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THE LOGIC OF LEGAL THEORY:
REFLECTIONS ON THE PURPOSE AND
METHODOLOGY OF JURISPRUDENCE

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INTRODUCTION

De Tocqueville once observed that Americans are a practical, action-oriented people, generally skeptical of abstract endeavors. "Men who live in democratic communities not only seldom indulge in meditation," de Tocqueville noted, "but they naturally entertain very little esteem for it."¹ Perhaps this explains a phenomena experienced by many who engage in legal philosophy, which is the skepticism expressed by colleagues and friends about the "value" of their work.²

Legal theorists are themselves somewhat to blame for this reaction, for their analyses often seem divorced from real world concerns. Consider, for example, the dominant school of Anglo-American jurisprudence in the twentieth century, which is sometimes called "analytical jurisprudence." The major writers in the field—and here I am thinking of Hans Kelsen, Ronald Dworkin and H.L.A. Hart—espouse complex, highly abstract legal theories. Their work is nearly unpenetratable to the uninitiated, and even legal scholars admit to feeling disoriented and confused.³

Kelsen's Pure Theory of the Law, Dworkin's invocation of a superhuman interpreter called Hercules, and Hart's con-

¹ See 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 43 (Phillips Bradley ed., Alfred A. Knopf 1976) (1834); see also id. at 3 ("I think that in no country in the civilized world is less attention paid to philosophy than in the United States.").

² See, e.g., PHILIP SOPER, A THEORY OF LAW 1 (1984) (arguing that legal theory has reached a "dead end"); see also JUDITH N. SHKLAR, LEGALISM (1964) (similar).

³ See, e.g., infra note 109 (noting commentary discussing the difficulty in understanding and making sense of Kelsen's theory); infra note 148 (similar for Dworkin).
struct of primary and secondary rules all seem to unfold in a world far removed from everyday concerns. The student, citizen, lawyer or judge might rightly ask, "How do these address the practical concerns of citizens or lawyers or judges or policymakers today? What, in short, is the point and purpose of legal philosophy?"

Asking these questions is entirely appropriate and desirable. Legal philosophy will reach a broad audience only when theorists are able to make an argument for its relevance in addressing practical legal questions. And yet, demonstrating the value of the discipline to colleagues or to the public at large is not the only, or perhaps even the primary, reason to clarify the purposes of legal theorizing. That effort is essential because identifying the theoretical goals remains the only way for legal philosophers to avoid confusion and ambiguity in

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4 Philip Soper has made precisely this point. As he wrote,
When one compares the conclusions of current legal theorists with the actual function of the judge, it is clear that judges are no better equipped to determine the law in difficult cases with the theorists' definitions than they are with unreflective definition. Master test, rule of recognition, basic norm, and law of nature—all these are concepts far too abstract to be used in actually deciding cases. Indeed, candid theorists usually confess that the picture of the law they paint is not meant to be representational even in the judge's chambers.

SOPER, supra note 2, at 5.


A philosophical theory that does not purport to explain, systematize, and deepen our understanding of some significant feature or property of the world is irrelevant and likely to fade quickly and quietly from the scene. . . . If a philosophical theory does not tell us something meaningful about our world that comports with intuitions to which we assign a high confidence level, it is doomed—and rightly so.

Id.

6 I am sure that many who are engaged in legal theory believe that they are doing something worthwhile, and they do not care a whit if the public understands or cares about what they are doing. See James Allan, Internal and Engaged or External and Detached?, 12 CAN. J. L. & JURIS. 5, 15 (1999) (noting that, in doing legal theory, the theorist "seems implicitly to be asserting, or at least to be pre-supposing, that his undertaking is worth doing—and so to be asserting its goodness"). Indeed, some may think there is something almost heroic about the lone scholar working for truth, without any public recognition.
their own analyses of the law.

One of the central disputes in legal theory today concerns "methodology." Theorists like Hart, Kelsen and Dworkin "do" legal theory in slightly different ways. For example, Dworkin uses a method that requires theorists to identify the moral basis for legal materials. Kelsen, by contrast, denies that moral principles have much of anything to do with understanding law's nature.

How are we to assess which method is "better?" For that we need some standard of evaluation, some way of determining which theory does a "better" job. And to answer that question, we need to ask, "A better job at what? What is the point of theorizing about the law?" After all, we will not be able to identify a "method" of jurisprudence, unless we know what the method is being used for. One cannot decide which analytical tools are best employed until one is clear about the function and goal for which that tool is to be used.

An initial step in bringing some clarity to the field of jurisprudence, therefore, is for theorists to be clear about the purpose of their analyses and to articulate the implications of that purpose for legal theory's methodology. Unfortunately, few theorists have confronted this challenge directly. There has been a remarkable dearth of writing—in an area where there is no dearth of words—about the point and purpose of the exercise itself. As a result, it is difficult to evaluate how

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7 See infra Part VIII.
8 See infra Part VII.
9 See SOPER, supra note 2, at 6 ("Instead of trying to infer the purpose of legal theory from the existing literature on the subject, it may be more profitable to ask directly what purpose legal theory ought or could be made to serve."); Ruth Gavison, Comment, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 21, 34 (Ruth Gavison ed., 1987) ("Generally speaking, criteria of adequacy for theories of law cannot be uniform. Adequacy is a relative idea: we must always know the tasks we want the theory to fulfill in order to judge its adequacy.").

It is even conceivable that disputes among legal theorists are really not disputes at all. It is possible that legal theorists are really answering different questions—one is trying to determine how to hammer a nail, the other how to turn a screw. Each might be employing the correct methodologies, given their differing objectives. See infra Part I (discussing false debate between some theorists about the conventional meaning of the term "law").

10 As one commentator recently observed:
well theorists’ methods serve their underlying purposes.

This Article seeks to encourage a conversation about the overriding purposes and, ultimately, the appropriate methodology of legal theory. The approach will be constructive: I will make an argument for a distinct theoretical objective and then explain how that objective calls for a distinct methodology. At the same time, the Article will have a critical component, too. The constructive argument will be used to critique the methodological coherence of two leading theorists—Ronald Dworkin and Hans Kelsen. The result will be to shine some light on what legal theorists are actually doing—and what they should be doing—when they do legal theory.

A brief road map of the discussion may prove helpful. In Part One, I suggest that one can identify an appealing purpose for jurisprudence relatively easily. To be useful, jurisprudence must help to answer questions that citizens care about, and citizens care deeply about a variety of normative questions. These are “should” questions, questions about how citizens should behave, how laws should be interpreted and how cases should be decided.

The difficult challenge is to identify a methodology that can help address these normative questions, or at least help us think more clearly about them. I argue in Part Two that an appropriate methodology is available, one that might be called “rational reconstruction.” That methodology seeks to identify the implicit premises of legal claims; it is a methodology designed to encourage individuals to deliberate more openly and more reflectively on the underlying assumptions they hold about the law.

The methodology of rational reconstruction leads to a series of important, if somewhat counterintuitive, insights about legal claims, which are discussed in Parts Three and Four. Part Three suggests that normative claims about the

All legal theorists take an implicit stand on meta-theoretical or methodological questions such as [the purpose of the theorizing endeavor]. Few, however, address such matters directly, and to the extent to which this does occur, the authors concerned often confine themselves to some relatively brief remarks in the course of pursuing some other agenda.

law must rest implicitly on a moral principle. Even more controversially, Part Four contends that the moral principle must be of a certain sort—it must be a unitary, objective principle of morality.

These conclusions conflict with a traditional tenet of positivism, the idea that law and morality have no necessary nexus. Given this conflict, Part Five steps back and considers whether positivism retains any vitality as a jurisprudential theory. The discussion concludes that positivism continues to play a part—though a limited one—in delineating the scope of the rationalizing endeavor.

With the core features of rational reconstruction articulated, Part Six offers a practical illustration of how the methodology operates, applying it to a debate over the nature of civil disobedience. As this Part demonstrates, rational reconstruction helps explain why some theorists are mistaken in believing that citizens have an independent obligation to obey the law. The analysis demonstrates how careful attention to the purpose of jurisprudence and a clear understanding of the relevant methodology helps untangle the web of intuitions that citizens have about this fundamental philosophical issue.

The last two parts of the paper contrast the methodology of rational reconstruction with the methodologies used by two of the most influential legal theorists of the twentieth century—Hans Kelsen and Ronald Dworkin. Part Seven examines Hans Kelsen’s Pure Theory of the Law, and Part Eight assesses Ronald Dworkin’s “constructive” approach to interpretation. These parts highlight how each theorist adopts a methodology that resembles the methodology of rational reconstruction in notable respects, yet each also departs from the rationalizing approach in several critical and ultimately unjustified ways. The analysis underscores how the failure to confront the underlying purpose of jurisprudence can lead to confusion and ambiguity in jurisprudential methods.

Before turning to the body of this enterprise, a brief comment about the aspirations of this article may be useful. My goal here is primarily Socratic in nature; I am interested in provoking legal theorists to question their own assumptions about the goals and methods of jurisprudence. One way to
encourage a conversation about underlying assumptions is to take a stand on the subject—to make a case for a certain jurisprudential objective and to show how that objective entails a distinct methodology. That is what I have done, and my hope is that it will inspire others to take a stand on these issues in turn.

Since a primary criticism advanced in this paper is that legal theorists have failed to make their implicit premises explicit, I have tried myself to be as explicit as possible about the core elements of my analysis. Where complex and contested legal concepts are employed, I have attempted to offer my own definitions. Where assumptions are made, I have tried to be open about them. Whenever possible, I have tried to use straightforward language. I join Philip Soper in the belief that “the closer one sticks to plain talk in analyzing ethical concepts, the less prone one is to that peculiar kind of philosophical error whose technical name is ‘nonsense.’” Clarity of language is a discipline to encourage clarity of thinking. But most importantly, it will allow others to understand, evaluate and critique the theory outlined in these pages with greater ease.

I. THE PURPOSE(S) OF JURISPRUDENCE

Legal theory during the twentieth century has been preoccupied with questions about the nature or concept of “the law.” This is, at first glance, a strange sort of question. Ordinarily, when we speak about the nature of an entity—like “water”—we assume that the concept refers to some objective thing, say H₂O. But the term “law” does not have a similarly fixed meaning. Rather, in everyday usage, the term means different things in different contexts.

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11 SOPER, supra note 2, at 13.
12 See LLOYD'S INTRODUCTION TO JURISPRUDENCE 47 (M.D.A. Freeman ed., 6th ed. 1994) (“[M]uch juristic ink has flowed in an endeavour to provide a universally acceptable definition of law . . . ”); see also Stanley L. Paulson, Introduction to NORMATIVITY AND NORMS xxx (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1998) (“When Kant . . . poses the classical philosophical question, ‘What is law?’, he is following a juridico-philosophical tradition that extends over two millennia.”).
13 Ronald Dworkin, A Reply by Ronald Dworkin, in RONALD DWORKIN AND
Consider, for example, an individual who asks his lawyer a tax question: "Is deducting medical expenses against the 'law'?” Here, we might suppose, the defendant is using the term “law” in a positivist sense; he wants to know whether he will be punished for deducting medical expenses. He is not interested in assessing whether the tax rule on the subject is justifiable in any moral or legal sense. If we focused solely on this context, we might follow Holmes or Austin in saying that law represents the coercive command of a sovereign, and that we should treat law from the perspective of the “bad man” who is only concerned with punishment and pain.\footnote{See Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897).}

By contrast, we might consider an individual arguing about how the Supreme Court should resolve an upcoming case concerning, say, religious freedom. Suppose the individual asserts that the case should be resolved in favor of the plaintiff because that is the “law.” The issue here is different from the first example. Here, the individual is using the term “law” to refer to the result he believes is “justified.” He is implying that the Court is under an obligation, a duty, to resolve the case in a specific way. In this context, we are not only interested in the perspective of the “bad man” whose focus is on punishment, but also on the “good man” who feels a sense of obligation to reach the right decision.\footnote{See Soper, supra note 14, at 1190-92 (distinguishing between perspectives of ...}

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\textit{Contemporary Jurisprudence} 247, 251 (Marshall Cohen ed., 1983) (“There is no standard use of the words 'legal' or 'law' . . . .”); Gavison, supra note 9, at 21 (“We use the word 'law' in a variety of meanings and contexts.”); see also Granville Williams, The Controversy Concerning the Word "Law," in Philosophy, Politics and Society 155 (Peter Laslett ed., 1956) (“The only intelligent way to deal with the definition of a word of multiple meaning like 'law' is to recognize that the definition, if intended to be of the ordinary meaning, must itself be multiple.”).

A common critique of positivist notions of the law is that they fail to account for the good man’s way of speaking about the law. Theorists seeking to explain how law might be justified or obligatory have pursued different strategies. For example, commentators embracing traditional natural law theories argue that the law is justified when it is based on moral principle. By contrast, analytical theorists, such as Hans Kelsen and H.L.A. Hart, attempt to account for this sense of the law without relying on moral claims. All of these theorists agree that the command theory does not capture the full meaning of the word “law” as used in linguistic practices.

Much ink has been spent trying to assess whether law is best understood from the perspective of the good man or the bad man. But if the goal of these theories is to identify the conventional way that the term “law” is used in legal discourse, both theories are correct. The term “law” does not have any essential or fixed meaning. It is a term used by human beings in the midst of specific enterprises for different purposes. And so the term's meaning depends on context and on the purpose for which the word is used.

That means that if the purpose of legal theory is this linguistic objective, then the battle between positivists and normative theorists may be a phony one. They might both be right, depending on the context. Sometimes individuals use the term “the law” to refer to predictions about the use of government sanctions, and sometimes they use the term to

the “good man” and the “bad man”).

16 See Alf Ross, Validity and the Conflict Between Positivism and Natural Law, in Normativity and Norms, supra note 12, at 151.

Despite manifold diversencies, there is one idea common to all natural law schools of thought: The belief that there exist universally valid principles governing the life of man in society, principles that have not been created by man but are discovered, true principles, binding on everyone, including those who are unable or unwilling to recognize their existence.

Id.

17 See Williams, supra note 13, at 152 (noting fallacy that “words have not only a proper meaning but a single proper meaning. This involves a denial of the fact that words change their meanings from one context to another. . . . The misconception again comes from supposing that there is an entity suspended somewhere in the universe called ‘law’ . . . .”).
refer to the sense that certain kinds of rules or decisions are obligatory. And this is not surprising. We often use the same term in different ways in different situations.\textsuperscript{18}

But there is a deeper question that needs to be asked, and that is the question whether legal theory should seek to identify the conventional meaning of the term “law.” Indeed, such a linguistic goal seems notably unsatisfying. It would relegate theorists to producing a kind of dictionary, in which the various meanings of the term “law” are identified and listed, perhaps with some explanation of how the various meanings apply in different contexts, communities and historical periods.

Moreover, if this is jurisprudence’s goal, the methodology adopted by theorists would be rather mundane. We might expect theorists, for example, to engage in surveys or interviews to discover what terms are thought to mean in a community. Needless to say, that is not the kind of analysis most legal theorists undertake. Rather, it is fair to say that most theorists have more ambitious theoretical ambitions than creating a dictionary of legal terms.\textsuperscript{19} Indeed, it would seem odd if the heated debates among legal theorists today turned simply on whether their theories accurately captured the conventional understanding of legal terms employed by the public or the legal profession.

But if theorists do not seek to capture linguistic meaning, what is their goal? To help address that question, we need to step back and consider in a more general way the kinds of objectives that theorists might possess when analyzing the law.

\textsuperscript{18} See infra Part III.A (discussing how terms like “should” and “ought” are used in different ways in different contexts).

\textsuperscript{19} Dworkin writes: “none but the most trivial theory of law could possibly be understood as an account of the linguistic conventions governing the concept’s use.” Dworkin, supra note 13, at 256; see also Soper, supra note 2, at 3 (“[W]ho cares? What is the point of marking off the distinguishing features of legal systems?”).
A. Empirical Questions

The purposes of theorizing can be divided into two sets of objectives, which might be called "empirical" and "normative" goals. Empirical goals attempt to identify facts about the world. Attempts to identify the conventional meaning of a term like the "law" is an illustration of an empirical objective, for that effort seeks to identify facts about the term—how the term is used by members of the community at large (or a portion of that community).\(^{20}\) Other empirical goals can be identified easily. A historian might be concerned with identifying past facts, such as the ideological commitments of a Supreme Court Justice during the Civil War. A practicing attorney might be interested in assessing future facts, such as the likelihood that a client will be sanctioned by the government for taking certain actions. These goals differ in their temporal focus—whether they focus on past, present or future events. They are all empirical, however, in their attempt to identify factual events that have happened, are happening or will happen.

Plainly, the methodological tools adopted by an individual will depend in part on the nature of the empirical objective pursued. For example, the professional attorney attempting to assess the likelihood of government sanctions will utilize the methodological tools familiar to lawyers counseling clients. The lawyer might look at the record of past decisions as a way of predicting the future path of the law.\(^{21}\) She might explore

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\(^{20}\) As Himma has written, "[d]efinitional claims are, thus, primarily empirical in character; to determine the truth-value of such a claim one must go out into the world and see how people, as an empirical matter, use the relevant terms." Himma, supra note 5, at 44.

\(^{21}\) As Oliver Wendell Holmes wrote:

The object of our study . . . is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall.

Holmes, supra note 14, at 457.
the psychologies and records of individual judges on a court in order to determine their likely actions. She might even analyze cultural trends on the belief that such trends influence judicial decision making.

Efforts to address historical questions, by contrast, will adopt different methods. For example, one who is interested in Justice Holmes' views on the First Amendment would use the typical tools of historical analysis—examination of primary and secondary materials concerning the subject of interest. Conversely, one who is interested in current facts about the legal profession—say, an assessment of how elected judges today are influenced by public opinion—would need to undertake a different methodological approach, such as an effort to compare the conduct of elected and unelected judges facing similar legal questions.

Empirical goals in short, can come in many different varieties and can differ in their temporal focus. All of these empirical goals are likely to be interesting to some people some of the time. One who finds them appealing will be justified in choosing a methodology that is tailored to achieving them.

At the same time, none of these empirical goals seems to capture what lies at the heart of jurisprudence today. Legal theorists, after all, do not seem interested ultimately in predicting the future path of the law, charting its historical roots or identifying the conventional meaning of legal terms. It is hard to see how these practical endeavors lend themselves much to "theorizing" at all.

Moreover, those empirical pursuits are commonly thought to fall within the province of other disciplines or fields. Predictive analysis, for example, is the stuff of typical law school courses but not philosophy of law courses. Historical analysis seems more appropriately pursued by legal historians. Linguistic analysis seems better suited to, well, linguists. Given this conclusion, we might naturally ask whether the second set of objectives—normative objectives—might serve as the ultimate goal of legal theorizing.
B. Normative Questions

The term "normative," like many words, has a varied meaning. For our purposes, normative questions refer to "should" questions, questions about how individuals or institutions should act.\(^{22}\) I will have more to say about the meaning of "should" statements a bit later; for now it is enough to suggest that normative statements are a way of saying that an individual or institution has a duty or obligation to act in a certain way.\(^{23}\) A statement that a decision is "justified" or "good" is a normative statement if it implies that a decisionmaker is, was or will be under an obligation to reach a certain decision. Thus, the claim that a legal right to assisted suicide is justified typically means that a court should rule in that way.

Normative (or "should") statements should be distinguished from empirical (or "is") statements. Normative statements are claims about how we are obligated to act. Empirical statements are different; they simply tell us how the world is (or was or will be). To be sure, normative claims might rely, in part, on empirical judgments. To assess whether the current Supreme Court jurisprudence on privacy is "justified" we need to have some empirical knowledge about what the Supreme Court said. But normative claims, unlike empirical ones, are not simply questions about the facts. They also require an evaluation of whether those facts are authorized, justified or obligatory.

Unlike empirical goals, normative questions offer an ap-

\(^{22}\) See, e.g., CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY 8 (Conora O'Neill ed., 1996) ("[Normative statements] make claims on us; they command, oblige, recommend, or guide. Or at least, when we invoke them, we make claims on one another. When I say that an action is right I am saying that you ought to do it . . . ") (footnote omitted); cf. H.L.A. HART, THE CONCEPT OF LAW 6, 85 (2d ed. 1994) (discussing law and obligation); GRAHAM WALKER, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT 13 (1990) (noting that all normative statements advance an implicit argument about the existence of an obligation). "[T]he word 'obligation' etymologically relates particularly to the 'binding force' (ligare, to bind) of promissory or quasi promissory commitments." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 297 (H.L.A. Hart ed., 1980).

\(^{23}\) See infra Part III.A (discussing nature of normative statements).
pealing object for an independent discipline called jurisprudence.\textsuperscript{24} The most contentious and vibrant disputes about the law today involve normative disputes—about how individuals, courts and other institutions \textit{should} act.\textsuperscript{25} Moreover, many of the perennial questions of legal theory are normative in precisely this way, questions about civil disobedience, judicial review, constitutional interpretation and punishment. When should individuals disobey the law? Is the Court justified in exercising judicial review? How ought the Court interpret the Constitution? When and how should the government punish law breakers?\textsuperscript{26} Jurisprudence would be a powerful discipline, indeed, if it could help us answer, or at least think more clearly about, these difficult issues.

For purposes of this paper, therefore, my working as-

\textsuperscript{24} Some theorists have suggested that normative and empirical questions exhaust the kinds of questions that can be asked about the law. See Felix S. Cohen, \textit{Transcendental Nonsense and the Functional Approach}, 35 COLUM. L. REV. 809, 824 (1935).

Fundamentally there are only two significant questions in the field of law. One is, "How do courts actually decide cases of a given kind?" The other is, "How ought they to decide cases of a given kind?" Unless a legal "problem" can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense.

\textit{Id.}; see also id. at 828-29 (arguing that we should look at the real life implications of words, rather than treating them as some kind of abstract entity). I am sympathetic to that position, though demonstrating its truth is not necessary here. My goal is to encourage theorists to be explicit about the purposes their methodology is serving, whether or not that purpose can be classified as normative or empirical in nature.

\textsuperscript{25} Cf. WALKER, \textit{supra} note 22, at 4 ("[A]ll the important arguments in the field of constitutional theory are normative.").

\textsuperscript{26} The debate over when and whether civil disobedience is justified is a common topic of discussion in philosophical texts. See, \textit{e.g.}, \textit{JURISPRUDENCE} (Stephen E. Gottlieb ed., 1983); \textit{PHILOSOPHY OF LAW} (Joel Feinberg & Hyman Gross eds., 5th ed. 1995); \textit{THE PHILOSOPHY OF LAW} (Frederick Schauer & Walter Sinnott-Armstrong eds., 1996). Similar debates persist about the justification for judicial review and about the proper method of constitutional interpretation. See Erwin Chemerinsky, \textit{The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review}, 62 TEX. L. REV. 1207, 1207 (1984) (noting that debates over the justification for judicial review remain an "obsession of constitutional law scholarship"); Jed Rubenfeld, \textit{On Fidelity in Constitutional Law}, 65 FORDHAM L. REV. 1469, 1470 (1997) ("[H]ow ought the Constitution to be interpreted? That is one foundational question of constitutional law, and it tends to have the lion's share of attention.").
sumption will be that addressing these normative questions is the overriding objective of legal theory. The following sections attempt to trace out the implications of that objective for the jurisprudential method. One who finds this objective appealing will be interested in exploring the methods used to address normative questions.

At the same time, no one is obligated to agree that this is the ultimate goal of jurisprudence. Those who are interested in a different set of questions, such as questions about the conventional meaning of legal terminology, will find the analysis in the following pages uninteresting. Nonetheless, the broader point advanced in these pages remains—legal methodology follows from the goals of legal theory. Those who embrace a different jurisprudential method have a responsibility to identify the ultimate purpose of their endeavor and to explain how their favored methodology promotes that goal.

II. THE RATIONALIZING METHODOLOGY OF JURISPRUDENCE

We have assumed for the sake of argument that the goal of legal theory is to address normative questions. On this assumption, a jurisprudential method will be useful if it helps us answer—or at least think more clearly about—these kinds of “should” questions. Thus, the question we need to ask is, “What methods are best suited for addressing the normative objectives of legal theory?”

A. Prescriptive Methods

One answer is that such a methodology should help us identify authoritative principles that answer the important “should” questions—whether citizens should obey the law, how courts should interpret the law, how government should enforce the law. This might be called a prescriptive, or “top-down,” approach. This approach is extremely ambitious; it aspires to tell us nothing less than the justified result.

An obvious difficulty with this approach is that the content of the authoritative principles is disputed. It is not obvious how one would go about proving which principles are authoritative, or even what kinds of principles provide author-
itative answers. Consider, as an illustration, the on-going debate about the appropriate methods of interpreting the Constitution.

To interpret the Constitution, we need some principle of interpretation. Do we focus on the original intent of the Framers, the conventional meaning of the text or some other element? The difficulty is that we cannot derive those principles of interpretation from the Constitution itself, since reading the document requires a commitment to an interpretive method. That means that principles of interpretation, if they are to be justified, must rely on principles independent from, transcending, the Constitution.

What kind of principles? Moral principles offer one possibility. But moral principles themselves are endlessly disputed. We do not agree on basic issues of morality and the Good, nor do we agree on how standards of justification should apply to specific disputes.27 Lacking agreement on ultimate standards of justification, we seem to have no persuasive way to resolve these and other normative disputes.26

This conclusion seems to undermine, or at least raise serious doubts, about the possibility of a useful normative jurisprudence. But before we despair for the discipline of jurisprudence entirely, we might consider an alternative approach. This method has more modest aspirations than the top-down approach. Rather than attempting to identify the “right” an-

27 Thus, one theorist can assert that homosexuality is immoral, while another can take precisely the opposite position. Compare, e.g., John Finnis, Is Natural Law Theory Compatible with Limited Government?, in NATURAL LAW, LIBERALISM AND MORALITY 1, 9 (Robert P. George ed., 1996) (arguing that the public promotion and facilitation of homosexual activity impedes “human goods”), with Stephen Macedo, Against the Old Sexual Morality of the New Natural Law, in NATURAL LAW, LIBERALISM AND MORALITY, supra, at 28 (Robert P. George ed., 1996) (“affirming the good” of homosexual relationships).

26 It is partly for this reason that some scholars, like Richard Posner, have concluded that moral theorizing is by its nature useless and futile. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 131 (1999) (“Even if there is an objectively correct answer to every moral question . . . , the answer will appear arbitrary because there is no reasoning process that a judge might follow that would strike a detached observer as furnishing objective justification for the answer.”); see generally Aaron J. Rappaport, Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy, 2001 UTAH L. REV. 441, 445.
swer, the method seeks to help us think about these normative questions in a more intelligent, comprehensive and reflective manner. The methodology might be called "rational reconstruction."

B. The Methodology of Rational Reconstruction

Rational reconstruction does not attempt to identify authoritative principles that dictate how individuals should act. Rather, the method seeks to make the implicit premises of legal claims explicit. Arguments in support of any claim are, by definition, comprised of implicit premises. The premises are what an individual must accept as true in order to assert that a claim is persuasive. Rational reconstruction attempts to expose these premises so that individuals can consider them more openly and reflectively. This goal—of making implicit premises explicit—is a central objective of traditional philosophical analysis.


Neil MacCormick, Legal Reasoning and Legal Theory 21 (H.L.A. Hart ed., 1978) ("[A]n argument . . . purports to show that one proposition, the conclusion of the argument, is implied by some other proposition or propositions, the 'premises' of the argument.").

See, e.g., Felix S. Cohen, Ethical Systems and Legal Ideals 5 (Greenwood Press 1976) (1933) ("Ethical science involves an analysis of ethical judgments, a clarification of ethical premises."); L.A. Zaiert, Philosophical Analysis and the Criminal Law, 4 Buff. Crim. L. Rev. 101, 101 (2000) ("Philosophical analysis can be viewed as the attempt to clarify concepts by distinguishing their constitutive elements. This clarification seeks to identify the set of necessary and sufficient conditions for a given entity to be an instance of the concept being analyzed."); see generally Rappaport, supra note 28, at 445 n.18.

R.M. Hare suggests that the term "ethics" should be reserved for these kinds of "logical" or "analytical" inquiries. R.M. Hare, Ethics, in The Concise Encyclopedia of Western Philosophy and Philosophers 130 (J.O. Urmson ed., 1960) [hereinafter Concise Encyclopedia] [hereinafter Concise Encyclopedia]. Moreover, Hare distinguishes this form of ethical analysis from purely prescriptive or
Rational reconstruction, in this respect, represents a form of logical analysis. To reconstruct a normative claim, an individual begins by assuming, for the sake of the analysis, that the normative claim under consideration is justified. She then attempts to "back out" or "reverse engineer" a rationale for those rules. The rationale will be comprised of premises that, together, entail the conclusion that the decision is justified.

C. The Rationale of Rational Reconstruction

How does identifying implicit premises help to promote the normative goals of legal theory? As an initial matter, identifying the premises of a normative claim can help to clarify points of agreement and disagreement among individuals. To illustrate, consider two individuals who disagree whether the Court should establish a constitutional right to homosexual sodomy. Little can be said about the specific nature of the dispute without further analysis of the premises of the opposing beliefs.

Suppose one individual is asked why he supports such a constitutional right, and he responds with this simple argument:
(1) society should be structured to promote human happiness, or "utility";
(2) constitutional protection of sexual contact between willing adults will promote human happiness over the long run;
(3) homosexual sodomy is a kind of sexual contact;
therefore,
(4) homosexual sodomy between willing adults should be constitutionally protected.

Having exposed the premises of the individual's belief, an opponent can more easily identify points of agreement or dis-

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descriptive claims. Thus, he writes: "ethics in the narrow sense [of analytical inquiry] is concerned directly neither with whether polygamy is wrong . . . nor with whether anybody in fact thinks it is wrong . . .; it is concerned with the question 'Precisely what is one saying if one says that polygamy is wrong?'" *Id.* at 131; see also P.H. Nowell-Smith, Analysis, in CONCISE ENCYCLOPEDIA, supra, at 17 ("[T]he function of philosophy . . . [is] not the acquisition of new knowledge . . . but the clarification and articulation of what we already know.").
agreement. For example, the opponent might agree with the first (moral) premise, but disagree that constitutional protection of sexual contact will promote human happiness, or agree with the first two premises but disagree that homosexual sodomy is a form of sexual conduct. Disagreement, in other words, can occur at many different levels, concerning different premises. By clarifying underlying assumptions, rational reconstruction can help structure debates, focusing attention on the real sources of dispute.

Even more fundamentally, rational reconstruction provides a tool for an individual decisionmaker to reach more thoughtful and considered judgments about normative questions. By making implicit premises explicit, the methodology encourages reflection on the premises of one's beliefs—and, as a result, on the justifiability of a given decision. Thus, if an individual is able to identify a plausible argument for a given claim, the individual can assess the logic of that claim more directly.

In this assessment, the individual is certainly not obligated to endorse the implicit premises of the normative claim. But if she finds the underlying arguments unappealing, or if she is unable to find any plausible argument in support of a given claim, she will necessarily have to reconsider the appeal of the normative claims themselves. Decisions, under these

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32 See Bankowski et al., supra note 29, at 23.

One must reconstruct the system in view in order to understand and explain it without regard to the question whether it expresses sound values or value-commitments. Good legal description is neither advocacy of the system nor critique of it. Our aim here is good description in this sense, not advocacy or critique.

Id.

33 As I have discussed elsewhere, rational reconstruction can be viewed as the first step in a common form of philosophical inquiry, a movement towards "reflective equilibrium." Rappaport, supra note 29, at 565 n.19 (discussing link between reflective equilibrium and rational reconstruction). Reflective equilibrium occurs when an individual's premises and judgments are in harmony. See JOHN RAWLS, A THEORY OF JUSTICE 20 (1971) ("[Reflective equilibrium] is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation."). An initial step in reaching reflective equilibrium is the process of identifying—reconstructing—the premises of one's beliefs. The hope is that, by mak-
circumstances, are made with full knowledge of their underly-
ing assumptions. Rational reconstruction thus transforms
intuitive beliefs into reflective decisions.\textsuperscript{34}

\textbf{D. Clarifications and Qualifications}

The rationale for rational reconstruction—to help individ-
uals assess the appeal of normative claims—influences the
way in which the methodology is applied. For example, in
reconstructing a normative statement, we may find that more
than one argument supports the claim. In that situation,
which argument should be considered?

The answer is that the individual reflecting on a norma-
tive claim should consider the \textit{strongest} argument available.\textsuperscript{35}
For example, if we are interested in assessing whether the

\textsuperscript{34} A core assumption of this methodology is that reflective decisions are more
accurate in the long run than unreflective ones. This cannot be proved. To be
sure, we can be confident that rational reconstruction provides a kind of knowl-
dge. At a minimum, the methodology highlights decisions that appear to lack
any plausible justification. But even with that knowledge, we cannot be certain
that the ultimate decision an individual makes will be better after reflection than
one made without any thought at all. Thus, the claim that the process of rational
reconstruction leads to better decision making is a core epistemological premise of
the rationalizing methodology.

That said, one who rejects this assumption must pay a high price. If reflec-
tion does not help in making better decisions, then it is not clear how normative
debate and discourse can ever provide benefits. If reflection has no benefits, then
theorizing about the law can aspire to nothing more than rhetoric and advocacy,
a tool for promoting one's own fixed positions, without offering any greater in-
sight. Some have adopted such a position. \textit{See, e.g.}, Pierre Schlag, \textit{Normative and
Nowhere to Go}, 43 STAN. L. REV. 167 (1990) (arguing that, since normative schol-
ars cannot prove the correctness of their positions, their efforts must be viewed
as rhetorical efforts to advance their agendas). But one who believes debate and
discussion are useful must at least assume the usefulness of the rationalizing
endeavor.

\textsuperscript{35} To avoid confusion, I am not suggesting here that a definitive external
standard is available to determine which rationale is strongest and most persua-
sive. Rather, the claim here is simply that the individual who is using the ratio-
"
Supreme Court's ruling concerning homosexual sodomy is justified, we should seek to identify the best possible argument in support of that decision's validity. We should adopt, in other words, a "principle of charitable interpretation."³⁶

Why? Why not seek to identify the rationale actually adopted by the decisionmaker in the relevant case? That is to say, why not evaluate the Supreme Court's sodomy decision based on the actual rationale expressed by the Court itself? The answer is that the Court's rationale might be muddled; it might rest on implausible premises. Rejecting that rationale, thus, would not tell us whether we should find the ruling appealing on other grounds, even grounds unforeseen by the Court itself.

Thus, in reconstructing a normative claim, we are not interested simply in identifying the rationale adopted by the claimant.³⁷ In assessing whether a normative claim deserves our allegiance, we need to evaluate that claim on its most persuasive grounds. We will call the premises of the rationalizing argument "implicit premises" to highlight the fact that they need not be expressly held by the claimant herself.

Before proceeding further, it is useful to distinguish between two different perspectives on normative claims—the internal and external perspectives. The discussion thus far has suggested that, in rationalizing a normative claim, we

³⁶ See Bankowski et al., supra note 29, at 20 ("The jurist or scholar has to strive to make the best reasonable sense that can be made of the law as a rationally coherent and generally applicable normative system, though certainly without disguising any irresoluble antinomies present in the system at any time."); see also CEDERBLOM & PAULSEN, supra note 29, at 28 ("When more than one interpretation of an argument is possible, the argument should be interpreted so that the premises provide the strongest support for the conclusion."); ROBERT P. GEORGE, MAKING MEN MORAL 65 (1993) (adopting the following canon of interpretation: "[S]elect among equally plausible interpretations of a text that interpretation under which the position taken or argument made in the text is more plausible").

Ronald Dworkin has adopted a similar principle of interpretation when he directs individuals to adopt the "best" theory of political morality that can support the existing legal structure. Dworkin's position is discussed further, infra, Part VIII.

³⁷ See John Rawls, Outline of Decision Procedure for Ethics, 60 PHIL. REV. 177, 185 (1951) (identifying intent of speaker is not the goal of the rationalizing effort).
need to adopt a specific perspective towards that claim. We need to assume, if only for the sake of the analysis, that the claims under analysis are justified. This is what I will call an "internal perspective" on the law. 38

At the same time, it must be emphasized that this perspective is adopted only for the sake of the rationalizing analysis. An individual is not committed to endorsing the claim. 39 To the contrary, the claim itself should be adopted only if the individual finds the premises to be, on reflection, appealing. When the individual steps back and assesses whether the premises are truly appealing, we might say that she is viewing the claims from an "external," rather than internal, perspective.

Rational reconstruction in this regard is not a prescriptive methodology—it does not purport to tell individuals or institutions how they should act. Rather, it is more accurately described as having both descriptive and normative features. It is normative in the sense that it focuses on "should" statements. But it is descriptive because it attempts to describe the premises of the existing claims without asserting that one must embrace the premises themselves. 40 By making implicit premises explicit, it offers a tool for undertaking a structured assessment of the merits of normative claims.

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38 Theorists differ on precisely what they mean by an "internal" perspective or point of view. See, e.g., Brian Bix, Natural Law Theory, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 230 (Dennis Patterson ed., 1999) (contrasting perspectives of John Finnis and H.L.A. Hart). For purposes of this paper, I use the term to refer specifically to the perspective of one who believes that the claims under analysis are justified (i.e., impose categorical obligations).

39 Bankowski et al., supra note 29, at 23.

One must reconstruct the system in view in order to understand and explain it without regard to the question whether it expresses sound values or value-commitments. Good legal description is neither advocacy of the system nor critique of it. Our aim here is good description in this sense, not advocacy or critique.

Id.

40 See id. at 21-22 ("Rational reconstruction aims at a descriptive account of normative material.").
III. THE PREMISE OF NORMATIVITY

The previous discussion described a methodology—rational reconstruction—that can be employed to address the normative objectives of jurisprudence. The methodology seeks to identify the premises of normative claims about the law. This Part discusses the kinds of premises that are found in the rationalizing effort. The analysis generates an important—and perhaps counterintuitive—insight about the nexus between legal claims and morality.

A. The Nature of Normative Claims

To identify the premises of normative statements, one first needs to clarify what these “should” statements mean. What do individuals mean when they say that a court “should” interpret the Constitution a certain way or a citizen “should” obey the law? In this effort, one cannot simply consult a dictionary for the word “should.” Words, we have noted, often mean different things in different contexts, and that is certainly true of words like “should” (or its frequent synonym “ought”).

For example, “should” can be used as a statement of “supposition.” We might say, “If you want to drive fast, you should push on the accelerator.” The word “should” can also be used as a statement of “prediction.” For example, we might say: “I hear that it should rain tomorrow.”

These are all valid ways to use the word “should,” at least if our standard is the conventional use of the term. But those are not the way “should” statements are used in legal debates over how courts should act or individuals should behave. That is to say, these are not the kinds of “should” statements we are interested in analyzing. When someone says that a court “should” interpret the Constitution to find a right to privacy or that an individual should disobey the law, he typically means that the individual has a obligation—a duty—to act a certain

way.

This is a duty, moreover, of a certain sort. As an initial matter, the obligations implied by normative statements do not depend on whether or not the individual who is the subject of the duty is aware of their existence. Thus, when I say that the Supreme Court has an obligation to find a right of privacy in the Constitution, I believe that to be true regardless of whether the Supreme Court itself acknowledges the existence of that obligation. Indeed, if the Court fails to recognize the obligation, I say that the Court has erred. In this sense, the obligation transcends the knowledge, belief or preferences of the decisionmaker.

Moreover, the obligation is deemed to exist whether or not a material sanction would follow a violation of the duty. Thus, when I say that the Supreme Court has an obligation to interpret the Constitution a certain way, I believe that the Court has a duty to act even if the Justices suffer no negative consequences for failing to comply with the obligation. We might say that the obligation exists inherently, regardless of whether it is enforced by any other means. To use Aquinas’s phrase, the obligation binds “in the conscience” and not by the sword.42

We might pause here and recap. What we have found is that an individual making a normative statement is making a statement about an obligation of a distinct kind. It is an obligation that does not depend on the decisionmaker’s awareness of, or agreement with, the obligation’s application. Nor does it depend on the existence of a material sanction. For ease of reference, I will refer to obligations of this sort as “categorical” obligations.

Lest there be any confusion, I am not claiming that “should” statements necessarily invoke categorical obligations. Rather, at this point, I am simply suggesting that this sort of claim is a common one in legal debates, and that it is the kind of statement that we are interested in analyzing. For the purposes of this paper, therefore, I will assume that normative

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42 The "Summa Theologica" of St. Thomas Aquinas Q.96 (Fathers of the English Dominican Province trans., London 1922).
claims involve categorical obligations.\textsuperscript{43}

B. Reconstructing Normative Claims

With a clearer picture of the meaning behind normative claims, we can turn to the critical question: What sorts of premises must be adopted to believe that categorical obligations exist? It has been recognized for millennia that normative statements—about how an individual "should" act—cannot be derived solely from factual premises. Normative statements must be grounded on other should statements, on deeper and more general principles that dictate how individuals should act.\textsuperscript{44} These underlying principles are the source of the categorical obligations; they are presupposed in

\begin{itemize}
\item \textsuperscript{43} Individuals are free, of course, to focus on claims that do not involve categorical obligations. But choosing a different kind of claim to analyze will result in different premises. \textit{Cf.} R.M. Hare, \textsc{Moral Thinking: Its Levels, Method, and Point} 22 (1981).
\item It is not necessary to my argument to insist that ‘ought’ for example, is never used non-prescriptively... Many words have various senses... All that is necessary is for there to be a recognizable sense in which it has the properties which I have claimed. People who then ask moral questions in this sense—as, I think, we do much of the time—are bound by the logical rules which these properties dictate. If they want to switch to different questions, that is up to them.
\item \textit{Id.}
\item \textsuperscript{44} \textsc{John Stuart Mill}, \textsc{Philosophy of Scientific Method} 355 (Ernest Nagel ed., 1950) (1843) ("A proposition of which the predicate is expressed by the words ought or should be is generically different from one which is expressed by \textit{is} or \textit{will be}"). Efforts to move from factual premises to normative conclusions is sometimes called the Naturalist Fallacy. It violates the fact that "it simply is not deductively valid to move from premises about the way things are in the world to conclusions about the way world ought to be." \textsc{James Allan}, \textsc{A Sceptical Theory of Morality and Law} 194 (1998); \textit{see also} Finnis, supra note 22, at 37 ("[It is a] logical truth, widely emphasized since the later part of the nineteenth century, that no set of non-moral (or, more generally, non-evaluative) premises can entail a moral (or evaluative) conclusion.").
\item Like most philosophical ideas, the is/ought distinction is not universally accepted. Some have suggested that it is possible to move from an "is" to an "ought" under certain circumstances. See Georg Henrik von Wright, \textit{Is and Ought}, in \textsc{Normativity and Norms}, supra note 12, at 368 (discussing proposals by Searle and others to bridge gap). Those positions, however, have suffered from powerful critiques by subsequent commentators. See \textit{id.} at 376-79 (criticizing Searle and others); \textit{see also} Mackie, supra note 41, at 66-72 (discussing and rejecting Searle's proposal).
\end{itemize}
the normative claim.

Consider, for example, the normative statement that the legislature should enact a law barring killing. We might ask: Why “should” killing be prohibited? A utilitarian might respond that killing is wrong (in this case or in general) because killing (in this case or in general) reduces the utility, or happiness, of the community. In this example, utility is a premise of the prohibition on killing.

Now this simple illustration allows us to distinguish various kinds of norms or normative claims. Specifically, the normative claim under analysis—that killing is wrong—might be called an “instrumental” claim, because it is justified in terms of another, higher order principle—in this example, the principle of utility.\(^{45}\) Utilitarianism is a normative claim, too; it affirms that individuals should act to promote the greatest happiness of the greatest number. But this normative claim is different. For the utilitarian, the greatest happiness principle, by definition, generates obligations inherently.

Utility, in this sense, is the “ultimate” principle of obligation: It has no further justification. At bottom, every normative statement must rest on a core assumption about the source of obligations. I will call this ultimate principle a “moral” principle—a principle that by its very nature generates obligations. Moral principles, then, are any ultimate, non-instrumental principle that generate categorical obligations. Adopting this definition leads to a core insight: Any normative claim about how individuals or courts “should” act (in the categorical sense) must rest on a moral principle.\(^{46}\) Normative claims presuppose moral principles.\(^{47}\)

\(^{45}\) See Nicholas Dent, *Instrumental Value*, in The Oxford Companion to Philosophy, *supra* note 41, at 410 (“Some item has instrumental value just to the extent that it lends itself (fortuitously or by design) effectively to the achievement of some desired or valued purpose.”).

\(^{46}\) Graham Walker has put this complex point in simple terms: “[P]rescription implicates . . . a moral premise. For prescription implies a morally compelling standard empowering prescription.” *Walker, supra* note 22, at 10.

\(^{47}\) Some may feel that I have linked law and morality by adopting a very broad definition of moral principle. But that is a semantic dispute of no consequence. The point here is simply that, in order to make claims about categorical obligations, one must believe that some principle exists that generates obligations.
C. An Objection

This conclusion sometimes triggers a common, but misplaced, objection. The objection takes issue with the claim that normative statements necessarily rest on moral premises. That claim cannot be true, the argument goes, because one can easily identify factual premises for normative claims.

For example, one might say that, when an individual makes a normative claim, he is simply making a statement about his or her own emotional reaction to given phenomena.48 Thus, when one individual says that “capital punishment should be abolished,” he is simply expressing his own negative emotional reaction to capital punishment.49 When another individual disagrees and says that “capital punishment should be retained,” she is simply expressing her own positive feelings about the practice. The normative claims, in short, are simply factual statements about the speaker’s “psychological state”—in this example, states of approval and disapproval triggered by the practice of capital punishment.50

Normative claims, thus, do not rest on moral premises; they reflect (empirical) states of being.

In theory, of course, someone might use “should” statements in this way, but it is not the way normative statements are used in legal debates. Most notably, this interpretation undermines the very idea that the speakers are engaged in any conflict. According to this interpretation, the claimants are simply making reports about their emotional states. As a result, both of their claims may be true without any inconsistency.51

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48 This view—that normative statements represent statements about an individual’s emotional state—is sometimes called “subjectivism.” See R.W. Hepburn, Objectivism and Subjectivism, Ethical, in THE OXFORD COMPANION TO PHILOSOPHY, supra note 41, at 631-32 (stating that one version of subjectivism is the idea that “moral judgments [are] simply individual avowals of feeling”); see also Hare, supra note 31, at 134-36 (describing “subjectivism” and distinguishing it from non-descriptivist theories, like “emotivism”).

49 This discussion is drawn from D.D. RAPHAEL, MORAL PHILOSOPHY 24 (1994).

50 HARE, supra note 43, at 76.

51 Id. at 77 (noting that if the speaker’s psychological state were all that
But, of course, this does not make sense of this interaction (or legal debates in general). The speakers really are disagreeing. When they affirm that capital punishment should be abolished or preserved, they are not merely stating facts about themselves. Rather, they are making a claim that policymakers or courts are under an obligation to act in a certain way, and that this obligation is binding on these individuals. They are claiming that individuals who feel differently about the subject are wrong and that contrary beliefs should be changed.\textsuperscript{52} The empirical explanation for the speakers' views does not—and cannot—account for this sense of obligation.\textsuperscript{53} Normative claims, in short, must rest on moral premises, for only moral premises can explain the existence of binding obligations.

Again, to avoid confusion, let me emphasize that I am not affirming that moral principles really exist. That would be a statement from an external perspective, about the true nature

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\textsuperscript{52} See W.D. Ross, Critique of Ayer, in MORALITY AND THE GOOD LIFE 69, 70 (Thomas L. Carson & Paul K. Moser eds., 1997).
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\textsuperscript{53} As R.M. Hare affirms, to view normative statements simply as statements about an individual's psychology "make[s] impossible moral disagreements which we all know exist." HARE, supra note 43, at 77. Hare concludes that, "[b]ecause of this objection, the view has been generally abandoned." Hare, supra note 31, at 135.
\end{flushleft}
of reality. Our goal is to reconstruct claims from the internal perspective. That endeavor simply asks what an individual must assume in order to make a categorical "should" statement. The answer is that individuals must assume the existence of moral principles, as we have defined the concept. The analysis of normative claims, in this sense, is inevitably an exercise in moral philosophy.

D. Intermediate Assumptions

The insight of the previous sections—that every normative claim must rest on a moral premise—does not mean that only moral premises will be found when reconstructing those claims. Rather, arguments in support of normative claims will often require the adoption of certain "intermediate" assumptions as well. These are assumptions about the nexus between the underlying moral principle and an instrumental normative claim.

Consider again the prescription: "Do not kill innocent human beings." We previously noted that, for the utilitarian, the moral premise underlying this statement is the greatest happiness principle. But utilitarianism is not, alone, sufficient to justify the prescription. One must also assume an additional, intermediate assumption—that killing really will diminish happiness. The need for this intermediate assumption is underscored by the logical possibility that one might agree with the utilitarian moral premise, yet conclude that happiness is actually promoted by killing an innocent person (say, to save the lives of other innocent people). 54

In short, any argument in support of a normative claim necessarily has a moral premise at its foundation. In some cases, it will also include an intermediate assumptions that explains how a given claim serves the moral premise. The ultimate goal is to identify those moral and intermediate assumptions that together entail the conclusion that the relevant normative claim is justified. This might be called a re-

54 For a discussion of the difference between moral and intermediate assumptions in the criminal sentencing context, see Rappaport, supra note 29, at 569-70.
quirement of “vertical consistency” or of “fit.” The premises must generate arguments that “fit”—are vertically consistent with—the claim under analysis.

IV. THE NATURE OF THE MORAL PREMISE

We have thus far identified a methodology to serve the normative objectives of jurisprudence, and we have made some headway in identifying the kinds of premises—including moral premises—that underlie those claims. In this Part, we will explore in greater detail the nature of these underlying moral principles.

A. RELATIVIST AND OBJECTIVE MORAL PRINCIPLES

Moral principles are commonly divided into two broad categories—relative and objective principles. We might naturally wonder which of these two categories best characterizes the moral premises that underlie normative claims. Although a definitive answer is not possible here, the following analysis suggests that objective principles offer a much more plausible basis for rationalizing normative beliefs about the law.

Consider relativist principles first. Relativism holds that moral principles are defined in terms of the values held by some portion of individuals in a society. A common form of relativism links moral principles to the values held by a ma-

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55 The doctrine of relativism has been interpreted in various ways, so it is easy to be confused about its relevance to the present study. Relativism is sometimes used in the sense of “cultural relativism, a theory of anthropology or sociology.” Oppenheim, supra note 51, at 174. In this sense, relativism is merely a statement about the world—that different communities have different moral codes. It is not a statement about obligation-producing principles. For our purpose, the doctrine that interests us is “ethical relativism,” which is the idea that “everyone has the moral duty to conform to the moral and political principles which happen to be prevalent in his society.” Id. at 176; see also R.W. Hepburn, Ethical Relativism, in The Oxford Companion to Philosophy, supra note 41, at 758 (defining ethical relativism as “[t]he view that moral appraisals are essentially dependent upon the . . . practices and norms accepted by a social group at a specific place and time”). In this sense, ethical relativism imposes categorical obligations. The moral principles prevalent in a society generate real obligations that individuals should obey whether or not they are aware of those obligations and whether or not sanctions will follow from disobedience.
majority or supermajority of a community, an approach that
might be called "conventionalism." Here, values are "relative"
to the community's beliefs.

Conventionalism is a highly controversial theory of morality. Some theorists question whether it offers a coherent basis
for normative statements at all. Others point to serious
practical difficulties in utilizing conventionalist theories, not-
ing difficulties in defining the scope of the relevant commu-

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nity. These are powerful critiques, and raise serious questions
about the appeal of a relativist theory. But my intent here is
not to assess whether those challenges are successful. The
question I want to ask is whether relativism serves as a plau-
sible basis—a plausible reconstruction—for core intuitions
individuals have about the law. The answer, as many com-
mentators have concluded, is "no."58

Consider the implications of the conventionalist theory for

56 As Gilbert Harman notes, critics attack relativism by defining it as the
assertion that "(a) there are no universal moral principles and (b) one ought to
act in accordance with the principles of one's own group, where this latter prin-
ciple, (b), is supposed to be a universal moral principle. It is easy enough to show
that this version of moral relativism will not do." Gilbert Harman, Moral Relativ-
ism Defended, 84 PHIL. REV. 3, 3 (1975) (citing BERNARD WILLIAMS, MORALITY: AN
INTRODUCTION TO ETHICS 20-21 (1972) and MARCUS SINGER, GENERALIZATION IN
ETHICS 332 (1961)). Harman finds this criticism unconvincing, and so do I. Rela-
tivism can be rehabilitated by disputing the first premise. Rather than (a), one
might define relativism as resting on a single universal moral principle: "One
should act according to the principles of one's own group." In this limited sense,
relativist theories have an objective feature. The relativist's belief in the single
universal principle holds true regardless of what people think. That is to say,
ethical relativism, as I am using it here, rests on the assumption that the prin-
ciples of the group generate real (objective) obligations.

about relativistic beliefs whenever disputes exist within a group or among several
groups). David Lyons raises concerns about the possibility of relativist accounts
generating internally conflicting prescriptions. See David Lyons, Ethical Relativism
and the Problem of Incoherence, 86 ETHICS 107, 107-08 (1976).

58 See ROBERT A. DALI, PREFACE TO DEMOCRATIC THEORY 36 (1956) ("[N]o one
except its enemies has ever defined democracy to mean, that a majority would or
should do anything it felt an impulse to do." (emphasis added)); Tony Honoré, The
Basic Norm of a Society, in NORMATIVITY AND NORMS, supra note 12, at 91-92
(attacking view that obligations exist just because the community thinks that they
do); David A.J. Richards, Sexual Autonomy and the Constitutional Right to Pri-
cacy, 30 HASTINGS L.J. 957, 977 (1979) ("[N]ot everything invoked by democratic
majorities as justified by 'public morality' is, in fact, morally justified").
some of the most fundamental questions of jurisprudence, such as questions involving civil disobedience, judicial review and constitutional interpretation. Conventionalism, for example, faces profound difficulties in justifying civil disobedience, for it does not provide a basis for critiquing the community's norms. Under a conventionalist account, one can never be justified in practicing civil disobedience, at least where the law at issue is endorsed by the community.

Similarly, a relativist account has difficulty explaining how judicial review as currently practiced is justified. In exercising their review power, courts commonly act in a countermajoritarian way—that is, in conflict with the majoritarian orientation of conventionalist morality.\textsuperscript{59} Finally, conventionalist accounts of value have odd implications for constitutional interpretation. Arguably, conventionalism suggests that, as the public's views about interpretive practices shift, so should the court's favored approach to constitutional interpretation.

In offering these comments, I am not claiming that conventionalism (or relativism generally) is false from an external perspective. My claim here is simply that conventionalism cannot serve as a plausible reconstruction of common normative beliefs citizens have about the law. Perhaps someday conventionalism will be found to be the "correct" moral principle. But if so, common intuitions about legal practices would need to be discarded. In the meantime, if one believes that civil disobedience, judicial review and interpretive practices are justified, one must look for a non-relativist moral premise, principles that transcend community belief. One must believe, in short, in "objective" moral principles.

Objective principles are moral principles that are thought to exist whether or not they are endorsed by any individual or group of individuals.\textsuperscript{60} They exist, in a sense, in "the fabric of

\textsuperscript{59} Commentators have attempted, nonetheless, to reconcile majoritarianism and judicial review. Perhaps for obvious reasons, these efforts have not been entirely persuasive. For a discussion of a few notable attempts, see Rappaport, supra note 28, at 471-76.

\textsuperscript{60} The belief that objective moral principles exist is sometimes called "moral
the universe."\textsuperscript{61} Utilitarianism is a classic example of an objective principle. For a utilitarian, the greatest happiness principle is believed to be true, regardless of what human beings happen to believe about the nature of morality. Indeed, for a utilitarian, that principle would be true even if everyone on earth were persuaded to embrace a different concept of value.

Objective principles, in turn, are often divided into consequentialist and deontological categories. Roughly speaking, consequentialism is the idea that a decision is justified so long as, on balance, the decision generates consequences that promote public "welfare."\textsuperscript{62} Utilitarianism is a common form of consequentialism; it holds that the measure of good consequences is "utility."\textsuperscript{63}

Deontological theories are different. This moral tradition rejects the idea that decisions are justified based on their consequences for society. Rather, and again speaking roughly, decisions are justified based on some inherent moral quality of the act or actor himself. There are, of course, many variants of deontological theory; Kant's moral theory is widely considered to be one of the most influential illustrations of this approach.\textsuperscript{64}

realism." See Jeremy Waldron, The Irrelevance of Moral Objectivity, in NATURAL LAW THEORY 158, 158 (Robert P. George ed., 1994) (asserting that the moral realist believes that "[t]here are facts which make some moral judgements (that is, some statements of value or principle) true and others false, facts which are independent of anyone's beliefs about the matters in question"); see generally DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 14-36 (1989) (discussing realism and conventionalism in ethics).

\textsuperscript{61} RONALD DWORKIN, LAW'S EMPIRE 267 (1986) (criticizing the idea).

\textsuperscript{62} See Kyron Huiigers, Rethinking the Penalty Phase, 32 ARIZ. ST. L.J. 1195, 1206 n.45 (2000) ("Under a consequentialist theory of punishment, the criminal law's system of prohibitions is morally justified as a whole by virtue of its optimizing social welfare.").

\textsuperscript{63} Utilitarians have traditionally equated utility with the experience of pleasure or pain. Some theorists, however, have favored an approach that incorporates alternative measures of the human good. See David O. Brink, Utilitarian Morality and the Personal Point of View, 83 J. PHIL. 417, 422 (1986) (contrasting utilitarian theories that rely on "subjective" conceptions of welfare with those that rely on "objective" conceptions); see also RICHARD NORMAN, THE MORAL PHILOSOPHERS: AN INTRODUCTION TO ETHICS 108 (2d ed. 1998) (contrasting hedonistic and "Platonic-Aristotelian" strands of utilitarianism).

\textsuperscript{64} See Brian Orend, Kant on International Law and Armed Conflict, 11 CAN.
Objective moral principles do not suffer from the same defects as relativist accounts of morality. For example, objective principles offer a plausible basis for justifying civil disobedience and judicial review. They capture the sense that obligations are real and independent of the passing beliefs of any group of individuals. For these and other reasons, many theorists conclude that "objective" moral principles are presupposed by normative claims of obligation. As the philosopher J.L. Mackie put it:

[O]rdinary moral judgments include a claim to objectivity, an assumption that there are objective values . . . . And I do not think it is going too far to say that this assumption has been incorporated in the basic, conventional, meanings of moral terms. Any analysis of the meanings of moral terms which omits this claim to objective, intrinsic, prescriptivity is to that extent incomplete . . . .

Following Mackie, I will proceed with the view that only objective moral principles are capable of supporting the kinds of

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J. L. & JURIS. 329, 333 (1998) (concluding that, despite some debate, "the standard reading of Kant as a deontologist retains considerable plausibility").

65 Some of the most famous efforts to justify civil disobedience have relied upon the demands of objective morality. See, e.g., Martin Luther King, Jr., Letter from Birmingham Jail, reprinted in WHAT COUNTRY HAVE I? 117 (Herbert Storing ed., 1970) (justifying civil disobedience in terms of the objective moral principles of natural law). Similarly, a range of theorists have argued that only objective morality can provide a coherent basis for judicial review. See, e.g., Michael S. Moore, Law as a Functional Kind, in NATURAL LAW THEORY, supra note 60, at 188, 230 ("justification of judicial review is a wild and unseemly scramble" for any but those who believe in objective moral principles).

66 MACKIE, supra note 41, at 35; see also id. at 31 ("objectivism about values . . . has . . . a firm basis in ordinary thought, and even in the meanings of moral terms"). Mackie ultimately rejects the reality of objective moral principles. But he does so as an "external" critique, not as an analysis of moral terms. In effect, he argues that objective moral principles are implicit in ordinary moral discourse, but that we are all wrong in believing such principles exist. Id. at 35.

[T]he denial of objective values will have to be put forward not as the result of an analytical approach, but as an 'error theory,' a theory that although most people in making moral judgments implicitly claim, among other things, to be pointing to something objectively prescriptive, these claims are all false.

Id. Nothing I say here is meant to dispute Mackie on this point. But if he is right, then one might question whether normative discourse is feasible.
normative claims we hope to make about the law.

B. Unitary and Hybrid Theories of Morality

The previous section reveals an important insight: Categorical obligations most plausibly presuppose the existence of objective moral principles. This section addresses a separate and important issue, which concerns the number of objective moral principles that can lie implicit in a rationalizing argument.

Many individuals have an intuition that a multiplicity of conflicting moral principles exist. We like the idea—so eloquently articulated by Isaiah Berlin—that there is an irreducible plurality of values.\textsuperscript{67} Theories that rest on this belief might be called "hybrid" theories of morality, to distinguish them from "unitary" or "monistic" theories that rest on a single moral principle. The question we need to ask is this: Can hybrid theories serve as a plausible basis for justifying normative claims?

1. Reconstructing a Single Normative Claim

In answering that question, one might begin by considering a practical example—the attempt to reconstruct a single normative claim about how much punishment an offender should receive.\textsuperscript{68} Many criminal theorists today argue that a compelling punishment theory must be a hybrid theory, which incorporates both utilitarianism (a consequentialist principle) and retribution (a deontological approach).\textsuperscript{69} A hybrid theory such

\textsuperscript{67} See ISAIAH BERLIN, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 118, 169 (1969).

\textsuperscript{68} The discussion here represents an abbreviated version of the argument presented in a separate article. See Rappaport, supra note 29, at 621-30.

as this one, however, faces serious difficulties in justifying punishment decisions.

A core problem is that, for a great many punishment decisions, utilitarianism and retribution conflict. Consider the common practice of giving criminals sentencing discounts when they help law enforcement agencies prosecute criminals.\textsuperscript{70} Utilitarianism offers a ready justification for this practice, since the sentencing discount potentially helps law enforcement fight crime in society. But retributivists have difficulty justifying the sentencing rule, since they cannot readily explain why punishment should be reduced for conduct unrelated to the crime of conviction.\textsuperscript{71}

Given the conflict, how can hybrid theorists justify the claim that the sentencing discount is appropriate? A common approach is to argue that utilitarian and retributive considerations should be weighed against each other to reach the justified result. For example, one might argue that greater weight should be attached to utilitarian considerations, so that consequentialist considerations trump deontological concerns in this case.

This approach will not salvage hybrid theories of justification. The problem is straightforward. If we assume that the punishment decision is justified, then some principle must exist to justify integrating utilitarianism and retribution in a specific manner.\textsuperscript{72} That principle, moreover, must itself be viewed as the ultimate source of value in the system, if it is to explain how and when obligations arise.\textsuperscript{73} The implication is that

\textsuperscript{70} See Rappaport, supra note 29, at 571-73 (discussing the practice).

\textsuperscript{71} See id. at 573-77 (discussing justifications for viewing a defendant’s “substantial assistance” as a mitigating factor at sentencing).

\textsuperscript{72} After all, if the principle generates arbitrary conclusions, the ultimate result would not be justified (i.e. obligatory). See Larry Alexander, Deontology at the Threshold, 37 SAN DIEGO L. REV. 893, 906 (2000) (affirming the proposition that “the difference between what is morally right and what is morally wrong cannot be arbitrary” (quoting Anthony Ellis, Deontology, Incommensurability and the Arbitrary, 52 PHIL. & PHENOMENOLOGICAL RES. 855 (1992))).

\textsuperscript{73} The higher principle essentially resolves any conflict between utilitarian and retributive principles. See HARE, supra note 43, at 26 (“[T]here is a requirement that we resolve the conflict [among moral duties], unless we are to confess that our thinking has been incomplete.”).
consequentialist and deontological norms are relevant to the extent, and only to the extent, that they serve this higher principle. In other words, to justify any choice, one must assume that conflicting principles are commensurable in terms of a higher principle, and we must assume that the higher principle is the ultimate source of value.

In this way, the hybrid theory collapses into a unitary theory of morality. John Stuart Mill made precisely this point a hundred years ago. As he wrote,

[t]here must be some standard by which to determine the goodness or badness, absolute and comparative, of ends or objects of desire. And whatever that standard is, there can be but one; for, if there were several ultimate principles of conduct, the same conduct might be approved by one of those principles and condemned by another, and there would be needed some more general principle as umpire between them. Accordingly, writers on moral philosophy have mostly felt the

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74 To make any sense of the analysis, we must recharacterize utilitarian and retributive concepts in terms of the higher principle. For example, in the sentencing context, the principle that integrates the utilitarian and retributive principles must be either consequentialist or deontological itself. If it is consequentialist, then the retributive principles must be reconsidered. After all, retribution as a deontological principle does not acknowledge the existence of some higher moral principle that determines the relevance and importance of retributive claims. To value retributive sentencing rules based on their promotion of good consequences, in other words, is to transform this deontological principle into an instrumental element of a consequentialist doctrine.

Nor can the hybrid arrangement be salvaged by treating the higher principle as a deontological value. The consequences of a punishment decision would have no relevance in such a situation. We have already posited, however, that the principal justification for the sentencing discount is its tendency to promote good consequences. Thus, if the higher principle really is a deontological principle, these considerations should be irrelevant.

75 Theorists sometimes call principles that can be integrated along a shared metric "commensurable" concepts, while principles that do not share a common scale are often called "incommensurable" rationales. See Rappaport, supra note 29, at 624 n.216 (defining "incommensurability").

The view that incommensurability precludes justified choice is probably the conventional view among philosophers. See Rappaport, supra note 29, at 627 n.222 (providing citations). Richard Warner puts the point bluntly: "When we encounter incommensurable reasons in crucial areas of public policy, we cannot do what we should do: Choose the option supported by the [morally] best reasons." Richard Warner, Does Incommensurability Matter?: Incommensurability and Public Policy, 146 U. PA. L. REV. 1287, 1287 (1998).
necessity not only of referring all rules of conduct and all judgments of praise and blame to principles, but of referring them to some one principle, some rule or standard with which all other rules of conduct were required to be consistent, and from which by ultimate consequence they could all be deduced.\textsuperscript{76}

As Mill recognized, any effort to justify a normative claim must ultimately rest on a single overriding moral principle that provides the ultimate justification for each normative claim.\textsuperscript{77}

Needless to say, this conclusion does not mean that morality is, \textit{in fact}, unitary. It may be the case that, in reality, morality is hopelessly fragmented and contradictory, shifting like light refracted in a turning piece of glass. The argument presented here is made from an internal perspective, not an external one. The claim, in other words, is simply that, \textit{if} we believe that a claim is justified, it cannot rest on a hybrid theory of morality.

2. Reconstructing Multiple Normative Claims

The previous section suggests that a single normative claim must be premised upon a single principle of morality. This point can be extended further to situations where one seeks to reconstruct several different normative claims at once. Suppose, as an illustration, one is interested in rationalizing a set of sentencing rules—say, the United States Sentencing Commission’s rules regarding drug crimes and homicide.\textsuperscript{78}

An important question is whether one can believe, without contradiction, that different moral principles underlie different sentencing rules. For example, suppose one believed that utilitarianism justifies the sentencing rules for drug crimes, while retribution justifies the rules for homicide. Is this approach internally consistent?

An initial answer is: Why not? The moral principles do not

\textsuperscript{76} Mill, \textit{supra} note 44, at 356-57.
\textsuperscript{77} See Henry S. Richardson, \textit{Practical Reasoning about Final Ends} 121 (1997) (discussing link between incommensurability and monism).
\textsuperscript{78} See Rappaport, \textit{supra} note 29 (rationalizing the U.S. Sentencing Commission’s guideline decisions).
seem to conflict—utilitarianism applies to one set of rules and retribution to another. The problem, however, is that moral principles are not easily quarantined: They aspire to universal application. As a result, if utilitarian principles apply to drug crimes, one would expect them also to apply to murder crimes. If they do not, if retribution alone governs the murder rules, one must implicitly believe that retribution trumps utilitarianism in this context. Again, to justify such a belief, a further moral principle must be assumed. That higher principle represents the ultimate principle of morality. Thus, as before, the hybrid theory inevitably collapses into a unitary moral theory.

The implication is that any effort to reconstruct one or more normative claims must rest on a single moral principle. That insight suggests that the reconstruction of these claims must possess a distinct architecture. First, it means that each individual normative claim must rest on a single moral principle, which provides the ultimate grounds of justification. As noted previously, this is the requirement of “vertical consistency.” Second, the analysis suggests that conflicts among mid-level, instrumental norms must be reconcilable in terms of the higher principle, and ultimately in terms of a single moral norm. This might be called the requirement of “horizontal consistency.”

A theory that satisfies both vertical and horizontal consistency is a theory that provides a moral argument for each decision, as well as a principle for resolving any apparent conflicts among the rationales. Such a theory might be called a fully

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79 Universality is a widely accepted feature of moral principles. Cf. R.M. Hare, Freedom and Reason 16-21 (1963) (discussing universality of moral principles). Although this is not the place to offer an extended defense of this aspect of morality, a brief comment on the topic may be useful. In effect, the universality of moral principles makes sense in light of our discussion of hybrid theories. Suppose a principle, P, is limited in its scope so that it applies only to situation X, but not Y. If that limitation is justified, one would need a principled rationale why P extends only to certain contexts. And that means one would need to refer to a higher moral principle to justify the limited scope. That higher principle would be the ultimate moral principle. It must necessarily be universal in its scope; otherwise, a further regress would occur.

80 See supra Part III.D.

81 This sort of argument satisfies “formal rationality—that is, noncontradiction
V. POSITIVISM AND THE LAW

The prior sections conclude that legal claims necessarily rest upon a single moral premise. That conclusion raises serious questions about the appeal of one of the most influential schools of jurisprudence today—positivism. At least traditionally, positivists have embraced what some have called the "separation thesis," the idea that law and morality have no necessary connection. That conclusion no longer seems tenable, at least if one embraces the normative goal of jurisprudence. Before rejecting positivism, however, one must consider a possible argument why the theory remains relevant to the rationalizing effort.

The argument begins with the observation that jurisprudence has a limited scope. It is not concerned with the analysis of normative claims in general. Rather, jurisprudence focuses on normative claims about the law, such as claims about whether one should obey or disobey the law, how to interpret current law and how to apply the law. In this regard, any effort to rationalize legal claims must presuppose some concept of what it means to speak about the "law."

Here, the argument continues, is where positivism has something useful to say. For any attempt to distinguish normative claims about the law from other normative claims cannot turn simply on the normative nature of the claims. All of the claims are normative. Thus, to determine what makes a legal

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within a system of belief . . . . The Rawlsian conception of reflective equilibrium as a coherent scheme within which consistency is achieved among principles, and between principles and individual cases, is simply the expression of this drive in a particular philosophic idiom." GALSTON, supra note 57, at 28-29.

normative claim distinct—different from a non-legal normative claim—one needs to identify features that do not depend on the normative nature of the claims.\textsuperscript{83} One needs, in short, a positivist description of the law.\textsuperscript{84}

This argument preserves a role for positivism in defining the scope of the jurisprudential method. But it also reveals just how limited and uninspiring that role is. The positivist’s project is important only if the ramifications of choosing one definition of law over another makes a significant difference to the normative goals of jurisprudence. That raises the question: Why do we want to distinguish between legal and non-legal claims?

No single answer presents itself. Individuals may have many different reasons for grouping social phenomena together under a common label.\textsuperscript{85} Those reasons might differ depending on the individual’s interests and situation.\textsuperscript{86}

\textsuperscript{83} See Gavison, supra note 9, at 25 (“Usually, when people think of a theory of law, they think of an attempt to identify the features which are unique to law and distinguish it from other social phenomena.”).

\textsuperscript{84} This seems to be the point advanced by some theorists who suggest that a positivist definition of the law is necessary to identify the kinds of claims—the “pre-interpretive data”—that legal theorists should analyze. See HART, supra note 22, at 266 (“[T]he legal rules and practices which constitute the starting-points for the interpretive task of identifying the underlying or implicit legal principles constitute ‘preinterpretive law’, and . . . for its identification [a positivistic account of the law is needed].”); see also H.L.A. Hart, Comment, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY, supra note 9, at 37 (“[T]he positivist’s insistence that there is a task and need for a descriptive analytical jurisprudence is salutary even if it is regarded only as a preliminary to the articulation of a justificatory theory . . . .”);

\textit{Jules L. Coleman, The Practice of Principle} 200 (2001) (“Descriptive sociology enters not at the stage of providing the theory of the concept, but at the preliminary stage of providing the raw materials about which one is to theorize.”).

\textsuperscript{85} As H.L.A. Hart has said, to understand a classification, one needs to identify the “latent principle which guides our use of [the words].” SOPER, supra note 2, at 22 (quoting HART, supra note 22, at 14); Soper, supra note 14, at 1189-90 (“At issue in the case of definition is not what a person . . . thinks is important about law, but what such a person thinks is important in classifying something as law.”).

\textsuperscript{86} Different societies might have different needs for assigning labels to phenomena. Thus, in western cultures, a single word for “snow” is sufficient. Eskimos, however, have many different terms for snow, because different kinds of snow are used for different purposes. SOPER, supra note 2, at 3. Soper says that the same considerations explain why we have “separate concepts for chair and couch . . . rather than a single concept of furniture that can be variously described in terms of length, shape, size and so on.” SOPER, supra note 2, at 22.
For example, in assigning the label "law" to certain phenomena, one might be interested in highlighting the fact that certain kinds of claims have a significant impact on social life. These are rules of broad application, promulgated by institutions with the power to enforce those rules through coercive sanctions. Given the significant impact of these rules, one might think it particularly important to assess whether these rules are justified and to establish a separate discipline, jurisprudence, dedicated to that effort. The term "law," in this regard, might be used as a short-hand way of identifying highly significant normative rules—rules that are promulgated by institutions that have the power to enforce the rules through highly coercive sanctions.

Another reason to distinguish between law and non-law might also be identified. One might be interested in highlighting, not the impact of the normative claims, but the complexity of any effort to analyze the claim. Certain normative claims, for example, are promulgated by institutions that typically employ special rulemaking procedures and are part of an organized governing system. As a result, efforts to understand the scope and limitations of these rules may require technical knowledge of the institution's design. In addition, efforts to reconstruct the rules may require an understanding of how the rulemaking body interacts with other entities in the institutional structure. Given the special knowledge and experience needed to understand and analyze these claims, one might conclude that it is useful to assign the label "law" to these claims and to establish a separate discipline, called "jurisprudence," to analyze them. Under this approach, the term "law" refers to a normative rule promulgated by an institution operating within a complex organized social system.

As these examples illustrate, the scope of the term "law"

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he observes: "One possibility is that we encounter the need for an object on which to recline as well as sit often enough to justify a separate concept for things that serve the purpose, saving us the need to repeat the more cumbersome description each time." Id.

87 Some of the complexities that arise in reconstructing the Supreme Court's privacy decisions are discussed in Rappaport, supra note 28 (identifying moral, political, institutional and pragmatic principles underlying privacy doctrine).
differs somewhat depending on the point and purpose of using the label. Examining why different individuals use the label "law" is interesting, for it helps us understand the different reasons why individuals deem certain kinds of normative claims significant in common ways. Nonetheless, little of theoretical interest turns on whether one adopts one definition of the law or another. Indeed, given the multiple rationales that might exist, no single definition can be deemed the "correct" one. As a result, the debate over the "nature" of law is ultimately inconclusive, for it depends on the context within which the label is used. 88

Moreover, if the ultimate goal is to analyze normative claims that interest us, we should not be distracted from that objective by disputes over whether the claim deserves the label "law" or not. The ultimate goal is to help individuals reflect on normative claims that interest them; in this light, little practical significance turns on whether other citizens apply the label "law" to that normative claim.

For example, suppose an individual is interested in assessing whether the international norm against genocide should be embraced. Suppose further that this international norm lacks an enforcement mechanism. If we define "law" to apply only to norms backed by coercive sanctions, then this international norm is not technically "law." But so what? If we are interested in assessing whether the norm is justified, we can proceed to analyze it by exploring the premises needed to justify the norm.

To recap, we have suggested that the province of jurisprudence is limited to analyzing certain kinds of normative claims—legal claims. In distinguishing legal claims from other claims, we have no choice but to adopt a positivist definition of the law. That definition might have some use—as a shorthand way of identifying claims that share common features and characteristics. At the same time, our discussion highlights why we should not worry ourselves too much if the boundaries

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88 Discussions about the "nature" of law are sometimes subsumed under the label "conceptual analysis." The discussion here does not do full justice to the complexities of that subject. I intend to examine the methodology of conceptual analysis, and contrast that approach with rational reconstruction, in a subsequent paper.
of that label (and hence the scope of jurisprudence) are a bit blurry. The ultimate objective of jurisprudence is to evaluate normative claims that interest us in order to make a more reflective judgment about their appeal. As a result, even if a rule does not technically fall within the definition of "law," nothing prevents us from proceeding to analyze the claim anyway.

VI. LAW'S OBLIGATIONS

The previous sections have outlined the basic features of rational reconstruction, clarified the nature of the moral premises that lie implicit in the rationalizing effort and highlighted the relevance of the methodology to the field of jurisprudence. This Part illustrates the methodology's operation, by applying it to a core jurisprudential issue. Specifically, this section addresses the question: Does a citizen have an independent obligation to obey the law?89

The question itself needs some clarification. First, the central issue we are interested in exploring is whether an independent obligation to obey the law exists—an obligation that is unrelated to the specific content of a law itself. As M.B.E. Smith points out, we all believe that citizens have a duty to refrain from murder, but that is because we believe that murder itself is wrong.90 The question we want to address here is whether an individual has an additional duty to obey the law simply because it is law.91

Second, those who claim that an independent obligation to obey the law exists do not claim that the obligation is absolute.

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89 In other papers, I have used the methodology to explain the premises of judicial review, the Court's core privacy doctrine, and the implicit premises of the U.S. Sentencing Guidelines. See Rappaport, supra note 28 (analyzing privacy and judicial review); Rappaport, supra note 29 (analyzing federal sentencing rules).


91 See William A. Edmundson, Introduction to THE DUTY TO OBEY THE LAW, supra note 90, at 4 ("It is the existence of a general, 'gap filling' duty to obey the law that is in dispute."); Kent Greenawalt, The Natural Duty to Obey the Law, 84 Mich. L. Rev. 1, 3 (1985) ("The issue is whether the legal prohibition adds to the moral reasons why one should not perform the act.").
Most argue that the obligation has some force, but can be overcome by countervailing moral considerations. That is, in some cases, civil disobedience may be appropriate to avert grave injustice. To suggest that law's obligation has weight, but is not dispositive, commentators frequently speak of a *prima facie* obligation to obey the law.\(^2\)

The question, therefore, is whether an *independent, prima facie* obligation to obey the law exists. The goal here is not to offer a comprehensive review of scholarly writing on the subject—the issue has been the subject of extensive debate. Rather, my intention is simply to demonstrate some of the ways that the process of rational reconstruction frames the analysis and provides a novel look at an age old puzzle.

\subsection*{A. Deontological Justifications for Obeying the Law}

As we have seen, all normative claims rest on moral premises, and the claim that citizens have an obligation to obey the law is no exception.\(^3\) But which moral principle can support the belief that citizens have an obligation to obey the law?

Most efforts to justify this claim have relied on deontological moral principles.\(^4\) H.L.A. Hart, for example, has advanced such a principle, which he calls the "duty of fair play." Hart argues that, "when a number of persons conduct any joint enterprise according to rules and thus restrict their

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\(^2\) See Smith, *supra* note 90, at 76.

\(^3\) Claims about the obligation to obey the law require some understanding of what is meant by the concept "law." However, commentators rarely, if ever, clarify what they mean by the term. For purposes of this section, I ignore this underlying concern and address the commentators' moral arguments on their own terms.

\(^4\) The principles discussed in this section are widely viewed as deontological principles; they seek to justify a citizen's obligation to obey the law in terms of the inherent rightness of doing so, rather than in terms of the consequences of obedience. See Greenawalt, *supra* note 91, at 4 ("Natural duties have been understood as something more than a general moral injunction to promote desirable consequences."); Joseph Raz, *The Obligation to Obey: Revision and Tradition, in The Duty to Obey the Law, supra* note 90, at 171-72 ("Non-instrumental reasoning is central to a distinguished tradition in political philosophy. Today one of the most common arguments [for the obligation to obey the law] . . . is based on alleged considerations of fairness."). Consequentialist arguments in support of an obligation to obey the law are discussed, *infra*, Part VI.B.
liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. The duty of fair play resembles a kind of social contract argument. As Raz observes, the “main thrust of the principle is that those who benefit from the cooperative efforts of others have an obligation to cooperate as well.”

John Rawls has offered a different deontological principle in support of an obligation to obey the law, which he calls a “natural duty of justice.” According to that principle, every citizen has an inherent duty to comply with the rules of a just society. For Rawls, society need not be perfectly just to generate obligations of obedience. Rather, citizens have an obligation to comply with the rules—even unjust rules—of any reasonably just society.

Commentators have criticized both deontological principles, on the grounds that they conflict with basic intuitions about the law's binding force. For example, the duty of fair play suggests that an individual who involuntarily receives benefits from the government (or from other individuals) has an obliga-

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56 H.L.A. Hart, Are There any Natural Rights?, 64 PHIL. REV. 175, 185 (1955) (emphasis added). Hart continues:

The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is due to the co-operating members of the society, and they have the correlative moral right to obedience.

Id.; see also A. John Simmons, The Principle of Fair Play, in THE DUTY TO OBEY THE LAW, supra note 90, at 109 (discussing Hart's views).

57 George Klosko, Presumptive Benefit, Fairness, and Political Obligation, in THE DUTY TO OBEY THE LAW, supra note 90, at 194; see RAWLS, supra note 33, at 112 (“We are not to gain from the cooperative labors of others without doing our fair share.”); Smith, supra note 90, at 78 (“[I]f it is often claimed that, when a person accepts benefits from another, he thereby incurs a debt of gratitude towards his benefactor.”).

58 See Smith, supra note 90, at 83; see also Greenawalt, supra note 91, at 47 (“If one's society has a constitutional order that is as just as one could hope for in that society, then a duty to support just institutions should reach compliance with its laws.”).

59 See Greenawalt, supra note 91, at 38 (“Rawls's natural duty to comply with just institutions concerns only nearly just constitutional orders, but reaches unjust laws within these orders.”).
tion to contribute to a cooperative enterprise. This might seem odd. As Simmons writes, it "would be peculiar if a man, who by simply going about his business in a normal fashion benefited unavoidably from some cooperative scheme, were told that he had voluntarily accepted benefits which generated for him a special obligation to do his part." The natural duty of justice generates its own anomalies. For example, that duty implies that a citizen has a duty to obey a law even when failure to comply would generate no negative consequences. Indeed, the natural duty of justice implies that a citizen would have a

90 See Klosko, supra note 96, at 198 (quoting A. John Simmons, Moral Principles and Political Obligations 131 (1979)); see also Smith, supra note 90, at 78 ("Ordinarily, if someone confers benefits on me without any consideration of whether I want them . . . I have no obligation to be grateful towards him."). Raz agrees, concluding that the duty of fair play, "is of dubious validity when one has no choice but to accept the benefits, or even more generally, when the benefits are given to one who doesn't request them." Raz, supra note 94, at 172.

Advocates of the duty of fair play have sought to respond to the criticism. For example, commentators like Rawls argue that an obligation to comply with a cooperative system exists only when an individual "accepts" the benefits in a voluntary and active way. See Rawls, supra note 33, at 111-12 (stating that no obligation exists unless one has "voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests"); Simmons, supra note 95, at 126 ("For Rawls and Hart, the principle of fair play accounts for the obligations of those whose active role in the scheme consists of accepting the benefits of its workings."); see also Klosko, supra note 96, at 199 ("In most cases this can be explicated as voluntary pursuit of given benefits."); A. John Simmons, The Principle of Fair Play, 8 Phil. & Pub. Aff. 307, 327 (1979) (defining acceptance).

The difficulty with this solution is that few citizens seem to have "accepted" the benefits of living in organized society in this way. Thus, as Simmons says, "a theorist who holds that the acceptance of benefits from a cooperative scheme is the only ground of political obligation will be forced to admit that in at least a large number of nations, no citizens have political obligations." See Simmons, supra note 95, at 135; see also Smith, supra note 90, at 83 (noting that "Rawls has abandoned the argument from fair play [which] . . . excludes the bulk of the citizenry . . . on the ground that, for most persons, receiving benefits from government is nothing they do voluntarily, but is rather something that merely happens to them").

100 Greenawalt affirms that, "given the many trivial, foolish, and overbroad laws and the many circumstances in which disobedience, even if widespread, will not undermine the serious aims behind laws, a natural duty to obey does not apply on every occasion of application of just laws." See Greenawalt, supra note 91, at 44; see also Smith, supra note 90, at 82-83 ("[V]irtually every legal system contains a number of pointless or even positively harmful laws, obedience to which either benefits no one or, worse still, causes harm."
duty to obey an *unjust* law, even if disobeying that law might lead to its reform and the creation of a more just society.

This criticism is powerful, and it raises serious questions about the intuitive appeal of the deontological principles. But since these considerations have been discussed in depth by others, we will not belabor that criticism here. Rather, our focus will be on assessing whether these deontological principles can offer a plausible reconstruction of certain basic intuitions about civil disobedience.

As noted, the obligation to obey the law is not absolute. Under certain circumstances, a citizen will have an obligation to *disobey* the law. Such an obligation may exist even in a reasonably just society and even in a society where citizens benefit from living in a cooperative social system. Neither the duty of fair play or natural justice offers a plausible basis for *disobeying* the law. How, then, can deontological theorists account for civil disobedience?

One possible answer is that deontological principles do not exhaust the moral considerations at play. Thus, one might assume the existence of separate moral principles that sometimes militate for noncompliance with the law. Where such moral considerations exist, an individual is subject to conflicting obligations. Deontological principles of fair play and natural justice support the obligation to obey the law, while other moral principles support an obligation to disobey the law.\(^{101}\) Civil disobedience is appropriate whenever the obligation to disobey the law exceeds the obligation to obey.\(^{102}\)

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\(^{101}\) Rawls himself acknowledges such a possibility in his earlier writings, although he suggests that only another deontological principle can override the natural duty of justice. See John Rawls, *Legal Obligation and the Duty of Fair Play, in Law and Philosophy* 13 (Sidney Hook ed., 1964) ("[O]ur obligation to obey the law, which is a special case of the principle of fair play, cannot be overridden by an appeal to utility, though it may be overridden by another duty of justice.").

\(^{102}\) This balancing approach also seems to account well for the common-sense view that civil disobedience should only occur in exceptional cases, where moral considerations are sufficiently powerful to override the duty of obedience. See Greenawalt, *supra* note 91, at 58 ("My own conclusion is that no simple principle exists for ordering justice and utility . . . . About the most that can confidently be said is that if a negative duty [to obey the law] is present, consequential rea-
This superficially appealing explanation, however, will not do. We have already seen that hybrid moral theories—which seek to integrate multiple moral principles into a single theory—cannot offer a coherent justification for normative claims. In order to reconcile the conflicting values in a justified manner, we must again assume the existence of a higher moral principle that can arbitrate the dispute. That higher principle is the ultimate source of value, for it dictates when a citizen has an obligation to obey the law and when she does not.

What might be immediately obvious is that neither the duty of fair play or natural justice can serve as this ultimate principle, since neither is capable of explaining why a citizen might have a basis for disobeying the law. Thus, if we believe that the obligation to obey the law is only a prima facie obligation, we must believe that some other principle exists to reconcile the conflicting norms, a principle that tells us when to obey the law and when to disobey. We must reject the idea, in other words, that a deontological principle (whether from natural justice or fair play) represents the “ultimate” moral principle. At best, the duty to obey the law must serve some higher purpose. It must be justified, if at all, on consequentialist grounds.

**B. Consequentialist Arguments for Duty to Obey**

The consequentialist justification for obeying the law is relatively straightforward. After all, obeying the law can generate a number of positive effects. We might have pragmatic reasons for obeying the law. We might think, for example, that disobedience will lead to disrespect for the governing institutions, which can breed general disorder and insecurity.\(^{103}\)

\(^{103}\) Smith, *supra* note 90, at 89 (“[G]overnment is absolutely necessary for securing the general good: The alternative is the state of nature in which everyone is miserable . . . . But, no government can long stand in the face of wide-spread disobedience, and government can therefore promote the general good only so long as its laws are obeyed.”); *see also* Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 7 (1990) (noting that disobedience “may encourage others to disobey law in situations where it would be morally undesirable for that to happen”).

might have institutional reasons to obey. We might believe, for example, that government has an institutional advantage in determining how to promote human welfare, that obedience will lead to better decisionmaking over the long run.\textsuperscript{104} We might have personal reasons to obey the law. We might fear, for example, that disobedience will lead to government sanctions.\textsuperscript{105}

A consequentialist, in short, will often have good reasons for encouraging citizens to obey the law. Nonetheless, for the consequentialist, the duty to obey the law will differ significantly from the duty portrayed by the deontological principles. Notably, under a consequentialist theory, a citizen's duty to obey the law will vary from case to case. Where the negative consequences of disobedience are negligible, a citizen will not be obligated to obey the law.\textsuperscript{106}

In this regard, consequentialism does not offer an argument for an independent obligation to obey the law \emph{in every case}. Rather, to assess whether an obligation exists, one must undertake an individualized assessment of the good and bad consequences of violating the law. As M.E.B. Smith says, "once we abandon the notion that civil disobedience is morally signifi-

\textsuperscript{104} Larry Alexander makes this point, when he writes:

If because of its design the legislature is likely to know much more than I about what is a safe speed at which to drive, which household products will pollute the environment, and so forth, then when it enacts [a law pertaining to these subjects], I may have reason to disbelieve what I had previously . . . believed . . . . In other words, the decisions of legal authorities in a well-designed legal system can affect people's epistemic reasons, their reasons for believing certain acts are desirable or undesirable. Alexander, supra note 103, at 8.

\textsuperscript{105} \textit{Id.} at 7-8 (noting that law may affect decisions whether to obey law, if disobedience "may result in my suffering a sanction, and that fact may carry sufficient normative weight to tip the balance" against disobeying).

\textsuperscript{106} We can easily imagine situations where the harmful consequences of disobeying the law are minimal. A driver facing a thirty mile-per-hour speed limit on a desolate stretch of road at 4 a.m. may conclude—we can assume quite accurately—that few negative consequences will occur from his driving faster. His act will likely go undetected, the violation is not likely to breed disrespect for the law and the government probably does not have an institutional advantage over him in assessing the danger of driving faster at this time. \textit{See} Smith, supra note 90, at 84.
cant per se, we shall judge it in the same way we judge most other kinds of acts, that is, on the basis of their character and consequences.\footnote{Smith, supra note 90, at 95. Although their reasons differ, an increasing number of philosophers today tend to agree with this conclusion. See Leslie Green, Who Believes in Political Obligation?, in THE DUTY TO OBEY THE LAW, supra note 90, at 301 (noting “coalescence of opinion” against idea that independent obligation exists to obey the law); Robert P. Lawry, Ethics in the Shadow of the Law: The Political Obligation of a Citizen, 52 CASE W. RES. L. REV. 655, 656 (2002).}

Rational reconstruction, in sum, poses a challenge to Rawls and Hart and anyone else who believes that citizens have a non-consequentialist duty to obey the law. Those who continue to believe that such an obligation exists must explain how deontological justifications can justify a \textit{prima facie} duty of obedience. By highlighting inconsistencies in those arguments the methodology encourages further reflection on the premises of belief. That, in the end, is the overarching goal of the rationalizing methodology.

\section*{VII. Hans Kelsen’s Pure Theory of Law}

The Article’s goal thus far has been constructive—to identify a plausible objective for legal theory and to outline a methodology that serves that objective. At the same time, the analysis provides a basis to assess the methods adopted by other legal theorists. To that end, this Part will contrast the rationalizing methodology with the approach taken by Hans Kelsen, one of the most influential legal theorists of the twentieth century.\footnote{Jeffrey Brand-Ballard, Kelsen’s Unstable Alternative to Natural Law: Recent Critiques, 41 AM. J. JURIS. 133, 133 (1996) (noting that the international community treats Kelsen as a central figure in legal theory, though “the seminal nature of his work remains underappreciated in the United States”); Robert P. George, Kelsen and Aquinas on “The Natural-Law Doctrine,” 75 NOTRE DAME L. REV. 1625, 1625 (2000) (referring to Kelsen as “the leading European legal theo-
the next Part.

A. Kelsen's "Regressive" Approach

Kelsen's complex and often obscure writings are notoriously difficult to decipher; nonetheless, several core theses can be identified.\footnote{Kelsen's theory has been widely criticized for its obscurities. \textit{See} Joseph Raz, \textit{The Purity of the Pure Theory}, in \textit{NORMATIVITY AND NORMS}, supra note 12, at 237 ("Some commentators have expressed exasperation in the face of what they regard as Kelsen's obscurities and have dismissed some of his central doctrines as confused. I myself have not escaped the occasional feeling of despair in struggling to fathom the meaning of some of his theses."); \textit{see also} LLOYD'S \textit{INTRODUCTION TO JURISPRUDENCE}, supra note 12, at 271 (suggesting that the controversy over Kelsen's writings "has partly been due to . . . the use of language which, to Anglo-Saxons at least, is apt to prove deceptive").} One central element is his "regressive" methodology, which resembles the methodology of rational reconstruction.\footnote{\textit{See Stanley L. Paulson, The Neo-Kantian Dimension of Kelsen's Pure Theory of Law}, 12 \textit{Oxford J. Legal Stud.} 311, 329 (1992) (discussing Kelsen's "regressive" approach).} Like rational reconstruction, the regressive approach is concerned with the "normativity" of the laws—the sense that legal claims represent "should" statements that impose "obligations" on citizens.\footnote{\textit{See Carlos Santiago Nino, Some Confusions Surrounding Kelsen's Concept of Validity}, in \textit{NORMATIVITY AND NORMS}, supra note 12, at 253 (observing that Kelsen is interested in the "binding force" of law); Deryck Beyleveld \& Roger Brownsword, \textit{Methodological Syncretism in Kelsen's Pure Theory of Law}, in \textit{NORMATIVITY AND NORMS}, supra note 12, at 117 ("A normative interpretation attaches a value ("good" or "bad," 'it ought' or 'it ought not' to be done) to an object or behaviour."). Similarly, Kelsen emphasizes that he is not interested simply in empirical questions about the law. Thus, he explains that he is not interested in the causative factors that lead certain laws to be enacted. That effort, he suggests is the focus of sociology, not legal theory. \textit{See} HANS KELSEN, \textit{PURE THEORY OF LAW} 101-02 (Max Knight trans., Univ. of Cal. Press 1967) (2d ed. 1960); HANS KELSEN, \textit{The Pure Theory of Law and Analytical Jurisprudence}, in \textit{WHAT IS JUSTICE?} 269 (1957).} Like the rationalizing methodology, Kelsen is not interested in demonstrating that legal claims are
in fact obligatory. Kelsen's interest lies in exploring the underlying assumptions that must hold true if the law has normative force. In other words, like rational reconstruction, Kelsen adopts an internal perspective on the law's claims.

Many of the details of Kelsen's approach will be familiar. Kelsen observes that "should" statements, which he calls norms, cannot rest solely on empirical assumptions. Rather, Kelsen says, a "should" statement must be premised upon another "higher" norm, which in turn might be justified in terms of even higher norms. Thus, the process leads to a kind of regress, in which deeper and deeper principles of justification are uncovered.

112 See Gerhard Luf, On the Transcendental Import of Kelsen's Basic Norm, in NORMATIVITY AND NORMS, supra note 12, at 224 (contending that Kelsen attempts to "demonstrate structurally whatever . . . must be presupposed when one takes up the law from the standpoint of legal science").

113 In this sense, norms are claims about how citizens "should" behave. Kelsen, Pure Theory of Law, supra note 111, at 4 ("By 'norm' we mean that something ought to be or ought to happen, especially that a human being ought to behave in a specific way."); id. at 5 ("[T]he norm is an ought . . . ."); Kelsen, The Pure Theory of Law and Analytical Jurisprudence, supra note 111, at 267 ("The regulation [created by laws] is accomplished by provisions which set forth how men ought to behave. Such provisions are called norms . . . ."); see also Hans Kelsen, Value Judgment in the Science of Law, in What Is Justice?, supra note 111, at 215; Honoré, supra note 58, at 90 ("Norms prescribe how people ought to behave."); Joseph G. Starke, Monism and Dualism in the Theory of International Law, in NORMATIVITY AND NORMS, supra note 12, at 537 ("A norm is in short a prescription enjoining a defined mode of action.").

In this regard, the "category of [legal] norms" is a "category designated by 'ought.'" Kelsen, supra note 108, at 26; see also Kelsen, Pure Theory of Law, supra note 111, at 4 ("The legal order . . . . is a normative order of human behavior—a system of norms regulating human behavior.").

114 Kelsen, Pure Theory of Law, supra note 111, at 195 ("The norm which represents the reason for the validity of another norm is called . . . the 'higher' norm."); id. at 193.

[Why an individual ought to behave in a certain way, cannot be answered by ascertaining a fact, that is, by a statement that something is . . . . From the circumstance that something is cannot follow that something ought to be; and that something ought to be, cannot be the reason that something is. The reason for the validity of a norm can only be the validity of another norm.

Id.; see also Kelsen, Value Judgments in the Science of Law, supra note 113, at 219 ("If we ask why a certain legal norm is valid, the answer is always in terms of another (higher) norm which regulates the creation of the former (lower) norm . . . .")
Kelsen recognizes that this process must ultimately come to an end. "It must end with a norm which, as the last and highest, is presupposed... This final norm's validity cannot be derived from a higher norm, the reason for its validity cannot be questioned." Kelsen refers to this final norm as the "basic norm" (or gründnorm in German). As he says, "The basic norm is the common source for the validity of all norms that belong to the same order—it is their common reason of validity." Like rational reconstruction, therefore, Kelsen concludes that all normative claims about the law must rest at bottom on an obligation-producing principle, the "basic norm."

The resemblances to rational reconstruction do not end here. Kelsen concludes that the basic norm must be a unitary principle. A multiplicity of basic norms cannot exist, Kelsen writes, because they might conflict when applied to specific

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115 Kelsen, Pure Theory of Law, supra note 111, at 194-95; see Kelsen, Value Judgments in the Science of Law, supra note 113, at 219 ("The series of reasons for the validity of a norm is not infinite like the series of the causes of an effect. There must exist one ultimate reason, one basic norm, which is the source of the validity of all norms belonging to a certain legal order."); see also Eugenio Bulygin, An Antinomy in Kelsen's Pure Theory of Law, in NORMATIVITY AND NORMS, supra note 12, at 313-14 ("The basic norm is neither a self-evident norm nor does it justify any legal order, for it is merely presupposed to be valid, but is not really binding... It is because the basic norm is a mere hypothesis of legal science that its acceptance does not commit jurists to a certain moral or political position... ") ; M.P. Golding, Kelsen and the Concept of a "Legal System," in More Essays in Legal Philosophy 64, 76 (Robert S. Summers ed., 1971) ("Ultimately the chain of justifications must reach a final link, the Grundnorm, which serves the function of the Unpositive Mover of a system of positive law.").

116 Kelsen, Pure Theory of Law, supra note 111, at 195 (noting that the "highest norm is referred to in this book as basic norm").

117 Id.; see also Kelsen, Value Judgments in the Science of Law, supra note 113, at 219. An individual can reject the basic norm's validity, but doing so would raise questions about the validity of the entire legal system. See Kelsen, Pure Theory of Law, supra note 111, at 68 ("True, legal norms, as prescriptions of what ought to be, constitute values; yet the function of the science of law is not the evaluation of its subject but its value-free description. The legal scientist does not identify himself with any value, not even with the legal value he describes."); Kelsen, Value Judgments in the Science of Law, supra note 113, at 226-27 (discussing the case of an anarchist who believes that the norm is simply a false ideology used to rationalize the law); see also Raz, supra note 109, at 246 (noting that Kelsen's analysis does not commit anyone to believe that the legal system really is normative and binding).
cases. That would be unacceptable, Kelsen says, for "the cognition of the law, like any cognition, seeks to understand its subject as a meaningful whole and to describe it in noncontradictory statements." Kelsen thus adopts something very much like the requirement of horizontal consistency. He contends that a single principle must lie at the foundation of the legal system, a principle that infuses the law with normative force.

B. The Purity of the Pure Theory

The similarities between Kelsen's approach and rational reconstruction are, at first glance, rather dramatic. Even so, it would be a mistake to view the methodologies as identical. Kelsen's legal theory differs in several respects from the rationalizing approach discussed in the first half of the Article. Some of those departures are, on reflection, insubstantial. But some raise serious questions about the ultimate purpose and coherence of his analysis.

One obvious difference between the two approaches is the way the methods characterize the obligation-producing principle that lies at the foundation of the normative claims. We have characterized that principle as moral in nature. Kelsen, by contrast, rejects the idea that the basic norm is a moral principle. Indeed, he affirms that the central purpose of his theory is to explain law's normativity without relying on moral-

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118 KELSEN, PURE THEORY OF LAW, supra note 111, at 206; id. at 208 ("[T]he basic norm makes it possible to interpret the material submitted to legal cognition as a meaningful whole, which means, to describe it in logically noncontradictory sentences."); see also H.L.A. Hart, Kelsen's Doctrine of the Unity of Law, in NORMATIVITY AND NORMS, supra note 12, at 553 ("[Kelsen's] central positive contention is that all valid laws necessarily form a single system, and [his] central negative contention is that valid laws cannot conflict." (footnotes omitted)).

119 A leading Kelsen commentator has even referred to Kelsen's approach as a "rational reconstruction" of the law. See Golding, supra note 115, at 71-72 ("One of the tasks which the logical positivists set for themselves is called rational reconstruction . . . . Briefly put, the logical positivists selected various branches of knowledge, . . . and attempted to reconstruct them on the basis of 'rational' principles."); see id. at 73 ("The underlying motif of Kelsen's 'pure theory of law' and the relation of his legal positivism to logical positivism is the application of the notion of rational reconstruction to legal systems, or normative orders.").
ity. This is, in large part, what Kelsen means when he says he is concerned with identifying a "pure theory" of the law—a theory of the law that is purified of moral philosophy (as well as other non-legal disciplines, such as sociology).  

These differences in the characterization of the fundamental norm suggest that a real divide exists between Kelsen's methodology and rational reconstruction. But at least on this point, the divide is merely semantic. Kelsen never offers a clear definition of the term "morality," so it is difficult to know what he means by saying that the basic norm is not a moral norm. But we have offered a definition; moral principles, we said, are obligation-producing norms. Kelsen's description of the basic norm fits that definition precisely.

\footnote{See Kelsen, supra note 108, at 7 ("[T]he Pure Theory aims to free legal science of all foreign elements."); Kelsen, The Pure Theory of Law and Analytical Jurisprudence, supra note 111, at 266 ("[T]he discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one hand, and from sociology . . . on the other."); Hans Kelsen, The Pure Theory of Law, 50 Law Q. Rev. 474, 477 (Charles H. Wilson trans., 1934) (affirming that his central concern is to purify legal theory—"to free the science of law from all foreign elements"); see also Ballard, supra note 108, at 143 ([Kelsen argues for] the 'double purity' of law—the notion that the legal realm is separable from both the moral and the factual realms.); Beyleveld & Brownword, supra note 111, at 114 ("The apparent paradox in Kelsen is that we have what may be construed as a thoroughly moral account of the concept of law . . . running alongside a textbook legal positivist account of legal validity . . . ").

In this regard, Kelsen can be viewed as trying to establish a middle-way between natural law and positivist theories of the law. Like natural lawyers, Kelsen is concerned with the binding force, the obligatoriness, of the law. But like the positivists he wants to explain this sense of obligation in a way that does not require reference to morality. Thus, Kelsen adopts the positivist's belief in the "separation" thesis—the idea that no necessary connection exists between law and morality. See Paulson, supra note 82, at 1793-94.}

\footnote{See supra Part III.B.}

Kelsen recognizes that the basic norm and moral principles share a similar form; both offer an explanation for law's normativity. As Kelsen notes, the basic norm's approach and natural law's approach are similar in that:

- the validity of law . . . according to all . . . of them [is] a hypothetical basic norm . . . . The only difference is that the validity for which the basic norm of legal positivism furnishes the reason, is the inherent validity of a positive law, whereas the validity for which the basic norm of a natural-law doctrine . . . furnishes the reason, is the validity of a natural . . . order.

Hans Kelsen, Why Should the Law Be Observed?, in What is Justice?, supra note
Thus, Kelsen may claim that his theory is pure, but given the definition adopted in this paper, it is hard to see how that is so.\textsuperscript{123} To put the point another way, both Kelsen’s methodology and rational reconstruction assume the existence of an obligation-producing norm at the heart of the legal system. That is the important point. Whether that principle is called a “moral” principle or simply the “basic norm” does not represent a substantive difference between the methodologies.

Nonetheless, real differences between the methods do exist. Those differences are not easily seen on a cursory examination of Kelsen’s theory. As we will see, they emerge only upon closer examination of the role the basic norm plays in Kelsen’s theory and particularly its role in explaining the normative force of the law.

\textit{C. The Odd Pedigree of the Pure Theory}

Kelsen describes the link between the basic norm and law’s normativity in a remarkable passage in his major work, \textit{Pure Theory of Law}.\textsuperscript{124} In that passage, Kelsen attempts to trace law’s normativity to its core premises. In doing so, Kelsen adopts a kind of institutional delegation analysis. He observes that a given law’s validity depends on the authority of the institution—typically, the legislature—that enacts it. The legislature’s authority, in turn, can be traced to the adoption of a constitution. He continues:

If we ask for the reason of the validity of the constitution . . . we may, perhaps, discover an older constitution; . . . the existing constitution is justified by the fact that it was created according to the rules of an earlier constitution by way of a

\textsuperscript{111, at 263.}

\textsuperscript{123} Other commentators have made similar points—observing that Kelsen cannot help but rely on moral claims if he is to explain the “normativity” of the law. See, e.g., Raz, \textit{supra} note 109, at 245 (“If legal statements are as normative as ordinary moral ones, if they are moral statements, then the law and its existence and content, which is what legal statements state, seem to be essentially moral facts.”); Ross, \textit{supra} note 16, at 160 (“[T]he idea of a duty to obey the law (to fulfill legal obligations) only makes sense on the supposition that the duty spoken of is a true moral duty corresponding to the ‘binding force’ inherent in the law.”).

\textsuperscript{124} KELSEN, \textit{PURE THEORY OF LAW}, \textit{supra} note 111.
constitutional amendment. In this way we eventually arrive at a historically first constitution . . . whose validity . . . cannot be traced back to a positive norm created by a legal authority . . . .\textsuperscript{125}

The historically first constitution, in this sense, is the final source of authority for the institutions in the legal system. That constitution delegates authority to subsequent constitutions, which in turn authorize enactments of current laws by rulemaking bodies.\textsuperscript{126} This idea of tracing the authority of current laws to an originating event—the adoption of the “first constitution”—is sometimes referred to as Kelsen’s “pedigree theory.”\textsuperscript{127}

It should be understood that the idea of the “first constitution” is not a metaphor for the moral principles that lie implicit in the legal system. Rather, the constitution represents an actual historical event, the written or unwritten rules of social organization adopted by the nation’s founders expressly or through custom.\textsuperscript{128} A moment’s reflection may raise questions about how a fact—the adoption of a constitution—can generate obligations. That seems to violate the principle that a “should” statement cannot be derived from an “is,” that normative claims cannot rest on empirical premises.

Kelsen, however, is aware of this potential criticism. He affirms that the historically first constitution is not the ultimate norm of the legal system, and that one can “ask for the reason of the validity of the historically first constitution.”\textsuperscript{129}

\textsuperscript{125} Id. at 200.

\textsuperscript{126} See Honoré, supra note 58, at 100-01 (discussing Kelsen’s concept of delegation of authority); see also HANS KELSEN, GENERAL THEORY OF LAW AND STATE 116 (Anders Wedberg trans., 1945) (“The whole function of [the] basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act.”).

\textsuperscript{127} See Honoré, supra note 58, at 100-05.

\textsuperscript{128} Kelsen frequently refers to the constitution as an actual historical event. See, e.g., Kelsen, Pure Theory of Law, supra note 111, at 201 (“I[It must be kept in mind that [the basic norm] refers directly to a specific constitution, actually established by custom or statutory creation, by and large effective . . . .”); id. at 210 (“The basic norm refers only to a constitution which is actually established by legislative act or custom, and is effective.”).

\textsuperscript{129} Id. at 200-01.
The assumption that the constitution is binding, he affirms, is a "presupposition." Moreover, "[s]ince the reason for the validity of a norm can only be another norm, the presupposition must be a norm . . . . [I]t is the basic norm of a legal order [and can] be formulated as follows: . . . One ought to behave as the [historically first] constitution prescribes." The basic norm, in other words, tells us that the constitution's commands are obligatory.

Here is where Kelsen's analysis founders; this description of the basic norm renders it incapable of explaining core intuitions citizens have about the law. To take an obvious example, Kelsen's approach cannot explain why civil disobedience is ever justified; that is, why law sometimes lacks normative force. Under Kelsen's pedigree theory, the basic norm stands for the proposition that citizens should always obey the dictates of the constitution. Thus, Kelsen's theory suggests, implausibly, that we are obligated to obey even grossly unfair constitutional directives.

These problems do not disappear if we limit our attention to reasonably just constitutional systems, such as our own. We can easily imagine cases where a "constitutionally authorized" rule in our society is so unfair that civil disobedience is obliga-

130 Id.; see id. at 204 ("One ought to obey the prescriptions of the historically first constitution."); Kelsen, supra note 122, at 262 ("We ought to obey the decisions of a judge or administrator, ultimately, because we ought to obey the constitution. . . . To the question why we . . . can only answer: the norm that we ought to obey the provisions of the historically first constitution must be presupposed as a hypothesis if the coercive order established on its basis . . . is to be considered as a valid order binding upon these individuals . . . . This is the basic norm of a positive legal order, the ultimate reason for its validity . . . .").

131 For a similar conclusion, relying upon a somewhat different analysis, see Honoré, supra note 58, at 102 ("It is generally agreed that Kelsen's pedigree theory, with its reliance on the validity of the original constitution, is unsuccessful.").

132 One might respond that the basic norm should be understood in a more limited sense—as a claim that the obligation to obey the Constitution arises only where the Constitution is adopted through fair procedures. But this will not do either. Few (if any) constitutions have been adopted through fair procedures. See Honoré, supra note 58, at 102 ("If the original constitution of virtually every country was invalid. It was made by people who were not entitled to rule. . . . It is only if Might [makes] Right that it can appear plausible . . . ."). The American Constitution, for example, was adopted through a procedure that excluded the great majority of adults, including all blacks and women.
tory. If that is so, then the basic norm's precept—"one always ought to behave as the constitution prescribes"—conflicts with common intuitions about the law's binding force.133

A further problem is that the basic norm fails to offer a way to justify decisions interpreting the constitution's meaning. Kelsen seems to assume that the historically first constitution has an easily identified and determinate meaning. But that assumption is wildly implausible. After all, any effort to interpret the meaning of the constitution requires an interpretive method. Should we look to the original intent, textual analysis, tradition, or some other factor? As noted earlier, the answer to that question cannot be found in the constitution itself, since any attempt to read the constitution presupposes an interpretive method.

The implication is that any claim that we "should" interpret the constitution in a certain manner must itself rely upon a deeper moral principle, a principle that generates obligations of obedience. And that moral principle must transcend the text of the constitution itself and provide a justification for choosing a specific interpretive method. Kelsen is unable to account for this deeper moral norm. He simply affirms that citizens should obey the constitution, without explaining how citizens can identify what the constitution justifiably means.134

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133 The obligation to obey the Constitution's commands is, at best, prima facie. The obligation can be overcome by sufficiently strong countervailing moral considerations. The implication is that Kelsen's basic norm is not the ultimate source of normativity in the legal system. A higher principle must exist to dictate when an individual is obligated to obey the constitutionally authorized rule and when he is not. That higher principle, not the grundnorm, is the ultimate principle in society; it determines the bindingness of constitutionally-enacted rules.

This conclusion cannot be avoided by positing the existence of two conflicting principles: One principle (the basic norm) instructs us to obey the first constitution; a second principle tells us to disobey the constitution when morality demands it. We saw in the discussion of civil disobedience that this sort of hybrid approach is unstable. If we believe we can resolve this conflict of obligations in a determinate manner, we must believe that a higher principle exists that dictates when to obey the law and when to disobey. That higher principle—not the basic norm—is the ultimate source of value.

134 An obvious illustration of the Constitution's indeterminacy is provided by the Supreme Court's privacy jurisprudence. Suppose we wanted to rationally reconstruct the major decisions in that field. See generally Rappaport, supra note 28
D. The Purpose of the Pure Theory

Jurisprudence, we have said, should seek to identify the premises of legal claims so individuals can consider those claims in a more reflective manner. Kelsen's theory fails to advance that objective. Given his description of the basic norm, he is unable to provide a coherent justification for common intuitions about the law, about constitutional interpretation and about civil disobedience.

It is conceivable, of course, that Kelsen's theory is designed to serve a different purpose than the normative goal we have identified. But, if so, Kelsen does not identify what that alternative purpose might be. On occasion Kelsen suggests that his

(reconstructing Supreme Court's major privacy decisions). Attempts to justify the decisions cannot rely simply on the language of the Due Process Clause or the "penumbras" of the Bill of Rights. After all, the Due Process Clause or the penumbras of the Constitution do not clearly say why certain privacy decisions (such as a right to contraception) are affirmed, but others are not (such as a right to assisted suicide). And the original intent of the drafters is no more helpful. See Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 1064 (1981) ("The judges and scholars who support judicial intervention usually acknowledge that the rights at stake—variously described in terms of privacy, procreative choice, sexual autonomy, lifestyle choices, and intimate association—are not specified by the text or original history of the Constitution.").

A more promising tack is to identify "unwritten" principles that give meaning to the constitutional text. For example, we might say that, in drafting the Constitution, the founding fathers expressed an appreciation for promoting both individual liberty and traditional values, principles that are both expressed in the Court's privacy cases. This approach is on the right track, but incomplete. Principles such as liberty can be interpreted in many different ways and at many different levels of generality. That means that, if we are to explain why specific judicial decisions are justified, we must take a stand on the specific meaning of these deeper, more abstract principles that underlie the Constitution.

That will often be challenging because the principles we identify, such as the principles of liberty and tradition, will sometimes conflict. As a result, if we believe these conflicts can be resolved in a justified manner, we must posit the existence of higher principles of justification. In this way, as we seek to reconcile the norms that give meaning to the constitutional text, we find ourselves again constructing a hierarchal system of norms. If the argument in support of the legal decisions is internally consistent, the system of norms will ultimately converge on a single obligation-producing principle. That principle, not the grundnorm, gives meaning to the Constitution and serves as the ultimate source of the law's normativity.
goal is to purify the law and "free the science of law from alien elements," such as morality. But this statement is insufficient to salvage Kelsen's claims. We have already seen that this endeavor fails; the gründnorm is a moral principle, at least as we have defined the term.

Moreover, even if one were to call Kelsen's theory "pure," one would still need to ask why anyone might care about such a theory. Kelsen is able to explain why law is obligatory by positing the existence of a basic norm. But that effort succeeds only if one assumes that civil disobedience is never justified and that the constitution has a determinate meaning. Neither assumption is plausible.

So the question must be repeated: Why should we care about a "pure" theory that is unable to explain these basic features of our legal system and that conflicts with core convictions citizens have about the law? Kelsen's defenders must offer some answer if they are to salvage his theory. They must identify some appealing purpose for jurisprudence and explain how Kelsen's regressive approach promotes that objective in an effective way.

135 Kelsen, Pure Theory of Law, supra note 111, at 1. As Kelsen observes, the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. . . . The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines . . . which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.

Id.

136 Similarly, Kelsen does not explain in any persuasive manner why he is concerned about the normativity of the law. Rather, he simply asserts that citizens, when they speak about the law, typically imply a normative meaning. See, e.g., Hans Kelsen, The Law as a Specific Social Technique, in What Is Justice?, supra note 111, at 232 ("[T]he social behavior of individuals is always accompanied by a judgment of value, namely, the idea that conduct in accordance with the order is 'good,' whereas that contrary to the order is 'bad.'"); see also Kelsen, Pure Theory of Law, supra note 111, at 104. But this claim is not entirely persuasive. As we have seen, it is certainly possible to speak about "law" in a non-normative sense. See supra, Part I; see also Honoré, supra note 58, at 105. Thus, to justify focusing only on the normative sense of law claims requires some further explanation.
VIII. RONALD DWORIN'S THEORY OF CONSTRUCTIVE INTERPRETATION

Ronald Dworkin is widely viewed as "the most influential English-language legal theorist of his generation." He has written broadly, offering both abstract theories of interpretation and concrete policy prescriptions. This Part focuses on one core aspect of his work—his theory of judicial interpretation, which is sometimes called a theory of "constructive interpretation.""138

A. Dworkin and Rational Reconstruction

In developing his theory of interpretation, Dworkin's goal is to make sense of legal claims, of "propositions of law." As he observes, individuals often make claims about which decisions are the right ones and about what the law "really" says. When individuals make such claims, Dworkin says, they use an interpretive process of a distinct kind. Specifically, individuals attempt to "impose coherence on the behaviour that makes up a social practice." This involves "proposing some consistent point or meaning the behaviour can be taken to express or exemplify."141

137 Brian Bix, Jurisprudence: Theory and Context 87 (2d ed. 1999); see also Cohen, supra note 82, at ix ("[T]he jurisprudential writings of Ronald Dworkin constitute the finest contribution yet made by an American writer to the philosophy of law.").
138 See, e.g., Bix, supra note 137, at 83 (describing Dworkin's methodology as one of "constructive interpretation").
139 Ronald Dworkin, Legal Theory and the Problem of Sense, in Issues in Contemporary Legal Philosophy, supra note 9, at 9 ("Lawyers and laymen accept and assert . . . propositions about what the law of their nation or state 'says' . . . . The question of sense asks what these propositions of law should be understood to mean, and in what circumstances they should be taken to be true or false or neither."); id. at 10 ([These problems of sense] must always be central problems of jurisprudence. Since the use of propositions of law and debate over their truth or soundness are pervasive features of legal practice, no competent account of that practice can ignore the issue of what kind of claims these propositions are used to make.").
140 See Dworkin, supra note 61, at 46-48 (discussing "interpretive" approach to law); Dworkin, supra note 139, at 13-15; see also Bix, supra note 137, at 83.
141 Dworkin, supra note 139, at 13.
142 Id. at 13-14; see also Bix, supra note 137, at 84 (stating that constructive
What is the "consistent point or meaning" of a legal claim? Dworkin explains that a legal claim represents an assertion that the government's enforcement of a rule is justified. To make sense of that assertion, a theory of law must explain how such a claim of justification might hold true. For Dworkin, this means that the theory must be grounded in political morality. The theory must offer a moral argument for the decision under analysis.

From this perspective, Dworkin says, it should be clear that any theory must satisfy two requirements. First, the theory must fit the specific legal decisions under analysis, which Dworkin calls the requirement of "fit." Second, the theory must explain why the decisions are justified in terms of political morality, a requirement of "justification." Dworkin acknowledges that sometimes more than one theory of political morality can fit the relevant legal materials. When that occurs,

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interpretation "depends upon being able to assign a distinctive value or purpose to the objective of interpretation").

143 DWORKIN, supra note 61, at 108-09 ("[L]egal argument takes place on a plateau of rough consensus that if law exists it provides a justification for the use of collective [force] against individual citizens or groups."); Dworkin, supra note 139, at 15 ("An abstract interpretation of legal practice . . . will deploy, as its organizing idea, some account of how the familiar practices and procedures of modern legal systems contribute to the justification of collective coercive force."); see also BIX, supra note 137, at 84 ("For the constructive interpretation of law, Dworkin states that the purpose of law is to constrain or justify the exercise of government power."); Gavison, supra note 9, at 27 (noting that for Dworkin, legal claims assert a "justification of the use of the coercive force of the community").

144 Dworkin recognizes that it may turn out that there is no theory of justification that fits the legal claims under analysis. Dworkin, supra note 139, at 15 ("It must be open to a philosopher of law to conclude that the practice he sets out to interpret has no decent justification . . . ."). In that case, one must conclude that the doctrine is hopelessly confused. Id. at 18 ("[I]nterpretation proposes a justification, so that when no justification at all is provided by what is law in the pre-interpretive sense, the right interpretive judgment is the sceptical one that denies the title of law." (emphasis added)).

145 The requirement of "fit" is comparable to the requirement of vertical consistency. See supra Part III.D. Thus, Dworkin begins with a set of claims, the "preinterpretive data" of the analysis, and attempts to identify a theory that is consistent with these claims.

146 See DWORKIN, supra note 61, at 239 (discussing requirements of "fit" and "justification"); RONALD DWORKIN, A MATTER OF PRINCIPLE 143-45 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 107 (1977).
Dworkin asserts, the interpreter must adopt the principle of charitable interpretation. She must choose the best theory available, one that makes the law the "best that it can be."147

Dworkin's argument in support of his interpretive theory is not always easy to follow.148 Nonetheless, the ultimate methodology that he adopts resembles the theory of rational reconstruction in obvious ways. Like rational reconstruction, Dworkin's approach focuses on normative statements about the law, questions about why legal decisions are justified.149 Like the rationalizing approach, his methodology can be viewed as an attempt to identify the basis, or premises, for those claims—an attempt to identify a theory that can explain how

147 See Dworkin, supra note 139, at 14 ("[N]ormal interpretation aims to make, of the material being interpreted, the best it can be of the enterprise . . . "); see also DWORKIN, supra note 61, at 90 (1966) ("General theories of law . . . try to show legal practice as a whole in its best light . . . "); Ronald Dworkin, Law's Ambitions for Itself, 71 Va. L. Rev. 173, 178 (1985) (arguing that a judge, in deciding which of several interpretations should be adopted, should favor the one that "provides the better justification").

Dworkin acknowledges that there is no way to prove conclusively that one theory of morality is better than others. Nonetheless, he notes that each interpreter must make an assessment for himself or herself about the most appealing theory in trying to make the law the best that it can be. See Dworkin, supra note 13, at 254 ("[T]wo judges, with different background moralities, will offer different sets of principles as the best possible justification of their own legal history. . . . [T]he question of which of these provides the best justification of that history will be a matter of moral judgment."); see also Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve, 65 Fordham L. Rev. 1249, 1258-89 (1997).

We argue for our constitutional interpretations by offering the best and most honest case we can for their superiority to rival interpretations, knowing that others will inevitably reject our arguments and that we cannot appeal to shared principles of either political morality or constitutional method to demonstrate that we are right.

Id.

148 Like Kelsen, Dworkin is sometimes criticized for being unnecessarily complex and hard to pin down. See, e.g., Neil MacCormick, Dworkin as Pre-Benthamite, in RONALD DWORIN AND CONTEMPORARY JURISPRUDENCE, supra note 13, at 183 (noting that, given the nature of Dworkin's writing style, "the reader is left to construct a whole view of the Dworkinian Theory out of what seem to him the main points of the position").

149 Dworkin, supra note 139, at 13 ("A]ny useful account of the truth conditions of such propositions [of law] must . . . be normative rather than simply descriptive.")
these propositions of law can be viewed as valid or true.\textsuperscript{150} Like rational reconstruction, Dworkin recognizes that such a theory must be rooted in moral premises, and that the ultimate task is to identify the best moral theory that fits the legal decisions under analysis. Arguably, Dworkin even adopts the principle of horizontal consistency, for he emphasizes that any justificatory theory must be internally consistent and coherent.\textsuperscript{151}

These similarities are so striking that one might be tempted, at first glance, to view Dworkin's theory simply as a version of rational reconstruction. Nonetheless, Dworkin's theory departs from the methodology of rational reconstruction in at

\textsuperscript{150} \textit{Id.} at 9.

\textsuperscript{151} As far as I am aware, Dworkin does not address the issue of horizontal consistency directly. Nonetheless, he offers a few comments that suggest approval of that requirement. As an initial matter, Dworkin repeatedly emphasizes the need to identify a coherent theory of morality. James Boyle, \textit{Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice}, 51 STAN. L. REV. 493, 520 (1999) ("[O]ne aspect of legal practice was the feeling that areas of legal doctrine are constituted by contradictory and potentially imperial ideals... Dworkin, on the other hand, indeed theorists of integrity in general, seeks to eliminate the conflict, to resolve it."); see also Dan Simon, \textit{A Psychological Model of Judicial Decision Making}, 30 RUTGERS L.J. 1, 124 (1998) ("Dworkin states that law as integrity 'demands' that the public standards of the community be both made and seen, so far as this is possible, to express a 'single, coherent scheme of justice and fairness'.").

Support for such a view can also be found in Dworkin's comments regarding another controversial subject—his claim that "all (or almost all) legal decisions have a unique right answer." BIX, \textit{supra} note 137, at 87. Although an assessment of the "right answer" thesis is beyond the scope of this paper; the thesis has implications for Dworkin's views on horizontal consistency.

As noted previously, a strong argument can be made that, if incommensurable moral principles exist—if horizontal consistency is rejected—then no morally justified decisions can be made. See \textit{supra} note 75. Some theorists have challenged Dworkin's "right answer" thesis on these grounds. BIX, \textit{supra} note 137, at 88 ("General challenges have been raised to the possibility of right answers under Dworkin's approach based on problems of incommensurability ... ."); BRIAN BIX, \textit{LAW, LANGUAGE, AND LEGAL DETERMINACY} 96-106 (1993) (summarizing debate between Dworkin and others on the incommensurability issue). Dworkin has responded by conceding that his right answer thesis "presupposes a conception of morality other than some conception according to which different moral theories are frequently incommensurate." Dworkin, \textit{supra} note 13, at 272 (emphasis added); cf. Ronald Dworkin, \textit{Do Values Conflict? A Hedgehog's Approach}, 43 ARIZ. L. REV. 251 (2001) (emphasizing that seemingly incommensurable principles—like liberty and equality—do not necessarily conflict).
least one critical respect. Specifically, Dworkin supplements his interpretive approach with an additional principle, one that conflicts with the basic insights of rational reconstruction. This is the principle of “integrity.”

B. The Principle of Integrity

For Dworkin, the interpretive theory used to justify the law is not simply a method for reflecting and deliberating on the law’s validity. Rather, it is a rule of decision for courts. Dworkin asserts that when judges decide new cases, they should first attempt to develop the best moral explanation for past legal decisions. Then they should use that theory to decide future cases. In other words, they should “decide cases in a way which makes the law more coherent, preferring interpretations which make the law more like the product of a single moral vision.” This judicial obligation is what Dworkin means when he speaks about the principle of “integrity.”

The principle of integrity marks a significant departure from the methodology of rational reconstruction. After all, rational reconstruction seeks only to identify the implicit premises of a set of legal decisions in order to help individuals reflect upon those decisions. But it does not commit the judge (or anyone else) to embrace those premises and apply them to new cases. To the contrary, rational reconstruction tells us that we should adopt a legal principle only if we find the premises of that principle appealing. Dworkin’s theory, by contrast, is not merely descriptive. It is prescriptive at its core. It tells

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152 See Dworkin, supra note 61, at 224-75.
153 Bix, supra note 137, at 84; see also Dworkin, Taking Rights Seriously, supra note 146, at 160 (“[M]en and women have a responsibility to fit the particular judgments on which they act into a coherent program of action, or, at least, that officials who exercise power over other men have that sort of responsibility.”); Dworkin, supra note 13, at 270 (“[I]ndividuals must nevertheless accept a responsibility of consistency according to their own best judgment of what consistency requires. Legislatures have no such responsibility.”).
154 Gavison, supra note 9, at 33 (“Dworkin asserts that legal theories are committed theories, that their cutting edge is the guidance of judges in hard cases. It is implied that one of the criteria of adequacy of a legal theory should be its conduciveness to the making of ‘good’ decisions.”); Simon, supra note 151, at 124 (“It is important to note that the notion of coherence in Dworkin’s theory is not
courts how they “should” reach legal decisions.

Understandably, perhaps, the principle of integrity has proved controversial. Why should a court apply principles used in prior cases, especially if the court concludes that those principles are unjust? If Dworkin seeks to persuade us that judges are obligated to follow the principles implicit in past decisions, he must offer an argument in support of that position. The argument, moreover, must be of a certain sort. It must be a moral argument, since only moral arguments (by definition) can generate obligations of obedience.

C. Deontological Arguments for Integrity

Over the years, Dworkin has offered a range of arguments in defense of integrity. These arguments have typically been grounded upon deontological principles of morality. That is to say, rather than defend integrity because it generates good consequences, Dworkin has argued that integrity is good in itself.

Dworkin defends this claim by appealing to his readers’ intuitions about “fairness.” For example, Dworkin asks the

merely descriptive, . . . it is prescriptive through and through. The decision must endorse the interpretation that best justifies the extant legal practice and institutions as a coherent scheme of principle.”); see also Dworkin, supra note 13, at 267 (“[E]ach official must believe that his use of force against individual citizens is justified, not only by his own opinions of their rights, but by some more general theory which can be said to be the theory that underlies the law of the community as a whole.”).

155 Christopher J. Peters, Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis, 105 YALE L.J. 2031, 2114 (1996) (noting that, in obeying the principles of stare decisis blindly, courts “dserve justice; they bind themselves and the future to the missteps and wrong turns of an imperfect past”). In that sense, Dworkin’s theory is conservative in nature, potentially binding officials to support immoral regimes.

156 Boyle, supra note 151, at 504 (“Over time, Dworkin’s answers have varied, reflecting—I think—the multiplicity of reasons we have for finding ‘integrity’ attractive.”).

157 Peters, supra note 155, at 2041 (“While consequentialist theories of stare decisis assign value to [judicative consistency] only to the extent that it serves the interests of justice in the long run, deontological theories of stare decisis assert that the value of adjudicative consistency is inherent, and therefore unaffected by whether it results in justice.”).

158 Dworkin, supra note 13, at 256 (“I believe there are reasons of fairness
reader to imagine a “checkerboard” statute, in which different individuals are treated differently based on random or arbitrary factors. Dworkin argues that most people have deep-seated intuitions that this is wrong. Those intuitions, Dworkin argues, reflect a widespread belief in adjudicatory consistency, in the idea that courts should decide cases based on consistent principles.

Dworkin asserts that adjudicatory consistency is also supported by fairness arguments that resemble the principle of fair play. As he observes, citizens often bear significant burdens in order to establish and maintain an organized society. Fairness, Dworkin says, suggests that citizens who bear these burdens are entitled to the consistent application of the laws upon which they relied.

The persuasiveness of Dworkin’s argument depends in part on whether one agrees with his claim that integrity is intuitively compelling. A moment’s reflection raises serious doubts about that claim. Consider, for example, Dworkin’s discussion of a hypothetical law in Nazi Germany, a law that confiscates Jewish property and transfers it to Aryans. Dworkin assumes for the sake of argument that the principle underlying these decisions is the belief that “Jews are less worthy than ary-
ans." Under Dworkin's analysis, fairness requires the consistent application of this rule to future cases. Moreover, under the principle of fair play, aryans who have suffered deprivations under Nazi rule, like being drafted, could point to the principle of integrity to argue that courts are obligated to apply the decisionmaking principle in subsequent cases involving Jews.\textsuperscript{165}

Is that intuitive? Few individuals, I imagine, would say that courts have an inherent obligation to observe the anti-semitic principle in subsequent cases.\textsuperscript{166} In this light, Dworkin's argument for the intuitive appeal of integrity seems painfully strained.\textsuperscript{167} Nonetheless, Dworkin has a response to

\textsuperscript{164} \textit{Id.} at 257.

\textsuperscript{165} \textit{Id.} Dworkin expressly acknowledges that possibility. As Dworkin says, "A judge might find, that is, just in the fact that the Nazi regime is an operating political system which enjoys the respect and compliance of officials and citizens alike, enough to force him to acknowledge that the aryan plaintiff has at least some weak case in political morality for what he asks." \textit{Id.} at 258.

\textsuperscript{166} Moreover, consider the implications of such a belief in the case at hand. The principle of integrity means that Nazi citizens who have suffered deprivations for the state have an entitlement to the consistent application of anti-semitic principles at the expense of others—Jews—who have suffered even more. It seems odd that the principle of fair play—a principle that ostensibly seeks to ensure a fair distribution of costs and benefits—should be used to disadvantage the most disadvantaged group in society. Moreover, what of the rights of Jewish citizens? Do their deprivations merely give them a right to the principled application of the anti-semitic principle?

\textsuperscript{167} Christopher Peters has criticized Dworkin's intuitionist argument for integrity on other grounds. Among other things, Peters observes that our intuitions about integrity need not imply the existence of an independent principle of justice. Rather, those intuitions can just as easily be explained in terms of our beliefs regarding the injustice of the specific results. As Peters notes, the problem with checkerboard statutes is that we have a sense that some individuals are being treated based on factors that are irrelevant or unjust—even if we are not entirely positive which those factors are. Peters, \textit{supra} note 155, at 2097 ("[W]e disapprove of checkerboard schemes based on impermissible criteria because we know that they too require unjust treatment of people, treatment based in every case on an irrelevant factor."). They provide evidence, in short, that the decisions themselves have an unjust effect on citizens.

Peters observes that "[t]he only way to test whether integrity plays some role, however small, in informing our attitudes toward government decisionmaking is to identify some case or type of case in which government can be said to be acting inconsistently in principle but in which this inconsistency has no corresponding unjust effect on people. . . . The problem, though, is that we can imagine no such test case." \textit{Id.} at 2103.
this criticism, one that will be familiar from our discussion of civil disobedience. Though individuals may have an obligation, rooted in "integrity," to obey the law in all cases, they might also have an obligation, rooted in "justice," to disobey the law where it leads to unjust results. In other words, Dworkin suggests, courts sometimes face a conflict between the demands of "integrity" and "justice." Where the demands of justice are sufficiently powerful, the court may choose to depart from past principles. In this way, Dworkin attempts to reconcile his embrace of integrity as a deontological principle, with common intuitions that disobedience is sometimes obligatory.

Nonetheless, as our previous discussion of civil disobedience suggests, this attempt to make sense of normative claims by positing a medley of moral principles is problematic. Dworkin apparently assumes that the conflict between "integrity" and "justice" can be resolved in a justified manner. But for

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168 See, e.g., Dworkin, supra note 13, at 259 ("[T]he community's political history [i.e. its past decisions] often provides an independent ground for a moral argument that may compete with, though it may fall before, other moral arguments that are disconnected from that history."); cf. Ronald Dworkin, Reflections on Fidelity: Originalism, Scalia, Tribean, 65 FORDHAM L. REV. 1799, 1816 (1997) ("I agree with [Robin West] that there is nothing in my account of constitutional adjudication, even under the moral reading, that insures that constitutional law will not be conspicuously unjust . . . ").

169 See, e.g., DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 146, at 326-27, 341-43; Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve, supra note 147, at 1263 (acknowledging that considerations of, among other things, "justice" might in some cases "trump fidelity," or "integrity"); Dworkin, supra note 139, at 17 ("Suppose we think that Siegfried's legal system is so wicked that it can never provide any justification at all, even a weak one, for state coercion, so that in every case Siegfried, if he can get away with it, should simply ignore legislation and precedent altogether."); Dworkin, supra note 13, at 258 (noting that, even though integrity imposes an obligation upon Nazi courts to implement an anti-Semitic principle, "it does not follow that this or any other statute enacted by the Nazi regime should actually be enforced. In this case there are very strong, perhaps compelling, moral reasons of a different sort for refusing to enforce the statute . . . "); see also BIX, supra note 137, at 86 n.20 (stating that for Dworkin, "if the legal system within which one is working was sufficiently wicked, the judge should not try to make the legal system 'the best it can be;' he or she should just lie about what the law requires"); Hart, supra note 84, at 40-41 ("Dworkin [acknowledges] that where the settled law is morally iniquitous [,] principles forming part of the 'best' justification of it might be morally so bad that the judge's moral duty might be to lie rather than enforce the legal right or duty identified by such principles.").
that to occur, one must also assume that a higher principle exists to mediate between the competing norms.

The higher principle must be the ultimate source of value—for it dictates when a court should act with integrity and when it should not. This conclusion undercuts the idea that integrity is an ultimate deontological principle.\textsuperscript{170} Instead, the analysis suggests that, if the principle of integrity has force, it must be because it promotes a higher moral end. The principle of integrity, thus, must represent an instrumental norm—one that is justified, if at all, on consequentialist grounds.\textsuperscript{171}

\textbf{D. Consequentialist Arguments for Integrity}

Consequentialism offers, on first glance, an appealing basis for justifying integrity. In many cases, following past principles will generate good consequences. Arguments for following past principles include, "[t]he protection of reliance interests, the need for certainty and predictability in the law, the goal of judicial efficiency, the promotion of confidence in something called 'the rule of law,' the imposition of constraints on judicial lawmaking— the list is a familiar one to any lawyer."\textsuperscript{172}

\textsuperscript{170} Cf. Peters, supra note 155, at 2114 ("Courts grasp at thin air when they search for reasons why stare decisis must be an intrinsic good.").

\textsuperscript{171} Id. at 2040 (contending that consequentialist arguments for integrity "assign no inherent value to adjudicative consistency itself; rather, they value consistency only to the extent that consistency serves justice-related [or moral] ends").

\textsuperscript{172} Id. at 2112-13. Peters adds, "these sorts of reasons are purely consequentialist ones; they are strategic reasons to decide a later case in the same way as a previous one, but they are not reasons for following precedent \textit{qua precedent.}" Id.; see also Robin West, \textit{Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law}, 65 FORDHAM L. REV. 1313, 1316 (1997) ("A common, but I think incomplete, answer is that consistency or integrity in the application of public force renders that force more predictable, and hence manageable, than would be the case if state force was to be applied arbitrarily . . . .").


[Virtually all judges, most lawyers and most lay people agree that [the rule of law] requires what jurisprudential scholars call "horizontal equity":}
At the same time, consequentialism does not always support the principle of integrity; sometimes, the consequentialist benefits of following past principle will be negligible. In those cases, no significant obligation to act with adjudicative consistency will exist, and a departure from past principle will be justified whenever any significant moral reason exists to do so.\textsuperscript{173}

This is certainly not the way Dworkin envisions the principle of integrity. Dworkin sees the principle of integrity as an independent moral principle that applies in every case, one that can be overcome only by the most extreme countervailing moral considerations. But the consequentialist approach places the principle of integrity in a far more modest light. Rather than viewing integrity in near-absolute terms, the consequentialist justification requires the court to assess the consequences of acting with adjudicative consistency on a case-by-case basis. Integrity is thereby transformed into a pragmatic doctrine of varying significance, an instrumental tool for achieving beneficial ends.\textsuperscript{174} Consequentialism, in sum, can-

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judges must treat like cases alike. Similar cases must be decided similarly. This only seemingly banal and simple constraint has been expressed in a number of ways. Judicial decisions must, to use Dworkin's formulation of this basic intuition, have \textit{integrity}.
\end{quote}

\textit{Id.} David Strauss offers another consequentialist argument for adjudicative consistency, which he calls a "traditionalist" argument. As he says,

\begin{quote}
[t]he central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time. Judgments of this kind embody not just serious thought by one group of people, or even one generation, but the accumulated wisdom of many generations. They also reflect a kind of rough empiricism: they do not rest just on theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough.
\end{quote}


\textsuperscript{174} By contrast, a judge who embraces the methodology of rational reconstruc-
not justify Dworkin’s broad, categorical claims for integrity’s normative force.

E. Interpreting Interpretation

Perhaps recognizing the weakness in his moral argument for integrity, Dworkin advances another, distinct argument for the principle. He argues that integrity is justified in the same way that any principle is justified: The principle represents the best justification for existing practices and, specifically, the best explanation for the way judges actually interpret the law. According to Dworkin, courts typically decide cases as if they are under an obligation to act with adjudicative consistency.

This alternative argument, however, is deeply problematic. As an initial matter, one might doubt that integrity really is the best interpretation for current practices. To prove his case, Dworkin would need to show that an independent (deontological) principle of integrity both “fits” and “justifies” the courts’ interpretive practices. But we have already seen that consequentialism fits past practice too. Arguably, it provides a superior fit; consequentialism alone provides a co-

175 Dworkin, supra note 168, at 1813 ("I defended my own account of how interpretive concepts should be interpreted . . . by calling attention to the structure of social practices . . . in which people back social claims with arguments trying to show how a practice would go better if their claims were recognized as sound or appropriate within it.").

176 Arguably, consequentialist arguments offer a better “fit” for Supreme Court practice. In its most extensive discussion of stare decisis in recent times, the justices characterized adjudicatory consistency in instrumental, not deontological, terms. See Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992); see also Peters, supra note 155, at 2113-14 (discussing the Casey Court’s “prudential and pragmatic” approach to precedent).
herent explanation why obeying past principle is only a prima facie duty, not an absolute one. In this regard, consequentialism seems to offer a better, more plausible theory of the courts’ interpretive practices than deontological principles.

In any event, even if one were to assume that a deontological principle of integrity is the best interpretation of our interpretive practices that does not mean that courts should necessarily adopt that principle as their own. The mere fact that courts have acted a certain way in the past does not give us a reason to follow those practices in the future. We might conclude, on reflection, that courts have adopted the wrong interpretive approach. Dworkin, in other words, does not tell us why the best interpretation of past practice should have prescriptive power over us. As we have seen, that claim requires a separate moral argument, an argument that Dworkin has failed to provide.¹⁷⁷

Dworkin has a response to this criticism, but it is entirely unpersuasive. He argues that integrity’s validity does not depend on finding a separate moral argument in its defense because other valuable disciplines—such as mathematics and science—are self-contained systems of thought that lack “external” support. Thus, Dworkin affirms, “it seems plausible to say, as many philosophers do, that an entire domain of supposed knowledge or belief, like science as a whole or a comprehensive moral system, cannot have an external justification and does not need one.”¹⁷⁸

¹⁷⁷ Jed Rubenfeld has offered a similar critique of Dworkin’s theory. Rubenfeld argues that Dworkin’s claim—that judges should embrace integrity because integrity offers the best interpretation of their own practices—is circular. To justify integrity, Rubenfeld concludes, Dworkin must rely on some external justification. Simply referring to the judge’s own practices does not explain why integrity is an appealing principle. Rubenfeld, supra note 26, at 1475-76 (suggesting that, to “validate his interpretation of interpretation, Dworkin cannot merely say that it makes interpretation the best that it can be. He must also say: . . . this is the right interpretation of interpretation”); see id. at 1477 (“If this is right, then constitutional law must look to criteria outside the philosophy of interpretation to decide what sort of interpretation is appropriate to it.”).

¹⁷⁸ Dworkin, supra note 168, at 1812 (citations omitted); id. at 1814 (affirming that his aim is “to rely on their solidity [of math and science] to show the fallacy in Rubenfeld’s argument. . . . A theory may be complete and coherent even
The problem with this analogy to mathematics and science might be patent. Those disciplines simply do not generate the kind of prescriptive force that Dworkin claims for the principle of integrity. For example, one might support scientific research on nuclear fission in the hope that it generates new insights into alternative energy sources. Nonetheless, engaging in that work does not create an obligation to go further and build a nuclear power plant based on the research. An obligation to build a nuclear power plant exists only if doing so serves moral ends (by definition).

The same point can be made about rational reconstruction. One might believe that undertaking the rationalizing analysis is valuable, in part because it allows us to deliberate more openly and reflectively on our decisions. But that certainly does not mean that a court should adopt the results of that analysis when issuing decisions. As we have discussed, a court should do so only if those decisions are morally justified.

Dworkin's references to mathematics and science, in other words, cannot salvage integrity as a prescriptive principle. Like mathematical and scientific research, the insights of rational reconstruction should be embraced and implemented only if we have good moral reasons to do so. The mere act of identifying the premises of our practices does not give us independent reasons to adopt those assumptions. Premises are not self-generating principles of prescription.

CONCLUSION

Legal theory has failed to confront some of the most basic questions about its overarching purposes and methods. As I have argued here, a critical task for theorists today is to clarify the ultimate goal of their endeavors and to explain how their

though it can appeal to no wholly external support."); id. at 1813 ("[If Rubenfeld's] argument were sound, it would follow that science and mathematics and other apparently well-established domains of thought are also self-defeating."). For the purpose of this discussion, I will assume that Dworkin is correct in suggesting that mathematics and science are self-contained systems of thought, in the sense that these systems of thought are based on axioms that lack external justification or support.
methodology is well suited to that objective. I have offered an illustration of this approach in this article, advancing a preliminary defense of the methodology of "rational reconstruction."

Undoubtedly, some readers will find this methodology unsatisfying. Many of us have a deep-seated desire for authoritative principles that tell us how we should act and how we should interpret the law. Rational reconstruction, however, tells us that no definitive principles exist to make those determinations. It tells us, instead, that any normative claim about the law must rest on underlying assumptions that are always up for debate and reconsideration.

Rational reconstruction, in this way, does not offer answers. It is rather a tool for making more reflective judgments. It seeks to bring to light what has been suppressed, to make explicit what has been implicit, to encourage self-awareness. It rests on the assumption that individuals can be trusted to make decisions with their eyes wide open. It assumes, in short, that individuals can think for themselves.

Not everyone will agree with this assumption. Some may fear that the public's awareness of the uncertain premises of the legal system will breed disrespect for the law and for government and thereby encourage disorder. Similar fears, conscious or not, may motivate Dworkin's efforts to privilege the principles of the past and Kelsen's attempts to identify a basic norm that commands citizens to obey the nation's constitution.

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179 Some of the leading arguments for positivism have been based on these fears. See John Austin, The Province of Jurisprudence Determined 186 (Isaiah Berlin et al. eds., The Noonday Press 1954) (1832) ("[T]o proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy . . . .").

180 This may be somewhat unfair to Kelsen. Kelsen never argued that the basic norm, in fact, generates obligations. It was, for Kelsen, a hypothetical norm: if the basic norm is valid, then we must obey the Constitution's commands. Nonetheless, Kelsen's argument can be easily construed as offering a "reason" for obeying the Constitution, even if he did not expressly intend for it to be used in that way. Indeed, some modern-day theorists seem to draw upon Kelsen's concept of a basic norm in arguing that the Constitution obligates inherently. See, e.g., Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353 (1981) (affirming that our Constitution is simply our basic norm, which we accept without argument). This result is rather ironic, since Kelsen attacked other theories on
These concerns do not call into question the insights offered by the rationalizing methodology (such as the insight that legal claims rest on moral premises). Rather, they call into question the benefits of publicizing those insights widely. One who believes that the dangers of publicity are significant may conclude that it is better to tell the public "noble lies"—comforting fictions about the authoritative status of our legal system and the binding nature of our laws—in the hope of preserving social stability and cohesion.\(^{181}\)

Whether a "noble lie" of this sort is ever justified, and whether it is justified in our own time, is a question that this paper does not answer. But the implications of repressing the insights of the rationalizing methodology should be confronted directly. In essence, it means that we are afraid of thinking too much about the validity of law’s commands and about the uncertain foundations of our legal and social system. We are afraid, in other words, of too much understanding.

the grounds that they were unduly conservative in nature. See HANS KELSEN, Law, State, and Justice in the Pure Theory of Law, in WHAT IS JUSTICE?, supra note 111, at 297 (contending that the "historical function of the natural-law doctrine was to preserve the authority of the positive law"); KELSEN, PURE THEORY OF LAW, supra note 111, at 69 (The idea that law is supported by absolute moral principle “amounts to an uncritical justification of the national coercive order that constitutes this community”).

\(^{181}\) In The Republic, Plato describes a utopian society that is based on a myth that the creator “mixed a different metal in members of each of the three social classes; gold within rulers, silver within administrators, and iron within the farmers and craftsmen.” John Moon, The Freedom of Information Act: A Fundamental Contradiction, 34 AM. U. L. REV. 1157, 1157 n.4 (1985). See generally PLATO, THE REPUBLIC 106-07 (F. Cornford trans., 3d ed. 1979). This "noble lie" produces "a narcotic effect that artificially makes the populace care more for their commonwealth." Moon, supra, at 1157 n.4 (quoting PLATO, THE REPUBLIC, supra, at 107); see also David Luban, Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato, 54 TENN. L. REV. 279, 319 (1986) ("The purpose of this is to make them defend their city 'as though the land they are in was a mother.'" (quoting PLATO, THE REPUBLIC, supra, at 414e)).