides the rule-indicated result. If this is so, then it is error to conclude that legal decisionmakers are restricted to a domain of legal norms smaller than the totality of norms available to any public decisionmaker.

The best reading of Dworkin turns out to be quite similar to this best reading of Kennedy. Start with the premise that, to the positivist, cases like *Riggs v. Palmer*[44] and *Henningsen v. Bloomfield Motors, Inc.*[45] are cases in which there was "a rule of law" (not to be confused with "the rule of law") that existed before the particular decision. That rule of law could have been identified by resorting to the very kind of rule of recognition that is posited by the positivists. Had the judges applied that so-recognized rule of law to the facts of the cases at issue, exactly the opposite results would have been reached: Elmer Palmer would have inherited the proceeds of his evil deed, and Bloomfield Motors would have reaped the benefits of the disclaimer written into the contract.[46]

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43. By legitimately, I mean that the judge can so act without being thought to violate the metanorms of the society or her role within it. Compare this (contingent) sociological acceptability with the unacceptability of a judicial decision refusing to apply an applicable rule because its rigid application would produce the astrologically unacceptable consequence of allowing a Sagittarian plaintiff to recover on a Tuesday during April of a leap year.

44. 115 N.Y. 506, 22 N.E. 188 (1889).

45. 32 N.J. 358, 161 A.2d 69 (1960).

46. Dworkin's most misleading and confusing phrase is plainly his claim about "one right answer," but close behind as a sower of the seeds of confusion is his use of the phrase "hard cases." It has led many people to believe, quite erroneously, that the Dworkinian perspective arises only in the context of those cases that are in some way doctrinally indeterminate. *See, e.g.*, Mirfield, *In Defense of Modern Legal Positivism*, 16 FLA. ST. U.L. REV. 985 (1989). To the contrary, appreciating the bite of Dworkin's critique requires understanding that cases like *Riggs* and *Henningsen* were doctrinally *easy*, in the opposite direction, prior to their decision. *See The Jurisprudence of Reasons*, *supra* note 6.

So why not? It is Dworkin's point, or should be, that when the recognized rule generated a result at odds with what a non-recognized and non-recognizable set of political, social, and moral principles would have generated, then the recognized-rule-generated result gave way to the unlimited-norm-set-generated result. Therefore, it turns out that *every* case requires consultation of that unlimited norm set, and it is simply illusion that there is a distinction between the cases in which this unlimited norm set is applied and those in which it is not.[47]

A common response to Dworkin is that it is possible to construct a rule of recognition such that the legal principles used to set aside legal rules in cases like *Riggs*, principles like the one mandating that no man shall profit from his own wrong, were in fact legally recognizable and recognized rules at the time. Arguably, so too was the meta-principle allowing a legal principle to trump a legal rule. That being the case, the critics say, the idea of a rule of recognition and the idea of positivism as limited domain remain intact.[48]

Dworkin rejoins (or should) with *Henningsen*, which arguably involved the trumping of a recognized rule by a principle (unconscionable agreements will not be enforced) not hitherto recognized by the legal system. Thus, it appears once again that the full array of a society's moral, social, and political principles are available to set aside those undesirable results that might be indicated by the set of legal principles. That being the case, then, as in Kennedy's account, the decisionmaker must consult in *every* case the full set of society's principles and not only the legal set, because prior to that consultation the result generated by the recognized rule is not final.

The positivist now has two responses. She could challenge this account of *Henningsen*, or, more precisely, she could challenge the account of the state of the law of New Jersey immediately prior to the decision in *Henningsen*. What if the unconscionability principle, like the no-man-shall-profit-from-his-own-wrong principle in *Riggs*, did exist (in the rule-of-rec-

47. This is made explicit in *Law's Empire*. *See* R. DWORKIN, LAW'S EMPIRE 352-53 (1986). Consequently, although Dworkin's claim is that positivism cannot explain legal change, *see* Kress, *The Interpretive Turn*, 97 ETHICS 834, 850-51 (1987), what gives that claim real force is the fact that the legal change to which Dworkin refers takes place not only when "first stage" law runs out, but also when it is clear.

48. *See, e.g.*, N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978); Waluchow, *Herculean Positivism*, 5 OXFORD J. LEGAL STUD. 187 (1985).

ognition sense) in New Jersey prior to *Henningsen*? If so, the example would fail. True enough, but this is a failure only of the example and not the argument. If *every* potential rule-trumping principle were previously recognized by a rule of recognition, then either by some miraculous fortuity the common law from the beginning incorporated all the principles we would ever want in a legal system, *or* the set of legal principles can at no time be considered closed. If the set is not closed, however (and that is why Dworkin uses *Henningsen*), then positivism has no account of how a previously non-recognized principle is available to trump a rule-of-recognition-recognized legal rule or legal principle.[49]

Dworkin purports to cabin the implications of his account by distinguishing principle from policy. Judges should not consult the full totality of social factors, Dworkin claims, but only principles. As normative argument, Dworkin's account of the policy-principle distinction has some appeal, but as description of judicial behavior, it turns out to be empirically false. As Melvin Eisenberg demonstrates, common law judges consult the domain of policy as much as that of principle, and thus in every case the judge is explicitly or implicitly examining the full range of what Eisenberg calls "social propositions" in order to determine whether what looked like the legal rule should be applied.[50] Because the judge applies the legal rule only when it is consistent with the social propositions, and because that determination must be made in every case, the result is that this non-recognized set of social propositions is at work in *every*

49. A response might be that positivism is compatible with a system in which judges are permitted without rule-based constraint to employ a non-pedigreeable set of moral and social norms to set aside, when necessary, morally or socially undesirable results indicated by legal rules. Here, everything depends on the debate in which the positivist is taken to be a combatant. Professor Coleman has me claiming that the limited-domain thesis holds that "in *any* community the law *must* be only a part of that community's stock of norms." *Rules and Social Facts*, *supra* note 13, at 723 (emphasis added). Coleman erroneously attributes that view to me because he, unlike me, wants the question about positivism to be solely a question about concepts and not a question about contingently non-congruent domains. I maintain only that in this and most other communities of which I am aware, the law is indeed only a part of the community's stock of norms. Clearly, a society could choose otherwise and still be conceptually explainable from a positivistic perspective. However, the limited-domain thesis is what Raz, Gavison, and I, among others, claim is a description of this and most other modern communities. That is what Dworkin denies, and that is a real debate, whether it is Coleman's or not. Unlike me, Raz also maintains that the limited-domain thesis is a necessary feature of the concept of law. Thus, Raz and Coleman do have something to argue about, but Coleman is at least correct in not involving me in *that* debate.

50. *See* M. EISENBERG, THE NATURE OF THE COMMON LAW 14-42 (1988).

legal decision. Thus, the idea of legal decision being based on a limited set of rules, and therefore the idea of legal decision itself being rule-based, appears to dissolve.

As logical arguments, the anti-positivist and anti-rule accounts of Kennedy, Dworkin, and Eisenberg appear compelling. They all demonstrate that no interesting positivist position or rule-based account of legal decisionmaking can explain the common law, or uses of common law method in statutory context,[51] if that method allows legal decisionmakers legitimately to consult the totality of a society's norms to set aside a previously-recognized rule. To put it more broadly, it appears difficult to reconcile actual constraint by rule, and a perspective based on constraint by rule, with the observation about the common law that "the rules change as the rules are applied."[52]

Although the attacks I have described seem argumentatively impeccable, they also seem phenomenologically false. Judges, lawyers, and citizens see a world in which law appears to loom larger at times than other sources of norms. Under one view, perhaps Dworkin's and perhaps Kennedy's,[53] this is partly illusion, a function of the way in which some applications of the totality of social norms are so routine that the decisionmaker scarcely perceives what she is doing. It also turns out, however, that the world of legal decisionmaking does not look like the world we would expect to have if legal results were entirely at the mercy of the non-limited set of social norms.

If decisionmakers applied a legal rule only when consistent (or coherent?)[54] with a larger and unpedigreeable set of social norms, then we should be surprised to see many legal results inconsistent with that larger set of social norms. From that perspective, every such result would be a mistake, representing an

51. *See generally* G. Calabresi, A Common Law for the Age of Statutes (1982); Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987); Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 Mich. L. Rev. 672 (1987); Note, *Intent, Clear Statements, and the Common Law: Statutory Construction and the Supreme Court*, 95 Harv. L. Rev. 892 (1982).

52. E. Levi, An Introduction to Legal Reasoning 3 (1948).

53. There are many Duncan Kennedys. Some of what follows is more compatible with the Duncan Kennedy of *Freedom and Constraint in Adjudication*, *supra* note 23, than with the Duncan Kennedy of *Legal Formality*, *supra* note 26.

54. The parenthetical is designed only to contrast Dworkin's interpretive approach and that of others.

instance of a decisionmaker failing to test the legal-rule-generated result against the larger norm set.

But we know, of course, that such results are omnipresent, and we do not consider them mistakes. This is most obvious with respect to statutes and other canonically-inscribed rules. For instance, there are few arguments of principle or policy suggesting that the ethical obligations of a two-lawyer partnership are different from those of a single lawyer. A recent Supreme Court ruling, though, disallowed Rule 11 sanctions against a partnership solely because the language of the rule plainly applies only to lawyers in their individual capacity.[55] Even more extreme is *United States v. Locke*,[56] in which the Court, in interpreting an obviously misdrafted statutory filing deadline ("before December 31"—the plaintiffs filed on December 31), treated the literal deadline as dispositive.

With respect to the common law, judges often give the most directly applicable doctrinal answer even when that answer conflicts with the kinds of arguments from more distant policy and principle that were determinative in *Riggs* and *Henningsen*.[57] One example is the abrogation of common-law tort immuni-

55. Pavelic & Leflore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989). The language of the rule refers only to "the person who signed." FED. R. CIV. P. 11.

56. 471 U.S. 84 (1985). For a criticism of *Locke* on just these grounds, see Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. U.L. REV. 179 (1986).

57. There is a great deal embedded in the phrase "most directly applicable." Initially, it is important to acknowledge the realist-sounding argument that a case, or a legal event of any kind, is unlikely to present only a small number of salient facts easily matched with the factual predicate of a single rule. Rather, facts appear as components of highly complex events, with the salience of particular facts determined not prior to their subsumption under one rule, but rather after some lawyer or judge identifies the rule that makes certain facts but not others important. In other words, many events are likely to present themselves as candidates for inclusion under any of several potentially mutually exclusive rules. At that point, it is the selection of the rules that drives the selection of the salient facts, and the picture of an event as naturally fitting within only one prior rule turns out to be false.

Even when only one specific rule applies to an event, there are likely to be some number of more general but still applicable rules. This is how we can view cases like *Riggs*, for the events of that case fell within the "no man should profit from his own wrong" rule just as much as they fell within the "named beneficiaries inherit according to the terms of the will" rule. (The rejection of Dworkin's rule-principle distinction in the preceding sentence is intentional.) Yet the latter rule, because it encompasses this event and a far smaller number of others, is the more directly applicable, or the more locally applicable, or the more narrowly applicable. Much of the bite of a rule-based adjudicatory structure is a function of the priority that the more narrowly applicable rule has over an also-applicable, but less narrowly so, rule. Put differently, much that is in the text about the presumptive priority of recognized over unrecognized rules is applicable, *mutatis mutandis*, to the potential presumptive priority of the most narrowly applicable rule.

ties. Although most courts themselves abrogated these immunities once they determined that they could no longer be justified, others insisted that abrogation was solely the province of the legislature.[58] A better example is the fact that *Riggs* for a long time remained the minority view. A significant number of courts determined, even with knowledge of the "no man may profit from his own wrong" principle, that a wide range of unworthy beneficiaries, including ones causing the death of the testator or intestate, could, in the absence of statute, still inherit.[59]

Thus, there appears a set of cases in which the recognized rule dictates the result, even in the face of judicial awareness and acceptance of policies or principles that would indicate the undesirability of applying that rule. Yet there are also cases like *Riggs* and *Henningsen*, in which the recognized rule gives way to some policy or principle lying outside the set of recognized rules. Similarly, cases like *Locke* and *Pavelic & Leflore v. Marvel Entertainment Group* generate both dissents and criticism,[60] indicating that even in the statutory context, the primacy of the most directly applicable recognized rule is contested and controversial. How are we to explain this?

One explanation, sounding again in realism and inspired by Llewellyn's thrust-but-parry,[61] holds that both the rule-based and the non-rule-based approaches are available in any case, with the selection of one rather than the other being largely a function of the decisionmaker's view of the appropriate resolution of the particular case. Indeed, perhaps as soon as the decisionmaker realizes that the non-rule-based approach is available, the rule-based approach disappears, because the selection of a rule-based approach for necessarily non-rule-based reasons is itself a non-rule-based decision. If the choice of following a rule is based on non-rule-of-recognition-recognized principles of equity, then the presence of the rule-based alternative is illusory.

This rule-rejecting explanation of even those cases that at first appear to involve the application of rules is problematic. What is significant about the immunity abrogation cases, the

58. *See, e.g.*, Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976).

59. *See generally* T. Atkinson, *supra* note 25, at 111-21.

60. *See, e.g.*, Posner, *supra* note 56, at 204-05.

61. *See* Llewellyn, *supra* note 23, at 401-06.

unworthy beneficiary cases, and many of the statutory formality cases is that the very judges refusing to set aside the rule-based result plainly indicated their dissatisfaction with that result.[62] Were a legally legitimate alternative available to those judges, and seen by them to be available, then we would expect to see the opposite result in these and many other cases. Because we do not, there is a strong indication that the simple realist explanation is simply too simple.

Alternatively, we might explain the differences as a clash of competing legal theories. Dworkin sees *Riggs* and similar cases as evidence that different legal decisionmakers have different (that is, positivist and non-positivist) legal theories. Because these differences have yet to be resolved, a legal decisionmaker can, without fear of charges of betrayal of her role, adopt either of these theories in a way that she could not adopt a legal theory based on astrology, numerology, or the view that the right legal decision is always the one that would best pave the road to socialism.

This explanation, however, fails to explain why some legal decisionmakers appear to do both. Although I have not researched this assertion, I would be surprised to discover that none of the judges in *Riggs* or *Henningsen* had ever followed a common-law or statutory rule that they believed in error. I would be equally surprised to discover that the dissenters in those cases had never voted to set aside a rule in the service of other larger and non-recognized values. If this is so, and if the simple realist explanation does not hold, then we must search for some non-realist method of reconciling the presence of both approaches and both outcomes within the same legal theory and within the same judicial self-understanding.

At this point in the inquiry, the idea of a *presumption* seems quite useful, and I will argue that positivistically-recognized rules exercise presumptive but not conclusive force in many decisionmaking environments. In order to support the argu-

62. Moreover, most of these cases cannot be explained simply as examples of rule-sensitive particularism. Some cases in which a judge reaches a result she finds mistaken or suboptimal might be explained by the judge's own determination that this was a case in which the reasons for following the rule *qua* rule outweighed the reasons for reaching the individually optimal result that happened to contravene the rule. What characterizes many of the cases I am thinking of, though, is that the judges, by assuming that rule-revision is not part of their job, are engaging in the process I referred to above as "wholesale" rather than "retail" exclusion of rule-based values from case-by-case assessment.

ment, however, it is important that I distinguish two types of presumptions, the *epistemic* and the *justificatory*.[63]

An epistemic presumption, quite familiar in procedural law, deals with the implications of factual uncertainty. When there is no or incomplete information, decisionmaking systems often presume one fact rather than another for a host of substantive and procedural reasons. The form of such a presumption, as set forth in an interesting philosophical articulation of the common evidentiary uses of presumptions in the legal system, is: "Given that p is the case, you (the rule subject) shall proceed as if q were true, unless or until you have (sufficient) reason to believe that q is not the case."[64] The epistemic presumption thus exists within a framework in which the question is the existence or non-existence of q.

By contrast, a justificatory presumption, more familiar (although not by this infelicitous term) in constitutional law, operates in a decisionmaking framework in which reasons vary in strength. Even absent epistemic uncertainty, there may be reasons for taking some action that are simply stronger or more pressing than others. This loose observation, strong enough for present purposes, explains the difference between a reason that is compelling and one that is simply rational, between a justification that is reasonable and one that is important. The constitutional import of all of these distinctions is that, time and again, reasons that are sufficient for some purposes are insufficient for others. For instance, the existence of a quite good reason for restricting speech or taking race or gender into account may still turn out to be insufficient because of the overwhelming justificatory burden that such a reason must meet.[65]

As should be plain, this latter type of presumption is most applicable to the relationship between the results indicated by a recognized rule and those indicated by the full set of extant

63. I am extraordinarily dissatisfied with the latter term, but have yet to come up with anything better.

64. Ullman-Margalit, *On Presumption*, 80 J. PHIL. 143, 154 (1983). Although not germane here, Ullman-Margalit does recognize that presumptions may be of varying strengths, including the conclusive. *See also* Ullman-Margalit & Margalit, *Analyticity By Way of Presumption*, 12 CAN. J. PHIL. 435 (1982).

65. There should be little doubt, for example, that the governmental justifications offered in cases as diverse as Palmore v. Sidoti, 466 U.S. 429 (1984); Craig v. Boren, 429 U.S. 190 (1976); and American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986), would have been sufficient to satisfy a rational basis level of scrutiny.

moral, political, and social norms. Following the above formalization of the epistemic presumption, we might formalize the justificatory presumption as: "Given that result *a* is indicated by rule *R*, you (the rule subject) shall reach result *a*, unless or until you have a reason of great strength for not reaching result *a*."[66] I use "great strength," but the idea is only that the reason must be sufficiently weighty to overcome some weight in the opposite direction. This means that the weight must be stronger than *ceteris paribus*, but just how much stronger need not be specified. Although there are confusions engendered by the use of any term, the idea I am trying to capture is often articulated in terms of the rule having *prima facie* force.[67]

Although examining the extent and subtleties of the presumption as it exists in this or any other legal system would require more investigation than I have performed, it appears likely that the conflicting descriptive insights of the positivists and their critics can be reconciled by thinking of the recognized rules as justificatory presumptions. Were that the case, we would expect to see many cases in which the recognized rule generated a result consistent with that generated by the full norm set; some cases in which the recognized rule indicated a result that was set aside in the service of some conflicting social norm; *and some cases in which the recognized rule indicated a result that conflicted with a larger social norm, but not by so much or so egregiously that it was worth setting aside the result indicated by the social norm.* It is this last set, the set of slightly but not extremely wrong answers (from the perspective of the set of social norms), that indicates the existence of exactly the kind of presumption in favor of the recognized rules that I am positing. More importantly, it explains how the insights of Dworkin and others can be seen as consistent with the apparent phenomenological dominance of the very kind of limited domain of recognized

66. Contrast the following: "Given that result *a* is indicated by rule *R*, you (the rule subject) shall reach result *a* unless there are reasons for not following rule *R* in this case that outweigh the sum of the reasons underlying *R* and the reasons for setting forth those underlying reasons in the form of a rule." The difference between this formulation and the one in the text is both enormous and of enormous significance. It is another way of stating the difference between the form of decisionmaking I call "rule-based" and the one I refer to as "rule-sensitive particularism." For further development of this distinction, see F. SCHAUER, *supra* note 4, at 159-71; *supra* note 8 and accompanying text.

67. I am, however, reluctant to endorse use of that term in this context, largely for reasons set out in Searle, *Prima Facie Obligations*, in PRACTICAL REASONING 81 (J. Raz. ed. 1978).

rules that lies at the heart of the positivist perspective.[68]

Implicit in *presumptive positivism*,[69] in this picture of the presumptive force of a first-stage legal rule vis-à-vis a wide range of other, non-pedigreeable considerations,[70] is the assumption that a decisionmaker can examine the set of other, non-pedigreeable considerations casually. That is, the picture of presumptive positivism is open to the charge that there is no way of knowing that the presumption has *not* been overcome without examining the very factors that might overcome it. If that is the case, so the argument goes, then the idea of the presumptive force of a limited norm set disappears.

Against this possibility, I tentatively offer the idea of a casual look, a glimpse, a peek, a preliminary check, pursuant to which a decisionmaker follows the recognized rule unless some other factor overtly intrudes on her decisionmaking process. Implicit in presumptive positivism is a phenomenology such that the decisionmaker is open to the possibility of the presumption being overcome, but does not actively pursue it, or can do a quick check short of a thorough inquiry. If I am correct, if presumptions do serve as psychological simplifiers as well as analytic decisionmaking devices, then presumptive positivism does not fail, even though it requires the decisionmaker to examine in some way the larger range of potentially overriding factors.[71]

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68. My thesis that the existence of presumptive positivism explains a significant amount of the dominance of a limited domain of legal rules in America might fit with my description of the *convergence hypothesis*. *See supra* note 38.

69. Professor Gavison suggests that I steer clear of the debates about what kind of claims positivism makes by referring to this descriptive-explanatory thesis as "presumptive ruleness." *See* Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 750-52 (1991). I have no strong objection to that term, except insofar as it cedes the term "positivism" too easily to only one debate, a debate of less contemporary importance than the debate about limited domains.

70. Professor Postema properly chastises me (and too gently at that) for some ambiguity about the sources of the potentially overriding norms. *See* Postema, *Positivism, I Presume?... Comments on Schauer's "Rules and the Rule of Law"*, 14 HARV. J.L. & PUB. POL'Y 797, 813 n.23 (1991). Here, the debate seems to be one between Dworkin, for whom only principles accepted in a certain way will be usable in legal decisionmaking, and Eisenberg, whose domain of "social propositions" is congruent with the full set of normative propositions or sources accepted by the society at large. Descriptively, Eisenberg seems to be correct, but as a celebrant of existing common law practice he needs to offer some justification for treating judges and lawyers as appropriate translators and appliers of the totality of society's norms. Dworkin's account is sensitive to this problem, but his attempt to argue that this is the best explanation of existing practice seems somewhat of a reach.

71. Postema argues that although he accepts the distinction among (non-presumptive) rule-based decisionmaking, rule-sensitive particularism, and pure particularism, he thinks that presumptive rule-based decisionmaking and rule-sensitive particularism are intensionally and extensionally identical. *See id.* at 813-17. *Pace* Postema, however, I

As a descriptive account, therefore, American law appears to treat an existing legal rule, whether it be a crystallized common-law rule or a rule canonically inscribed in a statute, as entitled to presumptive but not conclusive force.[72] Because the presumption necessarily produces some suboptimal results, American law, as described by presumptive positivism, appears

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am not persuaded that there is no difference between the two, and I still maintain that the difference relates to the decisionmaker's ability to vary the weight of the presumption. As I conceive of presumptive rule-based decisionmaking, all of a certain domain of rules come to the decisionmaker with a certain presumptive force, and although that force can be outweighed by other reasons, it cannot be eliminated, even if the reason for the presumption does not obtain. In other words, although the ruleness values are not so strong as to make the rules necessarily conclusive, those values are still not open to evaluation for applicability in the individual case. By contrast, rule-sensitive particularism allows the decisionmaker to evaluate the strength and applicability of the ruleness values in each case, consequently giving those values as little as no weight where they are entirely inapplicable to the case at hand.

Thus, beneath all of the abstraction and excessive pigeonholing in the previous paragraph, there is a real debate here, not so much conceptual as normative. The normative debate is about whether it is always desirable for decisionmakers to be able to reevaluate their own roles in particular cases. In part because that reevaluation will usually be in favor of greater rather than lesser power for the decisionmaker, it is plausible to think that some decisionmaking environments will try to coerce or train their decisionmakers into a decisionmaking mode in which rules *always* have a certain amount of force, albeit a non-conclusive amount. That mode, which I refer to as presumptive rule-based decisionmaking, remains logically distinct from a mode in which the amount of force possessed by the rule is itself determined by the decisionmaker in each case.

72. In referring to a "crystallized" common-law rule, I bracket the question of precedent, except to note my agreement with what Larry Alexander calls the "rule model" of precedent. *See* Alexander, *Constrained By Precedent*, 63 S. CAL. L. REV. 1 (1989). Although I have some minor disagreements with Alexander about where the rule in the rule model comes from, *cf.* Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987), we agree that precedent is illusory where the precedents do not indicate some rule to be applied in future cases even when under- and over-inclusive. We also agree that such a rule exists most plainly when there are so many precedents that there is a common understanding, set forth in treatises and the like, as to what that rule is. The very fact that we refer to "the mailbox rule" or "the Rule in Shelley's Case" is some evidence for the existence of these common understandings operating in rule-like fashion even within the common law. *See* Schauer, *Is the Common Law Law?* (Book Review), 77 CALIF. L. REV. 455 (1989).

When compared to the presumptive force of such a crystallized common-law rule, the force of a statutory rule in the modern United States is typically greater. As the perspectives of Dworkin, Calabresi, and many others indicate, however, and as the existence of dissents in cases like *Locke* indicate, even the rule-based force of statutes is no more than presumptive for many judges. The best and most recent description and defense of a fairly aggressive and thus less rule-based understanding of the process of statutory interpretation is Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). *See also* Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989). As should be clear from the text, I believe that many of these perspectives understate the degree of presumptive ruleness that now exists, overstate the extent to which aggressive attempts at "ideal" interpretation are compatible with the idea of rule-based constraint, and treat as inevitable and beyond normative question a form of decisionmaking that is at best contingently desirable in some decisionmaking environments.

to have some of the manifestations of rule-based decisionmaking in a strong form. Insofar as the presumptions can be overcome, insofar as determining when they should be overcome requires at least a "peek" behind or beyond the rule in every case, and insofar as that peek entails a look at the full array of relevant all-things-considered factors that would be employed absent the rule, American law also appears to have some of the manifestations both of pure particularism and of rule-sensitive particularism. This mix in American law is contingent and not necessary, however, and it is to the normative evaluation of this and other possible mixes that I now turn.

VI.

Even if my account of presumptive positivism captures more accurately than its descriptive opponents the place of rules within much of contemporary legal decisionmaking, it may still be normatively undesirable. By allowing some number of morally suboptimal results to remain in place, it may be thought undesirable by those with greater aspirations for moral optimization.[73] Yet by recognizing a substantial relaxation in the constraint of rules, it may be thought too loose by others.[74] It is now time, therefore, to address these normative questions, not just about presumptive positivism, but about the place of rules within legal decisionmaking generally.[75]

In order to address the normative questions, we must dis-

73. I am inclined to think that Professor Radin is correct in identifying as trivial in one sense those cases in which ruleness values will predominate. *See* Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823 (1991). These are the cases, not necessarily trivial in amount or quantitative import, and not necessarily unimportant to the disputants, in which, from the perspective of the decisionmaker, either the stakes are small, or the stakes are large but the non-legal factors are roughly in equipoise (*see, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988)), or the decisionmaker herself sees the ruleness values as predominant.

74. In this respect, Professor Gavison provides a useful corrective to American theoretical provincialism. She reminds us that the debates in which we engage, debates in part that take seriously extreme forms of normative and descriptive rule-skepticism but do not take seriously equivalently extreme forms of formalism, are a peculiar product of American legal consciousness. *See* Gavison, *supra* note 69, at 731-32.

75. In what follows, the tone of the argument is much more a response to those theorists who have a weaker view of the desirability, on occasion, of rule-based decisionmaking than do I. This is not to say that I agree with the arguments of those, such as Bentham and Justice Scalia, who maintain that for reasons of majoritarian political theory, the idea of judge-made law, especially as it is made by the common-law process, is somewhere between highly undesirable and totally illegitimate. I believe that not to be the case, and believe as well that judicial lawmaking is neither illegitimate nor acontextually undesirable. But because so much of the present American theoretical climate takes just the opposite approach—maintaining that strongly rule-based decisionmak-

tance ourselves from the unfortunate tendency in much of American legal theory to conflate the questions of what the law should be and how judges should decide cases. By defining the former in terms of the latter, a great deal of judge-centered legal theory generalizes about the nature of law from an account of what judges, especially appellate judges, ought to be doing.[76] These, however, are distinct questions, and I want to address them distinctly. First, we must consider what place, if any, rule-based decisionmaking occupies in a conception of law far richer than an exclusive preoccupation with judges deciding hard cases. Then, and only then, can we turn to the question of what role judges are to play within that system.

By removing the judge from center stage, we can start with a more robust conception of the domain of "legal officials." This conception includes all those officials who have the authority to wield official power, who are under some role-related legal constraint, and who have the authority to apply law to specific instances, including the authority to exercise discretion when the law does not control that discretion. This definition is broad and inspired by a somewhat positivist conception of what

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ing, especially by judges, is what is illegitimate—I devote my attention here to examining that claim. *But see* Gavison, *supra* note 69.

76. In fact, the pathology is even more serious. A common normative account of appellate judging sees the appellate judge as a "proxy for me." What I would do were I an appellate judge, and were all appellate judges like me, is a quite different question from the question of what rules or what understandings I would urge on the current array of appellate judges, or the expected future array of appellate judges. I do not deny the utility of ideal theory, but it is important to recognize that those who are prescribing for ideal judges are engaged in a very different enterprise than are those of us who are engaged in the necessarily non-ideal enterprise of describing or prescribing the institutions of and for a non-ideal array of non-ideal decisionmakers. Without this distinction, very little about rules makes sense. As a result, thinking about the role of rules for ideal decisionmakers verges on the self-contradictory.

Moreover, I want to avoid the constraint of thinking that legal theory must make the role and the life of the judge intellectually stimulating and morally enriching, a point of view aptly captured in Posner, *What Am I, A Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 23. It is undeniable that, under a much more rule-constrained conception of judging than we now have, the judicial task (subject to the complications of the selection hypothesis) would be more mechanical and less dependent on judgment, more routine and less creative, more narrow and less intellectually stimulating. It is equally undeniable that, were that the case, some of the people now attracted to the job of judging would be less willing to become judges. I find it odd, though, that enriching the job description of judge should be the starting point for an argument, or even much of an argument at all for judicial empowerment. We do not, after all, take too seriously identical arguments with respect to the powers of police officers, court functionaries, or Central Intelligence Agency agents. As a result, the distinction between a judge exercising considerable judgment and a clerk of the courts exercising very little judgment seems more appropriately the conclusion of an argument about judicial power, rather than a premise of it.

law is and how it operates, but nothing turns on that positivist conception here. I merely want to make it clear that I am now talking about a domain of legal institutions and legal officials that includes, *inter alia*, appellate judges, trial judges, municipal judges, non-legally trained justices of the peace, executive officials of national and state and local government, tribunals like zoning and public housing boards, administrative officials, bureaucrats in administrative agencies and in the courts, and law enforcement officials from the Attorney General of the United States to the cop on the beat (including in this latter category the military police), the Federal Bureau of Investigation, and the Central Intelligence Agency. By saying that such individuals and institutions are part of the legal system, I do not deny that they may be part of other systems as well. For example, the official of the military police is part of the military, and the executive official is also part of the system of partisan politics. Still, all of these individuals and institutions have some role to play both in making and applying law, and thus seem in important ways part of the legal system.

From the perspective of this expansive conception of the individuals and institutions comprising the legal system, it is apparent that some of them are not institutions we normally expect to make all of their decisions in a rule-based manner. Let us take Congress as an example. In part, we *do* expect Congress to act within constitutional and legal constraints, and we expect Congress to treat those constraints in rule-like fashion. That is, we do not expect Congress to treat the constraints of the Constitution as only rules of thumb, to be revised *by* Congress when *it* finds that direct application of the justifications underlying constitutional rules would be better served by ignoring what the Constitution actually says. Were Congress to determine that, in the 1990s, a minimum age of thirty-five for senators better approximated the 1787 justification of sufficient maturity than the constitutionally-specified age of thirty, we would react that Congress had simply done something *wrong*. In other cases, the lines blur, such as when we debate the current effect of a Second Amendment adopted in an age of flintlock rifles and no cocaine, or the obsolescence in an age of nuclear weapons and space satellites of the textual commitment of exclusive power to Congress to declare war. Still, were Congress to say that some constitutional provision was not to be followed because its literal application would not serve the Constitution's background purposes, many of us would respond that not only had Congress misinterpreted those background purposes, but that their very interpretation was unauthorized where the text was clear. The Constitution is not merely a summary of past experience from which Congress is expected to learn, but a rule that Congress is expected to obey.

Despite the fact that many of us thus expect Congress to act within constitutional constraints and to treat those constraints as comparatively opaque rules, the practice of lawmaking does not strike us as significantly rule-based. In deciding what laws to enact and what taxes to impose, most of what legislatures do is taken to be an exercise of judgment, discretion, politics, morality, and policy, involving not the application of legal rules but the making of them.

If we thus see the legislature as the *maker* of rules within the powers granted by some empowering norm, we can recognize the same activity in other participants in the legal system. When a rule empowers an agent or institution, it cannot specify every instance of that power, and therefore some applications of that power will not be rule-based. Thus, a common-law court empowered to make law is not acting in a rule-based manner when it decides to make one law rather than another. For instance, when it decides, on a clean slate, to adopt or not to adopt the principle of charitable immunity in tort, or to allow or not to allow third-party beneficiaries to recover contract damages, it is not acting in a rule-based manner. Similarly, the actions of an administrative agency within its domain of discretion are not rule-based, nor are the determinations of a police officer in deciding, within the geographic boundaries of her "beat," which streets to patrol, and the order in which to patrol them.

These examples are merely an application of the standard positivist position that any set of norms leaves to the applier of those norms some room for action, and that the action exercised in that room is not rule-based, at least not based on or constrained by *legal* rules. Consequently, it is a mistake to assume that *any* legal official is solely in the business of rule-application, for most such officials will be operating at least in part within an area in which the rules allow that official to choose among mutually exclusive but equally legally permissible options.[77] In this sense, law is necessarily at least in part something other than the process of rule-application.

The more substantial question is whether law should *only* be something other than rule-application. This question concerns the attitude that legal officials should take toward the rules that *do* appear to constrain. Why is it so obvious, for example, that Congress should be precluded from recognizing that the age limitations in the Constitution are but crude and now-obsolete approximations of some ideal that has changed with time? Why is it so obvious that Congress should be disabled from abridging the freedom of speech if doing so would foster rather than impede the process of democratic decisionmaking that, arguably, represents the justification lying behind the First Amendment? Why is it so obvious that the right to jury trial in federal civil suits should be allowed in cases in which the amount in controversy is less than the amount in 1990 dollars that would be the equivalent of twenty 1791 dollars? Why is it so obvious that the pocket veto is permissible in an era of modern communication, modern transportation, and a full-time Congress?

We commonly answer these questions by drawing a distinction between the power of revision and the process of application. If an institution has the authority to set aside the indications of a rule in the service of that rule's background justifications, then the rule is not a rule at all for that institution, although the set of background justifications may be.[78] Thus, when we deny to Congress the power to revise the constitutional constraints upon it, we base that denial on a determination of the allocation of power between Congress and

77. I say "most" because of the possibility of closure rules. Although such rules are rare, it is possible to create a mandate under which officials are, for example, instructed to impose a sanction when plainly authorized by the mandate, but in no other case. There will still, of course, be some room for judgment when it is not clear whether the rule plainly applies. When a rule dictates a default rule when the rule does not otherwise indicate a result, though, the space in which discretion operates is significantly reduced.

78. As I have argued elsewhere, we can ask the same questions for background justifications as for rules, because cases may arise in which a background justification is under-inclusive, over-inclusive, or obsolete with respect to *its* background justifications. *See* F. SCHAUER, *supra* note 4, at 125; *Formalism*, *supra* note 6, at 534. What is the relationship, for example, of a "public deliberation" justification for the First Amendment to the "democracy" justification that might lie behind *it*? Thus, how we think about some restriction on the functioning of the deliberative process in the service of democracy is similar to how we think of some restriction on speech in the service of more effective functioning of the deliberative process. Similarly, if the language of a statute can be set aside in the service of its purpose, can that purpose be set aside in the service of even deeper purposes?

those who "made" the Constitution. Even if congressional revision were for the better, granting Congress the authority to revise does not comport with our understanding of who possesses the revising power.

Now, let us look at the issue from the perspective of a police officer. Consider the rules constraining a police officer, such as the rule prohibiting electronic surveillance without a prior court order, except in cases involving an emergency of a national security or organized crime variety.[79] We can imagine some instances in which an all-things-considered judgment, including consideration of the value of having a rule *qua* rule, would lead a police officer to conclude that not conducting electronic surveillance in a non-national security, non-organized crime case would produce an undesirable result: The officer might conclude that the law enforcement system would be unable to arrest, convict, and incarcerate an individual highly likely in the future to commit dangerous crimes, and that none of the potential abuses of the power to conduct electronic surveillance was present in this case or would be more likely in the future because of the use of electronic surveillance without court order in this case.

There is no clear answer to what the police officer should do in such a case, but we can conclude that the police officer's proposed unauthorized electronic surveillance contravenes the existing rule. We can also assume from the assumptions in the preceding paragraph that it could reasonably be concluded that the morally best thing to do in this case is to conduct the surveillance. Even under these conditions, however, many people, including myself, would be reluctant to accept the police officer's claimed authority to revise the rule. Because the proposed exception is not on the closed list of existing exceptions to the rule, the question is unavoidably one of revision. It is thus much the same as the question with respect to Congress and the Constitution: Who should have the power to revise, rather than just to apply, the rules when some circumstance indicates that the rule has generated an erroneous result in the case at hand?

I have used these tendentiously selected examples[80] to sug-

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79. *See* 18 U.S.C. § 2518(7) (1988). *See generally* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 3.7 (1986).

80. Actually, they are only tendentious depending on one's point of view. They are

gest that the virtues of rules within legal decisionmaking are, if taken to be contextual and not universal, virtually self-evident. The two cases are designed, however, to provide more than just two examples of the same point, for they involve two quite different rule-based values, neither of which has much to do with the occasionally valid but often overstated virtues of reliance, predictability, and certainty.

The first of these virtues, presented most plainly by the example of the police officer conducting electronic surveillance,[81] is the virtue of preventing some number of incorrect decisions through the use of a procedure that admittedly produces some other incorrect decisions.[82] It is true that faithful obedience to rules will produce some number of suboptimal, unjust, or downright silly results in the area of under- or over-inclusion of those rules. It is often likely that actual decisionmakers, however, if empowered to make a decision contrary to the rule when such a decision appears to them to be more just or less silly, will produce some number of unjust or downright silly results as a consequence of misjudging what is just, or making a silly calculation of silliness. In a world of non-ideal decisionmakers, therefore, one should calculate the virtues of ruleness based not only on an assessment of the costs of errors of under- or over-inclusion, but also on an assessment of the incidence and consequences of those errors that are more likely when decisionmakers are not constrained by rules. This is not to say that the calculation will always go the same way. Indeed, I have some sympathy for the view that we may traditionally overestimate the likelihood of governmental or official error (at

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most tendentious with respect to the class of people likely to be concerned simultaneously with excessive ruleness in the abstract and abuses of police or legislative power in the particular.

81. Consider as well the circumstances, if any, under which a police officer should have the power to determine that a *Miranda* warning need not be given. *See* New York v. Quarles, 467 U.S. 649 (1984) (establishing public safety exception to *Miranda* warning requirement).

82. Those of us who occasionally see some virtues in rules are commonly chastised for supposing that under a system of rules all disputes can be decided in advance. *See* Bartlett, *supra* note 30, at 853. Nothing could be further from the truth. *No one* I know of makes that claim, and no one has since Bentham. Moreover, even those of us who do think that some number of disputes can be decided in advance do *not* maintain that they can be decided *correctly* in advance. Rather, we think that on occasion the expected negative consequences (the product of frequency and harm) of those incorrect results may be less than the expected negative consequences of trying to eliminate them by empowering a particular array of decisionmakers to determine what that array of decisionmakers believes is an incorrect result.

the expense of the errors of governmental under-involvement) and thus overvalue the importance of government-disabling rules.[83] It still seems odd, though, to suggest that the risk of official error is never present, or that the risk of official error when officials are freed from rules is necessarily less than the risk of error from the faithful application of rules. Consequently, it appears counter-intuitive to conclude that, for all sets of official decisionmakers at all times, the mistakes likely to be made in pursuit of the power to revise rules when necessary will be less in number and degree than the mistakes made in faithful application of those rules.

My example of Congress and the Constitution looks slightly different. When we consider that example, we do not think about the likelihood that Congress will make more mistakes if given the power to revise the Constitution than it would make by faithfully applying it (although that is likely true). Rather, we concentrate on authority, thinking that this task is just not one for Congress to perform. The determination is a bedrock question of political theory, not strictly a function of who is better at doing what. Even if we were convinced that the present Congress could improve the Constitution by rewriting it, it would not follow that Congress, as a matter of political and constitutional theory, should be allowed to do so.

This suggests that rules are necessarily part of any differentiated decisionmaking environment that acknowledges the idea of separation of powers in the broadest sense. Where one decisionmaker performs all decisionmaking—as in the classic act- versus rule-utilitarian debates, which treat the decisionmaker as the one who both makes the rules and then applies them—rules have little or no role to play.[84] Only when there is role differentiation, *and always when there is role differentiation*, will rules be an essential component of the process of differentiation, of the process of allocating decisionmaking power.

When viewed from a separation-of-powers perspective, it

83. See C. MacKinnon, Toward a Feminist Theory of the State (1989); C. MacKinnon, Feminism Unmodified (1987). *See also* Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 86 Yale L.J. 561 (1977); Fiss, *Why the State?*, 100 Harv. L. Rev. 781 (1987).

84. Thus, David Lyons is both correct and beside the point when he argues that act- and rule-utilitarianism are extensionally equivalent when the rule-follower is permitted to make a rule of unlimited specificity at the time that the putative action is contemplated. *See* D. Lyons, The Forms and Limits of Utilitarianism (1965). *See also* Alexander, *Pursuing the Good—Indirectly*, 95 Ethics 315 (1985).

seems neither self-evidently true nor self-evidently false that judges should be in the business of rule-revision. To say that judges cannot be involved in rule-revision seems mistaken, for it is not necessary that majoritarian bodies like legislatures be the only legitimate rulemakers in a well-ordered society. We can and should ask about separation of powers in the well-ordered society, and we can and should ask about the incidence of errors by various bodies in the well-ordered society. It does not, however, inexorably flow from these questions that the well-ordered society is one that does not see judges as important components in a process recognizing the importance of rule-revision. Partly because of the difficulty of constitutional or legislative rule-revision, a society might entrust some less immediately accountable officials with rule-revision. Moreover, rule-revision by judges might be a necessary pressure-release valve from rules the under- or over-inclusion of which would otherwise produce results of such unjustness or silliness as to exceed the capacity of a society to tolerate them.[85]

Conversely, however, it seems equally mistaken to assert that judges *must* be in the business of rule-revision. To require that judges perform this function for reasons of morality seems mistaken, for as I argued above, there is no reason to suppose ex ante that judges will make fewer moral mistakes than will those whose rules they are to apply. In the eyes of some, such as Michael Moore, the question is whether it is moral for a judge to permit or be an instrument of an immoral result.[86] To couch

85. All of the foregoing, and more, explains why I disagree with the position espoused by Justice Scalia. *See supra* notes 17 and 18 and accompanying text. At some level, though, I am glad that Justice Scalia, given *his* substantive moral and political views, has the view of rules that he has. Those who urge a much more particularistic and context-sensitive account of judicial decisionmaking must consider the circumstances under which they would urge it on Justice Scalia. Although I am not particularly sympathetic to the idea of picking a *de*scriptive legal theory on moral or political grounds, a prescriptive legal theory cannot avoid those concerns. *See generally* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); MacCormick, *A Moralistic Case for A-Moralistic Law*, 20 VAL. U.L. REV. 1 (1985); Soper, *Choosing a Legal Theory on Moral Grounds*, in PHILOSOPHY AND LAW 31 (J. Coleman & E. Paul eds. 1987). That does not mean that such a theory should be responsive to short-term political winds. It does mean, however, that a prescriptive theory of the advantages or disadvantages of constraint by rule must, given the role of rules as potential constrainers of decisionmaker mistake, take into account the likely array of mistakes to be made by the likely array of decisionmakers, where "mistake" is necessarily measured from the perspective of the offeror of the prescriptive theory.

86. *See* Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827 (1989). *See also* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981). In fairness to Moore, his view

the question in this way, however, is to focus on the single ideal judge making a single decision. Even putting aside the distinction between ideal and non-ideal, we must remember that judges make more than one decision, and, as I have argued, the best decision procedure is not always the one that tries to make the best decision in each individual case. Thus, when we look at judicial decisionmaking in the aggregate, the question is whether it is immoral to prefer a procedure expected to make, say, six mistakes in a thousand to one expected to make ten mistakes in a thousand. If it is morally best to minimize the number of moral mistakes, assuming they cannot be eliminated, then the identification of a certain case of immorality as a sufficient condition for revision is to commit the same statistical fallacy as assuming from the appearance of double sixes on the first throw of the dice that twelve is a much more likely outcome than seven. Of course, the possibility that this decisionmaker might be in error is a factor that she should consider, and Moore and other proponents of rule-sensitive particularism appear to take this view. It hardly seems unreasonable, though, for some decisionmaker to disable herself in advance from making those calculations precisely for fear that she might underestimate the likelihood of her own error. Nor is it unreasonable for a designer of a decisionmaking environment to design that environment in a way that takes account of a decisionmaker's own likelihood of underestimating the frequency and consequences of her own errors.

Thus, we are led to one of two conclusions. The first is that failure to recognize the role of rules in allocating decisionmaking authority, and thus in serving the functions of separation of powers, leads to the impossibility of allocating functions at all. This generates the odd conclusion that ultimate authority resides in the last and most immediate decisionmaker, whether that be the cop on the beat or the juror. Or, alternatively, a

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about judicial power might merely be part of a larger view that it is the responsibility of *any* independent moral agent, including but not limited to judges, to avoid being the instrument of unjust results. Such a view, though, produces results with respect to police officers, agents of the Central Intelligence Agency, and justices of the peace with which I and many others are morally and politically uncomfortable. These results also do not seem compelled by an account of morality that recognizes the moral underpinnings of separation of powers, an account of which my current preoccupation with rules is a part. Alternatively, we need from Moore and others an account of the acontextual moral specialness of judges, an account that I find conceivable, but that has yet to be offered to my satisfaction.

special account of judging, or appellate judging, or Supreme Court judging, makes the judge, but not necessarily other legal decisionmakers, appropriate for the task of rule-revision when and as necessary.

I have doubts whether this last task can be performed. That is, I doubt whether the role of the judge is so special that we can assume, acontextually, that judicial mistakes of excessive or erroneous rule-revision will be less in number and consequences than the mistakes of insufficient rule-revision or erroneous non-revision that would occur if judges were prohibited from engaging in that task. What I have few doubts about, however, is the frequency with which this claim is taken to be self-evident. Perhaps judges are the ones to perform this task, or perhaps only certain judges, but if that is so, then the claim must be supported by a plausible account of judicial behavior.

If, as I suspect, no such account can be maintained, then what emerges is the first position I described above: the view that rule-revision is a task entrusted to any of a number of possible officials. The designation of the officials best suited to the task is an essentially context-dependent judgment. When I refer to context here, however, I refer not to the particular context of a particular decision, but rather to the context of this decisionmaking environment rather than that environment, this country rather than that one, and this era rather than another. I mean only to suggest, therefore, that it is a mistake to assume that official empowerment to pierce a rule in the service of its justifications, or the full array of justifications, is a good thing for all officials, all decisionmaking environments, all times, and all places.

Thus, I am emphatically *not* claiming that rules are always good things to have. I *am*, however, claiming that rule-based decisionmaking, in the service of allocation of power values, is frequently a good thing, and that it is virtually impossible to imagine a legal system without it. That is not to endorse the claim that all legal decisionmaking should be rule-based. But it is intentionally to reject the view that none of it should be.

Part of what I am urging here, and have urged elsewhere, is that rules, by allocating decisional roles, might serve the cause of decisional or personal modesty. In other words, rules can cause the individual decisionmaker to submerge her own judgment of what the best result ought to be, and of who ought to make that determination. Joseph Raz asks whether it can ever be rational for an agent to do something other than what she thinks ought to be done.[87] Part of my answer, and Raz's as well, is that it can be rational for an agent to recognize that someone other than herself might be better at determining what, on the balance of reasons, ought to be done. Moreover, the rational agent may want to take account of the fact that even she is likely to overestimate her own decisionmaking abilities.[88] Another part of my answer, and a smaller part of Raz's also, is that it can be rational to think that for certain categories of decisions, determining what ought to be done is not within my scope of authority.

Some have couched these concerns in the language of coordination (in a non-technical sense) or cooperation, and I do not want to resist those arguments.[89] I would, however, take the arguments for law as coordination as but a special case of rules as coordinating, and in turn I would take this as a special case of decisional modesty. The modern feminist concern with lessening the reliance on rules,[90] although correct in noting that individualized decisionmaking can include voices excluded by existing rules, may be only one story. A different story might also be told from a feminist standpoint. An important strand of feminist thought focuses on cooperation rather than combativeness, interaction rather than distance, compromise rather than conflict, supportive rather than competitive institutions, and "collective engagement rather than the individual exercise of judgment and power."[91] This perspective suggests that we might want to encourage use of those decisionmaking devices,

87. *See* J. RAZ, THE MORALITY OF FREEDOM 38-69 (1986); J. RAZ, PRACTICAL REASON AND NORMS 36-48 (1975).

88. *See* Regan, *Authority and Value: Reflections on Raz's "Morality of Freedom"*, 62 S. CAL. L. REV. 995, 1095 n.215 (1989).

89. *See* Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 115, 129-33 (1984); Green, *Law, Coordination, and the Common Good*, 3 OXFORD J. LEGAL STUD. 299 (1983); Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795, 804-08 (1989); Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982); Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139 (1984); Regan, *supra* note 88.

90. *See, e.g.*, Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

91. Bartlett, *supra* note 30, at 865. *See generally* Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Menkel-Meadow, *supra* note 90.

including rules, that discourage rather than encourage a view of the world in which the immediate decisionmaker is the only one whose judgment matters. Rules make it harder rather than easier to assert the specialness of the asserter, and make it harder for a decisionmaker to cast aside the decisions of others in order to take full control of the situation. Insofar as taking control without due respect for decisions made by others looks more prototypically male than does a form of decisionmaking that dampens difference and dampens individual control, the feminist concern with cooperation, interaction, and collective engagement might be more compatible with rule-based decisionmaking than is commonly supposed.

VII.

What of the actual decisionmaker? I have for the most part looked at the question from the perspective of the hypothetical designer of a decisionmaking environment. What is the relationship between this perspective and that of the decisionmaker making a decision? Implicit in what I have been saying is that the questions and the answers are quite different depending on where we are standing, and I want to explore this now.[92]

In order to make the point crispest, let us assume that it *is* irrational for the agent not to do what she thinks ought to be done, factoring all of the virtues of ruleness into the balance of reasons.[93] Thus, let us assume that the rational judge will and should do what that judge thinks on the balance of reasons ought to be done, including within the balance every reason—even judicial disempowerment—for not reaching the optimal reason in this case. Also assume the same for the police officer, the clerk of the courts, the citizen, and the member of Congress. Assume, in other words, a world of independent moral

92. My view that the virtues of rules vary by standpoint is compatible with Gerald Postema's view that authority looks different from the perspective of the self-identified participant than it does from the perspective of the observer. *See* Postema, *The Normativity of Law*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 81 (R. Gavison ed. 1987). But I not only want to reverse the focus, looking less at self-identified participants, but also to suggest that the standpoint of the designer of a decisionmaking environment is quite different from the standpoint of a decisionmaker within that environment.

93. For varieties of this perspective, see Regan, *supra* note 88; Regan, *Law's Halo*, in PHILOSOPHY AND LAW, *supra* note 85, at 15; Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973); and A.J. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979).

agents who must both make and also take responsibility for their own actions.[94] In such a world, it is both irrational and immoral for each agent to avoid making the best all-things-considered determination, including, as I have said, the full array of ruleness values within the notion of all things considered.

Under this view, a judge or a police officer who does not reach the most rational decision is not only acting irrationally, but may be acting immorally. It does not follow, however, that it is rational for the creator of a decisionmaking environment to encourage that freedom of decisionmaking. Thus, I want to focus on the phenomenon of the *asymmetry of authority*, the way in which the irrationality or immorality of imposing authority does not necessarily result from the (stipulated) irrationality or immorality of succumbing to that authority.

The argument for the asymmetry of authority is quite simple. Consistent with my assumptions, suppose that deference to authority in any strong sense is irrational and potentially immoral. Suppose, however, that it is also the case (as discussed above) that there is reason to suspect that a given decisionmaker or array of decisionmakers will make more errors, and consequently more immoral decisions, if allowed to make a decision on the basis of what she thinks is the balance of reasons than if compelled to make decisions only within a certain, much narrower range. In those circumstances, it seems plain that the moral designer of a decisionmaking environment has a moral responsibility to design that environment in such a way as to minimize the number of moral mistakes. If this is so, then just as it is rational and moral for a decisionmaker to reach the result she thinks best, then so too is it just as rational and moral for the designer of a decisionmaking environment to prevent her from doing so.

To put the matter somewhat differently, the question of authority arises when and only when there is disagreement between the authority and the subject of the authority. If in cases of such disagreement the subject should make the decision she thinks best, all things considered, then in those cases the authority make should also the decision *she* thinks best, all things considered. If we are talking about rules, then the question for the authority arises *prior* to any particular instance. It arises

94. On the relationship between rules and responsibility in this sense, see Michelman, *Foreword*, *supra* note 16.

from the expectation by the authority that in the future there will be cases in which the subject will *mistakenly* attempt to substitute her judgment for that of the authority. Predicting that this will be the case, the authority, in advance, makes the best all-things-considered decision not by creating a procedure in which the subject will be free to make mistakes, but instead by creating a procedure in which the subject will be dissuaded from exercising that subject's best (but expected to be mistaken) judgment.

If authority is asymmetric in this sense, then the task facing the rule imposer is to get the rule-applier or rule-follower to relinquish her best judgment. This might be done either with punishment or with rewards. Focusing on punishment rather than reward (although much that follows also applies to rewards), we can create a method by which the rule-applier is subject to sanctions in any case in which the rule was violated, even if it turned out to be best, all things considered, for that rule to have been violated. A good example of such a sanction is the exclusionary rule under the Fourth Amendment, which excludes all illegally obtained evidence, even if it turns out to have been best, all things considered, to seize the evidence. Under this approach, the imposers of authority attempt to discourage the subjects of authority from substituting their judgment by punishing the substitution, even in those cases in which the substitution turns out ex post to have been for the best.

The foregoing approach is likely to be both effective and unworkable. Its unworkability stems not from anything about the effectiveness of such sanctions *if imposed*, but from the psychological difficulty of imposing sanctions on those whose rule-avoiding decisions have turned out for the best. There is no reason to suppose that this cannot be done, but in most societies, the pressures will likely make punishment of those whose judgment turned out for the best to be quite difficult.[95]

There does seem to be an alternative, the increased palatability of which would likely increase its workability. This alternative posits a sanction system in which ex post sanctions are imposed for violating a rule only when it turns out best, all

95. Some support for this proposition is provided by society's willingness to punish those whose wrongful acts were within the scope of a seemingly reasonable rule. *See* Allen, *Foreword: The Nature of Discretion*, LAW & CONTEMP. PROBS., Autumn 1984, at 1.

things considered, *not* to have violated the rule, but in which such sanctions are extremely large. If contravening the rule turns out to have been for the best, then no sanctions are imposed. If contravening the rule turns out to have been in error, then sanctions of great severity are imposed.

This approach would force the rational punishment-avoiding agent to achieve a high degree of certainty before she proceeds against the indications of the rule. The deterrent effect of the severe punishment will prevent most agents from violating the rule, even when they do think it probably best to do so. Rule-constrained agents will be justifiably risk-averse not only because of their uncertainty about whether contravening the rule is indeed best, but also because of the uncertainty as to whether the sanction-imposer will agree with them about the inadvisability of following the rule. Unlike the first approach, this one avoids the unlikelihood-of-sanctions-actually-being-imposed problem. Because it does not sanction justified rule-contravention, it minimizes the number of public impositions of punishment on those whose rule-contravention turned out to be for the best.

Punishment, of course, is not the only way for a rational imposer of authority to induce those whose well-intended contraventions of rules are expected to be more likely mistaken than wise. As an alternative, there could be process, call it education in the broad sense, by which rule-following values are inculcated. This is part sanction and part reward, partly a function of whom we glorify and whom we condemn, whom we promote and who languishes in the same job for years, and what virtues we praise and what we scorn. Much of this explains why rule-following *qua* rule-following seems less dominant in this legal system than in many others. Perhaps this is appropriate, but *if* rules are to have their purposes, then we would expect to see encouragement of those who follow rules and thus serve those purposes. If rules have their purposes, then we would also expect to see discouragement of those who frustrate those purposes by arrogating to themselves decisions that are best made by others. Whether our current system of rewards and punishments for rule-following and rule-revising comports with our understanding of the optimal level of ruleness, however, is a question that must wait for another day.