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WALUCHOW'S DEFENSE OF INCLUSIVE POSITIVISM

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In "The Model of Rules I,"[1] Ronald Dworkin argues that judges are often bound by principles that do not derive their authority from having been formally promulgated by a judge or legislature in accordance with a rule of recognition. But, on Dworkin's view, the existence of such principles is inconsistent with positivism's pedigree thesis, according to which propositions are legally valid solely in virtue of having been promulgated in accordance with a rule of recognition. Thus, Dworkin concludes that positivism is false.

In *Inclusive Legal Positivism*,[2] W.J. Waluchow attempts to defend inclusive positivism from the above criticism by falsifying two claims on which he believes it depends: (1) It is logically impossible for a standard having weight to be legally valid; and (2) the pedigree thesis requires exclusively source-based, content-neutral tests for legal validity.[3] In this article, I reject Waluchow's defense against Dworkin. I argue that both points (1) and (2) are false, but that Waluchow's arguments fail to establish their falsity. Additionally, I show that Dworkin's criticism does not rest on either of these propositions.

I. THE VALIDITY ARGUMENT

Waluchow summarizes the first of what he takes to be Dworkin's arguments regarding legal principles (the "Validity Argument") as follows:

1. According to positivism, a law is a special sort of standard, distinguishable from all other sorts of nonlegal standards in virtue of its meeting certain tests of legal validity.[4]
2. In H.L.A. Hart's view the tests for legal validity are outlined or displayed in the rule of recognition, the master social rule which validates all the other legal standards of the system.

1. Reprinted in Ronald M. Dworkin, TAKING RIGHTS SERIOUSLY (1977) [hereinafter TRS].
2. W.J. Waluchow, INCLUSIVE LEGAL POSITIVISM (1994) [hereinafter ILP].
3. The inclusive positivist claims that a rule of recognition can incorporate moral standards as part of the law. In contrast, the exclusive positivist accepts that a rule of recognition can direct a judge to consult moral standards in deciding certain cases, but denies that those standards are thereby made part of the law.
4. H.L.A. Hart, of course, would reject this claim inasmuch as he views the rule of recognition as both law and not valid.

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3. So, for the positivist Hart, all law is valid law.
4. "Validity," however, "is an all-or-nothing concept, appropriate for rules but inconsistent with a principle's dimension of weight."
5. [P]rinciples of political morality, of the sort which figure in cases like *Riggs* . . . cannot, because they have weight, be valid.
6. Therefore, principles . . . cannot count as valid law. (ILP, pp. 168–69)

Thus, it follows that positivism is inconsistent with the existence of legally authoritative principles.

As is readily evident, premises 1, 2, and 3 merely sketch the so-called pedigree thesis at a fairly high level of generality and hence are not likely to evoke much in the way of disagreement from the positivist. The controversial premise is premise 4, which Waluchow interprets as the claim that "[l]egal validity and weight are logically inconsistent properties" (ILP, p. 170). Indeed, if it is true that weight and legal validity are inconsistent properties and that principles necessarily have weight, then it is necessarily true that there are no legally valid principles. Since, for the positivist, all law is legally valid, it follows immediately as a conceptual truth about law that the law cannot contain any principles.[5]

Given the uncontroversial character of the first three premises in the argument and its evident validity, the only plausible strategy for demonstrating the unsoundness of the Validity Argument is to show the falsity of premise 4. Accordingly, Waluchow concedes the first three premises and focuses on refuting premise 4, which he believes can be done by falsifying the following Dworkinian claims about rules:

> C1: Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. (ILP, p. 171)

According to C1, then, a rule is legally valid if and only if it must be followed in every case to which it applies; if a rule is not applied in a situation to which it clearly applies, it is because it is legally invalid.

To falsify C1, Waluchow cites the Canadian doctrine of federal paramountcy as an example of a legal doctrine that specifies conditions under which judges must decline to follow a legally valid rule in situations where it applies. According to Waluchow, the paramountcy doctrine establishes a hierarchy for resolving conflicts between federal and provincial law in the following way.[6] When a federal law comes into conflict with a provincial law purporting to govern the same set of facts, the federal law pre-empts the

5. Throughout this essay, I will be using the term "conceptual" as it is standardly used by legal positivists.

6. There is a similar body of law in the United States. The Supremacy Clause of the U.S. Constitution requires the exclusive application of federal law when state and federal law come into conflict. *See* U.S. Const. Art. VI, cl. 2.

provincial law in the sense that the federal law shall be applied to the exclusion of the provincial law. Nevertheless, the operation of the paramountcy doctrine has no effect on the status of either law; both the pre-empting federal law and the pre-empted provincial law are valid and remain so during and after the operation of the paramountcy doctrine (ILP, p. 173). Because federal law can preclude the application of a provincial law to facts that fall within the scope of that law without thereby invalidating it, Dworkin's C1 is false. On the strength of such considerations, Waluchow concludes that premise 4 is false.

There are a number of problems with Waluchow's approach here. First, it is not clear that Canadian paramountcy law is a counterexample to the claim that the legal validity of a law *S* implies that *S* must be followed in every case to which it applies. For one can reasonably object that when a federal law *F* and a provincial law *P* come into conflict with respect to a state of affairs, the proper characterization of *P*'s status with respect to that state of affairs is that *P does not apply*. According to such reasoning, the legal effect of the paramountcy doctrine is to limit the situations to which a provincial law *P* applies by adding to *P*'s application-conditions the requirement that there be no conflicting federal law. Suppose, for example, that a provincial law dictates that act *A* be punished by a $5,000 fine and that a federal law dictates that act *A* be punished by a jail sentence when condition *a*, *b*, or *c* obtains. One can plausibly argue that the paramountcy doctrine has the effect of modifying the provincial law to punish *A* by way of the specified fine in only those circumstances in which conditions *a*, *b*, and *c* fail to obtain. In other words, when there occurs an instance of *A* and condition *a*, *b*, or *c* obtains, the provincial law's application-conditions are *not* satisfied; hence, the proper characterization of the situation is that *the provincial law does not apply*. If this is correct, then Waluchow cannot infer the falsity of Dworkin's C1 from the paramountcy doctrine.

The second problem involves Waluchow's questionable inference that premise 4 is false from the negation of C1 (i.e., the claim that the legal validity of a law *S* does not imply that *S* must be followed in every situation to which it applies); the difficulty here is that the claim that it is possible for a standard having weight to be legally valid does not follow from Waluchow's discussion of the paramountcy doctrine. Indeed, this discussion fails to warrant the desired inference because Waluchow gives us no reason to think that (1) the applicable standard *S*, which is legally valid yet not followed pursuant to the paramountcy doctrine, could be a *principle*, and (2) the reason *S* is not followed is that *S* has been *outweighed* by another standard. If Waluchow's argument could show (1) or (2), he could justifiably infer the possibility of a legally valid standard having weight, which would imply the falsity of premise 4. But Waluchow never gives an argument for either (1) or (2).

On the face of it, there is nothing particularly implausible about (1); but the same cannot be said for (2) because, as a matter of legal theory, para-

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mountcy doctrines work, not by specifying conditions under which one standard (the federal standard) *outweighs* another (the provincial standard), but by requiring *as a matter of law* the application of the federal standard in certain specified situations. Indeed, paramountcy doctrines have the effect of *nullifying* considerations of weight because they require the application of one of competing standards without regard to the considerations that go into determining one standard's weight relative to another's.

For example, suppose that a provincial standard requires the province to discourage false advertising by all businesses in the province, and that courts had interpreted this standard to require imposing a fine on businesses engaging in such a practice. Suppose further that a federal standard requires the promotion of growth in the computer industry. What is the legal outcome when a computer manufacturer stimulates sales by making false claims about its products? If both of these standards were on the same level (as would be the case if they were both provincial standards), resolving the conflict between them might well involve the sort of weighing process that is typically involved, according to Dworkin, in the application of legal principles. The judge in such circumstances might consider the relative importance of the values advanced by the competing standards and decide the issue in favor of the standard that advances the "heavier" (or more important) value.

But the situation is very different when the two standards are at different levels (as when one is a provincial standard and the other is a federal standard), and conflicts between them are resolved by a paramountcy doctrine. For such a doctrine *requires* the application of the federal standard and thereby *precludes* the sort of reasoning process that attempts to calculate the comparative weights of the two standards. For this reason, while Waluchow's discussion of the paramountcy doctrine supports the claim that some legally valid standards are not followed in situations to which they apply, it does not support the claim that some legally valid standards have weight—which would falsify premise 4. Thus, Waluchow fails to establish the falsity of premise 4.

Nevertheless, it is not difficult to see that premise 4 is false because examples of legally valid standards having weight are easy to come by. The First Amendment, for example, is a legally valid standard having weight. For speech that is protected by the First Amendment may be regulated by the state when the interest in free speech is outweighed by a compelling state interest, a feature that Justice Harlan describes as follows:

> [W]e reject the view that freedom of speech and association . . . are "absolutes[.]" . . . [G]eneral regulatory statutes . . . limiting [the] unfettered exercise [of speech] . . . have been found justified by subordinating valid governmental interests, a pre-requisite to constitutionality *which has necessarily involved a weighing of the governmental interest involved.*[7]

7. Konigsberg v. State Bar of California, 366 U.S. 36, 49–51, 81 S. Ct. 997, 1005–7, 6 L. Ed. 2d 105 (1961) (emphasis added).

As Justice Harlan's remarks make clear, an individual's interest in free speech can be *outweighed* by a competing state interest when the latter is sufficiently important. Insofar as the First Amendment is valid in virtue of having been ratified according to procedures specified in the U.S. Constitution, it is an example of a legally valid standard having the dimension of weight.

Unfortunately, the existence of legally valid standards having weight is of no help because, *contra* Waluchow, Dworkin does not rest his critique of positivism on the claim that it is conceptually impossible for a standard having weight to be legally valid. Indeed, Dworkin never makes any unequivocal claims to this effect; in a remark that is parenthetical with respect to his critique of positivism, he asserts only that it "seems odd" to think of principles as valid:

> Hart's sharp distinction between acceptance and validity does not hold. If we are arguing for [some] principle . . . , we would cite the acts of courts and legislatures that exemplify it, but this speaks as much to the principle's acceptance as its validity. (It seems odd to speak of a principle as being valid at all, perhaps because validity is an all-or-nothing concept, appropriate for rules, but inconsistent with a principle's dimension of weight). (TRS, p. 41)

Dworkin indicates the parenthetical and tentative character of his remark here in four ways: (1) his use of parentheses indicating that the remark is not essential to his argument; (2) his use of "seems" in attributing oddness to the notion that principles are legally valid; (3) his use of "odd" instead of "inconsistent" (though he tentatively offers that the oddness might be explained by inconsistency); and (4) his use of "perhaps" in "perhaps because validity is . . . inconsistent with a principle's dimension of weight." Such markers indicate that Dworkin neither claims unequivocally that the properties of legal validity and weight are logically inconsistent nor rests his critique of positivism on such a claim.

In this connection, it is worth noting that Dworkin's conclusion that Hart's positivism is inconsistent with the existence of legal principles is weaker than Waluchow makes it out to be—though it is strong enough, if true, to falsify Hart's positivism. In characterizing Dworkin's argument as resting on the conceptual claim that it is logically impossible for a standard having weight to be legally valid, Waluchow implies that Dworkin's conclusion is also a conceptual claim, namely the claim that it is logically impossible for *any* principle to be legally valid (on Dworkin's view, only principles have weight). Dworkin's claim, however, is not that Hart's positivism is inconsistent with *every* legal principle; rather, his claim is that Hart's positivism is inconsistent with *some* legal principles—an *empirical* proposition that does not rest on the *conceptual* claim that the dimension of weight is inconsistent with legal validity.

Indeed, the nonconceptual, empirical character of Dworkin's critique

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can be seen by examining the character of the arguments he gives in support of it. In "The Model of Rules I," Dworkin points to specific principles that judges have used in deciding hard cases like *Riggs* and *Henningsen*, and then argues that such principles are binding on judges and that their legal authority cannot be explained in terms of Hart's rule of recognition:

> Most rules of law, according to Hart, are valid because some competent institution enacted them. Some were created by a legislature, in the form of statutory enactments. Others were created by judges who formulated them to decide particular cases, and thus established them as precedents for the future. But *this test of pedigree will not work for the* Riggs *and* Henningsen *principles*. (TRS, p. 40; emphasis added)

Similarly, Dworkin claims that "it hardly makes sense to speak of *principles like these* as being 'overruled' or 'repealed'" (TRS, p. 40; emphasis added). As the italicized portions indicate, Dworkin's claims about the inadequacy of the pedigree thesis apply *only* to principles resembling the *Riggs* and *Henningsen* principles; nowhere does he generalize his conclusions about such principles to *all* legally binding principles.[8] Moreover, as Dworkin undoubtedly realizes, his empirical argument will not support any stronger conclusion than the nonconceptual claim that there are *some* legal principles that are inconsistent with Hart's version of the pedigree thesis. For these reasons, Dworkin is not plausibly construed either as attempting to attribute to Hart any conceptual claim about validity and weight or as making any such claims himself. Rather, Dworkin's concern is to show that no reasonable modification of Hart's pedigree thesis can explain the authority of principles *like those* used in *Riggs* and *Henningsen*.

Moreover, there is nothing in Dworkin's criticism of Hart's positivism that *forces* him to claim either that it is conceptually impossible for a standard having weight to be legally valid or that Hartian positivists are committed to this view. As long as Dworkin can show that the authority of the *Riggs* and *Henningsen* principles cannot be explained either by Hart's pedigree thesis or by any consistent modification thereof, he has refuted Hartian positivism—and this is true even if Dworkin admits that there could be a legally valid standard with weight. Accordingly, Waluchow's argument against Dworkin fails because it falsely attributes to Dworkin a claim he neither accepts nor is committed to.

Why then does Waluchow believe that Dworkin holds premise 4? I think there are two reasons for this. First, as we have seen, Dworkin does entertain the possibility that weight and validity are inconsistent—though he takes pains to mark the tentative quality of his remarks on the subject. Second,

8. Indeed, Dworkin would not deny that the authority of the First Amendment is consistent with Hart's positivism—even though it has weight. *See supra*, 104–05.

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Waluchow appears to believe that C1 is implied by premise 4. Here it would be helpful to recall the language in which Dworkin expresses C1:

> C1: Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. (TRS, p. 24)

At first blush, there appear to be two claims in this passage: one about rules and one about legal validity. The first sentence describes the way in which rules are used to adjudicate cases: rules are applied in an all-or-nothing way. The second sentence explains what it means to say that a rule is applied in an all-or-nothing way: If the rule is valid and the facts it stipulates occur, then the judge must follow the rule; if the stipulated facts do not occur, the rule does not apply. Certainly, insofar as the second sentence clarifies the first sentence, it makes the same sort of claim as the first sentence, namely a claim about rules.

But one might think that the second sentence in the above passage also makes a claim about the nature of validity. Because the second sentence is concerned with validity and the all-or-nothing character of rules, one might believe that the second sentence somehow relates these two notions in the following way: Only standards applicable in an all-or-nothing fashion can be valid. A closer examination, however, makes clear that the second sentence makes no such claim about validity and the all-or-nothing character of rules. Rather, the second sentence expresses the following conditional: if the facts a rule *R* stipulates are given, then either (*R* is valid and the answer it supplies must be accepted) or (*R* is not valid and *R* does not contribute to the decision). Once the sentence is reworded in this way, it is easy to see that the second sentence neither states nor implies that only standards applicable in an all-or-nothing fashion can be valid. All it tells us is the following: If the facts stipulated by a rule *R* obtain, then *R* must be applied if and only if *R* is a valid rule. This conditional neither indicates what happens if the stipulated facts do not obtain nor has any implications with respect to standards other than rules.

Likewise, it is clear that premise 4 does not *imply* C1 and that hence the falsity of C1 does not imply the falsity of premise 4. Even if it were conceptually impossible for a standard having weight to be legally valid, this would not preclude the existence of legal systems in which judges are sometimes required to refrain from following a valid rule in circumstances to which it would otherwise apply. Indeed, if Waluchow is correct in thinking that Canada's paramountcy doctrine falsifies C1, one can construe it as being an example of precisely such a rule—and hence consistent with premise 4. And if this is correct, then the claim that it is conceptually impossible for a standard having weight to be legally valid (premise 4) does not imply that a valid rule must be followed in every instance in which it applies (C1). The

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claim that the only valid standards are rules does not have any logical connection with either the claim that valid standards must be followed whenever applicable or its negation.

From the standpoint of a positivist, this is not surprising. The pedigree thesis is principally a metaphysical thesis that explains legal validity in terms of certain factual conditions. According to the pedigree thesis, a rule *R* is legally valid in virtue of properties having to do with the procedural origins of *R* and possibly with whether *R* conforms to certain substantive constraints on the content of law. Thus, for example, the proposition that it would be illegal for me to set fire to my neighbor's house is valid in Washington because the state legislature duly enacted a statute prohibiting arson. But there is nothing in such claims about legal validity that implies that only standards applicable in an all-or-nothing fashion can be legally valid. A society is free to adopt such a constraint as part of its rule of recognition, but there is nothing in the *concept* of a rule of recognition that implies such a constraint. Accordingly, there is nothing in the pedigree thesis that implies only rules can be legally valid.

But Dworkin would probably not be surprised by any of this either. For Dworkin, the distinction between rules and principles is a logical one having to do with differences in their respective forms (e.g., a principle, unlike a rule, does not "purport to set out conditions that make its application necessary," TRS, p. 26). Of course, Dworkin also believes that this logical difference corresponds to a practical difference: Rules are applied in an all-or-nothing fashion; principles are not. But none of this commits Dworkin to claiming either that only rules can be valid or that the positivist is committed to such a claim. If Dworkin believes that only standards applied in an all-or-nothing fashion can be valid—and, as we have seen, he does make an equivocal suggestion to this effect—it is not because he thinks the logic of rules and principles commits the positivist to such a result. Apart from this one equivocal remark, then, there is nothing in Dworkin's writing that suggests he would endorse the view that Waluchow attributes to him.

II. THE PEDIGREE ARGUMENT

Waluchow next considers an argument (the "Pedigree Argument") that depends on the claim that positivism is committed to purely content-neutral, source-based tests for legal validity:

1. [L]aw is . . . "identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed." . . .
2. A principle, however, is a principle of law . . . only if it is a principle of political morality which figures in the best constructive, Herculean interpretative theory of the settled law.

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3. The attempt to determine what that best theory is, and therefore what principles it renders legal, "must carry the lawyer very deep into political and moral theory, and well past the point where it would be accurate to say that any "test" of "pedigree" exists for deciding which of two different justifications . . . is superior [and thus which principles are principles of law]."
4. So legal principles could not possibly satisfy the [positivist's] content-neutral, source-based, pedigree tests.
5. Thus legal principles could not, according to legal positivism, count as valid legal standards. (ILP, p. 175)

Waluchow wishes to refute the Pedigree Argument by attacking premise 1's claim that positivism is committed to purely source-based, content-neutral tests for legal validity. To falsify premise 1, Waluchow offers two cursory arguments. First, he points out that many positivists accept the possibility of content-based constraints on legal validity. For example, Hart concedes that "[i]n some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values."[9] Similarly, Bentham "recognized . . . that even the supreme legislative power might be subjected to legal constraints by a constitution and would not have denied that moral principles, like those of the Fifth Amendment, might form the content of such legal constitutional constraints" (ILP, p. 177).

Second, Waluchow points out that some legal systems contain content-based constraints on legal validity. For example, Section 7 of the Canadian Charter protects the right not to be deprived of liberty, except in accordance with fundamental justice. Accordingly, Waluchow concludes that "[t]o determine the validity of [a law] X in [a legal system] L one may be required to consider whether X violates an incorporated moral principle" (ILP, p. 178). And one cannot make such a determination without going beyond the source-based, content-neutral considerations of pedigree to which Dworkin believes the positivist is limited. Thus, Waluchow concludes that premise 1 is false.

Although, as we will see, Waluchow is correct in denying premise 1's claim that positivism is committed to purely content-neutral, source-based tests for legal validity, neither of his arguments falsifies premise 1 because both wrongly presuppose that it expresses an empirical claim. Waluchow's observation that Hart and Bentham accept the possibility of content-based constraints on law fails to falsify premise 1 because it does not make the empirical claim that Hart and Bentham reject the possibility of such constraints; rather, it makes the conceptual claim that the existence of such constraints is inconsistent with the pedigree thesis. And Waluchow's empirical claim that Canada includes what appear to be substantive constraints on the content of law fares no better as a defense against premise 1. For Dworkin would respond

9. H.L.A. Hart, THE CONCEPT OF LAW 204 (2d ed. 1994) [hereinafter CL].

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that legal systems, like Canada's, that incorporate content-based constraints on law are counterexamples to the pedigree thesis because such constraints are inconsistent with that thesis. Both of Waluchow's arguments against premise 1, then, fail to establish its falsity because each argument focuses on empirical matters instead of the conceptual claim that the pedigree thesis is inconsistent with the existence of a content-based test for legal validity, which is what Dworkin intends by premise 1.

This failure to appreciate the conceptual character of premise 1 might derive from a misunderstanding of why Dworkin believes that the pedigree thesis is inconsistent with content-based constraints on legal validity. Waluchow suggests a number of possible confusions that he thinks may explain this mistaken belief on Dworkin's part. First, Waluchow points out that "some positivists do tend to use content-neutral pedigree tests" (ILP, p. 181). Second, he suggests, quite implausibly, that Dworkin might be confused by the ambiguity in the term "validity," which in formal logic denotes a formal, content-neutral property of arguments but which is understood in moral contexts to incorporate substantive standards (ILP, pp. 181–82). Third, he argues that Dworkin might mistakenly assume that all positivists are exclusive positivists who *are* committed to premise 1 (ILP, p. 182). Finally, he suggests that Dworkin exaggerates the extent to which positivists are committed to defining law as providing "a settled, public, dependable set of standards for private and official conduct" (ILP, p. 183).

It is, of course, possible that Dworkin has made one or more of these mistakes, but Dworkin's principal reason for believing that positivism is committed to premise 1 has to do with the way in which he interprets the pedigree thesis. According to Dworkin, the pedigree thesis asserts that in all possible legal systems there exists a test that decides all questions of law. As Dworkin describes the thesis, "in every nation which has a developed legal system, some social rule or set of social rules exists within the community of its judges and legal officials, which rules settle the limits of the judge's duty to recognize any other rule or principle as law" (TRS, pp. 59–60). Because the judge's institutional obligations require that he or she recognize only true propositions of law, any test that "settle[s] the limits of the judge's duty to recognize [a] . . . rule or principle as law" also "settles all issues of which standards count as law" (TRS, p. 61).

One we understand Dworkin's interpretation of the pedigree thesis, it is easy to see why he believes that positivism is committed to exclusively source-based, content-neutral tests for validity. Dworkin believes, quite plausibly, that any content-based criteria of validity would necessarily give rise to hard issues of interpretation that create uncertainty about which standards count as law. Thus, any rule of recognition that incorporates content-based considerations would fail to provide a test for validity because a *test*, in the relevant sense, necessarily eliminates all uncertainty. Thus, the existence of content-based criteria for validity would be inconsistent with the existence of a test that eliminates uncertainty about what standards count as law.

On Dworkin's view, what commits Hart to the existence of such a test is his analysis of social rules. Hart characterizes the rule of recognition as a social rule, which is constituted by the conforming behavior of most people in the group, who also accept the rule as a ground for criticizing deviations from its requirements. Accordingly, Hart argues that there are two necessary conditions for whether a society has a legal system:

> On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. (CL, p. 113)

Like all social rules, then, the rule of recognition has an external and an internal aspect. The external aspect of the rule of recognition consists in general obedience to those rules validated by the rule of recognition; the internal aspect is constituted by its acceptance as a public standard of official behavior. Hart believes that it is this double aspect of the rule of recognition that accounts for its normativity and that enables him to distinguish his theory from Austin's view of law as a system of coercive commands. For, as Hart points out, a purely coercive command can *oblige*, but never *obligate*, a person to comply.

Dworkin believes that this feature of Hart's theory commits him to the claim that there cannot be any uncertainty about whether a proposition is legally valid:

> Hart's qualification . . . that the rule of recognition may be uncertain at particular points . . . undermines [his theory]. . . . If judges are in fact divided about what they must do if a subsequent Parliament tries to repeal an entrenched rule, then it is not uncertain whether any social rule [of recognition] governs that decision; on the contrary, it is certain that none does. (TRS, pp. 61–62)

The problem, according to Dworkin, is that the requirements of a social rule cannot be uncertain, for a social rule is constituted by acceptance and conforming behavior by most people in the relevant group. If there is no agreement on whether a particular behavior is required, then, on Dworkin's view, there cannot be a social rule governing that behavior: "two people whose rules differ . . . cannot be appealing to the same social rule, and at least one of them cannot be appealing to any social rule at all" (TRS, p. 55). Thus, Dworkin concludes, judicial disagreement about whether a proposition is valid is inconsistent with Hart's characterization of the rule of recognition as a social rule.

At this point, it is easy to see why Waluchow's defense of positivism against premise 1 falls short of the mark. For if Dworkin is correct that Hart's analysis of social rules implies the existence of a test that "settle[s] the limits

of the judge's duty to recognize any other rule or principle as law," then it follows that the rule of recognition cannot incorporate content-based considerations—at least insofar as such considerations necessarily result, as Dworkin believes, in uncertainty about what standards are legally binding. For this reason, it is insufficient to respond, as Waluchow does, with the *empirical* claims that there are positivists who acknowledge the possibility of content-based constraints on legal validity and that some legal systems have such constraints. What is needed is a response that addresses the *conceptual* assertions on which Dworkin rests his claim that the pedigree thesis is inconsistent with content-based constraints on legal validity.

Jules Coleman provides such a response. On Coleman's view, Dworkin is correct in thinking that if the rule of recognition is a social rule, then Hart's view implies that there must be general agreement among the officials of a legal system about what standards constitute the rule of recognition. But Coleman argues that it does not follow from Hart's conception of a social rule that there cannot be disagreement as to what those standards require in any given instance:

> The controversy among judges does not arise over the content of the rule of recognition itself. It arises over which norms satisfy the standards set forth in it. The divergence in behavior among officials as exemplified in their identifying different standards as legal ones does not establish their failure to accept the same rule of recognition. On the contrary, judges accept the same truth conditions for propositions of law. . . . They disagree about which propositions satisfy those conditions.[10]

The idea here is that Dworkin fails to distinguish two kinds of disagreement among judges: (1) disagreement with respect to what standards constitute the rule of recognition, and (2) disagreement with respect to what propositions satisfy the standards that constitute the rule of recognition. On Coleman's view, Hart's analysis of social rules implies that (1) is impossible, but not that (2) is impossible.

An example will help to clarify this point. Under the United States rule of recognition, a federal statute is legally valid if and only if it has been enacted in accordance with the procedural requirements described in the body of the Constitution and is consistent with the first fourteen amendments. Because, on Hart's view, the rule of recognition is a social rule, American officials must agree on the procedures the federal government must follow in enacting law, the set of sentences constituting the first fourteen amendments, and the requirement that federal enactments be consistent with the first fourteen amendments. But it does not follow that there cannot be any disagreement with respect to whether a given enactment is consistent with the first fourteen amendments. At one point, for example, mathematicians disagreed about whether the generalized contin-

10. Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 156 (1982).

uum hypothesis was consistent with a designated set of axioms, but there obviously was no disagreement about which axioms were contained in the designated set.

What Coleman's analysis shows is that Dworkin is mistaken in thinking that Hart's conception of the social rule of recognition is inconsistent with uncertainty about which standards count as law. Accordingly, we can reject both Dworkin's claim that positivism implies the existence of a test that distinguishes law from nonlaw and its consequence, namely premise 1's claim that positivism is committed to an exclusively source-based, content-neutral test for legal validity. Thus, although Waluchow's arguments fail to falsify Dworkin's premise 1, he is correct in believing that premise 1 is false.

III. A PROBLEM WITH WALUCHOW'S STRATEGY

In the last two sections I examined Waluchow's arguments against Dworkin's view that the pedigree thesis is inconsistent with the existence of some legal principles. I rejected Waluchow's attribution of the Validity Argument to Dworkin because it mischaracterizes his critique of positivism as resting on the claim that it is conceptually impossible for a standard having weight to be legally valid. I also rejected Waluchow's attempt to falsify premise 1 of the Pedigree Argument (i.e., the claim that the pedigree thesis is inconsistent with content-based constraints on legal validity) and I refuted premise 1 on other grounds. In this section I will argue that, even if Waluchow's arguments succeed in undermining claims that Dworkin would endorse, they nonetheless fall short of providing an adequate defense of Hartian positivism against Dworkin's criticisms.

To see the problem, it is necessary to articulate the three main planks of Dworkin's argument. First, Dworkin wants to establish that in hard cases judges use standards that do not function as rules. To this end, he exhibits a couple of cases in which the court makes clear use of such standards. One such example is the notorious *Riggs* case in which the court considered the question of whether a person could take under the will of someone he murdered. At the time the case was decided, neither the statutes nor the case law governing wills expressly prohibited a murderer from taking under his victim's will. Thus, the existing law seemed to dictate allowing the murderer in *Riggs* to take under his victim's will. Despite this, the court declined to permit such a result on the ground that it would be inconsistent with the principle that no person shall profit from his own wrong.[11] Thus, on Dworkin's view, the court decided the case by citing "the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills and in this way justified a new interpretation of that statute" (TRS, p. 29).

11. 115 N.Y. at 511, 22 N.E. at 190 (1889).

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The second plank of Dworkin's argument is that the principle that no person shall profit from one's own wrong is as much a legal standard as the statute it was used to interpret. One might think, for example, that when the *Riggs* court considered this principle, it was reaching beyond the law to extralegal standards in the exercise of judicial discretion. Nevertheless, on Dworkin's view, the *Riggs* judges would rightfully have been criticized had they failed to consider this principle; if it were merely an extralegal standard, there would be no rightful grounds to criticize the *Riggs* judges for failing to consider it (TRS, p. 35). Accordingly, Dworkin believes that the best explanation for the propriety of such criticism is that such principles are part of the law.

The third plank in Dworkin's argument consists in his claim that the legal authority of standards like the *Riggs* principle does not derive from their having been promulgated in accordance with purely formal requirements. In "The Model of Rules I," Dworkin explains the legal authority of such principles in terms of public and professional acceptance:

> [T]he test of pedigree will not work for the *Riggs* and *Henningsen* principles. The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. (TRS, p. 40)

On Dworkin's view, then, the authority of such principles cannot be explained in terms of official promulgation: "[e]ven though principles draw support from the official acts of legal institutions, they do not have a simple or direct enough connection with these acts to frame that connection in terms of criteria specified by some ultimate master rule of recognition" (TRS, p. 41). Accordingly, Dworkin concludes that "if we treat principles as law we must reject the positivists' first tenet, that the law of a community is distinguished from other social standards by some test in the form of a master rule" (TRS, p. 44).

It is worth noting that Waluchow declines to challenge Dworkin's first and second planks, which, taken together, assert that the law of a community includes standards that do not function as rules. Indeed, Waluchow concedes that "at least some of these principles are part of the law and judges are bound to respect whatever institutional forces they possess" (ILP, p. 167). As Waluchow realizes, it would be implausible to deny the existence of legal principles, given that (1) many of our most cherished rights are obviously protected by legal principles, such as the First Amendment's protection of freedom of speech; and (2) as Dworkin has convincingly demonstrated, the common law contains many binding standards that do not function as rules.

While Waluchow clearly believes that the third plank in Dworkin's attack on positivism is false, he does not directly challenge it; rather, he targets claims from which Dworkin ostensibly infers his third plank. Thus, instead

of refuting the claim that positivism is inconsistent with the existence of some legal principles, Waluchow attempts to refute the claims that the properties of weight and validity are logically inconsistent and that the pedigree thesis is limited to content-neutral, source-based tests for validity. Of course, this is a perfectly legitimate strategy, but it is one that falls short of providing an adequate defense of positivism—even if Waluchow's arguments succeed in refuting the claims he targets—for two reasons.

First, assuming that Dworkin has no other reasons supporting his third plank, Waluchow's arguments succeed in showing at most that Dworkin's arguments in favor of the third plank are flawed. It does not follow, of course, that the third plank, the desired conclusion, is false. An adequate defense of positivism against Dworkin must show the falsity of the third plank's claim that the legal authority of principles like those used in the *Riggs* and *Henningsen* cases cannot be explained in terms of the rule of recognition.

Second, Waluchow misses what is Dworkin's most convincing argument for thinking that the pedigree thesis is inconsistent with some legal principles. Whether or not Dworkin subscribes to the conceptual claims that Waluchow targets, Dworkin clearly offers a number of empirical arguments that attempt to show that the authority of some principles cannot be explained in terms of official acts. Thus, Dworkin argues that the "test of pedigree will not work for the *Riggs* and *Henningsen* principles" because "[t]he origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time" (TRS, p. 40). These are empirical claims about the source of their legal authority.

Accordingly, what is needed from the positivist is a showing that Dworkin's claim that the legal authority of the *Riggs* and *Henningsen* principles is inconsistent with positivism's pedigree thesis is false. Such a showing can be accomplished in only one way, namely by depicting how Hart's version of the pedigree thesis (or some reasonable modification thereof) can plausibly account for the legal authority of such principles. Because such an account must ultimately cohere with what I have called the theoretical core of positivism, it must explain the validity of principles in terms of some kind of official act on the part of the legislature or judiciary. Waluchow's defense of positivism ultimately comes up short because he makes no effort to provide a positivist account of how such principles could be legally binding, preferring instead to focus on flaws in Dworkin's arguments.

IV. CONCLUSIONS

Waluchow attempts to defend inclusive positivism against Dworkin's claim that the pedigree thesis is inconsistent with some legal principles by falsify-

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ing two propositions on which he believes it depends: (1) the proposition that it is logically impossible for a standard having the dimension of weight to be legally valid, and (2) the proposition that positivism is committed to an exclusively source-based, content-neutral test for legal validity. While (1) and (2) are both false, Waluchow has failed to establish their falsity. In any event, Waluchow's defense of positivism fails because he does not provide an account of legal principles explaining the authority of the *Riggs* principle in a manner consistent with the tenets of inclusive positivism.

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