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A LAW UNTO ONESELF: PERSONAL POSITIVISM AND OUR FRAGMENTED JUDICIARY

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This Article develops a new way of understanding the law in order to address contemporary debates about judicial practice and reform. The jurisprudential theory is "personal positivism," which holds that each judge's publicly known rules of decision are the law for that jurist and, therefore, part of the overall law of the legal system. This theory offers a richer and more useful account of law in the United States today, including its dependence on the views of individual judges. Personal positivism also recognizes that the law is increasingly constituted by the views of competing groups of judges—one liberal, one conservative, and each with its own set of personal rules. At the same time, personal positivism maintains that there is an abundance of genuine law—not just politics—even in contested cases. The problem facing the U.S. legal system, then, isn't that law is being replaced with politics, but rather that the law is too fragmentary. And the solution is not to ignore or suppress judicial individuality, but to harness it.

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INTRODUCTION

What is the law of the United States? Consider the following examples, all from the Supreme Court's last Term:

- After receiving a skeptical oral argument question from Justice Thomas, advocate Paul Clement agreed that "I wouldn't be making this argument in this case to you" and pivoted to a different rationale "under your"—that is, Justice Thomas's—"jurisprudence." Clement then discussed Justice Thomas's personal views in detail, concluding: "[T]his is a case where your own jurisprudence would give you the same answer, I think, as a majority of the court . . . ."[1]
- In another oral argument, Chief Justice Roberts noted that the U.S. Solicitor General's position defied the practice of "those of us who were on the D.C. Circuit." Justice Kavanaugh agreed, responding to the idea that the U.S. Court of Appeals for the D.C. Circuit was "not paying attention to the text" by asserting: "Yeah, we did." And, when Justice Jackson expressed similar skepticism, Justice Kagan noted: "Seems to be a kind of D.C. Circuit cartel," to which Justice Jackson responded: "It is. It is."[2]
- Just a few years after affirmative action's critics became "greater now in number on the Court," six Justices held that race-conscious

[1] Transcript of Oral Argument at 32, Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022) (No. 20-1573); see also Transcript of Oral Argument at 7, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22-859) (Justice Sotomayor inviting a lawyer to address Justice Thomas's distinctive jurisprudence).

[2] Transcript of Oral Argument at 35, 55, 66, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58).

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> university admissions practices violate the Equal Protection Clause. These events, Justice Sotomayor argued in dissent, fostered "suspicions that 'bedrock principles are founded . . . in the proclivities of individuals' on this Court, not in the law."[3]

These examples may seem like aberrations, embarrassments, or worse. But they are best understood as clues. They help us to see what is normally invisible: to be a judge, particularly a Supreme Court Justice,[4] is to be a law unto oneself.[5]

To bear out that claim, this Article develops a new way of understanding the nature of law.[6] In brief, each judge's publicly known rules of decision can be viewed as the law for that jurist and, therefore, part of the overall law of the legal system.[7] This "personal positivism" differs from the canonical positivism of H.L.A. Hart because it grounds the content of the law in the potentially distinctive views of each official, rather than in a consensus practice among officials.[8] Figuratively put, the conventional view is of the law as a monolith, whereas I want to describe the law as a mosaic.

The importance of identifying the law goes far beyond jurisprudential debates. After the recent spates of judicial appointments by Presidents Trump and Biden, the U.S. legal system is newly riven by methodological and ideological disagreement.[9] There are now two distinct groups of U.S. judges, each with its own commitments, heroes, and fissures.[10] In the face

[3] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2245 (2023) (Sotomayor, J., dissenting) (alteration in original) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)); see also infra note 171 (collecting sources).

[4] Justices are distinctively situated in part because their personal rules are mostly unchecked by the rules of other jurists. See infra text accompanying note 106.

[5] Being "a law unto oneself" captures both freedom from shared principles and personal adherence to genuine rules. For the phrase's biblical origin, see Romans 2:14.

[6] See Richard M. Re, Essay, Personal Precedent at the Supreme Court, 136 Harv. L. Rev. 824, 860 & n.224 (2023) (outlining "personal positivism").

[7] Regarding my focus on judges, see infra note 37 and infra Section II.B.

[8] See H.L.A. Hart, The Concept of Law 108, 116 (2d ed. 1994). For other positivist rejections of Hart's focus on consensus, see Mitchell N. Berman, Our Principled Constitution, 166 U. Pa. L. Rev. 1325, 1348–50 (2018); infra notes 95, 104.

[9] See, e.g., Neal Devins & Allison Orr Larsen, Weaponizing En Banc, 96 N.Y.U. L. Rev. 1373, 1408 (2021) (discussing increases in partisan en banc activity).

[10] Changes at the Supreme Court have more to do with "party sorting" than "polarization," in that party affiliation perfectly tracks ideology even if the gap between left and right hasn't grown. See Daniel Hemel, Can Structural Changes Fix the Supreme Court?, 35 J. Econ. Persps. 119, 125–26 (2021); see also Adam Bonica & Maya Sen, The Judicial Tug of War:

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of that fractured reality, efforts to cast the law as shared and unitary are inapt. Yet judges and scholars persist in doing so, following a jurisprudential path that allows for grand claims but little progress.

Take any number of major decisions in recent years. When considering whether to overrule *Roe v. Wade*,[11] transform administrative law,[12] strengthen Second Amendment rights,[13] or whatever else, how do judges, advocates, and lay observers ascertain the law? Again, Hartian positivism begins by asking about consensus practices among officials.[14] But consensus practices cannot answer a host of contested questions. The upshot is that there can be almost no determinate law in contested cases. The Justices must instead be left with vast and unchanging discretion—year in and year out.[15]

But that, too, would be wrong. The Justices regularly abide by publicly known rules and so do not act like policymaking legislators. Sophisticated observers are intimately familiar with the individual records of each justice, and advocates pitch their cases accordingly.[16] Moreover, anyone familiar with the U.S. legal system understood that replacing Ruth Bader Ginsburg with Amy Coney Barrett instantly affected legal practice as well as the authority of various legal sources. In short, people unencumbered by jurisprudence routinely act as though there is a lot of determinate law, even in cases at the Supreme Court. It's just that that law is substantially personalized.

None of this is to insist that there is just one right way to understand the law or its nature.[17] Jurisprudential thinkers frequently purport to identify a "general" theory of law that assertedly applies to most or all legal systems. I adopt a more complex meta-jurisprudential stance. At the outset, I defend personal positivism as a plausible general theory of the law. And I further argue that personal positivism has significant advantages over other approaches to general jurisprudence, including Hartian positivism. At the same time, I recognize that rival theories of law

How Lawyers, Politicians, and Ideological Incentives Shape the American Judiciary 257–61 (2021) (providing evidence of federal judicial polarization).

[11] 410 U.S. 113 (1973).

[12] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

[13] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

[14] See Hart, supra note 8, at 108.

[15] See infra text accompanying notes 62, 132 (collecting sources).

[16] See Re, supra note 6, at 845.

[17] Relatedly, I sometimes offer alternative theories or backup positions. See, e.g., infra note 55 (outlining a relatively moderate "personalized positivism").

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capture different truths. The answer to the question "What is law?" should accordingly turn on the question's context and purpose.[18] In a legal system characterized by judicial uniformity, or when trying to get the gist of how a legal system operates, it could make sense to follow Hart in starting with consensus practices.[19] Today, however, the realities of the U.S. legal system make personal positivism indispensable.[20]

To see the distinctive, even urgent importance of viewing the U.S. legal system through the lens of personal positivism, consider three interrelated challenges. First is the prospect of cynicism: especially after recent decisions like *Dobbs v. Jackson Women's Health Organization*,[21] many observers have suggested that constitutional law largely amounts to politics.[22] Second is the question of reform: if constitutional law is just policymaking, then the Court as we know it should probably be scrapped—as commentators have also suggested.[23] Third is the asserted hegemony of originalism, which now guides most Justices[24]: is

[18] See infra Section I.A (adopting a pragmatic stance toward meta-jurisprudence); cf. Hart, supra note 8, at 241 (Hart describing his own and Dworkin's differing "conceptions of legal theory" as distinct "enterprises" that may not conflict).

[19] See infra text accompanying note 130. A loose analogy: Newtonian physics is fundamentally incorrect, and yet, for most people, far more useful than relativistic physics—a superior theory that is itself still incomplete.

[20] Personal positivism could be recast as a local jurisprudential theory, that is, as a contingent account of the law as it exists within a specific kind of society. Yet local and general jurisprudential claims are related: if the United States is a central instance of a legal system and Hart's account is inapt in that specific context, then so much the worse for its general jurisprudential appeal.

[21] 142 S. Ct. 2228 (2022).

[22] See, e.g., Cary C. Franklin, Religious Liberty for Some, Jotwell (Jan. 30, 2023), https://conlaw.jotwell.com/politics-all-the-way-down/ [https://perma.cc/YRL5-7HJT] (discussing religious liberty case law in terms of "the fact that it's politics all the way down" and that "the Court is engaged in a political project"); Joseph Fishkin & William E. Forbath, Make Progressive Politics Constitutional Again, Bos. Rev. (June 23, 2022), https://www.bostonreview.net/forum/make-progressive-politics-constitutional-again/ [https://perma.cc/2B99-AXHF] (discussing "the right's decisive politicization of the courts"); James F. McHugh & Lauren Stiller Rikleen, The Politicization of SCOTUS Threatens Its Legitimacy, Bloomberg L. (June 30, 2022, 4:00 AM), https://news.bloomberglaw.com/us-law-week/the-politicization-of-scotus-threatens-its-legitimacy [https://perma.cc/A5KP-M9WX] (describing "the court's transformation from the nation's most significant legal institution into a court driven by political beliefs and pre-conceived agendas"). Similar ideas of course have a deep intellectual history. See Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 5–6, 32 (1984).

[23] See infra note 204.

[24] See Henry Gass, Originalism Moves from Theory to High Court. What That Means for US., Christian Sci. Monitor (Dec. 21, 2021), https://www.csmonitor.com/USA/Justice/2021/1221/Originalism-moves-from-theory-to-high-court.-What-that-means-for-US [https://perma.

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originalism "our law," and, if so, what are its demands on conscientious legal actors?[25] Personal positivism casts each of these challenges in a new and more favorable light.

Start with the prospect of cynicism.[26] While there may be precious little consensus law in contested cases, there is a vast amount of individual and group-based law. In fact, there may be *too much* law in contested cases. The judiciary is composed of individuals who adhere to personal rules, and groups of those individuals tend to endorse convergent rule sets. The result is group-based disagreement, with relatively formalist and conservative judges ascendant.[27] Jurists today are about as rulebound as their predecessors were, if not more so. But when placed in the same judicial system, these judges' conflicting legal commitments can generate unpredictability, or worse. So the claim that there is no constitutional law, or that constitutional law is just politics, misses the real problem.

That more nuanced picture of the legal system leads naturally to the topic of reform. If the courts often aren't acting as courts at all, then it makes sense to staff the judiciary as though it were a legislature, or else disempower it.[28] But once we see that personal law exists between policy and consensus law, we can envision subtler reforms, such as creating permissions that recognize and grapple with the genuinely *legal* diversity among jurists. Rather than insist that the law exists apart from individuals and their personal commitments, the law can be crafted with those

cc/6C6X-YHWQ]; Neil S. Siegel, The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent, 126 Yale L.J.F. 164, 166 (2016) (Justice Alito calls himself a "practical originalist").

[25] Cf. William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2352 (2015).

[26] See, e.g., supra note 22.

[27] Roughly speaking, one might say that personal rules associated with the Federalist Society now form a larger and more important part of the law than the personal rules associated with the American Constitution Society. See Emma Green, How the Federalist Society Won, New Yorker (July 24, 2022), https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won [https://perma.cc/72XK-D4L9]; see also Arthur D. Hellman, The Supreme Court's Two Constitutions: A First Look at the "Reverse Polarity" Cases, 82 U. Pitt. L. Rev. 273, 274 (2020) ("It is almost as though each group of Justices has found its own copy of the Constitution . . . .").

[28] See Eric J. Segall, Supreme Myths: Why the Supreme Court Is Not a Court and Its Justices Are Not Judges 167–68 (2012); Ryan D. Doerfler & Samuel Moyn, The Constitution Is Broken and Should Not Be Reclaimed, N.Y. Times (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html [https://perma.cc/59MC-2FHH]; Nikolas Bowie & Daphna Renan, The Supreme Court Is Not Supposed to Have This Much Power, The Atlantic (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/PM3Z-7QN6].

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different individuals in mind. The point is to foster stability, compromise, and moderation, while avoiding turbulence, obstinacy, or alienation—and to do so in a more nuanced way than simply continuing to insist that one's own preferred views are correct.[29]

Part of that effort must grapple with the varied theories of constitutional law put forward by judges and scholars. Take originalism. Professors Will Baude and Steve Sachs have argued—based on Hartian positivism—that originalism is in fact the law of the United States.[30] But the positivist case for originalism starts off on the wrong foot by following Hart in seeking an abstract principle of consensus.[31] By contrast, personal positivism looks to individual jurists and so reveals not just originalism in the U.S. legal system, but also a lot of non-originalist methodology, as well as many relatively specific commitments (or "fixed points") even among originalists. Thus, originalism and other constitutional theories form only *parts of* our law, even if very important parts.[32]

I. PERSONAL RULES AS POSITIVE LAW

I begin by explaining how personal positivism both builds on, and fundamentally breaks from, the canonical positivist theory set out by Hart. The result is a theory particularly well-suited to the challenges facing the United States today.

A. Why Ask About the Law?

The law is not a self-describing entity, and it is hardly clear what it means to understand the nature of law. To illustrate, consider a simpler question: What is a house? Any given house can be described architecturally, historically, emotionally, and so forth. The White House,

[29] Cf. Stephen E. Sachs, Presidential Comm'n on the Sup. Ct. of the U.S., Closing Reflections on the Supreme Court and Constitutional Governance 2 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Sachs-Testimony.pdf [https://perma.cc/CAE8-7962] (discussing problems with the judiciary that "can only be solved by the slow work of persuading others").

[30] See William Baude & Stephen E. Sachs, Grounding Originalism, 113 Nw. U. L. Rev. 1455, 1457, 1463 (2019); infra Section IV.C.

[31] See Baude & Sachs, supra note 30, at 1463 (noting that whether "the Hartian account is generally wrong and . . . some contrary positivist theory . . . is generally right" is "bigger game").

[32] Cf. Baude, supra note 25, at 2403–07 (discussing, as a fallback position, the possibility that originalism is "at least *part* of the law" and, moreover, that "a judge is legally entitled to be an originalist").

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for instance, is a kind of structure or workplace but also a historical and political artifact as well as a complex symbol for millions of people, among other things. Perhaps philosophical inquiry could disclose all properties necessarily or potentially associated with houses, or with a particular house, such as the White House. But such an inquiry seems doomed to fall short given the enormous richness associated with the idea of a house. As a result, a contextual approach is likely to take hold. When we hear the question "What is a house?", we naturally respond pragmatically.[33] Different answers make sense depending on whether the questioner is an architecture student, an aspiring homeowner, an urban planner, a refugee, and so on.

A similar pragmatism obtains when answering the jurisprudential question "What is law?" or "What is the nature of law?" When we ask those questions, what is it that we want to do? This approach is truer to our use of law as a concept. And it liberates us from the "general" jurisprudential question of what essential traits law must have.[34] That tradition has the unfortunate effect of encouraging writers to assert that very particular ideas fall out of the general essence of law, with the implication that anyone interested in "law" must necessarily agree with those ideas.[35] By contrast, we can simply set those sorts of claims aside. Even if "law" means what those theorists maintain, perhaps we are interested in law* or law-for-present-purposes, which might be different from whatever the essential nature of law *simpliciter* supposedly must

[33] In the main text, I suggest that the concept of law is sufficiently complex that we adopt simplifying models of it for various relevant purposes. Alternatively, we might think that the concept of law is up to us to design, and we ought to do so based on normative criteria including utility. See Raff Donelson, The Pragmatist School in Analytic Jurisprudence, 31 Phil. Issues 66, 67–68 (2021); see also Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 835 (1935) ("A definition of law is *useful* or *useless*. It is not *true* or *false* . . . .").

[34] See Frederick Schauer, The Force of Law 35–37 (2015) (critically discussing essentialist jurisprudence for overlooking the law's contingent properties). Or perhaps personal positivism and Hartian positivism describe different parts of legal reality. Cf. David Plunkett & Daniel Wodak, The Disunity of Legal Reality, 28 Legal Theory 235, 235 (2022) (suggesting that positivism may be true of only part of legal reality).

[35] A stark example is Baude and Sachs's Hartian argument that originalism is the law of the United States, see infra Section IV.C; but other works may also fall in this category, insofar as they contend that general jurisprudence has direct methodological implications. See Scott J. Shapiro, Legality 353–87 (2011); Mark Greenberg, Response, What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants, 130 Harv. L. Rev. F. 105, 119 (2017).

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entail. We might even find it useful to hold on to the older "law" concept and switch between thinking about it and law*.[36]

So, what exactly is the pragmatic investigation into the law that I want to pursue? What, that is, do we want our theory of law to accomplish? I propose a simple goal for a theory of law: the theory should identify principles of the sort that judges (or other officials[37]) have an open practice of treating as reason-giving when hearing arguments and resolving disputes.

This goal reflects the *desiderata* of three legally critical groups. First, it is the essential concern of a judge who faces the burden of judgment when resolving a case. Even if their decisions are actually the result of non-argumentative stimuli, adjudicators nonetheless desire reasons capable of guiding and supporting their decisions.[38] Second, it is the main concern of litigants who hope to argue and win their cases. These parties, after all, have an interest in making arguments that can persuade judges,

[36] To propose a new way of understanding a salient concept like "the law" is an attempt to do several things: enrich our understanding of a known phenomenon, redirect attention, and reallocate prestige. Whether these attempts ought to succeed is at least partially dependent on our approval of their effects. See David Plunkett, Negotiating the Meaning of "Law": The Metalinguistic Dimension of the Dispute over Legal Positivism, 22 Legal Theory 205, 205–06 (2016) (arguing that philosophical disagreements over the nature of law may actually be "competing proposals about which concept the word 'law' should be used to express"); see also Felipe Jiménez, Legal Positivism for Legal Officials, 36 Can. J.L. & Juris. 359, 359 (2023) (offering a "conceptual prescription" regarding the "'operative' concept of law").

[37] While I follow Hart in centering judges, see Hart, supra note 8, at 256, 267, personal positivism can be adapted to include other officials—much as Hartian positivism can fit any "recognitional community." See Matthew D. Adler, Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?, 100 Nw. U. L. Rev. 719, 730–32 (2006). That is, we might ask about the personal rules held by all officials, or even all individual members of the polity. Yet it is sensible to focus on judges, both because judges are unusual in having a rich store of personal rules and because the United States is largely characterized by "judicial supremacy." See Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 Const. Comment. 455, 455 (2000). To the extent, however, that non-judicial officials do adhere to publicly known personal rules (as opposed to simply doing what is expedient or popular), then it would be better to treat those rules, too, as part of the law. In this way, personal positivism can capture (among other things) the degree to which a legal system in fact exhibits departmentalism.

[38] Cf. Henry Paul Monaghan, Essay, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 725 n.343 (2012) (imagining an advocate who answers a question at oral argument with: "You got the power!!"). Monaghan believes that this colloquy would occur if judging were based on "personal reasons," which he contrasts with "justifications that purport to be public-regarding and [publicly] acceptable." Id. at 725. However, a judge's personal rules are often not just "public-regarding" and "acceptable," but actually *accepted* by the public. See infra text accompanying note 199; see also note 180 (on anti-modal argument).

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rather than arousing adjudicators' ire or generating apathy. And, finally, it is important to the many private individuals and public officials who have an interest in understanding how cases are decided. Of course, an answer to the question "What is the law?" can meet these three *desiderata* to varying degrees. We want an answer—a theory—that will maximally accomplish these three objectives, consistent with parsimony.

Our basic interest in reason-giving principles disqualifies many possible answers to the question "What is the law?" Of special note, it disqualifies a host of possible descriptive theories. Someone could sensibly ask about the law from the standpoint of wanting to predict, with the greatest possible accuracy, how adjudicators will in fact rule.[39] That approach could end up focusing on the sort of principles that judges generally deem reason-giving, but it might not. Perhaps the best descriptive theory would focus on biography, biology, or diet—the proverbial "what they had for breakfast" analysis.[40] Those factors, however, are generally not viewed as reason-giving either by or for adjudicators and so are disqualified from our inquiry. At the same time, we are concerned with the kind of principles that are in fact generally treated as reason-giving. If officials only pretended to treat certain kinds of principle as reason-giving, then those precepts will not be of much use to our imagined audiences. The result would be, for our purposes, fake law—not the genuine article.

Further, our interest in principles that are open and notorious disqualifies secret or solipsistic principles from being the law.[41] What interests us is a practice of dispute resolution in which certain arguments can be adduced and received as reason-giving. Just how much openness is required need not be specified too carefully. It is probably enough if litigants before an adjudicator can realistically ascertain the sort of

[39] See infra text accompanying note 87.

[40] The descriptive aspect of legal realism, for instance, often considered far more than publicly known personal rules—such as intuitive hunches and subconscious motivations. See, e.g., Jerome Frank, Law and the Modern Mind 116 (1930) (emphasizing the "hunch"); see also Dan Priel, Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea, 68 Buff. L. Rev. 899, 899 (2020) (exploring the origins of the "what the judge had for breakfast" idea); G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges 130 (2007) ("Realism eventually took the step of equating law with the idiosyncratic judgments of judges and other lawmakers . . . .").

[41] Publicity matters pragmatically not just for litigants and the public but also for judges' tendency to treat their own rules as reason-giving. See infra note 50 (discussing the desire to seem personally consistent). When publicly known, personal rules have objective content, much like promises.

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principles that that adjudicator will take as reason-giving.[42] So a principle that an adjudicator has simply thought up in her own mind, perhaps while on the way to hear a case, might qualify as incipient law. But it wouldn't already be part of it.

A more interesting question arises if judges generally accept certain rules but reveal them only among themselves, yielding a code that is unknown to litigants and the public at large. Clearly there is something morally wrong in this scenario, which has come to be called the Illuminati Problem.[43] But what, if anything, is the imagined society's law? This question is difficult because it places our three *desiderata* in sharp conflict with one another. That is, the rules that guide judges aren't at all the same ones that litigants use to argue or that observers use to understand adjudication. In that troubled society, personal positivism alone wouldn't offer a very useful answer to the "What is the law?" question—and neither, I suspect, would any conventional account of the law.[44] Fortunately, the best view of this hypothetical cannot control the proper way to assess actual legal systems. Untroubled by illuminati, the United States has its own distinctive concerns.

B. The Basic Theory

What I have said so far goes some distance toward disqualifying various practices and principles from being the law—or, at least, from

[42] This requirement could pose a problem for legal realists who believe that the "real rules" accepted by judges can be found only through sophisticated research. See Frederick Schauer, Legal Realism Untamed, 91 Tex. L. Rev. 749, 750–51 (2013).

[43] In the full illuminati hypothetical, judges follow their secret rules while deceiving observers into thinking that they (the judges) are adhering to publicly known principles. See Mikolaj Barczentewicz, The Illuminati Problem and Rules of Recognition, 38 Oxford J. Legal Stud. 500, 502 (2018); William Baude & Stephen E. Sachs, The Official Story of the Law, 20 Oxford J. Legal Stud. 178, 180–81 (2023).

[44] A descriptive or positivist solution to the illuminati problem should account for *both* the secret rules *and* the public ones. For example, Baude and Sachs imagine "Illuminati Baseball," where the umpires call what looks like a baseball game according to secret rules. Baude & Sachs, supra note 43, at 191–94. The authors plausibly suggest that these illuminati umpires "subvert" the rules of baseball. See id. at 192 (emphasis omitted). As a descriptive matter, however, what game was being played? Not baseball, but rather baseball-as-subverted-by-illuminati. Baude and Sachs may be open to that complex diagnosis. Though they sometimes ask "which set of rules" governs, as though there were an either/or choice, they ultimately "defend the legal *relevance* of the official story," insisting only that there are "good reasons *not to disregard* the official story of the law." Id. at 178, 201 (emphases added). That conclusion in no way undermines the positivist's need to *also* account for officials' secret rules.

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being the kind of law that we are interested in. But how *do* we identify the law, given our purposes? My basic claim is that the law consists of a set of rules that are *both* (i) publicly known *and* (ii) accepted by any judge (or other official[45]) as reason-giving, even if those principles are *neither* widely shared *nor* derived from practices or principles that are widely shared. I will call this set of principles "personal rules."[46] And the theory that recognizes personal rules as constitutive of the law is "personal positivism."[47]

The case for personal positivism begins with familiar Hartian positivism. What I want to take from Hart is, most importantly, the notion of rule acceptance among law-applying officials. That is, among the relevant set of officials, particularly judges, legal rules are assessed as reason-giving from the internal point of view.[48] To adopt the internal point of view is, for present purposes, to exhibit a disposition to adhere to a rule and to be concerned with criticisms based on the rule.[49] The fact that personal rules are both public and accepted by officials (in their official actions) distinguishes those rules from other influences on official behavior, such as subconscious bias or avowedly illicit reasons for action.[50]

But I break from Hart by rejecting the idea of a foundational consensus practice—the famous "rule of recognition"—from which all valid rules within a legal system must be derived.[51] Instead, each official's publicly

[45] See supra note 37.

[46] See Leslie Green, Introduction *to* H.L.A. Hart, The Concept of Law, at xv, xxii (3d ed. 2012) ("There are rules that are not social practices (e.g. an individual's rules) . . . ."). Consistent with Hart, I use the term "rules" broadly to encompass all legal norms, including (for example) discretion-conferring standards and principles with a dimension of weight.

[47] See Re, supra note 6, at 860 & n.224.

[48] See Hart, supra note 8, at 56–58.

[49] For Hart, the internal point of view also involved a disposition to criticize others for failing to follow the rule. Id. at 55–57. However, that interpersonal aspect of the internal point of view must be altered for personal rules. See infra note 93; Section III.B.

[50] While eschewing legal realism's interest in intuition, see supra note 40, personal positivism does have a pre-legal or naturalist foundation in human psychology, insofar as officials will often treat their publicly known personal rules as reason-giving. That is, people generally do not like to feel or seem inconsistent. See Re, supra note 6, at 830 & n.30. Additionally, judges have self-interested reasons to adhere to personal rules, including to promote their brand and legacy. Id. at 830–31.

[51] Hart, supra note 8, at 94; Shapiro, supra note 35, at 84 ("According to Hart, every legal system necessarily contains one, and only one, rule that sets out the test of validity for that system."). For Hart, only the advent of a rule of recognition and other "secondary rules" (that is, rules about rules) "are enough to convert the regime of primary rules into what is indisputably a legal system." Hart, supra note 8, at 94 (emphasis omitted). Throughout, I use

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known rules are viewed as the law *for that official* and, therefore, as part of the overall law of the legal system. Critically, this conclusion does not depend on the derivability of the judge's personal rules from any more fundamental, shared practice. The resulting rule set could be viewed as self-contradictory insofar as different judges may embrace contradictory rules.[52] In another sense, however, the rules are perfectly consistent, since each rule is applicable only to the judge who accepts it.

Separating the law from Hart's rule of recognition has two complementary implications. First, it deepens the law by grounding any consensus validating practice (should one exist) in the many personal rules adopted by individual judges. Again, Hart maintains that the law begins with the rule of recognition—that is, official convergence on a consensus practice that validates derivative legal rules.[53] By contrast, personal positivism maintains that a consensus rule can exist only to the extent that it emerges from antecedent personal rules that already qualify as part of the law.[54]

Second, personal positivism broadens the law by encompassing personal rules that are not validated by a rule of recognition. Some personal rules may be adopted by only a single judge. So, rather than imagining the law as a monolith emanating from the rule of recognition embraced by all or almost all judges, personal positivism envisions a complex set of rules traceable to individuals. Personal positivism thus recognizes many more legal principles than Hartian positivism.[55] Every

"rule of recognition" to mean the "ultimate" such rule—that is, the rule of recognition that validates any subsidiary rules of recognition.

[52] That is, different personal rules may have contradictory substantive content. And while a personal rule may be purely self-directed (such as: "I follow the text, regardless of what anyone else may do"), a personal rule usually reflects a moral view applicable to similarly situated officials.

[53] See supra note 51; see also Hart, supra note 8, at 95 (discussing "the germ of the idea of legal validity").

[54] To some extent, personal positivism resembles the proposition that the following is a naturally arising rule of recognition: "Each official's personal rules are the law, or validate the law, for that official." A core premise of personal positivism, after all, is that officials generally care about their own publicly known rules of decision (and can hold one another accountable to them). See supra note 50. But personal positivism does not assume that any judge self-consciously adopts that view of the law. It is the personal positivist, not participants in the legal system, who necessarily counts each official's personal rules as part of the law.

[55] Under what we might call *personalized positivism*, determinate applications of the rule of recognition generate law, much as Hart provided. In addition, however, personal rules that resolve indeterminacies stemming from the rule of recognition's application would also count as law for particular judges. This approach would effectively create two tiers of law: one that

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judge contributes her own distinctive storehouse of personal rules—that is, her own part of the law.

Personal positivism's distinctive features point toward its advantages. In Hart's view, the constitutive goal of the rule of recognition is to operate as a "remedy" for "uncertainty."[56] When the law is initially unknown, the rule of recognition comes to the rescue. But, as Hart went on to acknowledge, the rule of recognition is sometimes underdetermined and so fails to perform its constitutive task.[57] In those situations, Hart argues, courts necessarily lack law to apply and so must engage in "judicial law-making."[58] As we will see later, that position has come in for criticism.[59]

For now, though, the key point is that Hart's search for certainty in legal systems excludes an important possibility. Cases that cannot be resolved based on shared practices can be—and very often are—resolved based on judges' personal rules. And that is so because the legal rules that personal positivism recognizes are qualitatively different from Hart's rule of recognition. In brief, Hartian law is widely held and unitary,[60] but those traits effectively guarantee abstractness and indeterminacy.[61] By comparison, personal positivism's law is individualistic and fragmented—and, as a result, it also tends to be relatively specific and determinate.

For example, Hart notes that the UK's rule of recognition includes: "[W]hat the Queen in Parliament enacts is law."[62] This asserted precept

is shared and impersonal, and another that is "personalized." Personalized positivism is attractive insofar as officials share indeterminate foundational principles that yield significant personalization. However, this approach fares less well when foundational principles are not widely shared, as well as when personal rules are not necessarily dependent on foundational principles. See infra Part IV. Personalized positivism offers a fallback position, if personal positivism is deemed too great a break from Hart.

[56] Hart, supra note 8, at 94 (emphasis omitted).

[57] Id. at 147–54.

[58] Id. at 153; see also id. at 275 (suggesting that a judge is "like a conscientious legislator").

[59] See infra Section III.A.

[60] See Hart, supra note 8, at 95 ("unified"); infra text accompanying note 96.

[61] See Ronald Dworkin, Hart's Posthumous Reply, 130 Harv. L. Rev. 2096, 2118–20 (2017) (arguing that the U.S. rule of recognition would have to be expressed "in *extremely* abstract terms" to be widely shared among judges).

[62] Hart, supra note 8, at 115; see also id. at 107, 145 (noting the same). I say "includes" because Hart apparently thought that the British rule of recognition included more than the Queen-in-Parliament principle. See id. at 101; see also Kent Greenawalt, The Rule of Recognition and the Constitution, 85 Mich. L. Rev. 621, 631 & n.30 (1987) (ascribing to Hart the view that "precedent and custom . . . are law in the United Kingdom because they are accepted as law by officials").

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is useful but limited. For example, it does not establish how to interpret any given thing that the Queen enacts in Parliament, nor how to reconcile those enactments. Any interpretive principles that may also form part of the UK rule of recognition are similarly indeterminate.[63] By comparison, a judge's personal rules often adopt specific views on interpretation and methodology, thereby narrowing the range of legal "uncertainty."[64]

In addition, any rule of recognition is limited insofar as it is understood exclusively as a practice of validating legal principles. As scholars have noted, legal systems tend to be marked not just by abstract validating principles but also by more specific, substantive principles.[65] Take the unlawfulness of race segregation, per *Brown v. Board of Education*.[66] The proposition that *Brown* is correct is not a validating norm or any other second-order rule. It is instead a kind of primary rule,[67] that is, a substantive principle that confers private rights and constrains official actions. Hart's theory therefore suggests that *Brown*'s correctness *must* be validated by, and derivative of, a deeper rule of recognition.[68] But that view is doubly flawed.

First, no actual consensus practice or rule, other than the unlawfulness of race segregation itself, can determinatively lead to the view that *Brown* is correct. For example, consensus that the Constitution's canonical text contributes to the law cannot in itself show that the Fourteenth Amendment was properly adopted pursuant to Article V,[69] that it protects more than the "civil rights" recognized in the nineteenth century,[70] or that it prohibits assertedly "separate but equal" treatment.[71] Of course, more

[63] Some scholars suggest that the rule of recognition identifies only sources of law, not interpretive methods—a view that greatly undermines its provision of certainty. See Jeremy Waldron, Who Needs Rules of Recognition?, *in* The Rule of Recognition and the U.S. Constitution 327, 337 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Felipe Jiménez, Legal Principles, Law, and Tradition, 33 Yale J.L. & Humans. 59, 81 (2022).

[64] See supra text accompanying note 56.

[65] See, e.g., Cass R. Sunstein, How to Interpret the Constitution 110–11 (2023).

[66] 347 U.S. 483 (1954).

[67] See Hart, supra note 8, at 91.

[68] See infra text accompanying note 230 (discussing Baude and Sachs on this point).

[69] See, e.g., David E. Pozen & Thomas P. Schmidt, The Puzzles and Possibilities of Article V, 121 Colum. L. Rev. 2317, 2350–51 (2021).

[70] See Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1103–05 (1995).

[71] See *Brown*, 347 U.S. at 492–95 (discussing various social and psychological matters because "[o]nly in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws"); see also David H. Souter, Harvard University's 359th Commencement Address, 124 Harv. L. Rev. 429, 434 (2010) ("For those whose

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determinate foundational principles are available, and they might validate *Brown*. But those more determinate principles lack the consensus support necessary to be a rule of recognition.

Second, the many officials and other individuals who recognize the legal correctness of *Brown* generally do so independent of any deeper validating principle. The unlawfulness of race segregation "stands on its own bottom," as it were.[72] Thus, any argument that *Brown* is wrong because it defies the rule of recognition would, at best, be met with incredulity. It would be more accurate to say that a rule of recognition is correct because it validates *Brown* than to say that *Brown* is correct because it comports with a rule of recognition.[73] The correctness of *Brown* is thus a "fixed point," or axiomatic truth, in the United States legal system.[74]

To grapple with these sorts of difficulties, a Hartian thinker might propose that a rule of recognition does not have to be a validating norm after all. Instead, a rule of recognition could be understood to encompass any and all points of foundational, non-derivable consensus agreement among officials.[75] This revised and expanded view of the rule of recognition would make it possible for the rule to include the correctness of *Brown*, the lawfulness of judicial review, and any number of other conclusions. On this adjusted view, the rule of recognition would become something quite different: a rule of rules, akin to a legislative code.

exclusive norm for constitutional judging is merely fair reading of language applied to facts objectively viewed, *Brown* must either be flat-out wrong or a very mystifying decision.").

[72] Stephen E. Sachs, The "Constitution in Exile" as a Problem for Legal Theory, 89 Notre Dame L. Rev. 2253, 2278 (2014) (using this expression). But see infra text accompanying note 230 (describing Sachs's view).

[73] Cf. McConnell, supra note 70, at 952 ("Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."). McConnell's oft-quoted expression seems to categorize *Brown*'s axiomatic correctness as being "moral authority" only, not a fixed point in the law. Yet the phenomenon he describes—and then goes on to enact—tends to corroborate the positive account I describe in the main text.

[74] See Sunstein, supra note 65, at 101–31; see also infra Section IV.C. Anti-canonical rulings can also be viewed as fixed points in that they mark out what is legally wrong. See Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379, 386 (2011).

[75] Cf. Akhil Reed Amar, America's Unwritten Constitution 238–41 (2012) (arguing that legal principles with consensus public support ought to be honored even if they aren't originalist); Richard H. Fallon, Jr., Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence, 86 N.C. L. Rev. 1107, 1111–13 (2008) (discussing "superprecedents" in Hartian terms).

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By contrast, personal positivism does not begin by presuming an ultimate validating norm from which legal rules are derived. Thus, personal rules are freed from any need either to operate as, or to be derived from, a validating principle. Personal rules might instead encompass specific legal outcomes or conclusions.[76] And the relationship between methodologies and outcomes can be left indeterminate. While some jurists might be foundationalist in that they prioritize theory over application, others may embrace select conclusions more tightly than any theory. A positive jurisprudence should not dictate the relationship between general and specific commitments, and personal positivism does not do so. By contrast, Hart's theory demands a foundational validating principle.[77]

To bear out this point, let us move away from *Brown*, which (again) could be viewed as a *sui generis* fixed point and perhaps even as part of the rule of recognition itself. Let us instead imagine a young Justice Scalia in the late 1980s. By that time, Scalia had already maintained not just that originalism was the correct methodology for understanding the Constitution, but also that *Roe v. Wade* was an incorrect outcome.[78] Both the method and the outcome represented personal rules. Personal positivism would not dictate which of these two rules must predominate, should they come into conflict. The choice between these two rules might be indeterminate, or it might be settled by a separate personal rule.[79] Personal positivism thus casts both Scalia's originalism and his opposition to *Roe* as part of the law even in the late 1980s—a time when

[76] While a personal rule might establish a moral, empirical, or analytic proposition for some official, such ideas are not generally embodied in personal rules and so are not themselves part of the law. Thus, a personal positivist can distinguish the law from, say, the mathematical proposition that 31 x 27 = 837.

[77] To be clear, personal positivism views the search for reflective equilibrium as lawful only if or when it is consonant with personal rules. On the prevalence of reflective equilibration in constitutional practice, see Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1193, 1240–41 (1987); Sunstein, supra note 65, at 129 ("Each chooser—each one of us—must make a judgment about what those fixed points are," among other things.).

[78] See Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 862 (1989).

[79] See Melissa Murray, The Symbiosis of Abortion and Precedent, 134 Harv. L. Rev. 308, 341 (2020) ("[I]nterpretive methodologies, and thus approaches to precedent, may also be shaped in turn by other factors, including abortion."). Notably, some positivist originalists have prioritized originalism over the correctness of *Brown*. See infra text accompanying note 230.

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originalism was still unpopular among judges and *Roe* was very much in effect. The point is not that originalism was the law, full stop, or that *Roe* was always and everywhere erroneous. Clearly, a complete view of the law should account for officials other than Scalia. The point is instead that Scalia was an official whose votes were guided by well-known personal rules. And those rules played an ever-larger role in the law as each new official came to share them.

To exclude judges' personal rules from the law because they cannot be derived from consensus practice is a serious mistake—one at odds with the perspectives of legal actors, such as judges and litigants in the highest court in the land.[80] In a legal system featuring judicial individuality, personal rules create an enormous amount of legal certainty—which, again, is the very task that the rule of recognition was supposed to fulfill.[81] Blinkered attention to a rule of recognition at the expense of personal rules thus drains the lifeblood of legal practice and of the law itself.

* * *

Let me end this Section by disclaiming two easy ways of misunderstanding the nature of personal positivism.

First, my discussion could give the impression that personal rules necessarily foster judicial individuality—even chaos.[82] Yet personal rules can, and often do, generate uniformity and consistency among judges.[83] For example, a personal rule might direct a judge to act impersonally by following the views of original lawmakers (originalism), precedential courts (stare decisis), or legislative bodies (deference to the political branches).[84] And if many judges share the same personal rules, a group-

[80] See supra text accompanying notes 1–3.

[81] See supra text accompanying note 56.

[82] On the possibility that any positivist theory, including personal positivism, must assume a minimal degree of orderliness for a legal system to be a system at all, see infra text accompanying notes 96–100.

[83] Oathtaking can be viewed as an institutional means of ensuring that judges and other officials take office with significant personal rules and, moreover, that those personal rules are at least somewhat consonant with those of other officials. See Richard M. Re, Promising the Constitution, 110 Nw. U. L. Rev. 299, 307 (2016); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 401–02 (1937) (Sutherland, J., dissenting) ("The oath which [a Supreme Court Justice] takes as a judge is not a composite oath, but an individual one. . . . [H]e discharges a duty imposed upon *him* . . . .").

[84] A judge's personal rules may include second-order rules (or "meta-rules") that permit or require her to abandon some of her first-order rules in favor of adopting the views of other actors. For example, some Justices acquiesce to wrongheaded court rulings when failing to do so would create anomalies. See Richard M. Re, Beyond the *Marks* Rule, 132 Harv. L. Rev.

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based or consensus rule will emerge.[85] In attending to personal rules, personal positivism aims to discover the degree of individuality or uniformity within a legal system—not to focus on just one to the exclusion of the other. For a personal positivist, "the law would be widely shared to the extent that the rules that judges accept are widely shared. And the law would be personal to the extent that the rules that judges accept are personal."[86]

Second, personal positivism is not predictive in nature. For some theorists, most famously Holmes, the law (or some aspect of the law) is constituted by predictions regarding how judges or other actors will behave.[87] Political scientists have refined that predictive exercise. Under the highly influential "attitudinal model," for instance, a judge's "personal policy preferences" are key determinants of judicial behavior, at least at the Supreme Court.[88] By contrast, personal positivism follows Hart in being concerned with rules that judges accept from the internal point of view.[89] That focus has among its advantages the ability to explain the reasons that judges consider and that litigants put forward.[90] Judges

1942, 1998 n.294 (2019); see also infra note 208 (discussing personal rules of vertical stare decisis). These second-order rules are analogous to Hart's "rules of change." Hart, supra note 8, at 95.

[85] Hart and others have argued that the rule of recognition is conventional—that is, a rule adhered to partly or primarily because other individuals have likewise adopted it. See Hart, supra note 8, at 255, 267; Julie Dickson, Is the Rule of Recognition Really a Conventional Rule?, 27 Oxford J. Legal Stud. 373, 383 (2007). Personal positivism, by contrast, counts personal rules as part of the law, regardless of any conventions. Still, personal rules held in common—what I call "group rules"—may be conventions. For both self-interested and conscientious reasons, like-minded individuals often have good cause to pool knowledge and coordinate action. These attractive forces contribute to the creation, maintenance, and revision of personal rules—and, therefore, of the law. See infra text accompanying note 141.

[86] Re, supra note 6, at 859.

[87] Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). But see Hart, supra note 8, at 137–42, 147–48.

[88] Jeffrey A. Segal & Alan J. Champlin, The Attitudinal Model, *in* Routledge Handbook of Judicial Behavior 17, 17 (Robert M. Howard & Kirk A. Randazzo eds., 2018). See generally Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002) (empirically evaluating the attitudinal model as a predictor of Supreme Court decision-making).

[89] See Hart, supra note 8, at 88–92.

[90] Personal positivism resembles predictive jurisprudence insofar as a change in the composition of a court can yield a change in the law. For a personal positivist, however, the relevant change is in the rules held by legal officials, not a change in empirical predictions. Cf. Mark Tushnet, Temporality and Case-Based Constitutional Theory, Balkinization (Dec. 20, 2021, 1:25 PM), https://balkin.blogspot.com/2021/12/temporality-and-case-based.html

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generally do not decide cases by predicting how they themselves will rule,[91] nor do they entertain direct appeals to their "personal policy preferences."[92] Under personal positivism, what matters is whether a particular judge is publicly known to have accepted a rule. So, even if the judge's behavior were predictably contrary to his personal rule, perhaps because his emotions often get the better of him, the rule—not the prediction—would remain the law.[93] Observers would therefore be justified in viewing the emotional judge as transgressing the law.[94]

C. The Law as Unity—and Disunity

Personal positivism implicates an important tension within modern positivism, which has struggled to find unity in legal systems while recognizing their complexity.[95]

[https://perma.cc/A72C-D5D7] ("The content of legal-realist constitutional theory changes every time a justice leaves the Court and a new one arrives.").

[91] See Hart, supra note 8, at 90 ("[T]he violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility."). These observations cut against predictive jurisprudence, see Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651, 657 (1995) ("A judge on a court of last resort does not attempt to predict how she herself will decide the case."); Hart, supra note 8, at 147, but do not apply to personal positivism. Judges *do* reason from their personal rules. See supra Section I.A; e.g., supra note 1.

[92] See David E. Pozen & Adam M. Samaha, Anti-Modalities, 119 Mich. L. Rev. 729, 746–50 (2021).

[93] Personal positivism fosters a "reflective critical attitude" somewhat similar to the one underlying Hartian positivism. Hart, supra note 8, at 57. But whereas Hart sought shared criteria applicable to (because embraced by) jurists in general, see id. at 115, personal positivism identifies publicly accessible standards applicable to individual officials. A personal rule offers a shared reference point for *personalized* criticism and persuasion.

[94] Thus, officials can criticize one another either for inconsistency with their own personal rules, or for having the wrong personal rules. For a personal positivist, the first criticism is legal; the second, moral. See infra Part III.

[95] Perhaps the best existing work on this tension is Professor Mitch Berman's "principled positivism." Berman breaks from Hart in allowing "fundamental legal norms to emerge from legal practices that fall significantly short of consensus." Mitchell N. Berman, How Practices Make Principles, and How Principles Make Rules 21 (U. Pa. L. Sch. Pub. L. & Legal Theory Rsch. Paper No. 22-03, 2022), https://ssrn.com/abstract=4003631 [https://perma.cc/6D7U-TESB] [hereinafter Berman, Practices]; see also Berman, supra note 8, at 1348–50 (challenging the Hartian conception of consensus). In an important manuscript, Berman argues that a fundamental norm must be "embedded in or exemplified by numerous authoritative legal enactments: constitutional provisions, statutes, and particular judicial decisions." Berman, Practices, supra, at 25 (quoting Rolf Sartorius, Social Policy and Judicial Legislation, 8 Am. Phil. Q. 151, 154–55 (1971)). Such a norm is then "a legal norm of the system." Id. For example, Berman argues that "*colorblindness*" and "*anti-subordination*" are both norms "invoked, relied upon, or used, as legal justification for judicial rulings" and, therefore, are

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Hart himself insisted on the law's essential "unity and continuity," a position that effectively ruled out personal positivism. Here is the key passage:

> If only some judges acted 'for their part only' on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the characteristic unity and continuity of a legal system would have disappeared. For this depends on the acceptance, at this crucial point, of common standards of legal validity. In the interval between these vagaries of judicial behaviour and the chaos which would ultimately ensue when the ordinary man was faced with contrary judicial orders, we would be at loss to describe the situation. We would be in the presence of a *lusus naturae* worth thinking about only because it sharpens our awareness of what is often too obvious to be noticed.[96]

This passage focuses on "the characteristic unity and continuity of a legal system," which assertedly depends on "common standards of legal validity." But legal systems are also characterized by disunity and discontinuity, consistent with personal rules. Why should just some "characteristic" features of legal systems be treated as constitutive? Even

"principles of our law." Id. at 26. This account has many strengths and, for present purposes, is especially auspicious in that it (like personal positivism) rejects Hart's insistence that law be founded on consensus practice.

But Berman's principled positivism still maintains that all officials face the same set of fundamental legal norms and so follows Hart in viewing the law as unitary. As we have seen, that approach is flawed because it elides the conflicting nature of judges' personal rules as well as the law's often fragmented nature. Again, different judges follow different rules. To return to Berman's example, particular judges generally follow *either* colorblindness *or* anti-subordination. Principled positivism ignores that critical and well-known individualism.

Berman's requirement that fundamental legal principles be embedded in "authoritative legal enactments" is also questionable. Id. at 25. A dissenting opinion or law review article is often a surer guide to a judge's norm-based behavior than "numerous authoritative legal enactments" by other persons—and personal positivism embraces that fact. E.g., supra note 78 and accompanying text. Just think about how present-day Justices look back on the "authoritative" precedents and legal views of the Warren Court.

Finally, principled positivism leaves unclear just how a principle's being "taken up" by various "actors" and "legal decisions" constitutes the law. Berman, Practices, supra, at 22–25. For instance, is a principle "embedded" in twice as many decisions twice as forceful? Id. When it comes to integrating conflicting principles, Berman outlines a seemingly indeterminate process modeled on "vector addition." Id. at 22. By comparison, personal positivism specifies how to integrate the personal rules of different judges: ask how decisional power is apportioned among judges. See infra Part II.

[96] Hart, supra note 8, at 116.

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if a degree of "unity and continuity" is required for a legal system to exist, the system's disunities and discontinuities—its personal rules—could still be part of the law.[97]

Hart's crescendo claim involves "the chaos which would ultimately ensue" if legal norms were not traceable to a rule of recognition.[98] Insurmountable difficulties would inevitably arise, Hart explains, "when the ordinary man was faced with contrary judicial orders."[99] This is an acutely practical, contingent claim, and it is exaggerated to the point of hyperbole.[100] There is no necessary reason for these asserted difficulties to materialize at all, much less to arise in a way that would threaten the existence of a single legal system. The mere possibility of "contrary judicial orders" does not determine their frequency or significance.[101] Judges' personal rules might yield convergent results in most actual cases. And, knowing the problem that conflicting orders pose, courts and private parties alike would probably take steps to avoid them, as well as to mitigate their consequences when they arise. At any rate, a rule of recognition would not prevent "contrary judicial orders," which can stem from disagreement about how to apply shared principles.[102] Officials may converge on a rule of recognition—such as "what the Queen enacts in Parliament is the law"—but chaotically diverge as to what the law is ("Who is the true Queen?") or how to apply enacted laws ("Just what does an enactment regarding 'equality' demand?"). In short, a legal system

[97] See supra note 55. Relatedly, how does a rule of recognition change? Hart seems committed to the view that one rule of recognition switches abruptly to another one, perhaps with a lawless period (Hart's "*lusus naturae*") in between. Personal positivism, by contrast, would view a gradual transition from one consensus practice to another as just that—gradual. Law could exist throughout.

[98] Hart, supra note 9, at 116.

[99] Id.

[100] See Adler, supra note 37, at 783 ("Indeed, there can be divergence about matters that are quite foundational, without civil war . . . .").

[101] To wit, a rule of adjudication (even without a rule of recognition) can help resolve "contrary orders." See infra text accompanying note 121. In general, shortcomings in either a rule of adjudication or a rule of recognition can be made up for by strengths in the other. Imagine a legal system with no clear rule of adjudication but perfect consensus regarding the content of the law. Uncertainty about who should decide what cases might then be offset by certainty as to officials' fungibility.

[102] Of course, conflicting orders do in fact arise in legal systems. For a recent, high-profile instance in the United States, see Brendan Pierson & Tom Hals, Judges Issue Conflicting Abortion-Pill Injunctions, Reuters (Apr. 10, 2023, 5:00 AM), https://www.reuters.com/legal/us-judge-hands-anti-abortion-groups-partial-win-over-abortion-pill-2023-04-07/ [https://perma.cc/BNR5-J28Q].

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with a rule of recognition can be chaotic, and a legal system lacking a rule of recognition can be orderly.

Notwithstanding Hart's insistence on there being a single rule of recognition for each legal system, several leading positivists have qualified or abandoned the Hartian demand that law be traceable to common, foundational practice.[103] Most relevant here, some theorists maintain that there can be different rules of recognition for different groups of officials within a single legal system.[104] But, having recognized plural rules of recognition, why not embrace individualized ones as well?[105] Under personal positivism, one might say, every jurist effectively has her own rule (or rules) of recognition.

Even so, personal positivism might seem like a *reductio* of Hartian positivism. True, judges generally share personal rules on many important topics, such as the availability of judicial review; thus, personal positivism supports the commonsense view that the law of the United States authorizes judicial review. However, a critic might imagine a single outlier judge with a shocking rule, such as that all civil complaints filed on Tuesday afternoons must be dismissed. Surely, a critic might say, the bizarre views of a single jurist cannot be the law! But that reaction is too quick.

Under personal positivism, the oddball judge's personal rules are the law for that judge and therefore *part* of the overall law of the legal system. Any litigants appearing before that judge would do well to act on that basis—especially if the judge sits alone and appeal is impracticable.[106] Yet the oddball judge's rules are likely to be outweighed, overridden, or even cancelled out. A trial judge can be appealed, an appellate judge can

[103] See supra note 95 (discussing Berman's work).

[104] See Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of a Legal System 192 (2d ed. 1980) (noting the possibility of "partly overlapping[] sets of laws, each recognized by one or more of the organs instituted under it"); Adler, supra note 37, at 745 ("Law, I suggest, is 'group-relative.'"); Danny Priel, Trouble for Legal Positivism?, 12 Legal Theory 225, 253–61 (2006); see also John Gardner, Law as a Leap of Faith: Essays on Law in General 101 n.28 (2012) ("All but the most rudimentary legal systems have several ultimate rules of recognition . . . ."); cf. Matthew H. Kramer, H.L.A. Hart: The Nature of Law 89–90 (2018) (contending that a rule of recognition with "overarching unity" may contain diverse norms "addressed to" different groups of officials).

[105] Re, supra note 6, at 858 (criticizing an "arbitrary" focus on "most" judges).

[106] See Joanna Schwartz, Shielded: How the Police Became Untouchable 121–24 (2023); Re, supra note 6, at 860 n.222. Similarly important to the law are the personal rules of median judges on a multi-member court. And the rules of the median member of an apex appellate court are more important still.

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be outvoted, and so forth. When a judge is readily subject to plenary review, his eccentric personal rules may safely be dismissed as "not the law" in the sense that they do not comport with the overall law of the legal system.

The law can accordingly be understood as a mosaic. Each tile that makes up a mosaic has a distinctive shape or color, but the set of tiles is not just dropped randomly into a heap. Rather, each tile is arranged according to a pattern, with some far more prominent or central than others. Likewise, judges operate within a formal or informal arrangement of distributed power, such that some personal rules are highly consequential and others not. The law isn't just a random mash-up of personal rules but is instead an organized system that is itself partly constituted by those rules.[107]

The plausibility of personal positivism thus depends in part on its ability to explain how divergent personal rules are integrated within a single legal system. It is time to explore that important issue in greater detail.

II. PERSONAL RULES IN A LEGAL SYSTEM

Perhaps the most basic function of Hart's rule of recognition is not to identify the content of the law—critical though that obviously is—but rather to demarcate where one legal system begins and another ends. This Part focuses on that issue as a way to build out the general case for personal positivism.

A. Divergia and Its Law

Imagine that Divergia is a society with only two magistrates, each of whom has a publicly known practice of adjudicating cases based on a distinctive rule set. Let's say that one magistrate applies ancient Roman law and the other modern Australian law. Each magistrate views her own approach as correct but has little interest in what the other does. This situation came about accidentally, after each magistrate started deciding

[107] Consider the common practice of referring to local case law as "the law" of a particular jurisdiction, such as a particular federal circuit court. Professor Sachs has suggested that local precedent may require acting as if the court's holding were the law, when in fact it isn't. See Stephen E. Sachs, Finding Law, 107 Calif. L. Rev. 527, 562–63 (2019). Personal positivism does a better job of honoring language practices: if the judges of a particular jurisdiction have come to adopt a certain set of personal rules, then those rules are indeed part of "the law" in that jurisdiction.

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cases within a state of nature. Many residents of Divergia honor the magistrates' various judgments. For example, some residents impose punishments that the magistrates direct and ensure that damages judgments are collected.

If the magistrates were to disagree with respect to the same case, nobody quite knows what would happen. The question hasn't arisen because the magistrates roam separately over a vast countryside, and they have a tacit practice of never adjudicating the same dispute. There is of course unpredictability in this regime, but hardly chaos. Many residents of Divergia try to stay on the right side of both Roman and Australian law, or else buy insurance when they can't. And other residents simply resolve their disputes outside the law. On the whole, Divergia is a fairly well-ordered society.

Divergia is plausibly viewed as governed by law within a single legal system, owing to the fact that both magistrates have jurisdiction over the same people and terrain. Imagine that a newcomer to this region asked, "What is the law of Divergia?" A sensible answer would involve *both* magistrates and *both* of their rule sets. Those rules, after all, guide courtroom arguments, adjudicatory outcomes, and private behavior in the shadow of adjudication. The law of Divergia flows from (roughly) the following principle: "Two magistrates decide certain cases, and they respectively follow Roman or Australian law." Note that this principle is not itself a shared social practice or norm. Neither magistrate cares, much less approves of, how the other one decides cases. Thus, this principle is not a rule of recognition.

By contrast, it would be both false and distinctly unhelpful to say, when asked about the law of Divergia, "There is no law here," as though there were no magistrates or the magistrates operated based on whimsy. Divergia is a society whose officials decide cases based on publicly known and litigated rules, yielding rule-conforming social behavior. Most adjudicatory results in Divergia, like liability for theft, would be highly predictable—perhaps more so than in many real-world legal systems. Moreover, the scope of adjudicatory indeterminacy, where it existed, would be bounded by a limited range of options set out by the two relevant rule sets.

Yet a Hartian positivist seems committed to the view that there is no law or legal system in Divergia. After all, no rule of recognition is

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accepted by the regime's only judges.[108] That counterintuitive, indeed implausible, reaction to Divergia counts against the Hartian idea that a legal system's law necessarily flows from a shared validating practice.

A Hartian positivist could resist the foregoing line of reasoning in a few different ways. But each of those attempted solutions only underscores the problem with the Hartian picture.

First, the rule of recognition in Divergia might consist of a single jurisdictional principle along the lines of: "The two magistrates have authority to decide certain disputes within this terrain." But apart from overstating the degree of agreement between the two magistrates, this answer does not operate as a rule of recognition.[109] It cannot validate the rules that guide each magistrate's decisions. And, once again, to insist that those officially accepted rules aren't part of the law is to give an unhelpful, misleading answer to the question "What is the law of Divergia?"

Second, the law of Divergia might include each judge's personal rules after all, because the rule of recognition is something like: "Whatever either magistrate decrees is part of the law (subject to the jurisdictional principle mentioned above)." But that shared practice or rule, too, does not exist.[110] And because there is no agreement with respect to any foundational validating principle, no such principle could validate the magistrates' personal rules.

Third, and most seriously, Divergia could be viewed as having *two* rival laws, each corresponding to one of the two magistrates.[111] This view accepts that each magistrate is following law but resists the idea that the magistrates operate within the same legal system. The next Section explores this issue at length.

[108] On Hart's insistence on a rule of recognition, see supra note 51.

[109] Hart may dispute this point, as discussed in the next Section.

[110] For a personal positivist, the magistrates' personal rules form the law due to the nature or meaning of law itself, not because of any shared practice among officials. Acting as though this asserted rule of recognition existed, even when its participants in fact have no such practice, would come close to turning Hartian positivism into personal positivism. See supra note 54.

[111] This view could also be glossed as consistent with legal pluralism, or "a situation in which two or more legal systems coexist in the same social field," such as when political government has one law while religions, professional groups, or other entities have their own separate laws. Sally Engle Merry, Legal Pluralism, 22 Law & Soc'y Rev. 869, 870 (1988) (arguing that legal pluralism is ubiquitous).

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B. Identifying Officials Within a System

Elaborating on the third option above, a defender of Hart's account might accuse personal positivism of smuggling in a rule of recognition. How, after all, can we know who Divergia's officials or magistrates are, unless by way of a rule of recognition? A theory that counted the magistrates' personal rules as part of the law might have to view many other actors and rule sets in the same way. If Divergia were home to a chess club, for instance, would that organization's bylaws count as part of Divergia law? There are two possible answers to this challenge, one of which is more radical than the other.

The first, more radical answer is functional. Again, to ask "What is the law?" is to be concerned about a particular context.[112] And people concerned with practically significant adjudications are likely to be interested in the two magistrates. After all, the magistrates apply rules while wielding enormous power over Divergia residents, and we can recognize that fact even if no consensus practice or rule validates the magistrates' power. Put more abstractly, the relevant officials might be the set of individuals who enforce rules through the exercise of coercive force.[113] This approach disqualifies the chess club president from the ranks of Divergia officials.[114]

This functional focus on power also points toward a means of integrating divergent personal rules: the personal rules of officials who wield greater power would play a larger role within the overall system. In a regime more complex than Divergia, for instance, one magistrate might be subject to reversal by another, more powerful adjudicator. (The initial ruling of a feudal lord, for instance, might be subject to override by appeal to the Queen—not because of any formal jurisdictional principle, but just because the Queen commands a grander army.) Insofar as it held greater power and could override the other's views, the appellate adjudicator's personal rules would occupy a more important place in the law. Judges

[112] See supra Section I.A.

[113] Cf. Max Weber, Politics as a Vocation 2 (H. H. Gerth & C. Wright Mills eds. & trans., Fortress Press 1965) (1919) (viewing government as a "monopoly of the legitimate use of physical force" (emphasis omitted)); Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601, 1601 (1986) ("Legal interpretation takes place in a field of pain and death.").

[114] While my focus here is on whether chess clubs (and the like) are part of the same legal system as the Divergia magistrates, a related question is whether a chess club has a "law" at all. Cf. Brian Z. Tamanaha, Legal Pluralism Explained: History, Theory, Consequences 182–92 (2021) (summarizing the academic debate over the conceptualization of rules held within social associations as "law"); supra note 111 (discussing Merry).

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and their personal rules would thus be weighted according to the judges' relative practical control over adjudication.[115] Legal officials, and the law itself, would be organized by a system of power relations.

But perhaps this first, functionalist approach is overinclusive. We might imagine that, in addition to the two magistrates, Divergia is home to a mafia that systematically uses force to achieve its ends. Let us further assume that the mafia adheres to a code of *omertà* or some other rule set. Given these premises, could the mafia's leaders count among the officials of Divergia, such that the mafia's law is part of Divergia's law? Perhaps so, at least if the mafia exerts a degree or type of power important to the person asking, "What is the law?"[116] If that question is posed by a storekeeper who must make a weekly payment to the mafia or else, for instance, then the mafia's *pizzo* or "protection money" might resemble a regular tax collected by officials. Yet some readers will understandably view this answer as overly focused on the perspective of the person asking the question, rather than the perspective of the persons within the legal system being asked about. Here, something is lost when not just magistrates but also mafiosi are lumped together as Divergia officials—even though those two groups have no sense of shared undertaking and, indeed, are at cross purposes.[117]

This difficulty leads to the second answer that is more formalist and less radical. In brief, the magistrates may qualify as officials of the same legal system only if or because they recognize one another as such. On this view, a common practice or principle would indeed unite officials of a single legal system. However, that shared principle would not be a rule of recognition. In other words, the practice or rule that unites officials would not identify the content of the law. Despite recognizing one another as officials within the same legal system, each official might disagree regarding the ultimate criterion for identifying the law that officials ought to apply.

We can frame this answer as a targeted revision of Hart's theory. The shared practice or principle that I have described—one that identifies

[115] See Re, supra note 6, at 860 n.222.

[116] Cf. Matthew H. Kramer, Requirements, Reasons, and Raz: Legal Positivism and Legal Duties, 109 Ethics 375, 394 (1999) (arguing that "the Mafia's system of exerting far-reaching control . . . ought to be classified as a legal system" provided adequate "efficacy," among other things).

[117] On the asserted importance of viewing law as a shared undertaking, see Shapiro, supra note 35, at 204–09; see also Adler, supra note 37, at 750–53 (drawing on Bratman's notion of a "shared cooperative activity" and Shapiro's work).

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officials but not the law—closely resembles what Hart called a *rule of adjudication*, that is, a consensus practice specifying who decides certain disputes.[118] Hart suggested that, in any given legal system, the rule of adjudication emerges directly from social practices, not from the rule of recognition.[119] However, Hart further contended that the rule of adjudication would specify, not simply who decides disputes, but who applies the rule of recognition.[120] The revision proposed here is, essentially, that the rule of recognition be dropped from this Hartian picture.

Perhaps anticipating that revision, Hart argued that the existence of a rule of adjudication necessarily implies the existence of a rule of recognition, albeit an "elementary and imperfect" one:

> [A] system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a 'source' of law.[121]

The argument appears to take the following form: (i) the existence of a rule of adjudication guarantees "authoritative determinations"; and (ii) those determinations reveal the content of the legal system's rules; therefore, (iii) the rule of adjudication indirectly validates the rules of the legal system. Put more succinctly, the rule of adjudication indirectly validates rules by validating adjudications.

But a series of adjudicatory outcomes wouldn't guarantee the existence of a convergent official practice regarding the identification of law, as required for a rule of recognition to exist. For example, the judgments wouldn't "become a 'source' of law" if they remained secret, or if officials had a determined practice of reasoning afresh, without heeding

[118] Hart, supra note 8, at 96–99.

[119] Id; see also Gardner, supra notes 104–05, at 103 (discussing Hart's separation of rules of recognition and rules of adjudication).

[120] See Hart, supra note 8, at 96–99.

[121] Id. at 97. Hart may incorrectly assume that courts empowered by a rule of adjudication must "make authoritative determinations of the fact that *a rule* has been broken." Id. (emphasis added). The presence of personal rules, however, is not foreordained. Adjudication can occur without any substantive law.

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precedent-based arguments. Thus, Hart's chain of inferences isn't inevitable in the way that he supposes. Hart here may betray parochialism, insofar as he appears to think that something like the common law is foreordained in any legal system. In fact, however, the common law's rise was a contingent historical event.[122]

More fundamentally, Hart's argument betrays the deep shortcoming in his positivism. As Hart goes on to acknowledge, "this form of rule of recognition, inseparable from the minimum form of jurisdiction, will be very imperfect."[123] Using judgments "as authoritative guides to the rules depends on a somewhat shaky inference" whose "reliability" depends in part on "the consistency of the judges."[124] Hart here seems to admit what is doing the real work of picking out the law: the personal "consistency of the judges." Any rule of recognition would be imposed by the Hartian positivist as a "very imperfect" proxy for the real law—that is, the adjudicators' personal rules. What's more, those rules seem to exist as law even independent of the indirect chain of events that Hart envisions: if the judges have publicly known personal rules, for instance, then those rules would satisfy all three of our *desiderata* even before the first judgment issues.[125] Personal positivism recognizes this.

Now that we understand how a rule of adjudication can exist even without any rule of recognition, let us return to Divergia. As noted earlier, Divergia features a mutually recognized, even if unstated, practice: each magistrate avoids ruling on disputes that another magistrate has already adjudicated.[126] This practice represents a thin but critical form of coordination among powerful, rulebound actors. Moreover, this practice is a social fact and is not validated by any other shared norm or practice. So Divergia is plausibly viewed as having a rule of adjudication, even though it lacks a rule of recognition. The magistrates share a narrow commitment to a minimal adjudicatory system, even if not to the rules of the system. Thus, the magistrates may be viewed as officials of a shared legal system where law includes both of their rule sets.

The rule of adjudication's key role becomes increasingly evident as we turn to scenarios that more closely resemble actual legal systems. Imagine

[122] See Kramer, supra note 104, at 98 (noting that this sort of precedent exists "not in all legal systems").

[123] Hart, supra note 8, at 97; see also supra text accompanying note 121.

[124] Hart, supra note 8, at 97.

[125] See supra Section I.A.

[126] See supra Section II.A.

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that Simplicia is a society with a single adjudicatory official (named Rex) who has a practice of treating whatever is written on tablets in the town square as the law. In this scenario, there is both a rule of recognition and a rule of adjudication. In time, however, the people of Simplicia adopt certain reforms and rename their society Complexia. In this reformed society, Rex is joined by two additional officials: Tex, who follows the law of modern Texas; and Lex, who follows a unique rule set of her own creation. By consensus, Rex, Tex, and Lex decide cases together by majority vote. Complexia has a rule of adjudication, but its three adjudicators do not share a rule of recognition. Must we therefore conclude that there is no law in Complexia? Personal positivism avoids that counterintuitive result. Instead, each official's rules are regarded as the law for that official and, therefore, as part of Complexia's law. This point continues to hold if we imagine a society with a tiered appellate hierarchy and a multitude of judges variously resembling Rex, Tex, and Lex.

As between the functionalist and formalist ways of identifying officials, which offers a better version of personal positivism? I suspect that that answer, like the broader choice between Hartian positivism and personal positivism, may depend on context. When locating the boundary between legal officials and non-legal officials, or separating out officials of different legal systems, this theoretical choice might prove critical. For our purposes, however, the choice between these approaches is moot. As discussed below, the United States has a rule of adjudication that unites all state and federal judges within the same legal system.[127] So while different readers may favor either the more functionalist or the more

[127] Offering a somewhat similar picture, Professors Larry Alexander and Fred Schauer have argued that one aspect of the U.S. rule of recognition "recognizes as supreme law the Constitution in the National Archives, plus some range of interpretive methodologies (which will vary from Justice to Justice)." Larry Alexander & Frederick Schauer, Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance, *in* The Rule of Recognition and the U.S. Constitution, supra note 63, at 175, 184–85. But, they go on to argue, a single legal system is maintained by a "settlement rule of recognition" along the lines of: "Once the Court decides, . . . the rule of recognition incorporates that decision." Id. at 185. The core problem with this insightful view is that it is framed as a rule of recognition. It is doubtful that any consensus practice in the United States validates interpretive personal rules, given that judges routinely criticize one another's interpretive approaches. Further, the "settlement rule of recognition" is better understood as a rule of adjudication. Judges bow to the Supreme Court's past adjudications while continuing to maintain that the Court has committed legal error. That practice is at odds with treating Court rulings as automatically incorporated into the legal system's fundamental means of identifying the law.

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formalist version of personal positivism, I will remain agnostic as to this choice for the rest of the Article.

* * *

Divergia is of course an extreme hypothetical, but actual situations resemble it. For example, the British law and equity courts evolved independently, indeed almost accidentally, and so had to work out what to do when they disagreed as to a dispute, as well as how to avoid excessive disagreements in the first place.[128] And the underdetermined relationship between federal and state courts in the United States has posed similar challenges, especially in the nation's early decades.[129] In these and other situations, nobody quite knew which adjudicators or attending rules would have the last word. Yet law and legal systems existed.

Still, Hartian positivism has its place. The Divergia hypothetical works by imagining a society without thick consensus practices among its officials, leaving nearly all adjudicatory work for personal rules. Thus, the "What is the law?" question has to be answered in a non-Hartian way, or else it cannot be usefully or intuitively answered at all. In other situations, however, Hartian positivism may be more attractive. Imagine Convergia, that is, a society whose officials have foundational and determinate personal rules in common.[130] Personal positivism and Hartian positivism would then largely agree on the content of the law, and Hartian positivism would have the advantage of parsimony: it could begin with a single rule of recognition rather than a multitude of personal rules. At the same time, personal positivism could claim to be the deeper theory: if the jurists of Convergia began to adopt divergent rules, it would become apparent that personal rules had, the whole time, been the ultimate determinants of the law's content.

So, once again, the "What is the law?" question, like most questions, is a practical one whose answer is shaped by its purpose.[131] There may not

[128] See J. H. Baker, The Common Lawyers and the Chancery: 1616, 4 Irish Jurist 368, 370–71 (1969).

[129] See, e.g., Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816) (discussing the authority of the Supreme Court of the United States to review decisions rendered by state courts).

[130] The United Kingdom at mid-century might have resembled Convergia, or a society whose judges share uniform, determinate personal rules. In that sense, Hart's theory may partly reflect the time and place of its creation (as, of course, does mine).

[131] See supra text accompanying note 33.

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be a single sensible answer or constitutive theory of the law, no matter how nuanced. The primary task for us, as participants in a real-world legal practice, is to generate a sensible answer to this question in light of the challenges we actually face. In the United States, our legal system has *both* consensus principles *and* consequential personal rules. We reside in neither Divergia nor Convergia, but someplace in between. So we need a theory of law that sees *both* aspects of actual practice—not only the shared, foundational norms but also the individual- and group-based principles.

III. PERSONAL RULES AND MORALITY

We are ready to address actual legal practice. Personal positivism provides a helpful, indeed essential, theoretical model of the existing U.S. legal system. The key here is to see how personal positivism relates to morality.

A. Theoretical Disagreement

Begin by exploring how personal positivism can help mitigate or solve the well-known problem of theoretical disagreement.[132] In brief, the problem can be stated as follows:

> (1a) Positivists maintain that law flows from consensus practice, yet (1b) any consensus norms under-determine most if not all contested legal questions. A positivist therefore seems committed to the view that (1c) there is almost no law in disputed cases. Yet (2) participants in the legal system, including judges, generally act as though there is law in disputed cases. That is, judges don't say, "Having now run out of law, I am going to do something else." Rather, the judges reason from settled law and claim to arrive at legally correct results. Advocates and observers behave similarly.

Thus, there is a vast mismatch between positivism and legal practice. The standard upshot is to reject positivism, which cannot explain practice, and

[132] See Ronald Dworkin, Law's Empire 20–23, 33–40 (1986); Scott J. Shapiro, The "Hart-Dworkin" Debate: A Short Guide for the Perplexed, *in* Ronald Dworkin 22, 24 (Arthur Ripstein ed., 2007); see also Berman, supra note 95, at 3 (distinguishing the "*challenge from theoretical disagreements*" from the closely related "*too-little-law challenge*").

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instead adopt Dworkinian interpretivism or some kind of natural law, which can.[133]

But perhaps this problem is not so severe in the first place. Claim (1a) is that positive law is always determined by a consensus rule of recognition. If we reject that premise and instead admit personal rules to the ambit of law, then the positivist description of legal practice would look very different. The law would include not only consensus practices and whatever rules they authorize but also myriad idiosyncratic principles accepted by particular judges. Admitting all those personal rules would generate a much larger rule set and (for each judge) new determinate outcomes. As a result, claim (1b) is rendered moot, while the conclusion (1c) is rendered false. And the judges' behavior (2) becomes unsurprising.

We can use Dworkin's own examples to illustrate this new positivist picture. In the famous snail darter case, for instance, Dworkin pointed out that some judges prioritized the statutory language at issue, whereas others dwelled on purposive or practical points to reach an opposite conclusion.[134] Dworkin rightly characterized this case as involving theoretical disagreement about the grounds of law (not a disagreement about either facts or the need to adhere to the law). But this sort of theoretical disagreement is a hallmark of personal positivism. In the snail-darter case itself, the author of the majority opinion generally espoused prioritization of statutory text, and the dissent's author generally privileged purpose and pragmatism.[135] Based on those and other Justices' well-known personal views on methodology, at least some of the votes in the case were determined—and, if enough votes were determined, so too was the Court's final outcome. So both sides of the debate were adhering to positive law—that is, to their own personal rules.

Personal positivism thus allows for (i) theoretical disagreement that is (ii) sociological in the sense characteristic of Hartian positivism and (iii)

[133] Of course, positivists have offered their own responses to this asserted problem. See, e.g., Hart, supra note 8, at 274; Berman, supra note 132, at 32 (discussing positive principles with degrees of "weight" and "activation"). For instance, Brian Leiter argues in part that positivism's descriptive shortcomings in contested appellate cases are outweighed by its descriptive power with respect to consensus aspects of legal practice. Brian Leiter, Explaining Theoretical Disagreement, 76 U. Chi. L. Rev. 1215, 1228 (2009). Personal positivism, by comparison, can explain both aspects of legal practice: consensus and dissensus alike often stem from personal rules.

[134] Dworkin, supra note 132, at 20–23 (on TVA v. Hill, 437 U.S. 153 (1978)).

[135] Chief Justice Burger wrote the majority and Justice Powell the lead dissent. *TVA*, 437 U.S. at 156, 195.

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capable of yielding determinate results in contested cases. This conclusion goes a great distance toward mitigating, perhaps even to the point of solving, the problem that theoretical disagreement poses for positivism.[136] Again, personal positivism suggests that judges will frequently reach legally determinate results even as they express profound theoretical disagreement. And that, more or less, is what positivism's critics have alleged to be the case.

B. Judicial Argument and Criticism

Personal positivism can do still more to clarify and capture actual practice. When judges disagree about cases, they are sometimes criticizing one another for having inadequate or incorrect personal rules, an idea that is effectively captured by the more familiar label of "judicial philosophy."[137] These criticisms have a double aspect. On the one hand, the judge hurling the criticism is adhering to the law that is applicable to her—namely, her own personal rules. For a personal positivist, this first aspect of the argument is legal in nature. On the other hand, the judge is also appealing, at least potentially, to non-legal or pre-legal reasoning in the hope of swaying someone who has embraced different personal rules. This second aspect of the argument is moral in nature. And because these two different types of claim may appear together, arguments among judges can simultaneously have both legal and non-legal aspects.

Perhaps this stylized account of judicial debate doesn't really fit actual practice, which is usually focused on claims about interpersonal or institutional law. That is, judges regularly accuse one another, not just of having the wrong judicial philosophy, but of being legally incorrect. By contrast, personal positivism might demand that judges sharply distinguish moral arguments from legal arguments grounded in personal rules.[138] For example, a judge might have to say something akin to the following: "I am committed to originalism, so *X* is legally correct. And

[136] Cf. Priel, supra note 104, at 253–54 (noting that judges having "different rules of recognition" potentially "gives a straightforward way of understanding what Dworkin called 'theoretical disagreements' among judges").

[137] For empirical discussion, including as to the public appeal of judicial philosophy, see Christopher N. Krewson & Ryan J. Owens, Judicial Philosophy and the Public's Support for Courts, 76 Pol. Rsch. Q. 944, 945 (2023) ("Taken at face value, a judicial philosophy commits a judge to apply a set of principles consistently.").

[138] This is the personal positivist version of the Hartian problem discussed at supra text accompanying note 133.

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while my colleague isn't an originalist, she really ought to be. Only originalism comports with the political and moral value of democracy."[139]

While jurists like Justice Scalia (or, to opposite effect, Justice Breyer) have often talked in just this way when riding the lecture circuit debating their approaches to the law,[140] they did not typically organize their judicial opinions along these lines. Yet we should not be surprised that the legal aspect of judicial disagreement predominates when judges move away from first-principles debates and instead argue about discrete outcomes in litigated cases. Judicial opinions are generally content to argue from the personal rules shared by the authoring judges, without attempting to fully justify those rules. And, for a personal positivist, that practice makes sense: because each judge's personal rules are the law, those rules naturally form the basis of legal opinions emanating from courts.

Another consideration moves personal positivism still more in line with actual practice. So far, I have distinguished between (i) the pre-legal or non-legal reasons for having personal rules and (ii) the personal rules themselves. There is at least one more relevant category: (iii) consensus rules, that is, widely shared personal rules. Judges will appeal to consensus whenever possible—and, given their rhetorical incentives, more often than they should.[141] When a judge appeals to a consensus rule, she is arguing that her personal rules comport with the consensus, whereas the opposition's personal rules contradict it. That kind of claim packs a special punch because there are reasons to stay on the right side of a consensus, even if personal rules are, for those who maintain them, the applicable law. A self-interested judge may worry that, if he became an outlier, he might have a harder time persuading his colleagues or

[139] Scholars are similarly concerned with the "choice" of legal approach. See, e.g., Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Calif. L. Rev. 535, 576–77 (1999); Alexander Volokh, Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else, 83 N.Y.U. L. Rev. 769, 776 (2008).

[140] See, e.g., James E. Rogers College of Law, U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer Conversation on the Constitution, YouTube (Jan. 24, 2019), https://www.youtube.com/watch?v=jmv5Tz7w5pk [https://perma.cc/NBL9-VCVS] (held at the University of Arizona in 2009) (featuring Justices discussing "judicial philosophy," "consistency," and principles that "you believe in").

[141] See Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev. 1371, 1417 (1995); see also Cary Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119, 196 ("The claim that 'the law required me to' helps to justify and defend all decisions that thwart the will of majorities and the work of the elected branches."). In other words, the rhetoric of judicial opinions—if read at face value—might exaggerate certain features of legal practice.

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garnering acclaim. Or a conscientious judge might worry that his own idiosyncrasy will prove harmful to the legal system.[142] Because of these pre-legal reasons, most if not all judges have second-order personal rules that allow, or demand, that they avoid becoming outliers.[143] For example, a judge might abandon one personal rule based on another one that allows for adherence to institutional precedent.[144]

Putting all this together, personal positivism distinguishes among at least three types of legal argument.

First, and most salient, are arguments from consensus rules. That is, a lawyer or judge might derive a conclusion from widely shared personal rules. Again, this type of claim is uniquely powerful. By definition, consensus rules align with the personal rules of most judges. So an argument from consensus usually doubles as an argument from one's own personal rules. And it can also operate as an appeal to the personal rules of one's adversaries. Moreover, the moral and rhetorical heft that comes with consensus support provides added appeal. The fact that many (not all) arguments of this type are consistent with Hartian positivism helps to explain why that theory does indeed have considerable explanatory power.[145]

Second are arguments from non-consensus personal rules. These include affirmative arguments based on a judge's own "judicial philosophy," such as when Justice Gorsuch (or, before him, Justice Scalia) has waxed poetical about textualism on the way toward a textualist conclusion.[146] But it also includes negative or critical arguments that turn an adversary judge's past writings against them. Justice Kagan is now exemplifying the latter activity, including by accusing other Justices of

[142] See Adler, supra note 37, at 779 (giving the example that "decisions by the natural person that virtually everyone in the population recognizes as President will have moral weight for everyone in virtue of this collective recognition").

[143] See supra notes 84–86 (on "meta-rules"); see also Re, supra note 6, at 848–49. Put more generally, *interpersonal rules*—that is, personal rules that facilitate inter-judge coordination—are both important and often individualized.

[144] See Richard M. Re, Precedent as Permission, 99 Tex. L. Rev. 907, 947 n.173 (2021) (collecting examples).

[145] Personal positivism and Hartian positivism concur when a judge's personal rules align with the dictates of a foundational consensus practice. Disagreement arises when the judge confronts *either* a personal rule that is unsupported by a foundational consensus practice *or* a rule validated by a foundational consensus practice that the judge does not herself participate in.

[146] See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1737–38 (2020).

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breaking faith with their textualist precepts.[147] These arguments are less central than arguments from consensus, but they are still pervasive—and perhaps increasingly so, as self-consciously espoused judicial philosophies have become both common and celebrated.

Last are non-legal arguments justifying personal rules. These are essentially appeals to morality, and they most often appear either interstitially within the other two types of argument or in brief codas at the end of judicial opinions.[148] The point of these appeals is to argue for one personal rule and against another one, on pre- or non-legal grounds. These arguments could be taken as instances of Dworkinian or natural law reasoning. But, as we have seen, even these arguments often have a positivist aspect because they align with the arguing judge's preexisting personal rules. In other words, arguments *about* personal rules usually appear, if at all, in tandem with arguments *from* personal rules. Exclusively moral claims tend to be consigned to the periphery of judicial opinions precisely because they are not legal. By contrast, that kind of argument features prominently when judges directly defend their judicial philosophies in books and speeches.[149] And that, too, makes eminent sense: for a personal positivist, the moral justification for a judge's personal rules are non-legal and so are apt to take center stage in extrajudicial fora.

C. Fit, Justification, and Two Kinds of Integrity

If personal positivism can explain the disagreements pervading legal practice, does that mean it's really Dworkin in disguise, or a watered-down version of his approach?

At first blush the answer is simply no. In brief, Dworkin argued that the law is constituted by the set of principles that best "fit" and "justify" legal practice.[150] Dworkin therefore argued that there are never hard cases (in the positivist sense of being metaphysically undetermined[151]) for any judge, since a perfect judge named Hercules could in principle arrive at the One Right Answer to even the most challenging cases, based in part

[147] See infra note 189 (collecting examples).

[148] See, e.g., Leah M. Litman, "Hey Stephen," 120 Mich. L. Rev. 1109, 1115 (2022).

[149] See supra note 140; e.g., Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997); Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 18 (2005).

[150] See Dworkin, supra note 132, at 239.

[151] See Brian Leiter, Legal Indeterminacy, 1 Legal Theory 481, 484 (1995).

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on moral principles relating to justification.[152] By contrast, personal positivism maintains that the law's rules are finite. They are posited rules established by a judge's past public commitments. So, even under personal positivism, there will still be undetermined cases.[153] In fact, some cases that Hartian positivists view as easy based on consensus rules might actually be undetermined and therefore hard *with respect to particular jurists*, depending on their personal rules.[154]

Yet aspects of Dworkin's discussion suggest that his interpretive approach would, in practice, closely resemble personal positivism. That is because Hercules doesn't really exist. Since no actual person can possibly do what Dworkin imagines of his omniscient jurist, judges must muddle through based on their own experiences, insights, and powers of reflection.[155] It is inevitable that judges will rely on their own personally accumulated wisdom when thinking practically about the Dworkinian dimension of justification. For instance, a judge who has taken a position on originalism will have developed a view as to whether originalism is well-justified. The judge will then have good reason to hew to that position in the next case, rather than reinventing the wheel.[156]

To be clear, this Dworkinian perspective on personal rules isn't positivist. As we have seen, personal positivism adopts an internal standpoint when answering a practical question about the law in a given society. A particular official's rules of decision are part of the answer to that practical question. Therefore, those rules are part of the law. The Dworkinian picture, by contrast, adopts a less descriptive standpoint, choosing instead to incorporate aspects of morality. Personal rules operate, not as law, but rather as heuristics for judges pursuing the One Right Answer, which is a morally justified answer. The judge might say: "If my personal rules dictate *X*, then it is a pretty safe bet that, in the present case, I should operate on the assumption that *X* is correct." This is Hercules in plain clothes.

[152] See Dworkin, supra note 132, at 239–40 (discussing Hercules, "an imaginary judge of superhuman intellectual power and patience who accepts law as integrity").

[153] This is why a mitigated version of the problem of theoretical disagreement may obtain even for a personal positivist. See supra Section III.A.

[154] This point draws attention to legal systems where personal positivism is inapt—namely, where jurists lack distinctive personal rules. See supra note 130.

[155] Dworkin rebuts related points as objections, rather than as efforts to implement his abstract theory. See Dworkin, supra note 132, at 258–66.

[156] See Re, supra note 6, at 829–30. A judge's publicly known personal rules might themselves have moral significance, akin to a promise or oath. See supra note 83.

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Another aspect of personal positivism also interacts with Dworkinian interpretation. As we have seen, consensus principles have special appeal and judges often have good reason to avoid being outliers.[157] These points parallel, and may underlie, the Dworkinian dimension of fit.[158] A legal position that does not fit existing practice is one that, if adopted, would render the judge an outlier. The search for adequate fit thus recognizes the moral appeal of legal consistency, stability, and uniformity—traits associated with what Dworkin calls integrity.[159] The judge might say: "If *X* is an outlier view, then it is a pretty safe bet that, in the present case, I should operate on the assumption that *X* is wrong."

Personal positivism could thus be recast as operationalized Dworkinian interpretation. And that rough-and-ready version of Dworkin's theory reveals two different, competing forms of integrity. First is the integrity of one's own set of personal rules, which each jurist views as reliable heuristics for justification.[160] A judge might ask, for example, whether her own rule set is coherent. If not, then one or more of the judge's personal rules is likely unjustified. Second is the integrity of the legal system in general, which each judge views as a significant moral interest corresponding to fit.[161] If a judge's personal rules tend to undermine the overall legal system's coherence, then those rules pose a fitness problem. One might conflate these two forms of integrity by imagining Hercules as both omniscient and alone within a legal system. In that idealized situation, there would be no real difference between the judge's own personal views and the best view of the law in general. Yet a real-life judge engaged in Dworkinian interpretation must balance or trade off these two kinds of integrity. A particular judge might be able to enhance the coherence of her own personal rules only at the cost of undermining

[157] See supra text accompanying note 143.

[158] One puzzle is why Dworkin cares about fit at all, apart from its relevance to justification. For relevant discussion, see Mark Greenberg, How Facts Make Law, 10 Legal Theory 157, 196–97 n.47 (2004).

[159] See Dworkin, supra note 132, at 219–24.

[160] On the more general importance of consistency as a virtue of good faith, see Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 130 (2018). Importantly, judges who pursue external, sociological legitimacy will have to trade off internal, legal legitimacy. See Tara Leigh Grove, The Supreme Court's Legitimacy Dilemma, 132 Harv. L. Rev. 2240, 2262 (2019) (reviewing Fallon, supra). This dynamic implicates the role of personal precedent in averting hackery. See infra note 183.

[161] See Neil MacCormick, Coherence in Legal Justification, *in* Theory of Legal Science 235, 236–37 (Aleksander Peczenik, Lars Lindahl & Bert Van Roermund eds., 1984) (distinguishing between coherence and consistency).

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the legal system's coherence. This is the Dworkinian version of a problem we have already encountered within personal positivism: the challenge of hewing to one's own personal rules without taking on an unacceptably extreme or outlier posture within the legal system.[162]

Ultimately, then, the three aspects of legal reasoning that personal positivism recognizes all find analogues in Dworkinian jurisprudence.[163] First are consensus rules, which correspond with fit. Second are personal rules, which correspond to an important practical means of ascertaining justification. Last are the pre- or non-legal reasons underlying personal rules, which correspond to the complete set of moral considerations comprising justification. So perhaps personal positivism and Dworkin's theory largely agree on the relevant set of judicial behaviors and attitudes but simply go about characterizing them differently. While both are practical and prescriptive, personal positivism adopts a more descriptive standpoint that remains agnostic on questions of morality.

* * *

Stepping back, we can locate personal positivism within a larger jurisprudential landscape, where each contending theory brings its own advantages and insights. At one end of a spectrum are descriptive accounts that adopt an external perspective. These theories, which include predictivism and realism, seek to explain the actual behavior of legal actors. At the opposite end of the spectrum are theories that adopt an internal, moral perspective. These approaches are concerned (at least in part) with the morally correct thing for legal actors to do. Dworkinian and natural law theories fit this bill. In between are descriptive, internal accounts. These theories attend to actual normative practices. Hartian positivism is such an account, and so is personal positivism. And their relative usefulness largely depends on the degree to which legal practice reflects consensus or dissensus.

It is time to consider the implications of the distinctive jurisprudential perspective that personal positivism affords, given actual legal practice in the United States today.

[162] See supra text accompanying note 143.

[163] See supra Section III.B (describing these three aspects of legal reasoning).

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IV. IMPLICATIONS

Understanding the law is valuable for its own sake. But personal positivism is motivated by pragmatic concerns, so it ought to have some use. This Part makes good on that promise.

A. Too Little Law—or Too Much?

Many commentators, and even judges, perceive a shortage of meaningful law in the United States, especially when it comes to constitutional law.[164] Recent judicial appointments to the Supreme Court have fueled this impression, as longstanding practices have given way to transformative rulings on issues like abortion rights,[165] affirmative action,[166] and the Second Amendment.[167] Moreover, the Justices' votes and opinions are suspiciously consistent with political affiliation, as Republican appointees are all more conservative than their Democratically appointed counterparts.[168] Whether a judge has been appointed by a Republican or Democratic president is strongly suggestive of how they will approach many issues and cases.[169] A similar pattern is visible in the federal courts of appeals and high-salience state courts.[170] All this together suggests that the identity of judges is more important than impersonal sources of law, such as constitutional texts and judicial precedents.[171] Individual judges might even seem to be playing a role akin to party leaders, rendering the judiciary an extension of politics.

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[164] See supra text accompanying notes 3, 22.

[165] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[166] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023).

[167] See supra note 13.

[168] See Hemel, supra note 10, at 125; Lee Epstein & Eric Posner, If the Supreme Court Is Nakedly Political, Can It Be Just?, N.Y. Times (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html [https://perma.cc/6846-69E2].

[169] See, e.g., Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 86, 94 (2002).

[170] In the federal system, polarization is perhaps most evident in the Fifth Circuit. See, e.g., David Smith, How Trump Reshaped the Fifth Circuit to Become the 'Most Extreme' US Court, The Guardian (Nov. 15, 2021, 3:00 AM), https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us [https://perma.cc/864L-L4UV]. In the states, the recent judicial elections for the Wisconsin Supreme Court come to mind. See Reid J. Epstein, Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers, N.Y. Times (Apr. 4, 2023), https://www.nytimes.com/2023/04/04/us/politics/wisconsin-supreme-court-protasiewicz.html [https://perma.cc/3L6H-3J7C].

[171] See Richard A. Posner, How Judges Think 1 (2008) ("If changing judges changes law, it is not even clear what law is."); Segall, supra note 28, at xvii; Ariane de Vogue, Kagan Calls

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But conflating law with politics risks overlooking, and undermining, the considerable amount of law that does exist. Supreme Court Justices, like many other judges, have well-known personal rules. The present situation is therefore unlike one in which the Justices or other judges lack significant personal rules and so are lawless. The better view is that the courts exhibit, not an absence of law, but a profusion of it. Even in contested cases, legal practice today features countless personal rules of almost every variety, including both methodological principles and substantive commitments. Moreover, these rules are mostly distributed into two camps or factions. Of course, these groups also have many personal rules in common, such as fidelity to the result in *Brown*.[172] And the camps are fuzzy around the margins, with some judges not quite falling into either one of them. Still, the two camps—each associated with its own constellation of personal rules—exhibit law-like behavior. Judges care about their own personal and group rules, and they cast predictable votes based on them.

Today, then, the law is substantially characterized by a clash between two groups of judges, each organized around rival judicial philosophies or personal rules.[173] Very roughly, some judges espouse more formalist methods and conservative outcomes, whereas others adhere to more functionalist methods and liberal outcomes.[174] One group tends toward limitations on federal legislative power, cabined administrative agencies, rights to firearms, and religious exemptions. The other, by contrast, is associated with nearly plenary federal legislative power, vigorous administrative agencies, race-based affirmative action, and abortion rights. While leaving substantial agreement on many less ideologically charged matters, these disagreements (and others) aren't fairly dismissed

Leak of Draft Opinion Overturning Roe 'Horrible' and Expects Investigation Update by Month's End, CNN (Sept. 13, 2022, 5:45 AM), https://www.cnn.com/2022/09/12/politics/kagan-supreme-court-roe-draft-opinion-leak-investigation/index.html [https://perma.cc/MC93-RFMA] (Justice Kagan saying that if "[a new] judge comes in and all of a sudden the law changes on you" that "just doesn't seem a lot like law"); supra text accompanying note 3.

[172] 347 U.S. 483, 493 (1954).

[173] See Adler, supra note 37, at 757 (discussing "partisan" group-based law (emphasis omitted)). Group-based political alignments in the judiciary roughly mirror those in the political arena. See supra note 27 and accompanying text.

[174] See supra text accompanying note 173; supra note 27; see also Margaret H. Lemos, The Politics of Statutory Interpretation, 89 Notre Dame L. Rev. 849, 901–03 (2013) (reviewing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012)) (arguing that "textualism has become a conservative brand and purposivism its primary competitor").

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as marginal. Personal positivism allows us to see these potent judicial factions, as well as divisions within factions, as legal phenomena.

The difficulty is that these two coherent factions coexist within the same legal system. As we have seen, personal positivism can identify a legal system either functionally (based on the exercise of power) or more formally (by finding a rule of adjudication).[175] Either way, both liberal and conservative judges operate within a single system of law. The judges are powerful, rulebound actors, and they are both united and organized by a mutually agreed-upon adjudicatory structure. In other words, judges today may not agree very much on what the law is, but they do agree on who hears which cases, at what times, and with what consequences. But because there is now so much organized dissensus, the rule of adjudication is under strain.[176] The judges' personal rules are extraordinarily oppositional, both in the sense that individuals are strongly at odds with one another and in the sense that individual-to-individual disagreements are often representative of larger faction-to-faction disagreements.

This alternative diagnosis fulfills all three of our theoretical *desiderata* far better than the skeptical view that there is no genuine or determinate law in contested cases.[177] First, it takes seriously the position of the jurists who are deciding these cases and, for all appearances, evince concern for their espoused personal rules.[178] Second, it shows how litigants can and do make persuasive rule-based arguments in court, including arguments addressed to specific judges—an opportunity that is in fact taken up by sophisticated counsel.[179] Third, it explains how the public can understand so much about the law, including (for example) why many legal principles were unsettled by the death of Justice Ginsburg and appointment of Justice Barrett. So what we have is not chaos or whimsy, as one might expect if there were no law, but rather a system characterized by factional conflict organized around legal principles. Moreover, this picture is legal in nature, as opposed to being simply political or partisan—as evidenced by the absence of overt political argument in both litigant and judicial

[175] See supra Section II.B (discussing rules of adjudication). In the United States, judges have power *because* there is a rule of adjudication.

[176] One sign of the strain is the late proliferation of court reform proposals, discussed below. See infra text accompanying notes 203–04.

[177] See supra Section I.A (discussing three *desiderata* for personal positivism).

[178] See, e.g., supra text accompanying note 2.

[179] See, e.g., supra text accompanying note 1.

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reasoning,[180] as well as votes that are rule-based and yet out of step with the relevant judges' political affinities.[181]

Now, the conclusion that the United States has a lot of law—and a factionally fragmented law at that—isn't itself a normative diagnosis, either favorable or unfavorable. For a positivist to characterize the law is to advance a descriptive jurisprudential claim. Personal positivism allows that the law could exhibit varying degrees of uniformity, factionalism, or individuality. Indeed, a major benefit of personal positivism is that it recognizes diverse legal systems as they are, in all their complexity. At the same time, personal positivism offers a distinctive perspective that substantially changes the terms of debate, as well as the nature of any normative concerns. For example, someone who is skeptical that the Supreme Court presently operates based on law might want to create law, or else object that the courts are being political.[182]

Personal positivism points toward a subtler and more complex evaluation of the U.S. legal system. On the one hand, partisan decision-making is more likely to flourish among judges who haven't taken significant legal positions of their own and so have no personal rules to betray. And, again, most current judges have taken a host of legal positions. So while the U.S. judiciary may be overly influenced by politics, it has not yet collapsed into hackery.[183] To preserve that modest but indispensable achievement, reformers should build on or improve personal rules, not tear them down.

On the other hand, a fragmented legal system generates at least three interrelated worries. *Turbulence* arises when small, unpredictable changes in judicial personnel result in avulsive changes in the law, as came about through the sudden replacement of Justice Ginsburg with

[180] See Pozen & Samaha, supra note 92, at 753. Many personal rules, that is, disqualify pure moral argument.

[181] See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (Gorsuch, J.); Burgess Everett, Hawley on LGBTQ Ruling: Conservative Legal Movement Is Over, Politico (June 16, 2020, 4:03 PM), https://www.politico.com/news/2020/06/16/josh-hawley-lgbt-supreme-court-conservatives-323254 [https://perma.cc/AS7Y-2MZK]. Or consider failed challenges to the 2020 presidential election involving Donald Trump, who had appointed three members of the Supreme Court. E.g., Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020).

[182] See, e.g., supra note 28.

[183] See Re, supra note 6, at 852 n.174 (defining hackery as "obedience to the current wishes of a political party or other special interest, usually for reasons of personal gain and not based on any legitimate principle"). Put in somewhat different terms, the current U.S. legal system is characterized by the rule of law in the following important sense: judges and other officials generally follow publicly known (personal) rules, irrespective of the parties in a specific case.

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Justice Barrett.[184] *Obstinacy* occurs when judges prioritize their personal or group rules even when doing so is harmful. This is essentially the problem of "foolish consistency,"[185] which (for a personal positivist) amounts to following the law over a cliff. Finally, *alienation* results when many, even most, people support personal rules radically different from those constituting the law.[186] The need to address these problems leads to the next Section.

B. Reforming Legal Practice

Viewing personal rules as the basis of law, not its rival, points toward ways of reforming both the courts and legal culture.

First and most immediately, the judiciary's many critics should deprioritize ideals of impersonal law in favor of engaging more directly with the personal rules adhered to by individual jurists. In a time of widely shared personal rules, relatively impersonal, institutional rules like stare decisis are highly motivating, but direct appeals to those sorts of principles are less effective in an era of legal fragmentation. Moreover, effective engagement with relatively strong personal rules must sometimes take up one specific jurist at a time. So instead of ignoring or deprecating judicial individuality, critics should honor judges who espouse rich personal jurisprudences and generally adhere to those publicly known principles. This approach also has a negative aspect, insofar as deviations from personal rules ought to generate pointed criticism.[187] These efforts are valuable not just because they can temper willful or biased decision-making in the moment but also because they encourage the gradual clarification and development of each Justice's personal rules.

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[184] *Dobbs* is a prime example, see Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2349 (2022) (joint dissent), but Justice Sotomayor has made turbulence a broader theme. See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2322 (2023) (Sotomayor, J., dissenting) ("What a difference five years makes." (quoting Carson v. Makin, 142 S. Ct. 1987, 2014 (2022) (Sotomayor, J., dissenting))).

[185] Ralph Waldo Emerson, Self-Reliance (1841), *reprinted in* Essays—First Series 39, 50 (Floating Press 2009).

[186] See, e.g., Mark Sherman & Emily Swanson, Trust in Supreme Court Fell to Lowest Point in 50 Years After Abortion Decision, Poll Shows, Associated Press (May 17, 2023, 3:05 PM), https://apnews.com/article/supreme-court-poll-abortion-confidence-declining-0ff738589bd7815bf0eab804baa5f3d1 [https://perma.cc/F6HU-TTR2].

[187] Even so, majority opinions generally ought to avoid leveling accusations of personal inconsistency against dissenting Justices. See Re, supra note 6, at 852.

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Justice Kagan is implementing roughly this shift in strategy. After long celebrating stare decisis in a failed attempt to save *Roe*,[188] Justice Kagan has begun to level charges of methodological inconsistency against the Court majority and even to argue explicitly from other Justices' specific personal rules.[189] As Justice Kagan illustrates, the fact that a judge's own personal rules favor institutional considerations like stare decisis does not prevent her from holding her colleagues' feet to the fire. But as critics pivot from impersonal to personal critique, they must tread carefully. Accusations of inconsistency are easily exaggerated or confused with simple disagreements.

Second, personal positivism suggests the utility of a distinctive type of shared principle: permissions. At present, legal culture generally emphasizes mandates or duties, such that each jurist claims to be bound to rule in a particular way.[190] That frame makes sense for individual judges, given their own personal rules. But because the legal system includes jurists with different personal rules, no one judge's specific sense of being bound is necessarily generalizable. Other jurists might equally feel, and be equally entitled to feel, bound to rule another way. In that situation, the disagreeing judges cannot persuade one another by appealing to personal consistency. Instead, each judge could argue on moral grounds that the other judge should abandon her personal rules. But that claim would meet resistance. Judges trust their own past selves and do not want to be inconsistent.[191] These tendencies sustain personal rules and, for a personal positivist, give the law its force and fixity.[192]

There is at least one other move available to the disagreeing judges: rather than argue either from or against one another's personal rules, the

[188] See, e.g., Knick v. Township of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting).

[189] See West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (textualism); Sackett v. EPA, 143 S. Ct. 1322, 1360–62 (2023) (Kagan, J., concurring in the judgment) (similar); Biden v. Nebraska, 143 S. Ct. 2355, 2391 (2023) (Kagan, J., dissenting) (criticizing a majority opinion by Chief Justice Roberts by arguing from his dissent in *Massachusetts v. EPA*, 549 U.S. 497, 548 (2007)); see also Benjamin Eidelson & Matthew C. Stephenson, The Incompatibility of Substantive Canons and Textualism, 137 Harv. L. Rev. 515, 517–19 (2023) (noting Justice Kagan's textualist critiques). Justice Sotomayor is developing a similar pattern with regard to personal rules of stare decisis. See, e.g., Jones v. Mississippi, 141 S. Ct. 1307, 1337 (2021) (Sotomayor, J., dissenting).

[190] See supra note 141.

[191] See Re, supra note 6, at 826; see also Nina Varsava, Professional Irresponsibility and Judicial Opinions, 59 Hous. L. Rev. 103, 112 (2021) (arguing that judges are encouraged to write in a personal style to attract attention and enhance their reputations).

[192] See supra note 50.

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judges might try to establish a condition of mutual respect and toleration.[193] Remember, the basic problem that personal positivism reveals is that the legal system is marked by warring factions associated with contradictory personal rules. If that state of affairs poses a durable problem, the solution is to foster greater unity. What we need, then, is a realistic way to forge new, shared rules that can unite the conflictual personal rules that already exist.[194] And an auspicious way to do *that* is to accommodate disagreement and lower tensions. One aspect of this ambition is systemic and long-term. If two rival groups get in the habit of agreeing to disagree rather than fighting tooth and nail, they might come to look on one another more charitably and move closer to one another's views. Another aspect is dispute-driven and immediate. As shared rules of accommodation develop, it becomes easier for members of either faction to invoke those principles instead of the personal rules they started out with, yielding otherwise impossible compromise. By recognizing judicial personality, then, the legal system can moderate it.[195]

To illustrate, imagine two jurists who disagree about whether courts must follow plain statutory texts when doing so yields absurd results. For the sake of peace, both might agree to forge a shared rule of permission—that is, a rule expressly recognizing that both judges have embraced personal rules that are legally acceptable. Of course, a personal positivist would maintain that both judges were already acting in accord with the law, since each was abiding by her own publicly known personal rules. Yet it is a separate question whether a jurist in fact views her colleagues as acting legally or describes them as doing so.[196] A rule of permission would address those separate issues. True, the "live and let live" ethos

[193] Permissions thus check the adverse effects of elevating personal rules to the status of law. As Professor Allison Orr Larsen has suggested, normalizing judicial personality could bring about "an even more polarized Supreme Court with very little room for consensus and common ground." Adam Liptak, The Problem of 'Personal Precedents' of Supreme Court Justices, N.Y. Times (Apr. 4, 2022), https://www.nytimes.com/2022/04/04/us/politics/supreme-court-personal-precedents.html [https://perma.cc/VS2C-5Y4J]; see also Allison Orr Larsen, Supreme Court Norms of Impersonality, 33 Const. Comment. 373, 374 (2018) (arguing that "self stare decisis," the "habit of reiterating a dissenting view each time an issue presents itself again," is often harmful).

[194] An obvious alternative to conciliation is to work for one's favored approach to prevail. My next proposal addresses that possibility by describing the proper terms of public debate. In the meantime, permissions are critical.

[195] See generally Richard M. Re, Permissive Interpretation, 171 U. Pa. L. Rev. 1651 (2023) (arguing for interpretive permissions).

[196] See supra note 54.

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that permissions foster would have limits, insofar as each jurist might continue to argue that her own personal rules are morally superior (as well as applicable to herself). But the availability of permissions would sometimes discourage any argument from taking place, since each judge would have the option of simply acknowledging that the other has acted permissibly. Further, the disagreeing jurists might sometimes take advantage of the flexibility that shared permissions afford by deviating from their distinctive personal rules, at least for the case at hand. Rules of permission, then, would temper inter-judge conflict and foster compromise. At the same time, open use of permissions would reveal that what often controls outcomes in contested cases isn't impersonal law, but rather the divergent personal rules held by different judges within different factions. Greater transparency on that score is itself valuable—and leads to the next point.

Third, political actors and participants in legal culture should openly acknowledge the law's fundamental individuality. Once we see that each judge's personal rules are part of the law, the content and defensibility of those rules become an obvious topic of public interest. To some extent, political and legal culture already acknowledges this point. Federal court nominees are vetted, interviewed, and exposed to public scrutiny before their Senate confirmation hearings. And each jurist is expected to have a "judicial philosophy" of some form, even if indeterminate or modest. Yet the confirmation process teeters between two defective pictures of the judicial role. One picture focuses on a collection of politically relevant affiliations and outcomes, such as supporting or opposing abortion rights. This view, which became especially salient during the Bork nomination, pays too little attention to personal rules and so essentially casts the judiciary as a legislature.[197] The other picture is that judging is a technical activity akin to engineering or game-playing. The American Bar Association fosters this view by saliently rating nominees as "Well Qualified," "Qualified," and "Not Qualified."[198] But while technical

[197] Cf. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1001 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[I]f our Constitution has somehow accidently committed [value judgments] to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.").

[198] See Susan Navarro Smelcer, Amy Steigerwalt & Richard L. Vining, Jr., Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees, 65 Pol. Rsch. Q. 827, 828 (2012).

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competence and sound temperament are indeed important to judging, they do not come close to disclosing a particular judge's personal rules.

A better approach would borrow from theories of "democratic constitutionalism," which posit a link between popular politics and constitutional law.[199] One aspect of this link is descriptive. The political process selects who sits on the bench and screens for certain personal rules. A second aspect is normative.[200] To the extent that the political process recognizes and approves each judge's personal rules, those rules obtain a substantial degree of democratic legitimacy.[201] Reorienting legal culture around these points would helpfully clarify what is at stake in judicial nominations and confirmation hearings.[202] This reorientation would also help the public distinguish among approaches to court reform. Some reforms, such as jurisdiction stripping,[203] might alter the rule of adjudication in a way that favors or disfavors various personal rules, thereby bringing about a change in the law. Other reforms, such as limiting and regularizing judicial terms, would strengthen the democratic

[199] See, e.g., Robert Post & Reva Siegel, *Roe* Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007); Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 Suffolk U. L. Rev. 27, 27–28 (2005); infra note 217 (collecting sources); see also Lawrence B. Solum, Themes from Fallon on Constitutional Theory, 18 Geo. J.L. & Pub. Pol'y 287, 298 (2020) ("Popular Constitutionalism . . . is the view that 'We the People' can legitimately change the Constitution through processes such as transformative appointments that do not formally amend the text."); Brandon Hasbrouck, Movement Judges, 97 N.Y.U. L. Rev. 631, 631 (2022) ("Judges matter."); Robert L. Tsai & Mary Ziegler, Abortion Politics and the Rise of Movement Jurists, 57 U.C. Davis L. Rev. 2149, 2153 (2024) ("[M]ajoritarian preferences and electoral considerations have usually served as external constraints on the pace and sweep of constitutional change created by the Court."); Amy Coney Barrett, Precedent and Jurisprudential Disagreement, 91 Tex. L. Rev. 1711, 1727 (2013) ("Americans understand that there is a difference between Justice Scalia's originalism and Justice Breyer's 'active liberty' . . . .").

[200] Selecting a judge with certain personal rules is political, but the judge's application of those rules is not. This point applies both to the nomination and confirmation of federal judges and to the election of state-court judges.

[201] See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 Calif. L. Rev. 1323, 1328 (2006) (noting normative implications of a "positive" account of constitutional culture).

[202] The point here is to focus on a nominee's personal rules, see supra text accompanying note 41, not on "ideology" in general or all of a judge's influential "views." Cf. Erwin Chemerinsky, Ideology and the Selection of Federal Judges, 36 U.C. Davis L. Rev. 619, 621 (2003) (defining a judge's "ideology" as "the views of a judicial candidate that influence his or her likely decisions as a judge").

[203] See Christopher Jon Sprigman, Congress's Article III Power and the Process of Constitutional Change, 95 N.Y.U. L. Rev. 1778, 1781 (2020).

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legitimacy of the judges' personal rules.[204] Court expansion lies in between, as it implicates changes in the content of the law but also the structure of the adjudicator.[205]

This link between personal positivism and democratic constitutionalism casts in a new light many criticisms of the Justices as lawless or partisan actors. One obvious example is *Dobbs*, which overturned nearly fifty years of case law shortly after a significant rightward change in the Court's composition.[206] For many observers, *Dobbs* represented a legal error, and the Justices behind it are to blame.[207] But because the law is the set of personal rules that officials accept, changes in the composition of the courts have a direct effect on the law's content. The arrival of three new Justices appointed by President Trump accordingly altered the law, including in ways relevant to abortion rights.[208] So, far from undermining the existence of law, *Dobbs* illustrates personal positivism in action. The *Dobbs* Court remained roughly as law-abiding as its predecessors. It's just that the law in 2022 wasn't quite the same as the law that had existed just a few years earlier. Problems with *Dobbs*'s result are therefore likely to be moral in nature—not legal.[209] And those moral objections must grapple with the degree of democratic legitimacy that flows from the nomination and confirmation processes.

Efforts to surface judicial individuality might change how the public views the judicial role and, as a result, the degree of power wielded by the

[204] See Presidential Comm'n on the Sup. Ct. of the U.S., Final Report 113 (2021) [hereinafter Presidential Commission, Final Report].

[205] Confirming that official practice constitutes the law, altering the composition of the Supreme Court can be more effective than amendment. "If one amends the Constitution but leaves the same judges in place, there is the risk that the judges will neuter the changes." Sanford Levinson & Jack M. Balkin, Democracy and Dysfunction: An Exchange, 50 Ind. L. Rev. 281, 293 (2016). By comparison, changing personnel changes the law.

[206] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2349 (2022) (joint dissent).

[207] See id. at 2350; see also Nina Varsava, Precedent, Reliance, and *Dobbs*, 136 Harv. L. Rev. 1845, 1847–48 (2023) (arguing that *Dobbs* failed to give proper weight to reliance interests).

[208] Even so, personal rules can preserve settled law despite personnel changes. For instance, many lower court judges have personal rules directing them to follow on-point Supreme Court precedent until it is formally overruled. See, e.g., Preterm-Cleveland v. McCloud, 994 F.3d 512, 541 (6th Cir. 2021) (Bush, J., concurring).

[209] See Andrew Coan, What Is the Matter with *Dobbs*?, 26 U. Pa. J. Const. L. 282, 283–84 (2024). Charges of moral or legal error could separately rest on deviations from institutional or personal rules regarding stare decisis as well as procedural matters. See Richard M. Re, Should Gradualism Have Prevailed in *Dobbs*?, *in* Roe v. Dobbs 140, 154–56 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024).

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Justices. Perhaps judicial review should be abolished, or the federal courts' jurisdiction narrowed.[210] Again, these changes could be viewed as alterations in the rule of adjudication.[211] That kind of reform is very serious indeed. As we have seen, both methodological and substantive principles of law are now highly individualized as well as group-based, making the rule of adjudication perhaps the one shared point of almost universal convergence in current legal culture. The existence of that consensus precept may be necessary for the U.S. legal system to exist at all, and it surely plays a critical role in structuring the system as it now operates.[212] Personal positivism accordingly warns us about tinkering unnecessarily with such a foundational precept. Still, tinkering may be necessary. The judiciary's legitimacy should be well-grounded in an accurate picture of the law as it is. And if candidly recognizing the law's fundamental individuality causes the public to view the courts differently, or more skeptically, then we should probably welcome that result.

All three of the foregoing strategies should be carried out in tandem. That is, critics should simultaneously: (i) hold their opponents to their personal rules, (ii) develop new, shared rules of tolerance and permission, and (iii) surface the role of competing personal rules in the political arena. Some of these proposals focus on conflict, others conciliation. Personal positivism helps us see how we can pursue those strategies simultaneously, by focusing them at different aspects of legal practice.

C. Personalizing Constitutional Theory

Can jurisprudence shed light on constitutional law? If we followed Hart in seeking out consensus practices among judges,[213] we might be drawn toward any number of well-known theories, such as constitutional

[210] See Presidential Commission, Final Report, supra note 204, at 153.

[211] See supra text accompanying note 118.

[212] See generally Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359 (1997) (defending a version of judicial supremacy).

[213] See Hart, supra note 8, at 256, 267.

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pluralism,[214] common law constitutionalism,[215] and positive originalism.[216] Or, revising Hart, we might seek out consensus among elected officials or the general population, yielding a form of democratic or popular constitutionalism.[217] All these answers would begin by identifying a foundational consensus practice that gives rise to a uniform law.[218] Personal positivism suggests a more complex view. Constitutional law is not well-characterized by any uniform or foundationalist theory. It is instead constituted by a heterogeneous mix of personal rules. Uniform, foundationalist theories thus capture *parts* of the law, not the whole.[219]

First consider uniformity: Can a single, monolithic theory account for the diversity and tension endemic in the law, especially constitutional law? Because Hart tells us that every legal system has a rule of recognition, one might think that the best overall account of legal practice must underlie constitutional law.[220] But, in this context, being "best" isn't good enough. Even if a particular uniform theory captured the principle most likely to be the legal system's rule of recognition, it would still be

[214] See Philip Bobbitt, Constitutional Fate: Theory of the Constitution 7–8 (1982); supra note 95 (discussing Berman's non-consensus pluralism). While some forms of constitutional pluralism allow for individual variation, they generally still insist on a uniform range of options or considerations. Yet some judges reject constitutional pluralism or accept different forms of pluralism. Personal positivism could thus be characterized as a kind of second-order pluralism, with various parts of the law exhibiting different approaches, including non-pluralist ones. Cf. Heather K. Gerken, Second-Order Diversity, 118 Harv. L. Rev. 1099, 1102 (2005) (explaining that "second-order" diversity in decision-making bodies involves variation among the bodies, not within them).

[215] See David A. Strauss, The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?, 129 Harv. L. Rev. 1, 14–15 (2015).

[216] See Baude & Sachs, supra note 31, at 1457.

[217] See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 8, 31 (2004); see also Robert C. Post, The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 8–10 (2003) ("[C]onstitutional law could not plausibly proceed without incorporating the values and beliefs of nonjudicial actors."); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943, 1945, 2031 (2003) ("Congress can negotiate conflict and build consensus . . . and so vindicate constitutional values in ways that courts cannot."); supra note 199 and accompanying text.

[218] I here set aside non-positivist approaches, including non-positivist versions of the theories discussed in main text. Cf. Charles L. Barzun, Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin, 105 Va. L. Rev. Online 128, 131–32 (2019) (arguing that certain originalist projects are best understood as having non-positivist foundations).

[219] Cf. Baude, supra note 32, at 2352 (arguing that originalism is "our law").

[220] See, e.g., Baude & Sachs, supra note 30, at 1487 ("We believe we've put forward the best account of the official story of our constitutional law.").

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an improbable or imperfect offering. As the theory became more determinate, it would also become less able to capture consensus practice.[221] Exacerbating this problem, a practice with only (let's say) 60% odds of being the rule of recognition cannot responsibly be regarded as one, since it might either dictate or overlook any number of consequential legal rules. A uniform theory's exclusive claim to pick out the law thus depends not just on identifying the best available rule of recognition, but instead on being almost certainly correct.[222] Yet it is doubtful that any uniform theory could meet such a standard, and few if any have attempted to do so.

To illustrate this point, consider the explicitly Hartian argument for positive originalism put forward by Professors Baude and Sachs.[223] Those authors argue in part that the Supreme Court sometimes overrules its cases based on original history and has never issued a clear, canonical repudiation of originalism.[224] Here, Baude and Sachs are describing a kind of uniformity in legal practice. And their observations do indeed cut against rival uniform theories, such as constitutional pluralism or common law constitutionalism.[225] But this "what trumps what" inquiry turns on contestable comparisons. For example, rather than focusing on when precedent is followed, the argument focuses on when it is overruled; and rather than considering the doctrine of stare decisis, the argument considers the fate of discrete precedents. If we take a broader view,

[221] See Dworkin, supra note 61, at 2118–20; see also Gillian E. Metzger, Considering Legitimacy, 18 Geo. J.L. & Pub. Pol'y 353, 362 (2020) (noting "the question of how much agreement really exists on the bounds of reasonable constitutional argumentation").

[222] To account for uncertainty regarding which rule of recognition to choose, we might weight competing options according to, for example, their likelihood of being correct. Cf. Courtney M. Cox, The Uncertain Judge, 90 U. Chi. L. Rev. 739, 745–46 (2023) (suggesting that judges might "take into account the likelihood that each jurisprudence is correct and what each jurisprudence suggests is the cost of error . . . in a particular case"). The result would, in effect, generate a form of pluralism.

[223] Baude and Sachs contend that the U.S. rule of recognition demands or entails fidelity to the law at the Founding, as lawfully changed thereafter. See Baude & Sachs, supra note 30, at 1457. However, this practice is not "originalist" as that term has long been used, for there is no guarantee that it will generate a duty of fidelity to the Constitution's original public meaning—even though such fidelity is commonly taken to be a necessary tenet of originalism. See Lawrence B. Solum, Originalist Methodology, 84 U. Chi. L. Rev. 269, 269 (2017). For example, the asserted rule of recognition leaves open the possibility that, in the 1960s, interpretive practices lawfully changed so as to adopt the views of Justice William Brennan. A better label for Baude and Sachs's jurisprudential view would be "originationism," which conveys the authors' focus on origin stories as opposed to final destinations.

[224] See Baude & Sachs, supra note 30, at 1477–78, 1487.

[225] See id. at 1487.

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matters look quite different: stare decisis seems to dictate not only when to follow precedents that contravene original history, but also when to overrule the same precedents.[226] Moreover, the Court has never disavowed the doctrine of stare decisis. The Court instead works creatively within that doctrine when deciding whether to overrule—much as it abstracts away from original history when reaching outcomes that break new ground.[227] On this alternative way of assessing legal practice, the doctrine of stare decisis finds uniform support, consistent with common law constitutionalism. Of course, my point here is not to favor one uniform theory over another, but instead to suggest that the choice among uniform theories is undetermined by consensus practice. Because different judges exhibit importantly divergent practices, constitutional law just isn't uniform in a way that is conducive to its being well-grounded in a determinate rule of recognition.

Next, consider *foundationalism*: can a first-principles account admit "fixed points" into the law? As we have seen, the law is substantially made up of personal rules regarding the proper application of relatively abstract principles.[228] Personal positivism can recognize those personal rules as part of the law, without prejudging whether the abstract principles or their applications have priority in the event of any conflict.[229] By contrast, Hartian positivism is foundationalist in that it presupposes the existence of a rule of recognition from which all legal principles are derived. That foundationalism effectively demands that law privilege an abstraction over concrete applications. Once again consider the Hartian case for positive originalism put forward by Baude and Sachs. These authors suggest that, if a conflict arose between positive originalism and *Brown*, a decision to prefer *Brown* would constitute a revolution and fundamentally change the law.[230] But why not conclude that it would be a revolution to prefer originalism? As compared with originalism, *Brown* is at least as widely and fervently embraced by officials, and it too operates as a basis for legal reasoning, including when officials choose

[226] See, e.g., McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) (following); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244–48 (2022) (overruling).

[227] See, e.g., Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

[228] See supra note 65 and accompanying text.

[229] See supra text accompanying note 74 (discussing fixed points).

[230] See Baude & Sachs, supra note 30, at 1476 & n.140.

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and defend interpretive methods.[231] Thus, the law is not just the foundational principle but also the asserted application.

Moreover, *Brown* isn't the only fixed point in our legal system. Additional candidates include the legitimacy of judicial review associated today with *Marbury v. Madison*,[232] as well as the principle of expressive freedom extolled in *West Virginia State Board of Education v. Barnette*—an opinion which itself reasoned, not from any foundational precept, but from what it called a "fixed star in our constitutional constellation."[233] And individual judges, or groups of judges, often have their own fixed points. For some originalist judges, for instance, the vision of executive power described in Justice Scalia's *Morrison v. Olson* dissent is nearly self-evidently correct.[234] If originalism were shown to conflict with Scalia's *Morrison* dissent, these judges might sooner abandon the method than the dissent—and, under their personal rules, they could face an open question whether to do so.[235] Similar observations can be made about originalists' views on free speech,[236] or the unconstitutionality of race-

[231] See Guha Krishnamurthi, False Positivism: The Failure of the Newest Originalism, 46 BYU L. Rev. 401, 418, 438 (2021); supra text accompanying notes 73, 77. Personal positivism recognizes that *Brown* is a fixed point for individuals—not necessarily for every judge. Notably, some recent judicial nominees have declined to endorse *Brown* during their confirmation hearings. See Ronald Turner, Was *Brown v. Board of Education* Correctly Decided?, 79 Md. L. Rev. Online 41, 42–43 (2020).

[232] See 5 U.S. (1 Cranch) 137, 177 (1803).

[233] See 319 U.S. 624, 642 (1943).

[234] See, e.g., Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2217 (2020) (Thomas, J., concurring in part and dissenting in part); see also Adrian Vermeule, Morrison v. Olson Is Bad Law, Lawfare (June 9, 2017, 8:14 PM), https://www.lawfaremedia.org/article/morrison-v-olson-bad-law [https://perma.cc/QD9D-R42Y] (calling Scalia's *Morrison* dissent "canonical").

[235] Many "originalist" judges qualify their commitment to originalism or else leave originalism itself underdetermined. See, e.g., supra notes 24, 74. Thus, an apparent conflict between originalism and a fixed point can sometimes be resolved without abandoning originalism. See supra note 84. But, if these judges reacted to adverse evidence simply by breaking from their personal rules, they would (under personal positivism) be transgressing the law. Cf. Cass R. Sunstein, Does Evidence Matter? Originalism and the Separation of Powers 3–4 (Sept. 27, 2023) (unpublished manuscript), https://ssrn.com/abstract=4584484 [https://perma.cc/VP7U-GEVG] (discussing the tension between originalism and historical evidence against a robust removal power).

[236] See Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality, 102 Tex. L. Rev. 221, 251–52 & n.141 (2023) (citing Leonard W. Levy, Emergence of a Free Press, at xii–xv (1985)); see also Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246, 259 (2017) (discussing historical practice); Genevieve Lakier, The Invention of Low-Value Speech, 128 Harv. L. Rev. 2166, 2168 (2015) (discussing doctrinal evolution).

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based affirmative action.[237] Personal positivism casts these fixed points as widely held personal rules—and as part of the law.

The two foregoing problems—misplaced demands for uniformity and foundationalism—are interrelated. Constitutional scholars are often in search of a jurisprudential theory with concrete implications, and a uniform, foundationalist account fits the bill. In principle, such a theory could specify the precise content of all law—though actually carrying out that promise might take generations of research and intellectual labor.[238] Personal positivism offers a more practicable alternative, effectively flipping the equilibrium position that other theories have selected. While ceding the determinacy that comes from uniformity, personal positivism makes up for that shortfall by embracing anti-foundationalism. The result is truer to legal practice in part because of its greater determinacy, especially epistemic determinacy. That is, personal positivism surrenders the hope that a rule of recognition can or does specify all legal content. But by focusing attention on individual jurists and their well-known application-commitments, personal positivism readily identifies a vast amount of accessible, determinate law.

Having said all this, subtler versions of familiar constitutional theories have descriptive appeal, once adapted to be consistent with personal positivism. To wit, originalism has lately become an ever-increasing part of the law due to changes in judicial personnel,[239] even if the transformation remains incomplete. Constitutional pluralism, common law constitutionalism, and other views, too, capture parts of the law. What makes these accounts plausible is not that they correctly identify the rule of recognition. (They do not.) Rather, each of these diverse theories captures some of the personal rules that individual judges or other persons publicly accept. Constitutional practice is multifaceted enough to be susceptible to different uniform, foundationalist theories—which is another way of saying that each of those theories is descriptively wrong, or at least a simplification.

[237] See Fallon, supra note 236, at 255 & n.165 (collecting sources); see, e.g., United States v. Vaello Madero, 142 S. Ct. 1539, 1547 (2022) (Thomas, J., concurring) (suggesting that the federal government may be prohibited from race discrimination by the Citizenship Clause, not the Equal Protection Clause).

[238] See William Baude & Stephen E. Sachs, Originalism's Bite, 20 Green Bag 2d 103, 107–08 (2016); see also Mila Sohoni, The Puzzle of Procedural Originalism, 72 Duke L.J. 941, 1002–05 (2023) (criticizing positive originalism for its uncertain implications).

[239] See supra note 24 and accompanying text.

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Again, most of these points flow from jurisprudential differences. Someone determined to fit constitutional practice into a uniform and foundationalist frame would have several plausible options to choose from. Perhaps one of these views is even the "best" such account to be had. But if you seek a positive understanding of the law that is applied by judges, argued by practitioners, and understood by the public, then personal positivism offers a vastly more accurate and useful approach.

CONCLUSION

Many people have good reason to criticize or reform the law of the United States. But doing so presupposes some understanding of what the law is. This Article has suggested a distinctive answer: the law of the United States today is best viewed as the total set of personal rules publicly accepted by individual officials—particularly judges. That "personal positivism" challenges conventional legal positivism, including the canonical Hartian idea that the law begins with a shared, foundational practice.

And by challenging our understanding of what the law is, personal positivism points toward new criticisms and distinctive reforms. The United States suffers not from a shortage of law, but rather from having too much of it. Especially at the Supreme Court, judges have individualized jurisprudences that are roughly organized into two distinctive and opposed legal groups. The problem, if any, is that those factions operate within a single legal system.

The solution is not to ignore or disparage judges' personal rules, much less the rules of opposing judicial groups. Auspicious reforms must instead partially accept, and then aim to improve, the fragmented law of the United States. And that means paying more, not less, attention to individual judges; forging shared permissions that can unite disparate legal ideologies; and publicly recognizing the place for moral reasoning in each jurist's selection of her judicial philosophy—that is, her part of the law.