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HOW MORAL PRINCIPLES CAN ENTER INTO THE LAW*

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In recent times, especially in the pages of this journal, the debate between the proponents of the two principal species of legal positivism has gained new vigor. Specifically, some champions of Exclusive Legal Positivism have sophisticatedly challenged the Inclusive Legal Positivists' claim that moral principles can figure among the criteria by which the officials of a legal system ascertain the law. The present essay attempts to parry the most formidable of those recent challenges.[1]

This article's riposte endeavors to defend one variety of Inclusive Legal Positivism, while casting doubt on another variety. As will be seen, a notable salutary consequence of the recent attacks against the Inclusivist position is that they reveal an important divide within that position. Instead of seeking to straddle that divide, the first main section of this article will clearly opt for one side as opposed to the other. What will be defended here as Inclusive Legal Positivism is the view that consistency with a moral principle can be a *necessary* condition for the status of a norm as a legal norm. By contrast, this article in its first chief section distances itself from the view that correctness as a moral principle can be a *sufficient* condition for the status of a norm as a legal norm.

The latter view, designated by Jules Coleman as "Incorporationism,"[2] should thus be distinguished from the doctrine that is labeled herein as "Inclusive Legal Positivism." Coleman has developed his Incorporationist stance in reaction to Ronald Dworkin's broadsides against the legal-positivist model of law-ascertainment. In particular, he has sought to counter Dworkin's contention that legal positivists are unable to acknowledge that

*I wish to thank Wil Waluchow for his extremely helpful and perceptive comments.

1. My focus will lie chiefly on Scott Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469 (1998) [hereinafter cited as Shapiro, *Way*]. For a couple of other recent contributions to the debate, from the camp of Exclusive Legal Positivism, *see* Scott Shapiro, *The Difference that Rules Make*, in Brian Bix (ed.), ANALYZING LAW 33, 56–61 (1998); Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, 4 LEGAL THEORY 533 (1998).

2. For Coleman's latest defense of his position, *see Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 LEGAL THEORY 381 (1998) [hereinafter cited as Coleman, *Incorporationism*]. *See also* his *Second Thoughts and Other First Impressions*, in Brian Bix (ed.), ANALYZING LAW 257, 258–78 (1998); *Authority and Reason*, in Robert George (ed.), THE AUTONOMY OF LAW 287 (1996). The doctrine espoused by Coleman was first propounded by Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICHIGAN LAW REVIEW 473, 509–15 (1977).

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judges sometimes invoke moral principles as binding legal precepts. Incorporationism, which carves out just such a role for moral principles, is Coleman's answer to Dworkin—an accommodation of Dworkin's strictures shorn of his insistence that the process of law-ascertainment *must* involve a reliance on moral standards. Hence, given that the present essay looks askance at Coleman's position, it will have to come up with an alternative response to Dworkin's critique of positivism. Such a response will form my essay's second major section. As will become apparent, my discussion in that section does not reject Incorporationism outright. A more fruitful approach than wholesale rejection is the imposition of stringent limits on the range of circumstances to which Incorporationism pertains.

In venturing to uphold Inclusive Legal Positivism by distinguishing it from Incorporationism and by deflecting a powerful blow that has been launched against it, this essay reaffirms the doctrine advocated by H.L.A. Hart. Although Hart never distinguished clearly between Incorporationism and Inclusive Legal Positivism, all of his remarks on my general topic quite plainly align him with the latter theory. Whenever he readily acknowledged that the criteria for law-ascertainment in any particular legal system can include moral principles, he had in mind criteria that constitute restrictions on law-making power. That is, he had in mind the role of moral principles as hurdles that pose necessary conditions for the status of norms as legal norms.[3] Thus, my defense of Inclusive Legal Positivism is effectively an insistence that Hart correctly adumbrated the soundest way of developing his own legacy.

I. OF ELBOW ROOM AND SCOPE RESTRICTIONS

In the pages of this journal, Scott Shapiro has mounted a singularly powerful and subtle critique of Incorporationism and Inclusive Legal Positivism.[4]

3. This point is recognized in Shapiro, *Way*, *supra* note 1, at 500. Among the germane passages in Hart's work are the following: THE CONCEPT OF LAW [hereinafter cited as Hart, CONCEPT], 199 (1961); *Positivism and the Separation of Law and Morals*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY [hereinafter cited as ESSAYS], 49, 54–55 (1983), *Lon L. Fuller*, The Morality of Law, in ESSAYS, *supra*, at 343, 361; *Postscript*, to THE CONCEPT OF LAW (2nd ed.), 238, 247–48, 250–54 (1994). Although I readily concede that "the distinction between [Inclusive and Exclusive] versions of the positivist thesis was unknown when [Hart wrote THE CONCEPT OF LAW] and was therefore not part of the polemical context of the time" (Leslie Green, *The Concept of Law Revisited*, 94 MICHIGAN LAW REVIEW 1687, 1706–07 [1996]), the passages cited here are strong evidence suggesting that Hart implicitly or explicitly embraced Inclusive Legal Positivism throughout his career. There is no evidence—certainly no comparable evidence—to suggest that he ever embraced any full-blown version of Incorporationism.

My own previous writings in this area have stemmed from a perspective similar to that of Hart. *See* my IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 114–15, 152–61, 197–99 (1999); *Coming to Grips with the Law: In Defense of Positive Legal Positivism*, 5 LEGAL THEORY 171, 190–200 (1999). A Hartian perspective also generally informs W.J. Waluchow, INCLUSIVE LEGAL POSITIVISM (1994). Despite some inadvisably sweeping remarks that smack of thoroughgoing Incorporationism, the Inclusive Legal Positivist stance is what David Lyons defends in his *Principles, Positivism, and Legal Theory*, 87 YALE LAW JOURNAL 415, 423–26 (1977).

4. Shapiro, *Way*.

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He does not attempt to show that either of those doctrines is starkly incoherent or false, but instead attempts to show that neither of them is compatible with the claim that legal norms provide reasons for officials and citizens to act in specified ways. Most of his attention is focused on Incorporationism, which he aptly takes to be the thesis that there are no general constraints on the possible content of the criteria for law-ascertainment in any jural regime. Incorporationists maintain that the Rule of Recognition in any regime is conventional, and they further maintain that the conventions involved can take any number of routes. In particular, the criteria that make up some regime's Rule of Recognition can establish that moral correctness is a sufficient condition for the status of norms as legal norms. According to the Incorporationists, the Rule of Recognition can in principle consist completely of criteria that determine legality by reference to moral content rather than by reference to any procedural or historical touchstones.

Shapiro argues that, when officials adhere to an Incorporationist Rule of Recognition, the legal norms that they ascertain and affirm are not reasons for the decisions that they reach. Instead, those reasons reside entirely in the Rule of Recognition itself. If the criteria for law-ascertainment render moral worthiness a sufficient condition for the status of norms as laws, then the norms validated as laws under such criteria do not constitute any further grounds—any grounds beyond those supplied by the law-ascertaining criteria themselves—for official decisions. Given that the Incorporationist Rule of Recognition already directs judges and other officials to reach decisions through the application of moral principles, and given that the content of those moral principles is not subject to alteration by the will of the judges or other officials, those principles when validated as legal norms do not add any determinative force to that which is already present in the Rule of Recognition itself. At most, they are explications of what is already required by the Rule of Recognition. Any decisions to which they point have already been ordained by the criteria in that overarching rule. Thus, when an Incorporationist judge invokes a moral principle as a legal norm solely because of its content, he "is simply using it to figure out what the rule of recognition requires."[5] Though the moral principles validated as legal norms may serve as heuristic indicators of the implications of the Rule of Recognition, they are no more than indicators. They do not amount to any partly independent bases for official decisions.

A non-Incorporationist Rule of Recognition, by contrast, does indeed engender laws that are themselves reasons for officials to reach certain outcomes as opposed to others. Under the criteria in such a rule, correctness as a moral principle is never sufficient to qualify a norm as a legal norm. In every instance, that is, the status of legality ensues from something other than a norm's content. As a consequence, the decision to which a

5. *Id.* at 496.

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legal norm leads in any specific context is not preordained by the Rule of Recognition under which the norm has been validated as a law. That decision follows from the content of the norm, which is not predetermined by the Rule of Recognition (since the tests for legality in that overarching rule are not content-focused). Precisely on account of this lack of predetermination, each legal norm constitutes a partly independent reason for an official to arrive at the rulings that the norm requires. Were the content of the norm different from what it is—as it easily could have been, even within the confines of a single Rule of Recognition—the results for which the norm calls would be different. Hence, the fact that any given law does have some particular content is a basis for decisions that goes beyond the basis contained in the Rule of Recognition itself. Because that content is not preordained by the Rule of Recognition, it plays a genuinely determinative role rather than a merely heuristic role. Whereas the outcomes required by an Incorporationist Rule of Recognition *R1* will remain the same regardless of any moral principles that are validated as laws under *R1,* the outcomes required by a non-Incorporationist Rule of Recognition *R2* will hinge crucially on the norms that are validated as laws (on content-independent grounds) under *R2*. Unlike the moral principles validated as laws by an Incorporationist Rule of Recognition, then, the laws validated under a non-Incorporationist Rule of Recognition make a real difference by dint of their interposition between the ultimate criteria of law-ascertainment and the concrete decisions of adjudicators and administrators. The substance of those laws will weigh against some outcomes and in favor of others.

What is the importance of this distinction between the Incorporationist and non-Incorporationist Rules of Recognition? Shapiro contends that the distinction is of the utmost importance because of the basic role that is ascribed to law by Hart and most other legal positivists: the role of presenting people with norms that guide and direct their conduct. Moral principles validated as laws under an Incorporationist Rule of Recognition cannot perform such a role. Legal norms that do not constitute any reasons for or against specific decisions are thereby devoid of any capacity for affecting the practical reasoning of the officials who might invoke the norms. Such norms in this context are empty shells, rather than considerations that should enter into a rational balancing of the factors that favor or disfavor particular outcomes. Under an Incorporationist Rule of Recognition *R1, R1* alone is what decisively affects the practical reasoning of officials. It alone poses veritable reasons-for-action. Moral principles validated as laws under *R1* might serve as heuristic aids for the task of finding out exactly what *R1* requires, but, with *R1* in place, they do not themselves require anything. Officials whose reasons-for-action derive from *R1* do not gain any further reasons-for-action from the moral principles that they apply thereunder. Their rational deliberations therefore assign no weight to those principles—which means that the principles in themselves cannot guide and direct the officials' law-ascertaining activities at all. And because those

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principles cannot perform any guiding role in connection with the officials' ascertainment of the law, they likewise cannot perform any such role in connection with the behavior of ordinary citizens. Whether citizens are directly familiar with the nature of officials' law-ascertaining endeavors, or whether they gain their familiarity through intermediaries such as lawyers and the press, the moral principles validated as laws under *R1* will present the citizens with no reasons-for-action that have not already been presented to them by *R1* itself. As reason-giving guides to conduct, then, those principles/laws are utterly redundant.

Such is the gist of Shapiro's critique of Incorporationism. Now, although the second half of my article will raise some doubts about the devastatingness of his critique, the basic correctness of his arguments against Incorporationism is not in question here. On the contrary, the soundness of those arguments is one principal factor underlying my extremely wary attitude towards Incorporationism. Strikingly in contrast with those impressive arguments, however, is his effort to wield his critique against Inclusive Legal Positivism after having wielded it against the Incorporationist doctrine. When his target shifts to the Inclusivist thesis that conformity with a moral principle can be a necessary condition (as opposed to a sufficient condition) for the status of a norm as a legal norm, his critique becomes otiose. His attack on Inclusive Legal Positivism appears to broach two chief objections, neither of which succeeds.

Shapiro first submits or appears to submit that Inclusive Legal Positivism runs afoul of the same general difficulties that beset Incorporationism. Asking whether Hart could legitimately have adopted the Inclusivist position—as opposed to the Incorporationist position—Shapiro declares that "he could not and for much . . . the same reasons that felled [Incorporationism]."[6] He goes on to affirm: "Because someone who is guided by a rule of recognition that makes morality a necessary condition of legal validity can be neither epistemically nor motivationally guided by a rule supposedly validated by it, we must conclude that Hart cannot coherently embrace . . . inclusive legal positivism." Shapiro then straightaway remarks that "this argument is similar, but not identical, to the objection that was made against [Incorporationism]. The claim made here is not that a rule supposedly validated by an inclusive rule of recognition that made morality a necessary condition on legality cannot make a practical difference. The problem is that such a rule cannot make a practical difference *in the way that* rules are supposed to make practical differences."[7] We shall shortly explore the claim advanced in this last quotation. Before turning to that claim, however, this article should counter any lingering suggestion that Inclusive Legal Positivism plunges into the same pitfalls from which Incorporationism suffers.

Shapiro's key insight in his critique of Incorporationism is that an Incor-

6. *Id.* at 501.
7. *Id.* at 502 (emphasis in original).

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porationist Rule of Recognition will preordain any concrete decisions reached thereunder, and that it will therefore render superfluous (except as heuristic aids) any intermediate moral principles that it validates as legal norms. Those norms and those concrete decisions cannot be other than what they are, inasmuch as they emerge under the sway of a Rule of Recognition that calls for the application of correct moral principles. Everything is fixed from the outset, as long as that Rule of Recognition endures. And precisely because the content and implications of the legally incorporated moral principles are fixed from the outset, those principles themselves do not furnish any reasons for officials to arrive at certain decisions. Nor do they furnish any reasons for citizens to adjust their behavior in certain ways. Both for officials and for citizens, the reasons-for-action created by the law in an Incorporationist regime are created entirely by the regime's Rule of Recognition. Intermediate legal norms play no determining role whatsoever.

As Shapiro contends, an Incorporationist legal system is static in that its Rule of Recognition settles everything in advance. As he appositely states, there is no "elbow room" in such a system.[8] That is, insofar as judges adhere to an Incorporationist Rule of Recognition, there is no room for them to adopt intermediate legal norms or to reach concrete legal decisions other than those norms and decisions that are morally requisite. Very different indeed is any Inclusivist Rule of Recognition. Far from preordaining all laws and decisions *ab initio*, such a Rule of Recognition leaves an abundance of elbow room. Although it demands that laws and decisions be consistent with specified moral precepts, the congruence between the laws/decisions and the precepts is merely a threshold condition rather than a content-settling feature. Because that congruence can be adequately achieved through any of myriad diverse measures, the Inclusivist Rule of Recognition does not in itself select among those measures. That selection comes about through statutes and judicial doctrines and other legal norms, which consequently do provide reasons for officials to arrive at certain decisions and to eschew alternative decisions.

Let us ponder, for example, the Inclusivist Rule of Recognition depicted by Shapiro. Suppose that judges are empowered and obligated to apply any Congressional enactment unless it is "grossly unfair."[9] Suppose further that a minimum wage of one dollar per hour in the present-day United States would be grossly unfair to workers, and that a minimum wage of twelve dollars per hour (for menial work) would be grossly unfair to employers, and that minimum-wage levels between those two figures will not be grossly unfair. Against this background, Congress enacts a law requiring every employer to pay at least *eight* dollars per hour to every employee. In the aftermath of the enactment, the decisions of adjudicative and executive

8. *Id.* at 498.
9. *Id.* at 501.

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officials and the effects on citizens' behavior will diverge quite notably from the corresponding decisions and effects that would be taking place if Congress had instead enacted a law requiring every employer to pay at least *four* dollars per hour. Because of the statute requiring at least eight dollars, and only because of that statute, the officials are empowered and obligated to treat the eight-dollar level as the minimum acceptable hourly wage. Their Inclusivist Rule of Recognition in itself does not single out that level at all. Rather, the only relevant inference derivable from their Rule of Recognition is that the minimum wage in the current American economy has to lie somewhere between one dollar and twelve dollars per hour. The eight-dollar level is in no way preordained. Had Congress passed a statute specifying six dollars, the minimum hourly wage would accordingly have been at the six-dollar level; and it would have been at the nine-dollar level if a statute specifying nine dollars had been passed. Precisely because the Inclusivist Rule of Recognition allows these and numerous other significant variations in the level of the statutory requirement, it does not predetermine specific outcomes. Those outcomes ensue instead from the changeable legislation that Congress enacts. Hence, unlike an Incorporationist Rule of Recognition, an Inclusivist Rule of Recognition is not static. Legal norms validated under it can play a guiding and directing role. This point applies, of course, not only to the particular example of minimum-wage laws, but also to the whole range of matters that might be regulated by statutes or other legal norms.

Although Shapiro does not explicitly acknowledge the point made in my preceding paragraph, and although he puts forth one or two pronouncements that may seem to bespeak a contrary view, he probably does not disagree with anything that has just been said. As was intimated four paragraphs ago, the gravamen of his argument against Inclusive Legal Positivism is quite different from his critique of Incorporationism. Here his complaint is not that legal norms validated under an Inclusivist Rule of Recognition will fail to constitute any reasons for officials' concrete decisions. His complaint, rather, is that the reasons constituted by those norms do not partake of the exclusionary or peremptory force that is characteristic of genuinely authoritative directives. He states his accusation forthrightly, with reference to the example of the minimum-wage statute:

> Can the minimum-wage rule . . . motivationally guide a judge? The answer to this question is . . . "no." Recall that a rule motivationally guides conduct when it is taken as a peremptory reason for action; it follows that a rule cannot motivationally guide if the agent is required to deliberate about the merits of applying the rule. As the application of the minimum-wage rule depends, pursuant to the inclusive rule of recognition, on the employer first assessing whether the rule is grossly unfair, he cannot treat the rule as a peremptory reason for action and hence cannot be motivationally guided by it.[10]

10. *Id.* at 501.

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Shapiro recapitulates his argument in a passage that has already been partly quoted herein: "The problem is that [an Inclusivist Rule of Recognition] cannot make a practical difference *in the way that* rules are supposed to make practical differences: if the agent is required to determine whether the rule ought to be followed on the merits, then it can count neither as an epistemic tool for authoritative designation nor as a peremptory reason for action."[11]

Shapiro presumes that, if ascertaining the existence of a legal norm will perforce involve some moral judgments, then the norm cannot amount to a peremptory reason for action. Such a position, based on Geoffrey Warnock's and Joseph Raz's conception of norms as exclusionary reasons (a conception that Hart appropriated in his discussion of laws as peremptory reasons for action), has disregarded Raz's observations concerning possible restrictions on the scope of any particular reason's exclusionary or peremptory force. On the one hand, by virtue of being an exclusionary reason, a legal norm disallows certain considerations as legitimate bases for decisions or actions. The excluded considerations no longer properly count as factors that should be deemed to weigh against or for the mode of conduct which the norm requires or forbids. On the other hand, an exclusionary reason will almost never be of such overriding importance that it disallows *all* countervailing factors as legitimate bases for decisions and actions. In almost every instance, the peremptory sway of a norm is limited. As Raz writes: "It should be remembered that exclusionary reasons may vary in scope; they may exclude all or only some of the reasons which apply to certain practical problems. There may, for example, be some scope-affecting considerations to the effect that though Colin's promise [to act only in furtherance of the well-being of his son] apparently purports to exclude all the reasons not affecting his son's interests it does not in fact validly exclude consideration of justice to other people."[12] As long as an exclusionary reason removes *some* factors from a balance of considerations that can be legitimately acted upon, it need not remove *all* such factors. Restrictions on the scope of a peremptory reason are fully compatible with its nature as such a reason, as Leslie Green has remarked:

> Such reasons may be both *prima facie*, in the sense that they are not conclusive about what ought to be done, and at the same time categorical. The fact that they exclude and not merely outweigh reasons for not-φ-ing makes them categorical; the fact that they may not exclude all contrary reasons makes them *prima facie*. Thus the force of such commitments depends . . . [on] the scope of the reasons against φ-ing which they exclude.[13]

A legal norm can partake of peremptoriness even if it disqualifies only some countervailing concerns, rather than all countervailing concerns, as reasons

11. *Id.* at 502.
12. Joseph Raz, PRACTICAL REASON AND NORMS (2nd ed.), 40 (1990).
13. Leslie Green, THE AUTHORITY OF THE STATE 39 (1988).

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for legitimately acting at variance with the norm's demands. Its peremptoriness consists in the fact that it does disqualify certain counterbalancing considerations. The fact that the norm does not disqualify certain other counterbalancing considerations is a matter that affects only the *scope*, and not the *existence*, of its peremptoriness.

Let us now re-examine the scenario that Shapiro discusses. The non-exclusion of gross unfairness—the non-exclusion of it as a factor that will militate against the status of a norm as a legal norm—is perfectly consistent with the exclusion of numerous other factors. For instance, a judge will be neither authorized nor obligated to depart from the terms of a minimum-wage statute simply because he thinks those terms are unfair (as opposed to grossly unfair). Though the gross unfairness of the statute is an operative consideration that must be taken into account by the judge as he gauges the statute's legal force, the mere unfairness of the statute is not such a consideration. It is excluded by the Rule of Recognition, which instead makes gross unfairness the pertinent touchstone. Even more plainly excluded as a basis for the judge's decisions is the mere unwisdom of the statute. A judge who regards the minimum-wage statute as inadvisable but not as grossly unfair is forbidden to nullify the statute on the basis of his judgment about the legislature's unwisdom. (Indeed, even if he does view the statute as grossly unfair, his invalidation of it must be premised solely on that ground and not on the ground of the legislature's unwisdom.) His Rule of Recognition, which obligates him to give effect to duly enacted statutes unless they are grossly unfair, will have disallowed him from acting upon his view of the statute's sheer imprudence. Insofar as he adheres to that Rule of Recognition, he does not let statutory imprudence count as a factor that will incline him to strike down statutory mandates. He does not permit his views about the unwisdom of an enactment to inflect his official decisions about the enactment's jural status.

Hence, Shapiro errs when he submits that the legal norms validated under an Inclusivist Rule of Recognition cannot guide people's behavior in a peremptory fashion. Those norms do exclude a range of factors as legitimate reasons for failing to abide by the norms' requirements. To be sure, they do not exclude *all* such factors; for example, within the Rule of Recognition portrayed by Shapiro, gross unfairness is not excluded as a reason for nullifying legislative enactments. However, as we have seen, the peremptory force of a legal norm is fully compatible with the fact that not all concerns and considerations have been ruled out as bases for invalidating the norm. The noncomprehensiveness of a law's exclusionary sway is a restriction on the *scope* of that sway rather than a negation of its very *existence* and *nature* as such.

Shapiro's critique is warranted in application to Incorporationism, but not in application to Inclusive Legal Positivism. Although the guiding and directing role of law is stymied when a norm's correctness as a moral precept is a sufficient condition for the status of the norm as a law, that

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guiding and directing role is not thwarted at all when a norm's conformity to moral precepts is a *necessary* condition for the status of the norm as a law. Shapiro's onslaughts have left Inclusive Legal Positivism unscathed.

II. INCORPORATIONISM REVISITED

Given that Incorporationism suffers from the shortcomings that Shapiro has deftly highlighted, we might wonder why anyone has been led to adopt the Incorporationist position. Why have Coleman and Philip Soper been prepared to take the view that a legal system might be structured by a Rule of Recognition which effectively establishes that correctness as a moral precept is sufficient to render a norm legally binding? Why have they been prepared to accept that such a test for legal bindingness might even be the only such test in a particular legal regime? Plainly, both of these theorists have been replying to the anti-positivist strictures of Dworkin, who has maintained (especially in *Taking Rights Seriously*) that positivists cannot adequately account for the salience of moral principles in adjudication. Although some of Dworkin's objections have been aimed at the doctrine that I herein designate as Inclusive Legal Positivism,[14] his most famous criticisms are those to which Incorporationism is a riposte.

Dworkin's early critiques of Hart and legal positivism are too well-known to be in need of exposition here. (Shapiro's essay offers a good exposition.) According to Dworkin, positivism is belied by the fact that judges sometimes apply moral principles as binding laws even though the principles lack any clear-cut origins in statutes or administrative decisions or judicial opinions. Now, a natural response for somebody confronted with such a line of criticism is to contend that the positivist model of law can perfectly well accommodate the alleged tendency of judges to treat moral principles as legal norms. What Coleman and others have argued is that the sheer conventionality of the Rule of Recognition does not perforce impose any constraints on the substance of that rule's criteria. "There is nothing in [the general notion of the Rule of Recognition] that imposes any constraints on the conditions of validity. The Incorporationist sees no reason for assuming that these conditions cannot in principle include criteria making moral value or merit a condition of legality, at least for some norms. For the Incorporationist, what matters in the rule of recognition is not the criteria of validity set forth, but its existence conditions."[15] As Coleman reiterates: "The key move for the Incorporationist is the claim that positivism imposes no constraint on the criteria of validity. Whether a particular rule of recognition does so depends on the practice of officials."[16] Incorporationists,

14. Those are the objections to which I respond in the writings of mine that are cited in note 3 *supra*.

15. Coleman, *Incorporationism*, 406–7.

16. *Id.* at 407.

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then, are quite willing to suggest that the processes of law-ascertainment in any given regime might render moral worthiness the lone sufficient condition for legal validity.

Before we probe the Incorporationist rejoinder to Dworkin any further, we should note two preliminary points. First, none of my arguments in support of Inclusive Legal Positivism has implied that any moral criteria in this or that Rule of Recognition must be expressed in some explicit form such as a statute or a judicial opinion. Whether officials apply moral principles as necessary conditions for legal validity is entirely a matter of the officials' law-ascertaining behavior; furthermore, whether the relevant patterns of their behavior derive from written sources of law, or whether instead they derive from largely unarticulated (and perhaps subconscious) preconceptions that inform the officials' activities, is a contingent matter that can vary from one Inclusivist legal system to the next. Thus, there is no warrant at all for presuming that the law-ascertaining criteria in the Inclusive Legal Positivist model of a jural system must be rooted in overt sources. An Inclusive Legal Positivist should readily allow that moral principles can figure in adjudication without being rooted in such sources. (To be sure, the extent of agreement with Dworkin here is quite limited. After all, his early critiques of positivism are focused chiefly on sourceless moral principles that are validated as laws by dint of their content, rather than on sourceless moral principles that are applied as necessary conditions for legal validity.)

A second preliminary point relates to Coleman's unduly broad formulations of his central Incorporationist thesis. Coleman writes too sweepingly when he maintains that legal positivism does not presuppose any limits on the substance of the criteria that can make up the Rule of Recognition.[17] Let us think, for example, about a rather fanciful society that is under the sway of officials who settle disputes by applying whichever norms are in accordance with their own hunches. Each official justifies his selection of norms by reference to his hunches, and each expects his fellow officials to do the same. The officials perceive themselves as adhering to a Rule of Recognition that empowers and obligates them to resolve disputes through norms that emerge from their hunches rather than from any other sources of law. Now, because the officials' hunches are strongly heterogeneous, and because their regime does not contain any other law-ascertaining criteria that might foster uniformity, the directives of the officials are a bewilderingly higgledy-piggledy welter of conflicting signals. Unless legal positivists are comfortable with designating such a regime as a legal system, they ought to insist that there are in fact some constraints on the sorts of criteria that can form a Rule of Recognition. No such rule can consist solely of criteria that fail to secure the minimum of regularity which is prerequisite to the existence of a legal system.

17. For similar pronouncements, *see* David Lyons, *supra* note 3, at 423–25.

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In sum, Coleman's pronouncements on the elasticity of the criteria in the Rule of Recognition are excessively far-reaching statements of a thesis that should more confinedly be about the potential focus of such criteria on moral correctness. We therefore have to ask whether an Incorporationist Rule of Recognition can generate enough regularity to enable the existence of a legal system. This question is a key component of our broader inquiry into the adequacy of the Incorporationist reply to Dworkin. Let us straightaway note that this question concerning regularity does indeed pertain to the *existence* of legal systems and not merely to their *efficiency*. Coleman sometimes draws too sharp a distinction between effectiveness and existence, as in the following passage:

> We need to distinguish between law's possibility and its efficacy. Positivists insist on law's conventionality as essential to our understanding its possibility. The claim that law is made possible by a rule of recognition that supervenes on a practice accepted from an internal point of view is a conceptual claim; it states possibility or existence conditions. It does not matter, for these purposes, whether the rule of recognition is controversial and, if so, how controversial it is.
>
> On the other hand, a rule of recognition's efficiency varies with its controversiality. No positivist believes that it does not matter whether the rule of recognition is controversial. It is just that if controversy matters, it matters from the point of view of law's efficacy, not from the point of view of law's possibility.[18]

Unquestionably, the concepts of efficiency and existence are neither intensionally nor extensionally equivalent—which is why we can correctly talk about inefficient legal systems. Instead of having to hold that such institutions are not legal systems at all, we can rightly hold that they are legal systems which do not operate very well. Nevertheless, although the states of efficiency and existence are plainly not identical, they are not separable to quite as great an extent as Coleman implies in the passage above.

A fairly substantial degree of regularity is essential not just for the efficiency of a legal regime, but also for its very existence as such. Severe disaccordance among the countless decisions of officials will not only disrupt the smoothness of their regime's workings, but will also deprive those workings of the minimum of cohesion that is necessary for any scheme of governance-through-legal-norms. A jural system in its operations obtains as a jural system only by partaking of consistency in considerable measure. For an expression of this point, we can resort to a comment made by Coleman just a couple of pages before the passage quoted above: "Judges may agree about what the [Rule of Recognition] is but disagree with one another over what the rule requires—especially in controversial cases. They could not disagree in every case or even in most cases, as such broad and widespread

18. *Id.* at 412.

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disagreement would render unintelligible their claim to be applying or following the same rule."[19] Hart advanced a basically similar observation, with reference to the need for officials to uphold the various norms of their legal regime:

> Individual courts of the system though they may, on occasion, deviate from [its] rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system. If only some judges acted 'for their part only' on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the characteristic unity and continuity of a legal system would have disappeared. For this depends on the acceptance, at this crucial point, of common standards of legal validity. In the interval between these vagaries of judicial behaviour and the chaos which would ultimately ensue when the ordinary man was faced with contrary judicial orders, we would be at a loss to describe the situation. We would be in the presence of a *lusus naturae* worth thinking about only because it sharpens our awareness of what is often too obvious to be noticed.[20]

In short, a legal system must pass a certain threshold of regularity in its workings, if it is to exist as a legal system at all.[21] Above that threshold, the system will be functional and efficient to a greater or a lesser extent. Below that threshold, however, it will be nonexistent—i.e., nonexistent as a legal system—rather than merely inefficient. Lon Fuller was quite correct to insist as much. (Of course, if we attempt to specify the threshold of functionality precisely, we shall encounter the difficulties faced by anyone who tackles a sorites problem. Still, our inability to pinpoint the threshold does not detract at all from my current line of argument about the qualitative difference between a legal system characterized by a significant measure of regularity and a putative legal system characterized by very extensive irregularity. Though night and day shade into each other through dawn and dusk, they remain as different as night and day.)

Let us now return to the question that is our principal concern at this stage of my overall inquiry. Will an Incorporationist Rule of Recognition yield enough cohesion and uniformity to render possible the existence of a legal system? Clearly, any answer to this question must rely on one or two general empirical premises, however uncontroversial they might be. Unlike Shapiro's critique of Incorporationism—a critique with which this article has not yet entirely finished—my discussion of the operational regularity or irregularity of Incorporationist law-ascertaining criteria is not purely con-

19. *Id.* at 410.
20. Hart, CONCEPT, 112–13.
21. I have emphasized this point in several of my previous writings. *See* especially my IN DEFENSE OF LEGAL POSITIVISM, *supra* note 3, at 140–46.

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ceptual, even though it can aptly proceed at a high level of abstraction. (Specifically, my discussion will rest on an empirical premise relating to the ineliminability of widespread disagreement about the appropriateness of various ways of dealing with non-routine moral problems.) Moreover, the question posed here will oblige us to clarify the contours of an Incorporationist Rule of Recognition. We should first consider an uncompromisingly robust version which establishes that moral worthiness is the *lone* sufficient condition for the status of any norm as a legal norm; in a jural system that is oriented toward such a criterion, every legal judgment is a moral judgment through and through. Then we should consider a milder Incorporationist Rule of Recognition which establishes that moral worthiness is a sufficient condition for the status of any norm as a legal norm only in hard cases that cannot be resolved by reference to legal norms from other sources. As will be seen, Incorporationism of this milder variety should not be rejected out of hand.

In a regime where judges and other officials adhere to the robust version of the Incorporationist Rule of Recognition, their ostensible law-ascertaining activities will very likely partake of too little regularity to be properly classifiable as law-ascertainment. Such a Rule of Recognition instructs officials to handle every case by applying the moral norms that produce the optimal result in the circumstances. Although a system along these lines will leave some room for officials to pursue a certain degree of consistency among their decisions, there are ample reasons for thinking that the consistency in practice will be meager.[22] Let us ponder two main aspects of the situation.

First, because *ex hypothesi* there are no sources of law other than the realm of moral principles, any touchstones for official decision-making that stem from alternative sources cannot be treated systematically as authoritative. In other words, such touchstones cannot systematically amount to reasons-for-action which carry weight that is independent of their substantive worthiness. If officials do systematically ascribe content-independent weight to determinative standards (including, of course, standards other than moral principles that the officials deem to be worthy), then they are not adhering to a robustly Incorporationist Rule of Recognition. They are instead adhering to ordinary law-ascertaining criteria—i.e., non-Incorporationist criteria—and are simply upholding those criteria on the basis of the moral precepts that would be validated and applied directly as laws by a truly Incorporationist regime. If a robustly Incorporationist Rule of Recognition is at all distinctive, and if it is therefore more than just a misleadingly labeled motivational platform for an ordinary Rule of Recognition, it must involve the systematic invocation and application of moral principles on content-dependent grounds. Officials in a robustly Incorporationist regime focus chiefly or exclusively on the appropriate substantive resolutions of cases, rather than

22. My view here is largely similar to that presented in Joseph Raz, *supra* note 12, at 137–41.

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on formal or procedural earmarks. To be sure, as has been avouched above, many of the officials in such a regime will still undoubtedly endeavor to attain at least a modicum of consistency in their rulings, in the way of typical moral agents. Expectations that might be bred by past decisions will form part of the context wherein any present decisions are made. Nevertheless, if the officials' Rule of Recognition is genuinely and comprehensively Incorporationist, any consistency among their judgments cannot derive from systematic attentiveness to the manner in which the norms applied by their judgments have been brought into existence. Precisely on account of this aspect of any uncompromisingly Incorporationist regime, the consentaneity among the multifarious determinations of the officials therein will almost certainly be low.[23]

Second is a point emphasized not only by Hart but also by the great early modern philosophers who depicted a "state of nature" that anteceded the political institutions of full-fledged societies. Although one key feature of societies-with-governments that distinguishes them from acephalous societies is the existence of mechanisms for authoritative dispute resolution, another such feature is the existence of publicly ascertainable legal norms by reference to which the dispute resolution can proceed. A robustly Incorporationist regime will possess the first of these features but not the second. As a result, it will suffer from the severe problems of uncertainty and irregularity that have been highlighted by Hart and others in relation to primitive societies. Perhaps those problems can remain within manageable limits in a very small and static and highly homogenous social unit, where moral attitudes are widely shared. However, in any large and dynamic and heterogeneous society, the problems of moral disunity are bound to be grave indeed unless they are overmastered through the erection of a publicly ascertainable set of norms to regulate conduct. Thus, since a comprehensively Incorporationist Rule of Recognition renders every legal judgment a moral judgment, and since a regime structured by such a Rule of Recognition will therefore not subordinate any moral dissension to publicly ascertainable legal norms, it almost inevitably will be a shuddersomely fractionated regime in which the officials reach numerous clashing decisions and send out numerous clashing signals. To be sure, as has already been granted, the officials will very likely make some efforts to coordinate their decisions. However, they will not be adhering to a fully Incorporationist Rule of Recognition unless they focus primarily on substantive moral issues. In connection with those issues, the need for coordination is just one ancillary consideration among many. Thus, the officials' adherence to a thoroughly Incorporationist Rule of Recognition virtually ensures that their mode of governance will lack the regularity essential for the existence of a legal system.

Before going on to examine the milder version of the Incorporationist

23. This paragraph has been aimed principally against Philip Soper, *supra* note 2, at 512, n.129.

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Rule of Recognition, we should briefly consider a couple of points that strengthen my arguments concerning the thoroughgoing version. In the first place, nothing in the last few paragraphs has presupposed the indeterminacy of answers to moral questions. Everything said herein can tally with the view that each moral problem addressed by Incorporationist officials is a problem to which there exists a uniquely correct solution. Although such a view is of course not entailed by the arguments in my last few paragraphs, it can perfectly well square with them. What has been presupposed by those arguments is not the *indeterminacy* of moral truth-values, but the frequent *indemonstrability* and attendant *controversiality* thereof.[24] That is, although each moral problem tackled by Incorporationist officials may lend itself to a uniquely correct solution, the unique correctness frequently cannot be demonstrated in a way that will elicit widespread agreement. Regardless of the existence of objectively right answers, controversy will abound irrepressibly. My arguments about the robust version of Incorporationism do presume that very significant moral disagreements arising from people's diverse perspectives are ineliminable; however, my discussion does not have to affirm (or deny) that those disagreements are matched by the indeterminacy of any moral propositions' truth-values.

The potential role of citizens' expectations is a further point to be mulled over here. As was noted above, those expectations are some of the background circumstances that form the settings for Incorporationist officials' choices of moral principles. A defender of Incorporationism might accordingly submit that the moral significance of protecting people's legitimate expectations is sufficient to induce conscientious Incorporationist officials to strive for considerable regularity in their law-ascertaining activities. Any such rejoinder to my arguments would run afoul of two principal snags. First, one of the very inquiries that will occasion moral controversy in an Incorporationist scheme of things is whether the particular expectations harbored by citizens are indeed legitimate. Answers to any such inquiry concerning particular expectations will vie with one another amid the general moral disunity (and thus the general legal disunity) of an Incorporationist regime. Far from standing outside the moral fractiousness of such a regime, the question of the legitimacy of specific expectations will be a source and an object of that fractiousness. Second, and perhaps even more important, expectations are epiphenomenal rather than foundational. If they are reasonable at all and therefore legitimate at all, they have emerged only in contexts that warrant them. Once they have so emerged, they *prima facie* deserve to be satisfied; however, if some context does not provide any grounds for their formation, the nonexistent or unwarranted expectations therein cannot play any constrainingly justificatory role. Just such a state of affairs is overwhelmingly likely under a comprehensively Incorporationist

24. This distinction has long been emphasized by Dworkin. For one of his best and most recent discussions of the matter, *see* his *Objectivity and Truth: You'd Better Believe It*, 25 PHILOSOPHY & PUBLIC AFFAIRS 87, 129–39 (1996).

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Rule of Recognition. Insofar as officials adhere to such a Rule of Recognition, they focus primarily on matters of substantive justice, and they regard content-independent matters of consistency as secondary considerations. Thus, if the citizens ruled by such a regime are directly or indirectly acquainted with the nature of the officials' law-ascertaining criteria, they will not be inclined to form any confident expectations of consistent treatment. On the contrary, they will expect a high degree of irregularity in the patterns of adjudicative and administrative decisions. Consequently, the expectations held by citizens will not weigh in favor of the achievement of settledness and predictability in the aforementioned decisional patterns. (As has already been contended, the distinctiveness of a robustly Incorporationist Rule of Recognition lies in the fact that the officials abiding by such a rule are concerned first and foremost with the identification and application of moral principles on content-dependent grounds. Content-independent concerns are ancillary. If officials uphold content-independent considerations of consistency and regularity as their cardinal objectives, they are not in fact abiding by a robustly Incorporationist Rule of Recognition at all. Instead, as my discussion has already indicated, they are abiding by an ordinary Rule of Recognition and are doing so in pursuit of the moral ideals which a truly Incorporationist regime would apply directly as laws. If Incorporationism is even slightly interesting as a theory of law-ascertainment—as it manifestly is—then a thoroughly Incorporationist Rule of Recognition must be more than the motivational props or underpinnings for a non-Incorporationist Rule of Recognition.)

In sum, at least within a large and complex society, a comprehensively Incorporationist Rule of Recognition will very likely fail to secure the degree of regularity that is prerequisite to the functionality of a legal system. Though it might conceivably lead to a legal system that is woefully inefficient, it will much more probably lead to nothing at all that can qualify as governance-through-law. Precisely because such a Rule of Recognition is so unsuitable for enabling and sustaining the existence of a regime of law, the adoption of it by officials is exceedingly unlikely. If Incorporationist criteria for law-ascertainment play any part in the Rule of Recognition that prevails in some society, they will almost certainly play a confined part. Although we can perhaps imagine a number of intermediate variants of the Incorporationist Rule of Recognition,[25] the lone plausibly stable variant is that in

25. For example, some theorists have suggested that the common law proceeds in a roughly Incorporationist vein. *See, e.g.*, Philip Soper, *supra* note 2, at 512, n.129; Brian Bix, *Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate*, 12 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 17, 21 (1999). *Cf.* Stephen Perry, *The Varieties of Legal Positivism*, 9 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 361, 375–80 (1996); A.W.B. Simpson, *The Common Law and Legal Theory*, in A.W.B. Simpson (ed.), OXFORD ESSAYS IN JURISPRUDENCE: SECOND SERIES 77, 79, 80–87 (1973). Though I cannot pursue the matter here, my own view of the common law is much closer to that in Joseph Raz, *supra* note 12, at 140–41. A depiction of common-law decisions as products of an Incorporationist Rule of Recognition does not do justice to the frequently overriding salience of content-independent considerations of consistency within the various areas of the common law.

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which the Incorporationist criteria apply only to hard cases. If there are gaps in the law that need to be filled, or if there are conflicts or serious ambiguities in the law that need to be resolved, then judges and other officials may well invoke moral principles in order to deal with such circumstances.

This mild variant of Incorporationism is particularly pertinent in the context of my overall discussion, where we are pondering ways of replying to Dworkin. In his early attacks on legal positivism's alleged failure to acknowledge the salience of moral principles in the law, Dworkin focuses entirely on hard cases. Even in his more recent work, where he has expressed some doubts about the distinction between hard cases and easy cases, his whole discussion of positivism's ostensible shortcomings is informed crucially by his accounts of several difficult cases.[26] Hence, a version of Incorporationism attuned solely to such cases is apt indeed for fending off Dworkin's challenges. After all, the paramount merit of his challenges is to highlight the knotty legal cruxes that judges handle by recourse to moral principles. If legal positivism is to be worthy of commendation as a jurisprudential theory, it must be able to supply an adequate account of the judges' reliance on outright moral principles for adjudicative purposes. Incorporationism in its moderate form is an endeavor to furnish just such an account.

Exclusive Legal Positivism also offers such an account, however. Notwithstanding that the Exclusive Legal Positivists deny the legal status of the moral principles that judges invoke in hard cases, they unhesitatingly grant that judges in many legal systems do indeed invoke those principles. What the Exclusivist theorists maintain is that the moral principles are binding (in difficult cases) without being legal. Although such principles constitute standards which judges in many legal systems are obligated to apply in hard cases, they do not belong to any system of legal norms in which they are invoked. They are drawn upon as touchstones external to any particular jural system, in much the same way that the laws or procedures of a foreign jurisdiction are drawn upon in a conflict-of-laws case. When the existing legal norms fail to generate any answer to some dispute that has come before a court, the court can close the gap by resorting to non-legal moral precepts. Those precepts have not thereby amounted to legal norms; rather, they have filled in where the law has run out. So the Exclusive Legal Positivists assert.

Shortly, this article will present some reasons for favoring the mild variant of Incorporationism over Exclusive Legal Positivism. Straightaway, however, we should note a few pitfalls that can easily be overcome by Incorporationism in its moderate form. First, unlike the robust version of the Incorpora-

26. I of course especially have in mind Ronald Dworkin, LAW'S EMPIRE 15–30 (1986). For Dworkin's queries about the distinction between easy cases and hard cases, *see ibid.*, at 265–66, 350–54. For my responses to his queries, *see* my IN DEFENSE OF LEGAL POSITIVISM, *supra* note 3, at 135–40, 174–76.

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tionist Rule of Recognition, the milder version does not raise the specter of cripplingly pervasive disagreements among officials in the process of ascertaining the law. On the one hand, given that officials will have to make moral judgments when tackling hard cases that are not resolvable under the existing law, there is a very high likelihood of conflicts of opinion among the officials in regard to those hard cases. On the other hand, so what? We scarcely should be surprised that, when judges are faced with difficult situations that are not subsumable under the prevailing legal norms, they will frequently differ with one another as they arrive at their decisions. Such discord is a fact of judicial life—more precisely, a fact of life on appellate courts—that is wearisomely familiar to anyone who has read an English or American casebook replete with swarms of dissenting opinions. However, much more important than the prominence of judicial disunity in hard cases is the general uniformity of judgments in the large majority of cases, which are resolvable by reference to legal norms without any need for supplementary moral principles. Whereas a comprehensively Incorporationist Rule of Recognition makes every legal decision into a moral decision through and through, a mildly Incorporationist Rule of Recognition makes most legal decisions (i.e., the decisions in easy cases) into applications of authoritative norms that can be perceived as such through content-independent determinations. As a consequence, a mildly Incorporationist regime of law secures a healthy level of regularity in its workings that is not attainable by a robustly Incorporationist regime.

A second problem that gets defused by the moderate variant of Incorporationism is the problem on which Shapiro dwells. That problem does indeed arise here afresh. Just as the moral principles that regulate people's conduct under a comprehensively Incorporationist scheme of governance cannot in fact guide their conduct (via the creation of reasons-for-action), the moral principles that regulate people's conduct in hard cases under a moderately Incorporationist scheme of governance cannot guide their conduct in the circumstances that give rise to the hard cases. Once again, however, so what? We ought not to be surprised that the moral principles invoked to fill the gaps in the law are different from ordinary legal norms, in that they are incapable of serving as reason-creating guides for people's conduct. Those principles cannot serve as such guides, because they do not add any reasons-for-action to those that already exist by dint of the criterion in the Rule of Recognition that obligates and empowers judges to rely on moral principles in difficult cases. Although those moral precepts might fulfill a heuristic function, they do not constitute any decision-determining reasons (beyond those constituted by the instruction in the Rule of Recognition requiring judges to dispose of hard cases on the basis of moral precepts). Still, the judges draw on such precepts not for the purpose of receiving or furnishing guidance, but for the purpose of terminating disputes. Very much because the situations that engender hard cases are situations in which there does not exist any clear-cut legal guidance on some

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or all of the relevant points of contention, the top priority of judges when handling such cases is to resolve the points at issue. Instead of somehow offering guidance where none is available, the moral principles that enable the resolution of the disputes are simply means of achieving closure. Rather than *providing* guidance, their dispute-terminating effects *substitute for* guidance. We cannot expect any more in connection with hard cases, which are hard precisely because their facts are not subsumable under the ordinary legal norms that supply guidance by amounting to partly independent reasons for specific adjudicative decisions. Though an absence of guidance would be deeply problematic if it obtained in a legal system across the board, it is unavoidable and untroubling when confined to knotty cases that lie outside the ambit of the existing laws.

Presupposed by what has just been said is the moderate Incorporationist's way of surmounting a third problem—a problem that has been broached by Dworkin and others. When difficult cases emerge within a mildly Incorporationist legal system, and when the officials in the system therefore have to resort to moral principles to fill gaps in the law, they are legally obligated by their Rule of Recognition to proceed in exactly such a manner. They do not enjoy discretion to fill the gaps as they please. If any official were to decide difficult cases by adverting to factors other than moral precepts, he would be criticized by his fellow officials for failing to comply with his adjudicative duties. Hence, his reliance on those precepts when tackling hard cases is not something that he is legally at liberty to eschew.

Of course, the likelihood of intractable disagreements among the officials about the appropriate outcomes in hard cases is overwhelmingly high. Their shared adherence to a mildly Incorporationist Rule of Recognition does not prevent them from diverging markedly in their selection and application of moral principles for dispatching difficult disputes. While concurring with one another about the *in*tension of their Rule of Recognition, they persistently differ with one another (in hard cases) about its *ex*tension. Nevertheless, in hard cases with no uniquely correct solutions, all the moderately Incorporationist officials will be acting in accordance with their Rule of Recognition as long as the moral principles that they invoke and the outcomes that they favor are within the range of acceptable principles and outcomes. In any hard case where a uniquely correct solution is available, by contrast, only those officials who opt for the correct solution are acting strictly in accordance with the criteria in their Rule of Recognition. However, given that all the officials are credibly endeavoring in good faith to abide by those criteria (if indeed they are so endeavoring), and given that the unique correctness of the optimal solution is indemonstrable, the fact that some officials plump for suboptimal outcomes is not indicative of any breaches of duties. Although those officials might not be in strict compliance with the mildly Incorporationist instruction in their Rule of Recognition, they are not in violation of that instruction, either. Between strict conformity and outright transgression is the space occupied by their bona fide efforts.

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In the foregoing respects, then, a moderate version of Incorporationism can remain unscathed by various difficulties, some of which would bedevil a robust version of Incorporationism. A mildly Incorporationist Rule of Recognition will not lead to disruptive levels of irregularity in the ascertainment of laws; nor in most circumstances will it bring forth legal norms that fail to provide guidance; nor will it leave officials legally free to decide hard cases in whatever manner they please. Having glanced at these important strengths of the moderate Incorporationist stance, we should now seek to choose between it and Exclusive Legal Positivism.

Considerable circumspection is advisable here. An effort to choose between an Exclusivist theory and a mild Incorporationist theory is always prone to degenerate into an exercise in arid terminological stipulations. Both the Exclusivist theorist and the mild Incorporationist theorist readily maintain that judges within some legal systems invoke moral precepts to resolve the points of contention in hard cases, which cannot be resolved on the basis of legal norms that derive from ordinary legislative/judicial/administrative sources. Theorists from both camps likewise readily accept that, within legal systems of the sort just mentioned, the resort to moral principles by judges in difficult cases is legally obligatory rather than discretionary. What is at issue, then, is neither the determinative role of moral precepts in hard cases nor the legal mandatoriness of that role within some jural systems. What is at issue, rather, is the status of the precepts which perform that role. Are those precepts legal norms when they are applied by judges to the facts of hard cases for the purpose of resolving the disputes therein? Or are they non-legal norms that stop up gaps in the law without having been components thereof? Are they laws that belong to the system wherein they are applied, or are they similar to the rules of sporting associations and the laws of foreign jurisdictions which might be invoked by judges in certain unusual cases?

Plainly, we cannot settle this matter by reference to the most obvious aspect of the applied moral principles that renders those principles akin to laws: their status within a legal system as binding standards that judges bring to bear when assessing people's conduct in order to resolve disputes. After all, as has just been remarked, the Exclusive Legal Positivists are wholly willing to endorse such a characterization of the moral principles' status. We therefore have to shift our focus to some other aspect of the moral principles—an aspect that pertinently distinguishes them from the rules of clubs and sporting associations and the laws of foreign jurisdictions. If we can indeed single out some such feature of the principles, we shall have grounds for favoring a modest Incorporationist theory over an Exclusivist theory.

Consider, then, the significance of the fact that the correctness of the moral precepts that are to be invoked in hard cases is not brought about by anyone's deliberate acts and is not susceptible to alteration through deliberate acts. Shapiro himself emphasizes this characteristic of morality in the

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course of his critique of Incorporationism. Of key importance here is that the tenor of correct moral principles does not lie within the deliberate control of anyone who is outside the legal system in which the principles are applied as binding standards of conduct. In this respect, those principles are notably different from the rules of clubs or sporting associations and the laws of foreign jurisdictions. In their substance, such rules and foreign laws do indeed lie entirely within the deliberate control of people other than the officials in the legal system *L* where the rules and foreign legal norms are invoked. People who run the clubs and sporting associations determine which rules are operative therein, and they can modify those rules deliberately through amendments thereto. Much the same can be said *mutatis mutandis* about the officials in foreign legal regimes, who determine which laws are operative therein and who can modify those laws through such techniques as repealing, amending, and overruling. Exactly because the foreign laws and the rules of the clubs and associations are subject to the control of people outside *L*, the occasional application of those rules and laws within *L* should not be regarded as the incorporation of them into *L*'s matrix of legal norms. Instead, the application of them is a way of showing due respect for the norms that have been chosen and formulated in systems of authority that exist alongside *L*. As a means of showing such respect, the effectuation of those norms within *L* tends to highlight their separateness from *L*'s own norms. Given that the ground for invoking and applying foreign laws and associations' rules is their origin in external structures of authority that merit some recognition as such, the process of invoking and applying those rules/laws will have rested on a justification that underscores the fact that they belong to systems other than *L*. (Of course, some of the people in charge of clubs and sporting associations might also be legal officials. Nonetheless, each such person in his public capacity as an official is distinct from himself in his private capacity as a leader of a club or an association. The public and private roles remain separate, even if they are both occupied by a single person.)

Before contrasting the posture of clubs' rules and foreign laws with the posture of moral principles in hard cases, we should look at a further potential source of binding norms: custom. Few if any legal theories deny that customary norms have the status of full-fledged laws when invoked as such by judges. Indeed, one of the most prominent charges leveled by Hart against John Austin was that the latter theorist could not come up with any adequate explanation of the legal status of some customary norms.[27] Now, to a limited extent the reasons for ascribing binding force to customary norms are similar to the reasons for ascribing such force to the rules of clubs and the laws of foreign jurisdictions. That is, the officials in *L* who draw upon customary norms are thereby exhibiting due regard for the practices from which those

27. Hart, CONCEPT, *supra* note 3, at 44–48. I have argued elsewhere that Austin's theory can accommodate the role of custom much more resourcefully than Hart suggests. *See* my LEGAL THEORY, POLITICAL THEORY, AND DECONSTRUCTION: AGAINST RHADAMANTHUS 106–07 (1991).

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norms are distilled. Nevertheless, the dissimilarities between customary norms and foreign laws (or associations' rules) are more significant than the resemblances. Those dissimilarities warrant the difference between one's readiness to classify certain customary precepts as legal-norms-belonging-to-*L* and one's reluctance so to classify any foreign laws or associations' rules. In the first place, the statutory/judicial/administrative laws of foreign jurisdictions and the codified rules of associations derive from the decisions of people who occupy positions of authority. Likewise, those laws and rules are subject to deliberate alteration through standard procedures undertaken by the people in the authoritative positions. By contrast, the precepts of custom emerge and develop gradually instead of being brought into existence through discrete and authoritative acts. Moreover, unlike the laws of foreign countries and the formal rules of sporting associations, customary precepts are not subject to deliberate and abrupt modification through set procedures. Nor do they issue from clear-cut channels of authority; rather, they are immanent in practices that are typically carried on in the absence of any formal hierarchies or authoritative pronouncements.

In these key respects, the norms generated by custom diverge strikingly from foreign laws and sporting associations' rules. Those laws and rules are highly malleable products of institutions that are counterparts (at least rough counterparts) of the legal system *L* wherein the rules and laws are applied as binding norms from the outside. By contrast, customary precepts are not highly malleable and are not attributable to any authoritative decisions handed down and ratified through institutional mechanisms broadly akin to those in *L*. Hence, whereas the substance of the foreign laws and associations' rules is controlled by the directives of authorities outside *L*, the substance of customary precepts is not really within anyone's effective control. Since the tenor of the customary precepts is due to diffuse patterns of behavior rather than to focused decisions, and since the practices in which the precepts unfold are not authoritative institutions that are formal counterparts of *L*, the application of those precepts within *L* should be seen as the incorporation of them into *L*'s assemblage of legal norms. Though the customary precepts are immanent in practices, they do not belong to any authoritative institutions outside *L*. Thus, when they receive formal recognition within *L* as binding norms, they are not borrowings from another system in which they have an authoritatively established status. Until that point of formal recognition, they are free-floating—i.e., free of any institutional affiliation that has been authoritatively set. They are consequently available for incorporation into *L*. Plainly, that free-floating condition and that consequent availability for incorporation will not be characteristic of foreign laws or associations' rules. (Of course, a free-floating condition is hardly in itself sufficient to confer the status of a law on each norm that informs the authoritative utterances of officials. For instance, the fact that judges rely on the free-floating rules of grammar and diction does not mean that those rules are legal norms. Unlike statutes and judicial doctrines and certain customary

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and moral norms, grammatical rules do not serve as justificatory bases for official decisions. When judges have to explain why they are deciding a case one way as opposed to another, they do not invoke grammatical rules such as the rule against split infinitives.[28] Instead, they have to invoke some statute[s], judicial doctrine[s], customary norm[s], moral norm[s], or other decision-determining standard[s]. As has already been fleetingly remarked about the moral principles that are applied in hard cases, the most obvious feature of those principles that weighs in favor of our classifying them as laws is that they are indeed decision-determining standards.)

Along lines that are relevant here, principles of positive morality and principles of critical morality are much closer to customary precepts than to foreign laws or associations' rules. Indeed, moral principles of both types—especially the principles of critical morality—diverge more sharply from the aforementioned laws and rules than do customary precepts. Let us first ponder the status of positive moral standards. Positive morality consists in a mixture of customary beliefs / practices and widespread convictions. With regard to the component of positive morality that comprises a large array of customary precepts, the status of moral principles is manifestly at one with the status of norms that are grounded in custom. Therefore, given that customary norms are available for incorporation into *L*'s laws, the same will obviously be true of positive moral precepts. With regard to the component of positive morality that comprises people's widely shared convictions about right and wrong, the posture of moral principles is even more clearly detached from any authoritative institutional origins. Individual convictions, no matter how pervasively they may be harbored, are not the products of formal enactments or authoritative decrees. The patterns or networks of those convictions do not belong to any system, regardless of how widespread the convictions are. People's staunchest beliefs about right and wrong are free-floating in the sense defined above. Ergo, the moral principles encapsulating those beliefs are available for incorporation into *L*'s matrix of laws.

If the principles of positive morality can become subsumed into the overall array of *L*'s legal norms—as has just been argued—then *a fortiori* a parallel conclusion is warranted in connection with the principles of critical morality. By definition, they are principles that possess their morally binding force independently of their having been upheld by anyone. Their soundness as moral principles does not depend at all on their having gained acceptance within any set of institutions; their status as precepts of critical morality derives from their intrinsic tenor and not from their influence or roles (if any) in some formal system of authority. Their status as critical precepts certainly cannot be terminated by anybody's decisions or enact-

28. In highly unusual circumstances, to be sure, rules of grammar or pronunciation could indeed serve as the justificatory bases for official decisions. A situation broadly along these lines is discussed in my IN DEFENSE OF LEGAL POSITIVISM, *supra* note 3, at 35. In such circumstances, the aforementioned rules are indeed legal norms.

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ments. It is not within anyone's control. Hence, if officials in *L* draw upon the principles of critical morality for the purpose of resolving hard cases, they are not doing so out of any perceived need to show regard for some coexistent system of formal authority. Instead, the officials are drawing on those principles as norms whose validity transcends any recognition of them in other systems. A condition of free-floatingness, in the sense defined above, is inherent in the posture of critical moral precepts as such. When those precepts are invoked and applied in *L*, they are not borrowings from some other institutional structure to which they really belong. Even more straightforwardly than customary standards, they have been available to enter *L*'s matrix of legal norms as full-fledged elements thereof.

Should we conclude, then, that any recourse to moral principles by the judges in a mildly Incorporationist regime is an application of pre-existent law? Such an inference would be precipitate, for it elides the difference between the following two types of hard cases: those in which there are uniquely correct ways of ranking the applicable moral principles, and those in which there are no uniquely correct rankings. In hard cases of the former sort, a mildly Incorporationist Rule of Recognition will have fixed the content of the prevailing law.[29] Because that Rule of Recognition empowers and obligates officials to resort to moral principles in hard cases, and because *ex hypothesi* any questions about the bearing of those principles on the facts of certain hard cases can be answered in uniquely correct ways, the officials dealing with those cases have to pursue the uniquely correct routes if they are to decide the cases in accordance with their Rule of Recognition.

In a hard case *H* where the applicable moral principles can be ranked acceptably in more than one way, a mildly Incorporationist Rule of Recognition will not have fixed the content of the prevailing law. An irreducible and significant quantum of leeway will remain. In any such case, then, the ultimate resolution does not ensue simply from the balance of moral principles. Although the officials' recourse to moral precepts will probably help to narrow the range of acceptable outcomes, it will still leave key matters open—because the ranking of those precepts is open, to some extent. Accordingly, while the balance of moral norms invoked by judges to settle the points at issue in *H* may become the prevailing law that governs those points, it cannot accurately be presented as the pre-existent law thereon. Notwithstanding that the repertory of laws for hard cases under a mildly Incorporationist Rule of Recognition will encompass moral precepts, the pre-existent law for the controversy in *H* is indeterminate.

At any rate, what the second half of this article has sought to establish is that a moderate version of Incorporationism is preferable both to Exclusive Legal Positivism and to a thoroughgoing version of Incorporationism. Unlike the latter doctrine, the moderate variant of Incorporationism duly

29. On this point, though not on one or two other points, I agree with the discussion in David Lyons, *Moral Aspects of Legal Theory*, in MORAL ASPECTS OF LEGAL THEORY 64, 80–82 (1993).

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acknowledges the indispensability of uniformity and regularity in anything that counts as a legal system. Unlike Exclusive Legal Positivism, moreover, the position advocated herein can distinguish pertinently between the status of customary norms and the status of foreign laws (and of sporting associations' rules) when those norms and laws are given effect within any particular legal system. The basis for such a distinction leads to the conclusion that moral principles drawn upon by mildly Incorporationist judges in hard cases are sometimes laws of the system wherein they are invoked and applied. In insisting on that very point, a mild version of Incorporationism is superior to Exclusive Legal Positivism. When Incorporationism is confined within appropriate limits—quite severe limits—it proves to be a redoubtable doctrine indeed.

III. CONCLUSION

In the first half of this article, I have defended Inclusive Legal Positivism by dissociating it from Incorporationism. In the second half, I have defended a moderate version of Incorporationism by dissociating it from an extreme version. What ties together the two portions of the essay is a rejection of both Exclusive Legal Positivism and thoroughgoing Incorporationism. Exclusive Legal Positivism envisages undue constraints on the possible content of law-ascertaining criteria, whereas the robust version of Incorporationism envisages insufficient constraints thereon.

Of central importance in this context is the fundamental degree of regularity or uniformity that must obtain if a legal system is to exist as a legal system. A robustly Incorporationist Rule of Recognition will not secure that degree of regularity or uniformity; hence, robust Incorporationism as a jurisprudential position is unsound. Exclusive Legal Positivists err in the opposite direction. They insist that the range of possible law-ascertaining criteria is much more severely limited than is necessary to ensure the functionality of a legal system. (Indeed, given their ready acknowledgment that Anglo-American judges do and should invoke moral principles when adjudicating in hard cases, the Exclusive Legal Positivists can hardly claim that the limits delineated by their theory are essential prerequisites of a legal system's existence. Far from indicating any restrictions on the kinds of standards that can and should serve as adjudicative touchstones in a viable legal system, the Exclusivist limits are purely classificatory.) An Exclusivist theory suffers from some disconcerting weaknesses, such as its slighting of the similarities between customary norms and moral precepts. Weaknesses of that sort are avoided by a mildly Incorporationist theory. Like Inclusive Legal Positivism, the moderate version of Incorporationism maintains that the only inevitable constraints on the possible content of law-ascertaining criteria are those constraints that yield the regularity which enables the basic functioning and existence of a legal system as such.

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