

## **Are there any Rules?**

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In chess, bishops move diagonally. In England, cars stop at red lights. The bishops follow a rule of chess; the cars follow a rule of English law. But there are obvious differences. One difference is that cars can sometimes go through red lights without breaking the law. Suppose that I am being pursued by assassins, or I am making way for an ambulance, or rushing a dying passenger to the hospital, or obeying an instruction from a police officer. I do not know whether English lawmakers have laid down any rule for such cases. Suppose that they have not done so; still, if a policeman were stubborn enough to charge me with violating the law in one of those situations, I would be optimistic: I expect that even a very law-abiding magistrate might find the resources in English law to hold that I had not broken the law, even if no lawmaker ever deliberately laid down an exemption for my case.

But if I tried moving my bishop sideways in a chess tournament, I would not be optimistic: the judges would say that that is no move. It would do me no good to point out that the situation was desperate.

Ronald Dworkin's early essays attack the 'model of rules'—the view that the law of (e.g.) England is a system of rules. If by 'rules' we mean standards that are just like the rule that the bishop moves diagonally, then the model of rules is wrong. Perhaps there are no legal standards that are like chess rules. Dworkin's essays show why. But in that case, the model of rules is silly, and it is too easy a target. Dworkin's striking, original arguments succeed only if they give us reason to reject a picture of law that has some putative attraction. We need to try to make more of the notion of a rule, before we can assess the model of rules. And we need to look at Dworkin's essays fairly closely to find just what his argument is against the model of rules.

I think that it is possible to construct a version of the model of rules that is worth attacking or defending. I will not try to do that in this essay, but I will try to lay part of the groundwork, by addressing some puzzles about rules that Dworkin's early work raises. Dworkin writes as if there were rules of law, but seems to develop a theory in which there are no rules of law:

- (1) Dworkin seems at times to concede that rules can be made valid merely by acts of political authority. Yet his theory is committed to rejecting that view.
- (2) Dworkin often suggests that there are rules of law. Yet, if rules are absolute standards, it seems that there are no rules, or virtually none, in (e.g.) English law.

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\* I benefited from talking to Ofer Raban about some of the issues discussed here.

- (3) Dworkin seems to think that it is impossible to disagree about the application of rules- they are uncontroversial. Yet legal rights, in Dworkin's theory, are pervasively controversial.

These puzzles seem to lead to the conclusion that there are no rules of law in Dworkin's theory. Sections 1, 2 and 3 will try to explain that claim, and address its implications for an understanding of the issues that Dworkin addresses. Section 3 argues that a central feature of Dworkin's opposition to the model of rules is his view that the application of rules must be uncontroversial. Section 4 offers an explanation of the possibility of deep disagreement about the application of social rules.

I should emphasize that I will use the word 'rule' in Dworkin's sense—until section 3. I will argue that that is a sense of the word 'rule' that is of no use in understanding law. Of course, that is what Dworkin claims. But I think that we should not conclude that the model of rules is misconceived, but that it needs a better understanding of the idea of a rule. Section 4 seeks to contribute to that understanding. I do not offer a theory of social rules, but I argue that a theory of social rules would meet an important challenge that Dworkin has raised for jurisprudence: to account for the fact that legal rights and duties are frequently controversial. I will argue that that fact is no reason to reject the model of rules, because controversy over the application of social rules in particular cases is very common, and can be deep. Dworkin rejects that view, and I will propose reasons to disagree with him.

## 1. What makes rules valid?

Dworkin first expressed his theory of law in the essays “The Model of Rules” and “Hard Cases”, published in *Taking Rights Seriously*.<sup>1</sup> His purpose was to give an account of the role of principles in legal reasoning. Those essays contrast principles with rules, but do not state very clearly what rules are. Their two salient features seem to be the features that generate the first two puzzles I have mentioned: that rules are made valid by acts of officials, and that they apply in an 'all-or-nothing' way.

On reading *Taking Rights Seriously*, it would be understandable if a student came to think that Dworkin took the following view:

***The rules-plus-principles view:***

The law of a community at any time includes rules laid down by acts of political authority, as H.L.A.Hart held. Those rules can be identified as valid rules of law by the application of criteria provided by rules of recognition. But there is more to

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<sup>1</sup> Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977). I will refer to *Taking Rights Seriously* by page numbers in the text.

law than rules: there are also principles. Principles are not laid down by acts of political authority, but are to be identified by judgments of justice and fairness that fit and justify such political acts. Rules decide “easy cases”; principles decide “hard cases”.<sup>2</sup> So principles fill the gaps in a system of rules. Hart’s doctrines of (1) judicial discretion and (2) the separation of law and morality fail because there are such standards; Hart’s doctrine of (3) a rule of recognition fails in part because it provides criteria for identifying rules, but not principles.

That would underestimate the depth of Dworkin’s disagreement with Hart, and would obscure the radical force of his theory. Yet readers such as Hart have viewed Dworkin’s work in that way.<sup>3</sup> And various statements in Dworkin’s essays encourage it. He talks as if rules are made valid by acts of authority, and principles are identified by finding a theory that fits the rules:

...we can sometimes demonstrate the validity of a rule by locating it in an act of Congress or in the opinion of an authoritative court. (35)

...a principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question. (67)<sup>4</sup>

The suggestion in these statements, and others, is that rules are valid if they meet tests of ‘pedigree’, and principles are identified by moral judgments that fit the rules. So Dworkin writes that ‘...positivism ...mistakes part of the concept [of law] for the whole’ (47).

But that cannot have been Dworkin’s view. If we agree with his theory, we will conclude that the model of rules does not rightly explain even a little bit of the concept of law. That is the conclusion of *Law’s Empire*,<sup>5</sup> which presents an ‘interpretive’ theory of law. According to that theory, no statement of law is true simply because it reports the conventional significance of actions accepted as exercises of law-making authority. A statement of law is true if it follows from the interpretation of the whole legal history of the community that best fits and justifies that history. ‘[N]o paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake’ (*Law’s Empire* 72).

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<sup>2</sup> A ‘hard case’ arises ‘when no settled rule dictates a decision either way’ (83).

<sup>3</sup> See Hart’s statement of Dworkin’s views in *Essays on Bentham* (Oxford: Clarendon Press, 1982) pp. 148-9: ‘[The] settled part of the law includes the mass of constitutional law, statutes, and precedents under which individuals have already been treated as having legal rights and duties. This is the explicit law; but for Dworkin it does not constitute the whole law, for besides the explicit law, there is, so Dworkin claims, the implicit law which consists of the set of coherent and consistent principles which both explain and morally justify the explicit law.... The implicit law is a reservoir of principles presupposed by but wider than the explicit law, which will serve to yield a unique decision in all cases left indeterminate or partially unregulated by the explicit law.’

<sup>4</sup> Cf. also: ‘a legal obligation might be imposed by a constellation of principles as well as by an established rule’ (44).

<sup>5</sup> Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986).

Did Dworkin *abandon* the rules-plus-principles view when he adopted the interpretive theory in *Law's Empire*? I think that we should say, "no". But my purpose in asking is not to investigate Dworkin's intellectual biography. Indeed, for all I know, he may have held the rules-plus-principles view, and then changed his mind. I want to understand what he wrote in *Taking Rights Seriously*. And I think that the best way to reconcile the various remarks he makes is to conclude that Dworkin never endorsed the rules-plus-principles view.<sup>6</sup> The reasons are evident in the claims he makes about rules in the early essays. First, rules apply in an all-or-nothing way, and cannot conflict. So when two purported rules conflict, Dworkin says that we must appeal to 'considerations beyond the rules themselves' (27) to decide which is invalid. More generally, Dworkin holds that the validity of a rule depends on principles. An assertion that a rule is valid implies that the rule is 'supported by principles the court is not free to disregard, and which are collectively more weighty than other principles that argue for a change' (38). We might say that, in Dworkin's theory, *purported* rules have sources, but the validity of a rule is a matter of principle:

**The validity of rules depends on principles:** The claim that a valid rule exists needs support from arguments of principle.

As Dworkin puts it, 'no rules, or very few rules, can be said to be binding' (37), unless principles are binding.<sup>7</sup> What really kills the model of rules in Dworkin's theory is not the proposition that there are some legal standards not identifiable by reference to a rule of recognition, but the proposition that *all* legal standards depend on standards that are not identifiable by reference to a rule of recognition.

If rules depend on principles, what should we make of the suggestions that rules are made valid by tests of pedigree? Perhaps the answer is that Dworkin was not particularly interested in the questions of whether there are any rules of law, and if there are, what makes them valid. His goal in those essays was to oppose what he called 'positivism' or 'the model of rules'.<sup>8</sup> In the view that Dworkin attacks, judges are either following rules, or they are making up a new resolution for a case instead of giving effect to legal rights and obligations. Dworkin's chief aim was to show that judges can give effect to rights even when the case has no uncontroversial resolution. He was arguing against someone

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<sup>6</sup> 'My point is not that 'the law' contains a fixed number of standards, some of which are rules and others principles.... My point was rather that an accurate summary of the considerations lawyers must take into account, in deciding a particular issue of legal rights and duties, would include propositions having the form and force of principles....' (76) Cf. this statement in 'Reply to Critics', in *Taking Rights Seriously* (344): I did not mean, in rejecting the idea that law is a system of rules, to replace that idea with the idea that law is a system of rules and principles.'

<sup>7</sup> And see the argument at (43) that '*rules* like those announced for the first time in *Riggs* and *Henningsen* owe their force at least in part to the authority of principles and policies, and so not entirely to the rule of recognition.'

<sup>8</sup> The model of rules is the 'skeleton' of the position that Dworkin calls 'positivism'. 'Positivism' is an unfortunate term because, if there is any such thing as legal positivism, it is not entailed by an acceptance of the model of rules. Imagine someone who accepts the model of rules, and thinks that there is moral value in having such a form of social regulation, and that people have a *prima facie* moral obligation to obey the rules. Such a person would reject the 'separation thesis' that is the stock in trade of people who have called themselves 'legal positivists'.

who *agrees* that courts can give effect to legal rights in 'easy' (i.e., uncontroversial) cases, so he was not concerned to address the nature of legal rights in easy cases.

Dworkin writes as if easy cases were uncontroversial cases decided by rules, and hard cases were controversial cases decided by principles. But it is important for his theory that his explanation of legal rights in easy cases is fundamentally different from the model-of-rules explanation. The question 'what gives one party a right in an easy case?' is to be answered in just the *same* way as the question 'what gives one party a right in a hard case?'<sup>9</sup> He had not developed his interpretive theory when he wrote those essays, but the best way to interpret *Taking Rights Seriously* is to say that it is consistent with the interpretive theory—and that the interpretive theory is an elaboration of the views expressed in *Taking Rights Seriously*. Indeed, in describing the task of the ideal judge, 'Hercules', Dworkin comes close to stating the interpretive theory:

He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well. (116-7)

Given Hercules' task (which is to identify the parties' legal rights and duties), that is an explanation of the nature of law. It is an explanation that is consistent with the interpretive theory, which holds that precedents and statutory provisions do not make law; the law is the best constructive interpretation of those (and other) facts. Dworkin could have said more clearly that no rule is valid simply because it is identified by criteria provided by a rule of recognition, but I think that conclusion follows from the relation he alleges between principles and rules.

Is a rule a standard that is valid merely because it was laid down by an authority in the exercise of a law-making power that the community accepts the authority as having? Then according to Dworkin's theory, there are no rules.

## 2. The absolute force of rules

Rules 'dictate results, come what may' (35); their consequences follow 'automatically when the conditions are met' (25). They are 'absolute' (27) in the sense that nothing can weigh against the outcome they prescribe, when the conditions that they set are met.

If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supports must be accepted, or it is not, in which case it contributes nothing to the decision. (24)

This feature distinguishes rules from principles, which are not all-or-nothing, but have 'weight', so that they can be balanced against other principles in deciding a case.

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<sup>9</sup> That view becomes explicit in *Law's Empire* (see pp.353-354).

Dworkin calls this a ‘logical distinction’, by which he means that rules and principles support conclusions of law in different ways: a valid rule answers a question of law conclusively; a principle supports (more or less strongly) an answer to a question.

It seems that the requirement that cars stop at red lights in England is not a rule. There are certainly considerations that ‘argue in favour’ of liability to a penalty when you run a red light. But there is no *absolute* standard, if it is lawful to go through a red light not only when there is an exception to the rule,<sup>10</sup> but also in the emergency situations I mentioned at the beginning of this essay.

If the red light rule is not a rule, are there any rules? Dworkin talks as if there were. His examples of rules include the following:

In easy cases (when a man is charged with violating a statute that forbids driving over sixty miles an hour, for example) it seems right to say that the judge is simply applying a prior rule to a new case. (4)

...the rule that a will is invalid unless signed by three witnesses... If the requirement of three witnesses is a valid legal rule, then it cannot be that a will has been signed by two witnesses and is valid. (25)

For these purported rules, I think we can imagine counter-instances like the counter-instances to the red light rule. A court might hold someone not to have violated the law by driving over 60 when his speedometer is faulty, even if there is no established requirement of intention.

And consider the rule about wills, which refers to the much-discussed case of *Riggs v. Palmer*. Elmer Palmer poisoned his grandfather Frank Palmer. Frank had written a will leaving his farm to Elmer, and Elmer killed him because he was afraid that Frank would change his will. Elmer was sentenced for murder, but he claimed the farm. The issue before the New York Court of Appeals was simply ‘can he have it?’<sup>11</sup> The court said ‘no’, even though there was nothing wrong with the will.

Suppose that instead of shooting Frank, Elmer had shot one of the witnesses to stop him from signing Frank’s new will—and then Frank had died before another witness could be found. A court might treat the new will as valid for reasons similar to the reasons in *Riggs v. Palmer*.

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<sup>10</sup> Note that Dworkin claims that rules may have exceptions, but exceptions can be listed—unlike the ‘numberless imaginary cases in which we know that a principle would not hold’ (25). The requirement that drivers stop at a red light is subject to an exception in jurisdictions (e.g. Ontario) that allow a near-side turn on red. I will not discuss Dworkin’s remarks on exceptions to rules. My argument is that such legal standards are not ‘rules’ in Dworkin’s sense because they are not only occasionally subject to exceptions in Dworkin’s sense, but are typically subject to ‘numberless imaginary’ counterinstances.

<sup>11</sup> *Riggs v. Palmer* 22 N.E. 188 (1889) at p.189.

If these purported ‘rules’ and the purported red light ‘rule’ are not actually all-or-nothing standards, it is tempting to say simply that there is really no logical distinction between rules and principles. That is what Hart says in reply to Dworkin. According to Hart, the rule in *Riggs* lost out in a competition with a principle, and that shows that rules have weight too.<sup>12</sup> But I think it is better to say that Dworkin’s theory leads to the following view: if the court in *Riggs* decided the case rightly, that is because there *was no* rule that the person named as beneficiary in a will shall receive the legacy.

This line of thinking threatens to abolish legal rules: it seems that there are none. Is there any way for Dworkin to take a less surprising view? Here is one possibility:

***Rules of law are rules of thumb:*** They are absolute standards, which courts will apply when there are no reasons of principle against doing so. But courts may have reasons of principle not to apply such absolute standards in a particular case.

That view would not accord rules the force that Dworkin accords them—it would not accord them the force of legal standards. We can see this point, from his discussion of a purported rule against enforcement of contracts imposing an unreasonable restraint on trade. If there is such a rule, then ‘Enforcing these contracts would be forbidden by our rules, and thus permitted only if these rules were abandoned and modified’. (28) So rules of law, if there are any, cannot be ignored; they determine people’s rights and duties. But the passage suggests that rules might be *changed* for reasons of principle: is that a potential Dworkinian view?

***The changeable rules view:*** There are rules, but they can be changed by a court on the ground that arguments of principle require a change. A court can also make new rules, for reasons of principle. Rules are absolute standards, but courts can create them or repeal them for reasons of principle.

There are suggestions that Dworkin takes this view:

After the case is decided, we may say that the case stands for a particular rule (e.g., the rule that one who murders is not eligible to take under the will of his victim). But the rule did not exist before the case is decided; the court cites principles as its justification for adopting and applying a new rule. (28)<sup>13</sup>

Suppose a court decides to overrule an established common law rule that there can be no legal liability for negligent misstatements. (77)

But I think that the changeable rules view would be inconsistent with Dworkin’s theory, for the reason that I suggested in the discussion of *Riggs v. Palmer*. If there are reasons of principle not to hold a standard to be absolute, then Hercules would not find that a rule needs changing; he would find no rule.

<sup>12</sup> *The Concept of Law* (2<sup>nd</sup> ed., Oxford: Clarendon Press, 1994), ‘Postscript’ at 262.

<sup>13</sup> Cf.: ‘rules like those announced for the first time in *Riggs* and *Henningsen*’ (43).

Suppose that a rule of law requires that a person named as beneficiary in a will shall receive the legacy if the will is signed by three witnesses. That means that, if you are named in such a will, the outcome prescribed by the rule follows automatically. You have a legal right to the legacy (in the sense that it would be wrong for a judge not to order that you receive the legacy). For the rule to be a rule means that its result follows automatically; for the rule to be a legal standard means that its result is to identify legal rights and duties. Then it would be contrary to Dworkin's 'rights thesis' (the claim that the task of a judge is to give effect to the legal rights of the parties), to say that judges can either 'overrule an established rule', or 'adopt and apply a new rule'. Can there be a rule that has not yet been overruled, but that ought, legally, to be overruled for reasons of principle? No, because that 'rule' is not a legal standard. It is not a reason which points to one decision; it is invalid.

So on Dworkin's theory, if the court in *Riggs* decided correctly, it did not change a rule; it held that there *was no* such rule. Did it *create* a *new* rule that a murderer could not inherit from his victim? Suppose that a new case ('*Riggs 2*') came to court a month after *Riggs*, with identical facts. What considerations would decide *Riggs 2*? Not, I think, the fact that the court had laid down a standard in *Riggs*. The case would be decided on the ground (if it is the case) that there are no reasons of principle for departure from *Riggs*.

Is a rule a standard whose consequences follow automatically when the conditions are met? Then there are no rules. There are rule-formulations, and purported rules, but there are no rules. Or at least, we might say, there are no rules imposing obligations, disabilities, liabilities or other burdens on individuals. I do not want to suggest that there are no absolute legal standards. There are absolute standards in English law, such as the norm that no one is to be convicted of a criminal offence except on proof beyond a reasonable doubt. But such standards do not seem to fit the picture of rules that Dworkin paints in *Taking Rights Seriously*. They are absolute because arguments of principle support the claim that nothing can weigh against the outcome prescribed. They are absolute because nothing weighs against them. Perhaps the only absolute standards are unopposed principles.

What are the implications of this argument?

(1) First, we can see that there is a puzzle in *Taking Rights Seriously*, concerning the status of purported rules. What is the status of the proposition that a will is valid if it is signed by three witnesses? That was not a rule of New York law, if the decision in *Riggs* was right. It may seem to be a principle, because it does not decide the case, but it survives to decide other cases in which the countervailing principles in *Riggs* do not apply (or do not weigh as heavily). But it cannot be a principle, because its legal force seems to derive from its enactment by a legislature in a statute (or if its force does not *derive from* that act, it seems at least to have a relation to that act that principles do not have to any one of the various events that give them 'institutional support'). *Taking Rights Seriously* does not offer any category of legal standard into which we could fit standards such as the requirement that drivers stop at red lights.

In itself, I do not see any reason to think that this puzzle represents a flaw in Dworkin's theory. I think that we should simply say that Dworkin's technical apparatus was not fully elaborated in *Taking Rights Seriously*. Perhaps we could say that rules *are* legal standards, *if* there are any. But what Dworkin often calls 'established rules' are *prima facie* rules, and the conclusive validity of a rule depends on principles. In any case, the technical apparatus of *Law's Empire* fills the gap in Dworkin's theory: we can say that established rules are 'paradigms of law' (*Law's Empire* 72), or 'law in the preinterpretive sense' (*Law's Empire* 65-66). They are not legal standards at all: they are part of the material which any interpretation must fit. They do not impose duties on judges just by virtue of the fact of their enactment, or the fact that they are accepted as binding.

(2) We might be tempted to say that the argument shows that Dworkin's theory is a bad theory because a good theory has to fit legal practice, and lawyers commonly speak of 'rules' of law. But that would be hasty. Dworkin's theory can explain that talk, by saying that those lawyers and judges do not use the term 'rule' in the sense that he gives it—the sense that, in his view, the model of rules assigns to that term. Compare the fact that lawyers and judges often talk of decisions as being justified on 'policy' grounds: that fact does not defeat Dworkin's claim that judges generally ought to decide on grounds of principle and not on grounds of policy, because Dworkin can interpret the alleged 'policy' grounds as based on arguments of principle, and explain that the policy grounds that he opposes are advocated by a jurisprudential theory that he is attacking.

(3) We should see one very important feature of Dworkin's account of rules: I will call it his 'controversy argument'. The controversy argument is the claim that the model of rules is untenable because it cannot account for controversy about legal rights and duties. It holds that the model of rules pictures law as uncontroversial, and points out that lawyers and judges commonly disagree about legal rights and duties. That argument is a strand that runs through all of Dworkin's work, and it deserves careful attention.

### **The controversy argument**

The controversy argument has often captivated Dworkin. In his debate with Joseph Raz about the nature of rules and principles, Dworkin claimed that Raz 'argues from the fact that judges may disagree about principles, ...to the conclusion that judges must have discretion'.<sup>14</sup> In fact, there is no trace of such argument in Raz's work. It seems that Dworkin thought that Raz just *must* have meant that the application of source-based rules is uncontroversial.

Dworkin's captivation with the controversy argument reappears in his work on the right answer thesis: he concludes that 'the popular idea, that some legal questions have no right answer because legal language is sometimes vague, does not depend on any argument from vagueness after all, but rather on the different argument, which I describe later, that there can be no right answer to a legal question when reasonable lawyers disagree about

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<sup>14</sup> *Taking Rights Seriously* p.70-71.

what the right answer is.<sup>15</sup> I think that the view that disagreement implies that there is no right answer would be spurious. Elsewhere, I have argued that some legal questions have no right answer because of vagueness—but the argument does not rely in any way on the spurious view that there is no right answer to controversial questions.<sup>16</sup> Questions to which there is no right answer are not the same as controversial questions.

The link between the controversy argument and the account of rules in *Taking Rights Seriously* should be apparent: Dworkin thinks that the model of rules views rules as (i) identifiable by reference to social facts, and (ii) absolute. If rules are like that, and if there is nothing more to law than rules, then there can be no controversy about the law, if we all know the social facts: those facts tell us what the law is in absolute terms that do not allow for controversy. This argument against the model of rules is the precursor of Dworkin's fullest elaboration of the controversy argument: the 'semantic sting' argument in *Law's Empire*. The semantic sting is the misconception that people share criteria (which are made determinative by a semantic rule for the use of the word 'law') for identifying the law. If you suffer from the semantic sting, you have to think that there can be no genuine disagreement about what the law is.<sup>17</sup>

I think that the controversy argument includes two insights that represent major contributions that Dworkin has made to legal philosophy: one is that there can be significant, deep controversy about what legal rights and duties people have (not merely over what legal rights and duties people ought to have); the second is that the fact of disagreement does not entail that no one is right. But Dworkin has drawn conclusions from those insights that are unsupported: contrary to his suggestions, his second insight about controversy provides *no* support for his right answer thesis (though it refutes certain misguided objections to that thesis). And I will argue that, contrary to his suggestions, the first insight does not undermine the model of rules.

In Section 3, I will use the *Riggs* case to explain the challenge that the controversy argument poses for the model of rules. I think Dworkin is right to claim that that model fails unless it can explain the possibility of disagreements such as the disagreement between the majority and the dissent in that case. In Section 4, I will offer a way in which the model of rules can meet that challenge, by addressing Dworkin's claim in *Taking Rights Seriously* that there is no controversy as to the application of *social* rules (a claim which, on Dworkin's theory, makes the idea of rules of recognition incoherent, and makes it impossible for the model of rules to explain the disagreement in the *Riggs* case).

Note that to this point I have tried to use the term 'rule' in Dworkin's sense. Viewing the law of a community as a system of rules makes no sense if we use the term in that sense. In the rest of this essay I will no longer use the term 'rule' in that sense. Part of the tenor of Dworkin's essays (and of *Law's Empire*) is that no account of rules can be given that

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<sup>15</sup> *A Matter of Principle* (Oxford: Clarendon Press, 1986), p.131.

<sup>16</sup> *Vagueness in Law* (forthcoming, Clarendon Press, 2000).

<sup>17</sup> For a discussion of the semantic sting argument see Endicott, 'Herbert Hart and the Semantic Sting' (1998), 4 *Legal Theory* 283-300.

would support a non-interpretive theory of law; I want to suggest reasons to think that such an account is possible.

### 3. Disagreement in *Riggs v. Palmer*

Dworkin's discussion of the *Riggs* case hints that the model of rules cannot give a decent account of the court's decision. What explanation of *Riggs* does Dworkin ascribe to the model of rules? In *Taking Rights Seriously*, he only points out that the majority appealed to principles, and argues that the model of rules cannot adequately account for that form of reasoning. But he does not say how you might explain *Riggs* if you accepted the model of rules.

In *Law's Empire*, Dworkin ascribes the following account of cases like *Riggs* to 'positivism' (which he still associates with the model of rules):

In these cases past legal institutions had not expressly decided the issue either way, so lawyers using the word "law" properly according to positivism would have agreed there was no law to discover. Their disagreement must therefore have been disguised argument about what the law should be. (*LE* 37)

This putative 'positivist' view prepares the ground for Dworkin's argument that people like Hart suffer from a semantic sting. But why should someone who accepts the model of rules take the view that there was 'no law to discover' in *Riggs*? The majority judgment offers several overlapping justifications for the decision, all of which are compatible with the model of rules.<sup>18</sup> And, of course, it would be compatible with the model of rules to say that the Court of Appeals simply did not apply the law. The model of rules need not say that judges always apply (or that they always ought to apply) the law. But the notion that the Court of Appeals did not apply the law is only one possibility. Consider the following two explanations of the decision, both of which are consistent with the model of rules:

(1) The rules of recognition in New York State gave judges an equitable jurisdiction—a power to depart from the letter of statutes on grounds of conscience. The Court of Appeals exercised that dispensing power. [This is one of the several justifications that Earl J offered for the decision.<sup>19</sup>]

(2) The rules of recognition in New York State gave the legislature power to make law, and gave the court no equitable power to interfere with the application of statutes. The legislature had enacted that wills should be valid if executed in the way in which Frank Palmer executed his will; so the Court of Appeals abandoned

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<sup>18</sup> I think, for example, that it would be compatible with the model of rules to explain the case in a way rather similar to Dworkin, as decided by a legal principle that people should not benefit from their own wrongdoing. I will not support this claim here, because I have no room for the discussion of the nature of legal principles that would be needed.

<sup>19</sup> *Riggs v. Palmer* 22 N.E. 188 (1889) at p.190.

the law. [This was the view of Justice Gray: ‘We are bound by the rigid rules of law.’<sup>20</sup>]

We should reject Dworkin’s attack on the model of rules, if the model of rules can explain a disagreement about which of these (or other) views is right. Why? Dworkin’s chief attack on the model of rules, I have argued, is that it wrongly views legal rights and obligations as uncontroversial. Dworkin’s controversy argument raises a very important challenge to jurisprudence, by pointing out that any legal theory needs to account for disagreement about the law. In my view, a coherent version of the model of rules must meet this test: it must account for rules in a way that makes it possible for judges (and others) to be in doubt and to disagree about what a rule requires in a case. Dworkin’s attack fails if the model of rules can account for controversy.

Consider the disagreement between Gray J and Earl J in *Riggs*, simplified to say that the disagreement is between explanations (1) and (2), above (in fact, Earl J offered many different reasons). Dworkin’s controversy argument can say that the model of rules can explain the disagreement between those two judges, but only on the basis that at least one of them did not know the facts of their own legal history. In Dworkin’s view, the model of rules has to claim that the disagreement turns on facts which are uncontroversial. The model of rules can only allow for *empirical* disagreement between Earl J and Gray J (or for surreptitious disagreement about whether the law ought to be changed). But, although neither judge knew the entire legal history of New York, it is preposterous to suggest that it was ignorance of facts about that history that led to such deeply opposed views of what gives someone a legal right or duty. The model of rules fails unless it can explain the following sort of disagreement:

- (i) You and I disagree about which is the best account of the decision in *Riggs*,
- (ii) We both know all the relevant facts, including the facts of the case and the facts of legal history.

In fact, I think that test can be met. The model of rules can survive, however, only on the basis of a different understanding of rules from that offered in *Taking Rights Seriously*.

I will argue that it would be consistent with the model of rules to say that which account of the decision is best depends on potentially controversial questions of the requirements of the conventions of New York judges.

#### **4. How the model of rules can account for disagreement: the incompleteness of social rules**

Dworkin’s controversy argument presents a simple and ostensibly fatal objection to the model of rules. It runs as follows. The model of rules depends on the notion that the legal

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<sup>20</sup> *Riggs* at p.191

duties of judges (and presumably of other officials) are imposed on them by social rules—that is, by rules whose demands are determined by a social practice. But this theory is inadequate: ‘it cannot explain the fact that even when people count a social practice as a necessary part of the grounds for asserting some duty, they may still disagree about the scope of that duty’ (54).

We can illustrate with the example that Hart and Dworkin use: suppose that adult men take off their hats in a church, and accept that behaviour as obligatory. Hart wants to say that the behaviour comprises a social rule. But Dworkin supposes that participants in the practice do not agree about whether parents must remove their baby boys’ bonnets. We might want to say that the application of the rule is uncertain. But Dworkin says that that would ‘violate the thesis that social rules are constituted by behavior’ (54). The social rule cannot be uncertain, if we know what the behaviour of the community is. When we know that the participants in the practice disagree, we know that there is no social rule. It is ‘certain that no social rule exists on the issue of babies at all’ (55).

Dworkin’s conclusion is that there can be no controversy over the application of social rules. That conclusion would be fatal to the model of rules, because judicial duties can be controversial. The social rule theory can only apply to uncontroversial rules like chess rules. Dworkin concludes that ‘It simply does not fit the concept of a social rule, as Hart uses that concept, to say that a social rule may be uncertain’ (62). Hart himself, of course, states that the requirements of a rule of recognition may be uncertain on some points,<sup>21</sup> but Dworkin’s theory implies that that is an incoherence in Hart’s account. A social rule *cannot* be uncertain, because its requirements are determined by a practice. As soon as there is no unanimous practice, there is no rule.

I do not mean to defend Hart’s account of social rules. Hart himself came to see some problems with it,<sup>22</sup> but he never admitted the most serious problem—his attempt to explain the normativity of such rules merely by reporting the attitude of the participants in a practice.<sup>23</sup>

I do wish to challenge Dworkin’s notion that the duties imposed by a social rule cannot be controversial.

### ***Social rules***

For a community to have a social rule is for it to use a regularity of behaviour as a norm—as a guide to behaviour. Social rules can be complex and subtle, and their requirements can depend on context in complex and subtle ways. Moreover, it can be difficult to distinguish between social rules and the requirements of morality. There are all sorts of things that members of a community would never think of doing, and that

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<sup>21</sup> See e.g. *ib.*, p.258.

<sup>22</sup> See Hart’s ‘Postscript’, *ib.*, pp.254ff.

<sup>23</sup> For a clear statement of the theory see *ib.* p.255.

would provoke hostility if someone were mad enough to try them—yet it may be unclear whether to say that those things are prohibited by a social rule.

Is there a social rule against shouting in an ordinary conversation? If the members of a community tend not to do so, perhaps they are not following a social rule, but simply tend (in this respect) to act decently. Or perhaps they are following a social rule that prohibits something that would be wrong even without the rule.

Perhaps we can say that there is a social rule when the regularity is itself treated as a reason for the conduct in question (when the regularity defines good behaviour, rather than merely reflecting a regular tendency to behave well).<sup>24</sup> Suppose that in Singapore, and not in Switzerland, people regularly take off their shoes when they enter someone else's house. Are Singaporeans simply more considerate (or fussier) than the Swiss? It may be better to say that acting considerately requires taking off your shoes in Singapore, but not in Switzerland (or that it is fussy to take off your shoes in Switzerland, but not in Singapore)—because taking off your shoes is required by a social rule in Singapore. But I do not mean to say that that is obviously the case. The question is complicated in at least three ways:

(1) The Singaporeans we have imagined might conceive of themselves as acting for background moral reasons. Perhaps a social rule exists when, from the point of view of the members of the community, the regularity *is* a reason, even if the members of the community think of something else as a conclusive reason. The notion of something being a reason from the point of view of people who think they are acting on some other reason may seem puzzling. But to think of an example we only have to think of an instance of behaviour that is clearly governed by a social rule, even if the participants in the custom think that they behave alike because they happen to concur in wisdom, or decency, or *elan*.<sup>25</sup>

(2) It is the attitudes, views, and responses of members of the community that make a regularity of behaviour into a social rule; there is a vast multiplicity of forms and intensities of such attitudes, views, and responses. And there is no clear answer to the question of what form, intensity, and consistency of attitudes, views and responses it takes to distinguish a social rule from a mere regularity of behaviour with no normative force. We might say, again, that all it takes is that the members of the community treat the regularity as a guide to behaviour. This account does nothing to diminish the unclarity. But that is a virtue, because the unclarity is a genuine feature of some rule-governed behaviour.

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<sup>24</sup> Cf. Hart (*CL* 255-6) and Dworkin (*Taking Rights Seriously* 53ff., *LE* 145), and Raz's distinction between acting on a general reason and following a rule (*Practical Reason and Norms* (Princeton: Princeton University Press, 1990), p.57).

<sup>25</sup> Picture any peculiar custom that has no point except to dramatise a distinction between people (such as lawyers wearing wigs), and you have an example of a social rule—a practice in which the regularity functions as a reason for behaviour, even if participants in the practice think of themselves as acting on other reasons.

(3) We can certainly say that there is a social rule when there would be no reason to act in a certain way, if other people were not doing so; but what counts as a social rule requiring you to do what you have other reasons (even conclusive reasons) for doing? The answer, again, seems to be the community's use of the regularity of behaviour as a reason in itself.

The use of a regularity as a reason for action is a feature of social rules that survives the complications and uncertainties that accompany an attempt to give an account of social rules.

Imagine a simple, precise social rule, requiring workers to stop work when the 5 o'clock bell rings. We can say that the requirements of the rule supervene on the behaviour of the members of the community. The requirements of the rule can change only if the behaviour changes. But we have not yet said enough about the connection between the behaviour of the members of the community, and the requirements of the rule. We can also say that the people treat the regularity of conduct in their community as a reason to stop work. We can put it that the rule consists in the way they treat that regularity. There is no social rule if they all stop work at the same time merely for some other reason (e.g. if they do so to comply with an agreement with their employer, or because they want to work as long as they can and still catch a train that leaves just after 5). The regularity of behaviour is the fact that they tend to stop work when the bell rings,<sup>26</sup> and the norm is the use of the regularity of behaviour as a reason to stop when the bell rings. The regularity of behaviour must be capable of being used as a standard by which to guide or evaluate conduct. And the use of a regularity to guide or to evaluate conduct is what makes a social rule. There is nothing more to a social rule, though there is more to questions such as whether it should be followed.

On this understanding of the nature of a social rule, Dworkin's controversy argument misunderstands social rules. There is no reason to assume that the behaviour that the rule requires is identical to the behaviour concerning which the members of the community take a unanimous view. Does the hat rule determine whether babies ought to wear bonnets in church? That is a question of whether the regularity in question (the regular behaviour of adult men in removing their hats) gives a reason for parents to take off their babies' bonnets. And on that question—the very question of what the rule requires—reasonable participants in the practice might well disagree. So the view that, e.g., the rule about hats in church is uncertain with regard to whether babies ought to wear bonnets, does not 'violate the thesis that social rules are constituted by behavior' (54), because the question in applying the rule to a baby boy is a question of whether the similarities between the baby and the men to whom the rule clearly applies are sufficient to warrant applying the rule.

Dworkin's controversy argument would work if a social rule required, in each case, just what everyone says that it requires. Then there would be no rule, as Dworkin suggests, when there is any controversy about an application of the rule. But a social rule requires,

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<sup>26</sup> It would be more complete to say that the regularity of behaviour is a complex variety of related regularities of behaviour including regularities of action, criticism, self-justification....

instead, that the regularity of use should be treated as a reason for behaviour in the case in question. It does not require that the regularity should provide a complete guide to all behaviour.<sup>27</sup> Certainly there is no reason to think that the regularity of adult men taking off their hats in church provides a regularity which can be used to decide every question of how the standard is to be applied in a case. It may be very uncertain and controversial whether a regularity of behaviour, which very clearly governs one case, also provides a norm for guidance in another case which is similar in some ways and different in other ways.<sup>28</sup>

This view of social rules explains the dispute between Gray J and Earl J in a way that is consistent with the model of rules. The legal history of New York included facts such as the following (and they are, indeed, facts that Earl J either mentions or relies on implicitly): that it was a practice of the New York courts, inherited from the courts of England, to accept that judges have power in equity to prevent a party from relying on certain legal rights on grounds of conscience; that that practice had not in recent times been applied to the operation of statutes, although many people familiar with the law had said at various earlier times that it could so operate.

Assume only those facts (and actually Earl J and Gray J had much more complex knowledge of the facts of legal history, some of it stated in their reasons and some of it unstated). Then consider that on the basis of those agreed facts, two reasonable people could easily disagree over the crucial question: were the similarities between the other legal doctrines affected by the operation of equity, and the statutory regulation of wills, sufficient to warrant the operation of equity in *Riggs*—or did statute operate in New York in 1889 in a way that was immune from the operation of equity?

Since reasonable people can disagree in that way, the model of rules can explain controversy. But it can only do so if it rejects the notion that rules of law are like chess rules; the application of rules of law very frequently demands evaluative judgments of the sufficiency of similarities that are akin to analogical argument.

One potential Dworkinian response would be to say that, once social rules are understood in this way, there are no rules of *recognition*. The alleged social rules require judges to give effect to statute, but *either* give them an equitable dispensing power *or not*, depending on the best view of whether the conventions that give the judges equitable jurisdiction extend to the operation of statutes. And *that*, Dworkin might say, is not a rule of recognition, because it does not provide a shared way of identifying legal rights and duties and powers—it does not provide complete criteria for the identification of the law.

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<sup>27</sup> Hart makes a similar point in defence of his notion that rules of recognition may be incomplete: see *The Concept of Law*, Postscript, p.258. For a discussion of incomplete rules, see Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements', *Oxford Essays in Jurisprudence, Fourth Series*, Jeremy Horder, ed. (Oxford University Press, 2000).

<sup>28</sup> For other arguments in favour of the view that the requirements of social rules in particular cases can be controversial, see Joseph Raz, 'Two Views of the Nature of the Theory of Law' (1998), 4 *Legal Theory* 249-282.

That response fails, because the model of rules does not entail any claim that the law provides complete criteria for its own identification. Of course, law is not law if it provides *no* guide to its own identification. A good elaboration of the model of rules would say that if judges have discretion to decide any case in any way they like, then they are bound by no rules, and in a sense there is no law in such a system (aside from the rules that give judges that power). Such an elaboration could also point out the important differences between such an imaginary system and any ordinary legal system, in which judges have some widespread discretions, and yet are constrained by rules that control their decisions in very important ways.

The model of rules should not say that law is completely determinate, or that it is completely uncontroversial. It was controversial whether judges had the dispensing power that the majority claimed in *Riggs*. That does not mean that there were no rules of recognition in New York State, because the conventions of the judges clearly gave the courts equitable jurisdiction in some cases (in ways that no Justice Gray would deny). And those conventions clearly denied the courts equitable jurisdiction in most ordinary questions of the effect of statutes (in ways that no Justice Earl would deny). But there was certainly a serious disagreement in *Riggs* about the requirements of the law. And if the majority was right, the judges had a potentially far-reaching discretion over rights and duties. Widespread discretion is compatible with the notion that the law of a community is a system of rules. Widespread, deep controversy is also compatible with that notion.

## 5. Conclusion

Does this approach to social rules amount to capitulating to Dworkin's theory? In saying that there are generally no 'absolute' legal standards, I may seem to have admitted that the model of rules is indefensible, and to have accepted Dworkin's theory. In fact, I think that I have only rejected a non-Dworkinian position which is incoherent, and which no one I know of has ever held: it is the position that all legal standards are like chess rules. Perhaps we should read *Taking Rights Seriously* as claiming that there *is no* coherent non-Dworkinian position, and that all legal philosophers are best viewed as adopting Dworkin's theory of law, and differing on how to carry out Hercules' task. That is the attitude of *Law's Empire*: the 'semantic sting' is so disabling, that the only charitable thing to do with a theory like Hart's is to rework it as an interpretive theory—a theory that discloses what Hart was *really* trying to say.<sup>29</sup>

We could certainly defend the model of rules against Dworkin's arguments in a trivial way, by admitting that everything he says about law is true and offering such a flexible understanding of the notion of a 'rule' that Dworkin's theory becomes consistent with the view that the law of England is a system of rules. The question is whether we can come up with an understanding of the model of rules that (i) does not say that rules of law are

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<sup>29</sup> Hart spurns Dworkin's charity in the Postscript to *The Concept of Law*, at pp.248-250.

like chess rules, and at the same time (ii) does not simply amount to accepting Dworkin's theory of law.

Certainly a defensible elaboration of the model of rules will share some claims with Dworkin's theory—that rules of law cannot always be applied without regard to evaluative considerations, for example. But that does not mean that the model of rules must capitulate to Dworkin's theory, any more than it means that Dworkin's theory must capitulate to the model of rules. The two approaches remain distinct, because the model of rules can still claim that the content of the law of England is determined by the law-making acts of officials—it simply needs to recognize that it often takes controversial, evaluative reasoning to determine and to elaborate the law that the officials have made. And the model of rules can still reject the interpretive theory (in *Law's Empire*), and Dworkin's account of Hercules' task (in both *Taking Rights Seriously* and *Law's Empire*).