WHY THEORIES OF LAW HAVE LITTLE OR NOTHING TO DO WITH JUDICIAL RESTRAINT

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INTRODUCTION

The question I explore here, stated in its broadest form, is this: What is the connection between theory and practice—between academic claims about how judges should decide cases and the actual behavior of judges as revealed in the opinions they write? More particularly, do theories about the nature of law have any implications for the question whether a judge should adopt an "activist" or a "restrained" approach to deciding cases? [1] As you might infer from my title, I defend here

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1. I confess to some misgivings about giving a paper on legal theory at a conference on Justice White. On more than one occasion during recent gatherings to celebrate the life and decisions of the Justice, former clerks have suggested that White would have shuddered just to hear the word "jurisprudence" mentioned in his presence. He had little use for legal theories or abstract philosophical discussions that did not bear directly on the problem at hand. And he would probably have resisted attempts to characterize his own opinions as belonging to a particular school of jurisprudence or illustrating a particular aspect of legal theory. Not that this fact has deterred efforts to characterize White's jurisprudence in various areas of the substantive law – as evidenced by the papers presented at this conference as well as by previously published pieces. *See, e.g.*, William E. Nelson, *Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White*, 58 U. COLO. L. REV. 347 (1987); Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L. J. 419 (1993); Kate Stith, *Byron R. White: Last of the New Deal Liberals*, 103 YALE L. J. 19 (1993). Though I do not think that White would have done much to encourage such efforts, I suspect he would have reacted to them with bemused tolerance, recognizing that this was as much a part of the academic's job as it was no part of his. *See* William E. Nelson, *Byron R. White: The Justice Who "Never Thought of Himself,"* 116 HARV. L. REV. 9, 9-10 (2002) (In reply to "my pretentious question" about his distinctive judicial philosophy, White replied that being a Supreme Court Justice was "just a job.") In the end, the more I thought about it, the more I decided that this very fact – this apparent gap between academic theories about law and actual judicial practice as illustrated, for example, by Justice White – presented a puzzle worth exploring.

what I call "the skeptical thesis" in answer to both the general and particular questions. Judges pay little or no attention to disputes about the nature of law, even though those disputes purport to be critical determinants of what "the law" is and even though the job of judges, presumably, is to decide cases "according to the law." The reasons for this disconnection between theory and practice raise fascinating questions both about what it means to be a judge as well as about the limits of legal theory.

By "legal theory," I refer specifically to the disputes among legal theorists about the nature of law—disputes that inevitably lead to claims about the comparative merit of some form of positivism on the one hand, and natural law on the other. Positivism traces law to some social fact or source, e.g., the command of a sovereign, or the will of a legislature, or the prior decision of a court. Because such facts are, in theory, capable of being determined empirically without the need for moral judgments, positivism entails the additional familiar claim that there is no necessary connection between law and morality. Natural law theories contest the latter claim, insisting on a connection between law and morality, either because official directives that are too unjust can never count as "law," or because determining what the official "legal" directive is in the first place requires recourse to political or moral judgments as well as empirical facts.[2] With this brief background, my thesis can be restated: The disputes between positivists and natural law theorists have little or no bearing on whether judges are activist or restrained.

Some people, I assume, will react to my thesis with surprise; others will not. If one is surprised it may be because conventional wisdom seems to link positivism with restraint and natural law with activism. Positivism's insistence that law is exhausted by empirically determined conventions—by texts

2. The first characterization of natural law (directives that are too unjust are not "law") constitutes what might be called the classical version which "filters" the directives determined by the positivist's empirical test through a moral sieve, denying the title of "law" to those that are "too unjust." The second characterization (determining what the "official directive" is in the first place requires resort to both facts and political or moral theory) is, roughly, Dworkin's version of "natural law". *See generally*, PHILIP SOPER, THE ETHICS OF DEFERENCE: LEARNING FROM LAW'S MORALS 33 n.27, & ch. 4 (2002). I consider here mainly the classical version, but discuss briefly the relevance of certain aspects of Dworkin's theory in Part III, below.

or precedents—seems to imply that judges who accept such a theory will be less likely to impose their own values on society than their counterparts. In contrast, judges who accept a natural law theory that makes "law" depend in part on moral and political theory, as well as on conventional texts, are more likely to reach decisions that ignore legislative or even Constitutional directives that conflict with the judge's own values. I shall examine this conventional view, linking positivism with restraint and natural law with activism below and explain why I think it is wrong. But first I want to consider the other possible reaction to the skeptical thesis: Why might some people *not* be surprised by the claim that there is little connection here between theory and practice?[3]

One reason not to be surprised, I think, is that the empirical facts of how judges actually decide cases and write opinions provide strong support for the thesis. Judges do not cite legal and moral philosophers: they cite judicial precedents and legal texts and, where necessary, they make reference to values implicit in the texts they interpret. To make this point vivid, consider the connection between disputes about the nature of law and the decisions of the Supreme Court in the years since H.L.A. Hart's classic book, *The Concept of Law*, first appeared in 1961.[4] Hart's book defended a modern form of positivism, using methods of analysis that some thought represented the "swan song" of analytic jurisprudence.[5] The swan song, of course, turned out instead to be something of a siren's call, attracting new and powerful arguments, mainly by Professor Ronald Dworkin, in support of a new form of natural law—a theory that forcefully contested positivism's insistence on sharply distinguishing law and morality. Dworkin's final book-

3. Of course, those who are skeptical about theory in general, claiming that it can seldom if ever explain or affect practice, will find nothing surprising in my thesis. *Compare, e.g.*, Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987) *with* Pierre Schlag, *Authorizing Interpretation*, 30 CONN. L. REV. 1065 (1998). The skeptical thesis I defend here, however, is not intended as a general indictment of theory itself in this broader sense: rather, I defend the more limited claim that even accepted on their own terms as legitimate and distinct theories of law, positivism and natural law are commonly misunderstood as respects their implications for judicial restraint.

4. H.L.A. HART, THE CONCEPT OF LAW (1961).

5. *See* Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. PA. L. REV. 1080, 1085 (1956) (commenting on Hart's 1953 inaugural address, *Definition and Theory in Jurisprudence*, which preceded publication of THE CONCEPT OF LAW (1961)).

length expression of his views appeared in the late 1980's,[6] and the debate that was revived during this period continues apace today with a fresh generation of scholars.[7] Two things are worth noting. First, this roughly thirty-year period of intense and renewed interest in the nature of law, from the early 60's to the 90's, coincides roughly with the period of time that White served on the Court—a period that saw the Court move from what many describe as an "activist" era during the Warren Court years, to an increasingly "restrained" era in later years.[8] Second, whatever the explanation for the Court's shift from an active to a more restrained posture, one thing is clear: the shift was not the result of the Court paying any attention to arguments among legal theorists about the nature of law and how to decide cases. None of the Court's opinions during this thirty-some year period make any essential reference to the debates about the nature of law and associated theories of adjudication that were being hotly contested in the academic and philosophical journals of the time.[9]

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6. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

7. For an illustration of the continuing influence of Hart, as well as a glimpse into recent developments in the nature of law debate, see the several contributions to 4 LEGAL THEORY 249 (1998) (symposium on Hart's postscript to a new edition of THE CONCEPT OF LAW (1994)).

8. Whether this characterization of the Warren Court distinguishes it from the current Rehnquist Court may be questioned. *See, e.g.*, Cass Sunstein, *A Hand in the Matter*, Mar.–Apr. 2003, LEGAL AFFAIRS 27, 28 (if "activism" is defined as a willingness to overturn decisions of other branches of government, even though the Constitution may not clearly support such a result, then the Warren Court was highly activist toward state governments, but less so toward Congress, while the Rehnquist Court has been highly activist toward both.).

9. A quick Westlaw search of the opinions during this period reveals a total of three cases with citations to Hart and six to Dworkin. None of the Hart citations involve any reference to Hart's theory about law; they are, instead, general references to substantive points about criminal law that were made in some of Hart's other writings. *See* Roberts v. Louisiana, 428 U.S. 325, 354 n.7 (1976) (White, J., dissenting) (citing an article by Hart for its analysis of the nature of statistical studies on the deterrent effect of the death penalty); Furman v. Georgia, 408 U.S. 238, 342 n.84, 354 n.124 (1972) (Douglas, J., concurring) (citing Hart's work on the principles of punishment and on the statistics bearing on deterrence); *id.* at 395 n.20, 396 n.22 (Burger, C.J., dissenting) (citing Hart on the principles of punishment and on the deterrence effect of the death penalty); Bowers v. Hardwick, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting) (citing Hart's view that private sexual activity is not likely to affect general morality). So, too, in Dworkin's case: all of the citations are to substantive arguments on the issue of abortion, or the nature of "rights" or of human dignity, or the meaning of "discretion." Hewitt v. Helms, 459 U.S. 460, 484–85 (1983) (Stevens, J., dissenting) (citing Dworkin's discussion of the connection between liberty and independence in Mill's thought); Bd. of Pardons v. Allen, 482 U.S. 369, 375 (1987) (citing Dworkin

So the empirical facts seem to present a strong case, at least on the surface, for the skeptical thesis. But surfaces can be deceiving. The fact that the Court does not *explicitly* look to legal theory to determine what we mean by law may not mean that legal theory is irrelevant in explaining what judges do. It may be that judges operate with an *implicit* legal theory that reveals a tendency to be restrained or activist. After all, as Dworkin is quick to note, a theory that purports to show a connection between law and morality does not imply that judges carry copies of favorite moral philosophers beneath their robes.[10] It only means that judges implicitly operate with theories of morality or adjudication that legal theorists discover and endorse or critique. The same conclusion applies to other kinds of academic commentary. After all, virtually every case the Court hears is preceded by an onslaught of scholarly commentary that purports to explain how the case should be decided. Even if much of this academic literature is never cited in the Court's opinions, or even read, that fact by itself does not show that such discussions have no potential connection with judicial practice. So, too, it might be thought, in the case of legal theory: the lack of citation to academic disputes about the nature of law does not by itself prove that such disputes have no potential bearing on the outcome.

This objection—suggesting that legal theory might be implicitly relevant to practice, even if not explicitly cited—is

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on the nature of discretion); Del. v. Van Arsdall, 475 U.S. 673, 697–98 n.9 (1986) (Stevens, J., dissenting) (citing Dworkin on the connection between rights and dignity and for the point that invading rights is more serious than inflating them); Young v. Cmty. Nutr. Ins., 476 U.S. 974, 988 (1986) (Stevens, J., dissenting) (citing Dworkin for the proposition that "[a] statute is not unclear unless we think there are decent arguments for each of two competing interpretations of it"); Webster v. Reprod. Health Serv., 492 U.S. 490, 539–541 n.1 (1989) (Blackmun, J., concurring and dissenting) (citing Ronald Dworkin, *The Great Abortion Case*, NEW YORK REVIEW OF BOOKS, June 29, 1989, at 49); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 913 n.2 (1992) (Stevens, J., concurring and dissenting) (referring to Dworkin's argument that States cannot be entirely free to declare what things are "persons" under the Constitution). Only one of these citations (on the question of statutory interpretation) comes even close to being connected to what might be called legal theory, but even this cite has nothing to do with the basic nature of law dispute that divides positivists and natural law theorists and that formed the heart of Dworkin's dispute with Hart.

10. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 315 (1978) ("I do not believe that all, or even most, judges have devoted their time to abstract moral philosophy, or that they have settled on explicit theories of rights, some keeping copies of Kant under their robes, where others hide copies of Bentham or Teilhard de Chardin.").

worth emphasizing precisely because it helps clarify the claim I intend to defend about legal theory in contrast, for example, to claims about the supposed relevance of other kinds of academic commentary. In the latter case, involving academic discussions about particular substantive legal issues, one may concede the possibility that judicial decisions may never read or cite such discussions. But in the case of substantive commentary, even where it is not explicitly cited, the commentary is always *theoretically* relevant: there is always a basis for a comparison of the academic discussion with the opinion to see whether the two agree. My skeptical thesis about legal theory embraces a stronger claim: my claim is that it would make no difference even in theory to their decisions if judges did read and try to heed the debates within legal theory. To put it the other way around, unlike academic commentary on substantive issues which, even if not cited, can always theoretically be compared to the Court's decision for consistency, there is no way to tell from a judge's opinion whether it is consistent with a positivist or natural law view. Whether the opinion is characterized as "restrained" or "activist" will not reflect even an implicit judicial choice between these two standard views about the nature of law.

In what follows, I explore the reasons behind the empirical facts. First, I review what I have called the "conventional" wisdom that purports to link particular theories of law to particular approaches to judicial decision—with restrained or activist styles of judging. Second, I explain what is wrong with the conventional view. Third, I consider briefly what, if not legal theory, underlies decisions that appear to be restrained or activist. Basically, I argue, it is a judge's political theory, not her theory about the nature of law, that determines whether she is activist or restrained in her judicial decisions. Because legal theory has nothing to say about the content of such a political theory, the debates between positivists and natural law theorists are exhausted just at the point they become critical: theories of law provide no guidance on the question whether and how much a judge should defer to the judgment of other branches of government because that question, under either theory, is left to be resolved outside of the realm of the law. Finally, I draw some conclusions from this discussion about the nature of both legal theory and judging. Throughout the discussion, I shall occasionally illustrate points by reference to White's opinions. But since, as indicated, the evidence pro-

vided by those opinions is largely negative—underscoring the absence of any implicit reliance on legal theory—my use of his opinions will be mostly for the general tendencies they exhibit, rather than for their substantive results.[11]

I. THE CONVENTIONAL WISDOM

The conventional wisdom, as mentioned above, links positivism with restraint and natural law with activism. Numerous examples of this commonplace view can be found, but I shall confine myself here to three, drawn from the realms of the judiciary, of politics, and of the academy. The first is the received view of Justice Oliver Wendell Holmes. Holmes, we are told, is a paradigm example both of a judge who gave "almost religious deference"[12] to legislative views, and who did so because of a positivist legal theory. This connection between judicial attitude and legal theory is traced to Holmes' own opinions, in particular to his dissent in *Southern Pacific v. Jensen*.[13] That case denied recovery to an injured seaman under the general principles of maritime law which the majority thought should govern the case rather than the New York State's workman's compensation law. Holmes' now famous phrase in dissent that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified"[14] seems for many to establish him as a clear counterexample to my thesis. Holmes, that is to say, seems to be exercising judicial restraint precisely because of a positivist legal theory.[15]

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11. For a brief review of various tendencies in Justice White's judicial style that bear on issues raised by legal theory, see the discussion in Part III, below.

12. *See* Morris B. Hoffman, Book Review, 54 STAN. L. REV. 597, 614 (reviewing ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES (2002)). Holmes' lack of faith in both the legislative process and the substantive results of most of the legislation he enforced has been well-documented, *see* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES 58–59 (2000), and is famously reflected in such familiar quotes as "[I]f my fellow citizens want to go to Hell I will help them. It's my job." *Id.* at 63 (quoting Holmes' letter to Frankfurt, Dec. 23, 1921); and "I loathed most of the things I decided in favor of." *Id.* (quoting Holmes' letter to Laski, Mar. 4, 1920).

13. *See* S. Pac. Co. v. Jensen, 244 U.S. 205 (1917).

14. *Id.* at 222. For a general discussion connecting these Holmesian views to his "positivist[ic] theories of sovereignty" see G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 388 (1993).

15. *See, e.g.*, John J. Reilly, *The History of Justice Faustus*, 1 CULTURE

My second example, from the realm of politics, comes from the Senate confirmation hearings for Justice Clarence Thomas. One of the central concerns of those hearings was the possibility that Justice Thomas, based on his previous writings, believed in "natural law." One journalist described this discovery as analogous to finding out that a nominee to the Supreme Court "had let slip a reference to torture by thumbscrews . . . [or] had disclosed an obscure and probably sinister belief in alchemy."[16] Another suggested that it was as if critics "had found [Judge Thomas] at the airport in a Hare Krishna robe."[17] Even Senator Danforth, Thomas' principal supporter in the hearings, hastened to assure his audience that Thomas did not believe "scary things about natural law."[18] And Thomas himself, on the opening day of his testimony, was quick to characterize his previous writings on the subject as simply the philosophical "musings" of a "part-time political theorist."[19] Much of this, of course, was conscious hyperbole, and some of it was confused hyperbole: "conscious" because of the political overtones connected with the nomination;[20] and "confused" because of the

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WARS 14–16 (Jan. 1996) (reviewing G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993)) (Holmes "gave memorable expression to modern legal positivism in his Supreme Court dissent to the majority opinion in *Southern Pacific v. Jensen*"), *available at* http://pages.prodigy.net/aesir/holmes.html. As I shall suggest, this interpretation of the basis for Holmes' restraint is wrong: it was not legal theory driving his deference to the legislature, but political or moral theory. In this respect, the argument I develop here shares Alschuler's conclusion that it is Holmes' moral and political views, in particular his value skepticism (or nihilism, according to Alschuler), that explains his restraint. *See generally*, ALSCHULER, *supra* note 12, at 58–67.

16. Peter Steinfles, *Beliefs*, N.Y. TIMES, Aug. 17, 1991, at 9.

17. Stephen Chapman, *Is Thomas' Belief in Natural Law Unnaturally Odd?*, CHI. TRIB., July 18, 1991 § 1, at 27.

18. David G. Savage, *Thomas Backs Off Abortion, Natural Law Statements*, L.A. TIMES, Sept. 11, 1991, at A1 (quoting Sen. John C. Danforth (R.-Mo.)).

19. *Id.; see also The Nomination of Clarence Thomas to the Supreme Court*, FED. NEWS SERV., Sept. 10, 1991, LEXIS, Nexis Library, Wires File.

20. The political basis for the concern over Justice Thomas' potential adherence to "natural law," seems most evident when one compares Senator Biden's position in the Thomas hearings with his position four years earlier in the hearings on Judge Bork's nomination. In Thomas's case, Senator Biden led the charge against appointing a judge who embraced a natural law theory that, in Biden's view, would allow a judge to ignore even clear conventions of the Constitution. *See* Joseph R. Biden, Jr., *Law and Natural Law: Questions for Judge Thomas*, WASH. POST, Sept. 8, 1991, at C1 ("If Clarence Thomas believes that the Supreme Court should apply natural law above the Constitution, then in my view he should not serve on the Court."). Four years earlier, Judge Bork met defeat in Biden's

tendency to equate natural law as a legal theory with natural law as a moral or religious theory.[21] But the controversy confirms the conventional wisdom. The specter of a judge who believed in natural law seemed to imply a resurrection of Holmes' "brooding omnipresence" with a consequent approach to judicial decision-making that would ignore, not only legislative commands, but even Constitutional norms wherever they conflicted with the demands of a higher, "natural law."

My final example comes from the academic realm and the views of one of the major legal theorists of the last thirty years. Ronald Dworkin, as already noted, is probably best known for his vigorous defense of a non-positivist theory about the nature and sources of law. But he is also known for a long-standing and sustained objection to a recent development within positivism known as "inclusive" or "soft" positivism. "Soft" positivism resembles classical positivism in requiring that legal sources be conventional; but, if those conventions incorporate moral standards, as in the equal protection or due process clauses of our Constitution, soft positivism counts these moral standards as law as well—law because they have been conventionally made sources of judicial authority.[22] Dworkin, from the beginning,

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Committee in part because Biden accused him of not being sensitive to "natural rights" above and beyond those found explicitly in the Constitution. *See The Supreme Court of the United States: Hearing and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee* 100th Cong. 97 (1990) (opening Statement of Chairman Joseph R. Biden, Jr.) ("I believe all Americans are born with certain inalienable rights. As a child of God, I believe my rights are not derived from the Constitution"); *id.* at 320 (questioning of Bork by Biden) ("What has been protected, [by the Court] are . . . important and fundamental liberties that, in my view, predate the Constitution. I have them because I exist . . . ."); *id.* at 862 (endorsing an expansive view of the Ninth Amendment that would require a judge to recognize that "we are just born with certain rights as a child of God having nothing to do with whether or not the State or the Constitution acknowledges I have those rights").

21. "Natural law" as a legal theory insists only that law and morality are separate, without taking a position on the nature of morality. "Natural law" as a moral theory refers to a particular view of morality—in particular, that it is discoverable by reason, in the same way as other "natural laws." For a fuller discussion, *see* Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2392 (1992).

22. This version of positivism was introduced some time ago as a suggested way of reconciling Dworkin's views with Hart's. *See* Philip Soper, *Legal Theory and the Obligation of a Judge: "The Hart/Dworkin Dispute,"* 75 MICH. L. REV. 473 (1977); David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L. J. 415 (1977); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUDIES 139 (1982). "Soft positivism" was explicitly endorsed by Hart some thirty years later in the postscript published in the final edition of THE CONCEPT OF LAW.

has insisted that this version of positivism is not positivism at all and, in fact, commits the positivist to assumptions about the objectivity of morality that are inconsistent with the point of a positivist theory of law. In a recent book review entitled, appropriately enough, *Thirty Years On*,[23] Dworkin provides a capsule summary of these changes that have taken place within positivism over the last half-century—a summary that suggests that he, too, links positivism, at least as traditionally understood, to judicial conservatism. The height of positivism's practical importance, according to Dworkin, occurred in the Supreme Court's famous decision *Erie R.R. Co. v. Tompkins*,[24] a case familiar to every first-year law student as the decision that refused to recognize the existence of a "federal common law" that could be called upon by federal courts in deciding disputes arising under the laws of the States. Brandeis, citing Holmes, made essentially the same point Holmes had made: just as there was no "brooding omnipresence" over and above the decisions of the legislature to which a court could appeal, so too there is no "law" for federal courts to look to in deciding a dispute arising under State law over and above the authority of the State's own legislative and judicial decisions.[25] Positivism at this juncture in history, Dworkin suggests, supported democratic values by removing the power of courts to overturn the progressive economic and social legislation of the period. But in the years that followed, rapid technological change and the increasing appeal to moral rights protected by our Constitution made the theory that law consists exclusively of the explicit decisions of the legislature increasingly outmoded. So positivism tried to adapt: in order to avoid becoming marginalized or irrelevant in explaining the tendency of courts to decide cases by looking to moral principles that could not easily be traced to conventional texts, positivism changed its stripes and tried to "incorporate" these additional moral principles as part of "conventional law;" in doing so, however, it became less and less like positivism and more and more like natural law. The

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HART, *supra* note 4, at 150–54. For a book-length examination and defense of this version of positivism, see W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994).

23. Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655 (2002) (reviewing JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001)).

24. 304 U.S. 64 (1938).

25. Dworkin, *supra* note 23, at 1677.

puzzle for Dworkin in all of this is what "sacred faith" motivates positivists to develop such an artificial and strained view of "law as convention" in the face of the embarrassing fact that the law is less and less a matter of convention. I shall return later to Dworkin's answer to this puzzle—the "sacred faith" that keeps positivism from simply acknowledging the natural law claim. But it is not my purpose to reconsider here the question whether "soft" positivism is really positivism. For now, the point that I am interested in seems established: even leading legal theorists like Dworkin, at the forefront of the natural law/positivism debate, continue to take for granted that positivism, at least as traditionally understood, promoted judicial restraint by restricting a judge's ability to invoke general moral principles in deciding a case.

II. PROBLEMS WITH THE CONVENTIONAL VIEW

What, then, is wrong with the conventional view? If realms as diverse as the three I have just described all support the alleged link between positivism and judicial restraint, why might one think the conventional view is wrong? My answer to that question is that the conventional view depends on a superficial understanding of legal theory. In particular, the popular view ignores just what it means—and more importantly, what it does not mean—to adopt either a positivist or a natural law theory. Once one understands what these theories entail, one discovers at least two problems in ascribing to either theory the consequences for judicial activism that the popular view assumes. The first problem is the problem of irrelevance: in many cases ("hard cases," for example) neither theory will differ in the guidance it offers to judges about how to determine what the law is. The second problem is the problem of indeterminacy: theories that purport to make political theory relevant to determining what the law is do not themselves provide any determinate answer to the question of what such a political theory might be. Because the answer to that question is inherently controversial and difficult to determine, both restrained and activist judging will prove equally consistent with the legal theory's purported reliance on moral or political principles. In the sections that follow, I elaborate on each of these problems.

A. The Irrelevance Problem

Begin with legal theory itself and some commonly accepted views about positivism and natural law. The first point to note is that positivism does not entail that judges can never refer to moral and political values when deciding cases. Quite the contrary. Positivism, at least in its original form, emphasized that explicit conventions never provide complete guidance in all cases. Indeed, in most cases that reach the appellate courts, certainly in the cases that the Supreme Court decides in applying the open-textured guarantees of the Constitution, conventional texts and precedents inevitably lose their ability to function as determinant guides to decision. White knew quite well that judges in such cases had little choice but to reach for broader principles of justice and morality to reach a decision. One example of his view of the judge's task when confronting these open-textured clauses of the Constitution can be found in his dissent to one of the Court's decisions in the early 70's, invalidating a State statute providing public support for parochial schools:

> No one contends that he can discern from the sparse language of the Establishment Clause that a State is forbidden to aid religion in any manner whatsoever or, if it does not mean that, what kind of or how much aid is permissible. And one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations. In the end, the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choice among many alternatives.[26]

This language of making a "choice" among reasonable alternatives is exactly the language used by positivists to describe judicial decision in what Hart called "the penumbra" of conventional texts.[27] For positivists, of course, judges in these cases are deciding by reference to *non-legal* principles—they are exercising an inevitable legislative function. For Dworkin,

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26. Comm. for Pub. Educ. & Rel. Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting).

27. *See* HART, *supra* note 4, at 127. For an excellent account of this standard version of positivism, and a similar explanation of how positivism, thus understood, does not support claims about its political implications that have often been made about it, see John C.P. Goldberg, *Style and Skepticism in the Path of the Law*, 63 BROOK. L. REV. 225, 246–52 (1997).

in contrast, the principles used to decide such cases, even if they turn out to be the same principles used by positivists, are themselves part of "the law."[28] Thus the only apparent difference here between the positivist and the natural law theorist is found, not in the fact that moral principles are necessarily invoked in reaching a decision—the only difference is over whether to *call* these principles "law" or not. Now, I think, it should be clear why this dispute over what to *call* the standards one uses to decide such cases would be of little concern to someone like White. If both natural law and positivism prescribe similar procedures for resolving hard cases, then judicial behavior remains unaffected by the choice between the two theories of law. I shall call this the "irrelevance" problem for the conventional view. The irrelevance problem focuses on hard cases and insists that, since both positivism and natural law theories agree in making normative judgments necessary to decide these cases, nothing of practical relevance remains to guide the job of judging. To put the point the other way around in line with my thesis: the fact that judges in hard cases make normative judgments where conventional texts are unclear will not by itself indicate whether the judge embraces a positivist or natural law theory.

28. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

B. The Indeterminacy Problem

A second problem with the conventional view arises when one considers the implications of legal theory for a judge in precisely the opposite situation—in an easy, rather than a hard case. I have just suggested that in a hard case, a judge, far from being "restrained" by a positivist theory, will find that he is authorized, even compelled, to make a legislative decision—drawing on other principles to decide the case. Consider now the situation of a judge who explicitly embraced a natural law legal theory: Would he be led to reach different decisions from those of his positivist counterpart? It was this concern that apparently caused such a tempest in the confirmation hearings for Justice Thomas. Senator Biden could not repeat often enough that we could not tolerate the appointment to the Bench of a judge who was prepared to let his own views of a "higher natural law" override the clear mandates of statutes and the Constitution.[29] Is it here, perhaps, that we find the explanation for the belief that natural law supports a greater degree of judicial activism, inviting judges to ignore even clear conventions in order to reach results in line with their own personal views?

Now I think one must admit that this possibility—that certain classical versions of natural law could lead to judicial decisions that ignore even clear conventions—is *theoretically* possible.[30] So in this respect, my skeptical thesis must be modified. After all, the title of this paper implies that legal theory, even if it does not have much effect on judicial restraint, may have a "little." But it is so little that in most minimally decent societies, its practical effect will be non-existent. In particular, I do not believe that accepting this view of what we mean by law would have made any difference to any of the decisions of the Court over the period that White served and, possibly, to any

29. *See* Biden, *supra* note 20. Biden's views in this respect appeared to be the exact opposite of the views he had previously expressed in connection with Judge Bork's nomination. *Id.*

30. Indeed, as I have argued elsewhere, the claim that conventional laws that are "too unjust" are no law at all is a necessary implication of what "law" must mean if that concept is to be distinguished from coercion. *See* PHILIP SOPER, THE ETHICS OF DEFERENCE: LEARNING FROM LAW'S MORALS 96–99 (2002).

period in our history.[31] That is because the assumption that natural law frees a judge to do whatever she wants, ignoring even clear texts, is simply wrong. Natural law does not invite a judge to do whatever she wants; it empowers her, at most, to reach decisions that she believes are required by her own views of a sound, defensible moral and political theory.[32] Natural law may authorize a judge to look to a "higher" law; but the legal theory itself has nothing to say about the content of that higher law. Any sensible judge will recognize that a plausible higher "natural law" will include a political theory about the importance of democratic values that assign a limited role to judges, justifying (and requiring) their enforcement of laws even

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31. The most obvious possible counterexamples involve the Court's decisions during the period of slavery when called upon to enforce the Fugitive Slave Law (or the Fugitive Slave clause of the Constitution itself). *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). Robert Cover's widely admired exploration of the dilemma courts faced in these cases indirectly lends support to the thesis I defend here. Cover claims that legal positivism was, in part, responsible for the judicial failure to take advantage of various unclear provisions of the relevant statutes to reach decisions that would have favored the fugitive slave. *See* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 159–92 (1975). As Dworkin notes, the puzzle is why positivism wouldn't have led to just the opposite result: if these really were "unclear" cases, judges who were opposed to slavery would have been legally "free" to reach decisions in line with their moral views. Dworkin's explanation attempts to show the difference that legal theory makes: judges who decided in favor of the fugitive slave would have been perceived as imposing their own values on society; they were thus led to overemphasize the formal, mechanical nature of the law, reaching decisions they "could not help." Had they embraced a theory of law that saw these moral principles themselves as part of the "law," they would not have needed to fear the charge of judicial legislation. *See* Ronald Dworkin, *The Law of the Slave-Catchers*, LONDON TIMES LIT. SUPP. 1437 (1975). Three points are worth noting: First, as Dworkin's own explanation makes clear, it is psychology and, perhaps, misplaced political theory that prevented judges from reaching the morally better decision—it was not a logical implication of positivism. Second, if the point of a legal theory like Dworkin's, in contrast to positivism, is to help judges avoid the charge of judicial legislation, that point seems likely to be lost in cases such as these for the same reasons Cover emphasizes: nobody would believe the judges were really following "Dworkin's theory" rather than imposing their own values. Third, if these cases were not so "unclear" after all, leaving little room for judicial discretion, we can more easily understand both the judicial dilemma and the possible difference that legal theory might make: explicit acceptance of a natural law theory *would* have permitted judges to reach results favoring the fugitive slave, ignoring the text of both the Fugitive Slave Law as well as, presumably, the Constitution itself. (Whether, in practice, a judge would have the courage to carry out what in theory natural law invites him to do—overturn clear, Constitutional conventions he thought were seriously immoral—would, of course, remain open to doubt.).

32. As always, one must be careful here not to confuse natural law as a legal theory with natural law as a moral theory. *See supra* note 21.

though they are not the laws the judge would have enacted herself.[33] Far from being a license to enact one's own views, whatever they might be, natural law requires a judge, particularly in our society, to justify the extraordinary act of departing from the clearly expressed democratic will. That justification must confront, at least implicitly, the arguments for democracy and the arguments from political theory that both explain the state's existence and that allocate distinct areas of responsibility to legislative and judicial branches of government. Small wonder, then, that the cases in which this *theoretical* possibility of ignoring clear conventions will actually occur are likely to be confined to rare cases of extreme injustice.[34]

Here, then, is the second problem with the attempt to find a difference in legal theory bearing on the question of judicial restraint. Legal theory itself leaves completely undetermined the question what a defensible political or moral theory would authorize a natural law judge to do in confronting the conventions he is asked to implement. I shall call this the indeterminacy problem. The indeterminacy problem arises from the fact that one can never tell what a judge will do with the invitation to include moral principles along with conventional texts as sources of "law." It is possible that such a judge will embrace a conservative political theory that emphasizes the dominance of legislative will over judicial views and, as a result, act in an even more restrained manner than his positivist counterpart. Alternatively, a judge might embrace a less conservative political theory and thus feel theoretically more at liberty than the positivist to depart from convention; but even then, the likelihood that he could justify doing so in practice by reference to a plausible, honestly held moral or political theory is probably go-

33. *See* Ronald Dworkin, *"Natural Law" Revisited*, 34 U. FLA. L. REV. 165, 178–79 (1982) (in easy cases, the conventionalist and the naturalist are very likely to make exactly the same decision).

34. In the modern world, the examples that fit such a model of judicial activism are those "crimes against humanity" that are currently the basis for Nuremberg tribunals, trying persons guilty of committing such crimes regardless of whether the domestic law at the time authorized the conduct in question. Applied to our own country, although we can all cite examples of laws in our history that were immoral and even eventually recognized to be horribly wrong, it is difficult to suggest that explicit acceptance of a natural law theory would have led to different results. *See* Korematsu v. United States, 323 U.S. 214 (1944); *but see* the fugitive slave cases, discussed above at note 31.

ing to be limited to cases of clear injustice of a sort unlikely to arise very often in any minimally decent society.

III. FINDING OR MAKING LAW?

The indeterminacy problem also bears on another claim that has recently been advanced about the relevance of legal theory to judicial behavior. Thus far I have been examining primarily what might be called "classical" versions of the two major theories about the nature of law.[35] Natural law's invitation to disregard conventions that are "too unjust," I suggested, is not likely to yield a difference in practice except in extreme cases. And positivism, in turn, offers no different instructions to judges in terms of the necessity for making moral judgments in hard cases than does natural law. But since I have been using Ronald Dworkin as the major example of a contemporary legal theorist defending a non-positivist account of law, it is only fair to observe that it is precisely here, in the hard case, that Dworkin thinks legal theory points the way to different paths for judges in deciding a case. The positivist judge (Herbert) will indeed act as I have suggested, drawing on his own political and moral views to reach a decision, for example, that he believes the legislature or society might have wanted in the case at hand; or he might choose to adopt a more activist role, reaching results in line with his own view of how the case should be decided, whether or not it accords with society's views. Dworkin's Judge Hercules, in contrast, who accepts a different non-positivist model of law, has no choice: just because he has run out of convention does not mean that he has run out of "law": He must draw now on those political and moral principles that underlie the texts he interprets to determine which, among the possible decisions, is the one most consistent with the entire legal framework and, at the same time, best justifies State coercion. At the risk of digressing somewhat from my main thesis, it may be worth asking whether White's opinions serve as an obvious counterexample to either one of these two views about how judges should decide cases—should judges, in hard cases, openly admit that they are choosing among equally reasonable alternatives; or should they insist that they are reaching the decision that, in their view,

35. *See supra* note 2.

represents the single best understanding of the legal materials they confront?

The evidence bearing on this question in White's case is, I think, mixed. I have already quoted views of White that suggest he recognized that judges must make choices among reasonable alternatives when interpreting the open-textured clauses of the Constitution.[36] That evidence supports a view of the judge's role consistent with the positivist's law-making account. On the other hand, in cases where White was most vigorous in dissent, he can often be read as claiming that the majority, though it had the raw judicial *power* to "make new law," had exceeded its legitimate role in doing so by failing to tie its decisions to the text of the Constitution and relevant precedents. Thus, for example, dissenting in *Miranda*, White wrote:

> That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present re-interpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers. . . . But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to . . . inquire into the advisability of its end product in terms of the long-range interest of the country.[37]

Now it is certainly possible to see in this passage an explicit recognition that judges *properly* "make law" in much the manner that positivists (in cases of "open-texture"), and realists (in many more, or even all, cases) suggest.[38] The problem

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36. *See supra* note 26.
37. Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting).
38. This is the reading that Professor Stith gives the text. *See* Stith, *supra*

with this reading is that it leaves the first part of the passage unexplained—why point out that the Court has departed so far from textual and other kinds of institutional support if, in fact, it is free to legislate as if on a clean slate? On the other hand, if one emphasizes those parts of the quoted passage that criticize the majority for departing so far from "language, history and precedent," then how does one make sense of the apparent recognition that the Court historically has always "made law?" One way to reconcile these conflicting interpretations is to recognize that here, White is providing alternative holdings, as it were, for his dissent. The first holding is that the Court cannot justify its decision by reference to the only materials that can properly serve as sources for a *legal* decision—thus the Court got the law wrong. Alternatively, even if we accept that Courts *can* legislate (though not necessarily properly), this is bad legislation: *Miranda* for White is both bad law (because it is incorrect) and bad law-making (because it is bad legislative policy).

This possibility, that White recognized limits on the justifiability of judicial "law-making" even where the text is unclear is re-enforced by other opinions. Consider, for example, his dissent three years after *Miranda* in *Orozco v. Texas*,[39] extending *Miranda* to defendants held in custody outside the stationhouse. White begins by repeating his reasons for disagreeing with the result in *Miranda*:

> I continue to believe that the original [*Miranda*] rule amounted to a "constitutional straitjacket" on law enforcement which was justified neither by the words or history of the Constitution, nor by any reasonable view of the likely benefits of the rule as against its disadvantages.[40]

Once again, White here seems to be mounting a double attack: the decision in *Miranda* can be justified neither as "law" (that decision that best fits the words or history of the Constitution) nor as good law-making ("policy"). White surely knew that judges have the power to make law; the question is whether he thought they had the "right" to do so. But this much seems clear: even if White thought that courts do prop-

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note 1, at 20 (citing this passage as evidence for the claim that "White always understood that judges make law.").

39. 394 U.S. 324, 328 (1969) (White, J. dissenting).

40. *Id.* at 328.

erly make law, it is not because, as the positivists and realists would have it, they have no choice—it is not because they have run out of "law." White seems in fact to say just the opposite: there is "law," even in hard cases, though "law-making" occurs just the same.

When one moves on to consider the other area of Supreme Court decisions that prompted White's best known and most vigorous dissents—the abortion cases stemming from *Roe v. Wade*[41]—we find that the claim that judges should not make law even if they have the power to do so becomes fairly explicit. Consider, for example, his dissent in *Doe v. Bolton*:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right . . . . As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.[42]

A dozen years later, dissenting in another abortion case, White again employed language that is revealing about his attitude toward judicial law-making:

> As its prior cases . . . show, . . . this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the "plain meaning" of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.[43]

Once again, one *can* interpret this language as indicating that judges may, in White's view, legitimately legislate when interpreting the open-textured clauses of the Constitution.[44] But notice, now, that the language begins to assume much more the flavor implied by Dworkin's claim that judges are al-

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41. 410 U.S. 113 (1973).

42. Doe v. Bolton, 410 U.S. 179, 221–22 (1973) (White, J., dissenting).

43. Thornburgh v. Am. Coll. of Obst. & Gyn., 476 U.S. 747, 789 (1986) (White, J. dissenting).

44. *See* Stith, *supra* note 1, at 20.

ways searching for the single correct answer, most consistent with relevant legal sources, than it does the positivist's language of "choosing" among equally plausible decisions. That one must exercise "normative judgment" in interpreting an open-textured clause is perfectly consistent with Dworkin's claim about the law and how judges write opinions, even when the case is difficult and judgment is controversial. That the judgment is not deduced in some simple logical way from the text of the Constitution does not mean that the judgment is anything other than a normative claim about the best way to interpret the relevant legal materials, including both the explicit Constitutional provision as well as the underlying principles it implicates. White, in short, was not a textualist; but rejection of textualism is consistent with both positivist and natural law accounts of adjudication.[45]

Perhaps the most telling passage supporting this view occurs elsewhere in White's dissent in this same abortion decision. Justice Stevens' opinion in *Thornburgh* had accused White of contradiction: If White admitted (in the passage just quoted) that the open-textured clauses of the Constitution left room for judicial choice in filling the gaps, how could he accuse the Court of acting illegitimately? Wasn't he just disagreeing with the choice the Court made, urging a different result but one that was still simply his "choice" uncontrolled by the Constitutional text? Here is White's response:

> Justice Stevens finds a contradiction between my recognition that constitutional analysis requires more than mere textual analysis or a search for the specific intent of the Framers and my assertion that it is ultimately the will of the people that is the source of whatever values are incorporated in the Constitution. The fallacy of Justice Stevens' argument is glaring. The rejection of what has been characterized as "clause-bound" interpretivism does not necessarily carry with it a rejection of the notion that constitutional adjudication is a search for values and principles that are implicit (and explicit) in the structure of rights and institu-

45. Textualism is a theory about how to interpret texts—often recommending a literal approach to the language or to the supposed "original intent" reflected in the language. Positivism requires ascertaining the legislative will, but need not embrace textualism as the best way of determining that will. Positivists can be just as sophisticated about interpreting texts in light of their purposes and moral implications as can natural law theorists.

> tions that the people have themselves created.... [T]he hallmark of a correct decision of constitutional law is that it rests on principles selected by the people through their Constitution, and not merely on the personal philosophies, be they libertarian or authoritarian, of the judges of the majority. While constitutional adjudication involves judgments of value, it remains the case that some values are indeed "extraconstitutional," in that they have no roots in the Constitution that the people have chosen.[46] (citations omitted)

Dworkin, I think, should be pleased (with the style, of course, not the substance). This is not the image of a judge who believes that, once conventions have been exhausted, the books are set aside and the legislative hat assumed in place of the judicial one. Judges must still ground their normative judgments in a decision that purports to be the best understanding of the "values and principles that are implicit ... in the structure of rights and institutions that the people have themselves created."[47]

In my view, the rush to label White a "realist," a "functionalist," a "positivist" or anything else that suggests he exemplifies one particular legal theory is misconceived, at least if those labels are meant to indicate that he is clearly acting differently from the way that is predicted by theories of adjudication like Ronald Dworkin's.[48] Indeed, among the characteristics that are most often noted by former clerks, few are emphasized as often as White's work ethic—his commitment to decide each case, almost as a common law judge might, by looking at both sides of the argument, wrestling with precedent and text and history—all of which makes little sense if one is simply deciding which alternative to "vote" for in an act of judicial lawmaking, but which makes perfect sense for one who sees his task as requiring him to find the best solution to the case in the implicit law underlying the materials at hand.

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46. *Thornburgh*, 476 U.S. at 796 n.5.

47. *Id.*

48. *See* DENNIS HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE:A PORTRAIT OF JUSTICE BYRON R. WHITE 445–46 (1998), (challenging the view that legal education at Yale made White into a "realist"); Bernard W. Bell, *Byron R. White, Kennedy Justice*, 51 STAN. L. REV. 1373, 1394 (1999) (reviewing DENNIS HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE) ("Hutchinson throws cold water on the most prominent explanation for White's devotion to the countermajoritarian difficulty—the influence of the legal realism prevalent at Yale Law School when White entered in 1939.").

All of this is, however, a digression from the main question: What determines whether a judge is activist or restrained? Note what follows, even if one concedes that White is not a clear counter-example to Dworkin's claim that judges are finding the law, rather than making it. The problem here, in attempting to connect legal theory to judicial restraint or activism is, once again, the problem of indeterminacy. Since the legal theory cannot specify in advance how to find the right answer, nothing prevents a judge from deciding that the "best answer," most consistent with the legal materials, requires deference to the legislature—or just the opposite.[49] A judicial decision, in short, will appear "activist" or "restrained," not because of the legal theory, but because of the political theory that the judge believes underlies the materials he interprets.[50]

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49. Pierre Schlag makes a similar point about Dworkin's theory of adjudication, suggesting that the advice to discover the "best" solution to a case "is not entirely empty, but it is useless." *See* Schlag, *supra* note 3, at 1086–87.

50. Other reasons for skepticism about the effect of Dworkin's theory on judicial practice may also be mentioned. First, it is clear that White's views about how judges should decide cases is not a result of his paying any attention to Dworkin's theory of law. Whether or not one agrees with my characterization of White's opinions as consistent with Dworkin's view, his opinions are *evidence for* the legal theory rather than the other way around. That is to say, legal theories such as Dworkin's purport to discover what we mean by "law" by observing how judges decide cases; judges are not themselves proponents of one theory of law, over another; they are only the evidence on which the legal theory itself is constructed. Second, even if White's opinions suggest that he is always searching for an apparently "right" answer to a case, that does not distinguish him from those other members of the Court with whom he disagrees. The majority in the abortion decisions and in *Miranda* would have insisted that they, too, were reaching decisions thought to be the most consistent with the Constitutional and legal materials they were interpreting. Thus, if we designate White's position as "restrained," and the majority's as "activist," it will, once again, not be because of a difference in legal theory. (Indeed, one Constitutional scholar suggests that the rhetoric of both sides is similar. *See* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2020 (2002) ("[b]oth liberals and conservatives are fond of characterizing the decisions that they don't like as judicial activism.")). Finally, whichever method one adopts—looking for a single right answer in principle, or making the best possible legislative choice among reasonable alternatives—the process is not likely to appear different in any noticeable way either to those observing judicial practice, or to the judge himself. What judge, in writing an opinion, would not present the result he reaches as the "right answer," even though he thought he was choosing among reasonable alternatives? Defending one's views as "the best," in short, is consistent both with "making" as well as "finding" law.

IV. SUMMING UP

A. The True Grounds for Restraint

It is political theory, not legal theory, that determines whether a judge is activist or restrained. In White's case, for example, there is little doubt that his reputation for judicial restraint, to the extent that it is deserved, stems from the implicit moral values he embraced, rather than from any particular view about the nature of law. Consider again another excerpt from his dissent in *Thornburgh*:

> Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.[51]

As a defense of judicial restraint, this explanation is familiar and plausible: absent clear indications that the democratically chosen solution is inconsistent with Constitutional guarantees, the Court should give the benefit of the doubt to the legislature. Equally clear, however, is that this explanation is grounded in a particular vision of democracy and its values. One could certainly expand on the values that underlie this vision. White's willingness to defer to the judgments of others, whether he agreed with them or not, reflects not only his view about the Constitutional scheme for allocating power among the various branches of government, but also his view about the relative skill and expertise of judicial, legislative, and administrative institutions—views which, to some extent, underlie and explain the Constitutional scheme itself. His deference also resulted from another value that he exhibited in many

51. 476 U.S. 747, 787 (1986) (White, J., dissenting).

opinions: a willingness to assume, until proven otherwise, that other officials would perform their jobs in good faith, without the need for judicial correction and oversight. This belief in the good faith of fellow officials has been mentioned often in connection with his deference to prosecutors, legislators, and administrators.[52] But the case that I think best illustrates this aspect of White's approach is the little-known, and seldom remarked decision of *Ward v. Village of Monroeville, Ohio*,[53] decided in his tenth year on the Court. The Court in that case reversed two fifty dollar traffic ticket convictions on the grounds that the mayor who had found the defendant guilty was also responsible for village finances, a large portion of which came from such traffic fines. White, joined by Rehnquist, dissented in a single, brief paragraph:

> To justify striking down the Ohio system on its face, the Court must assume either that every mayor-judge in every case will disregard his oath and administer justice contrary to constitutional commands or that this will happen often enough to warrant the prophylactic, *per se* rule urged by petitioner. I can make neither assumption with respect to Ohio mayors nor with respect to similar officials in 16 other States . . . . I would affirm.[54]

B. The Limits of Legal Theory

The other question I asked at the outset about why the conventional view persists is not so easy to answer, but indirectly, in my view, the answer is similar to the explanation for why judges have little use for academic disputes about the nature of law. Judges must, after all, assume that their obligation as a judge requires them to decide cases according to "the law." Thus they must operate with some implicit concept of what we mean by "law." My thesis assumes that their understanding of what we mean by "law" never requires going beyond what Hart called the "common knowledge" possessed by an "ordinary educated" person.[55] Hart thought that the persis-

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52. *See, e.g.*, Ides, *supra* note 1 at 439, 458; *Perspectives on White: A Roundtable*, 79 ABA J. 68, 72 (1979).

53. 409 U.S. 57 (1972).

54. *Id.* at 62.

55. *See* HART, *supra* note 4, at 3.

tence of the question "what is law" reflected the broader, humanistic inquiry into the differences between law, morality and coercion—he did not suggest that ordinary citizens or judges required more than the common understanding in order to operate quite well within their respective spheres—citizens worrying about sanctions or legal obligation, judges worrying about their duty as a judge. So, too, with the conventional view that links positivism and judicial restraint. The conventional view rests on a simple view about the nature of law. The conventional view tends to collapse positivism as a theory about law into textualism—a simplified theory of interpretation, combined with a political theory about the limits of judicial authority.[56] Missing from this simplified account is the problem that occupied most positivists from the outset: namely, that of explaining what judges should do when texts are unclear. So the conventional view can be explained in the same way that we can explain the ordinary judge's view about what we mean by "law." Both views ignore the nuances that legal theory provides in moving beyond the ordinary language account of "law" and the clear cases of convention. This explanation indirectly confirms my thesis. Legal theorists are exploring answers to different questions from those that ordinary citizens or judges are asking when they want to know what "law" is.

What, then, is the role of legal theory? What answers is it seeking, if not answers that bear on the judge's task in deciding cases? In my view the answer to that question is also the one that Hart suggested in *The Concept of Law*.[57] Theories about the nature of law are most useful when they are employed to help us understand the distinctions between law, morality, and force in ways that shed light on the differences and similarities between these common means of social organization. Such theories are not particularly useful when employed to produce theories of adjudication that purport to prescribe methods for judges to follow in deciding particular cases. In making this claim about the limited role of legal theory, I am admittedly endorsing the view that the enterprise is largely a conceptual or descriptive one, aimed at revealing poorly understood connections among the concepts of law, morality, and force and

56. For an excellent discussion of how positivism *could* lead to judicial restraint but only when coupled with a certain Hobbesian political theory see Goldberg, *supra* note 27, at 246–52.

57. See HART, *supra* note 4.

limited in its practical consequences to indicating broadly the implications for our attitudes toward law once these connections are recognized. This conceptual enterprise is, of course, the one that Dworkin debunks in the piece I referred to earlier.[58] Conceptual analyses of the concept of law, Dworkin suggests, like the desperate attempt of positivism to change its stripes by incorporating moral principles, are motivated by the same "sacred faith": namely, the perpetuation of a guild-like mentality that permits legal theory to flourish among a small band of followers whose work has less and less relevance to the larger questions of political and moral argument that underlie judicial decisions.[59] "Guild," of course, is meant to be pejorative; but why should that be so? Instead of being embarrassed by recognizing that legal theory has a limited domain, why not celebrate that fact, happily admitting that the great questions of political and moral theory are, indeed, the important ones—but insisting that they must be confronted head-on as independent branches of human inquiry, not derived from a theory of law that purports to make political theory subservient to the legal philosopher. The only people who could be distressed to learn that these issues of political theory are largely independent of legal theory are those who want the empire to belong to law, rather than, as it always has, to political and moral theory.

C. "Doing Justice"

I shall close with one final remark. I have not said much about just what it means to be "restrained" as a judge, and that question undoubtedly could be the subject of a completely separate paper.[60] I have suggested a rough definition that identifies restraint with a decision to defer to the legislative judgment in close cases. That definition, over-simplified though it may be, underscores one possible misunderstanding about what it means for a judge to be "restrained." The decision to defer to democratically chosen norms whether or not one agrees with them is itself the result of an actively chosen political theory. In that respect, a judge who is restrained is no different from

58. *See* Dworkin, *supra* note 23.

59. *See id.* at 1678–79.

60. *See, e.g.*, Sunstein, *supra* note 8 (suggesting that the Rehnquist Court has been just as activist, in its own way, as the Warren Court).

his more activist colleague—each is acting on his or her own view of which political theory best explains the legal structure the judge is required to interpret and develop, and in each case, the judge "actively" embraces, and could implicitly defend, the theory he or she employs. The point may be obvious, but it can be overlooked and, in fact, has been ignored on occasion in casual remarks by Justices about their own conception of their role. I am thinking now of Justice Holmes, with whom I began this paper. Among all the stories and aphorisms told about Justice Holmes, one in particular appears to be quoted by commentators more often than any other. That is the story of Justice Holmes's response to a young Learned Hand's offhand parting remark: "Well, sir, goodbye. Do Justice!" to which Holmes replied, with some vigor, "That is not my job. It is my job to apply the law."[61] There is a danger, of course, in reducing a life to a short quip or comment, and, I am afraid, that danger exists in White's case, too. The comment of White's that seems fast on its way to becoming the most repeated story is the response to a journalist during his confirmation hearings to the question what he saw as the role of a Supreme Court Justice. "To decide cases" was the reply.[62] Holmes was wrong, and White was half-right. A judge *does* do what he thinks justice requires, but "doing justice" is a complicated matter that requires sensitivity to the question of the proper allocation of responsibility between legislature and court. Despite Holmes' disclaimer, "applying the law" *is* doing justice, when political theory says so, and "deciding cases," may, of course, be an elliptical way of making the same point.[63] White decided cases, but

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61. Michael Herz, *"Do Justice": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 111 (1996). According to Michael Herz, the original version of this tale has Justice Holmes replying, "That is not my job. My job is to play the game according to the rules." *Id.* at 116–17. Herz's account is surely the most definitive and engaging recounting of this story, and the uses and mis-uses to which it has been put, that one is ever likely to encounter. Whether my alteration of the quote reveals a hidden agenda, similar to those Herz documents in similar variations on the story, I leave for others to decide.

62. HUTCHINSON, *supra* note 48, at 331.

63. Michael Herz suggests that this point is both obvious and consistent with Holmes' own view of Justice. *See* Herz, *supra* note 61, at 131–32 ("Holmes' actual words leave open the possibility that justice will be done *because* judges play the game according to the rules . . ."). My excuse for pointing out the obvious "lest anyone miss it." *See id.* at 115, n.15 (chiding a judge's dissenting opinion for adding the obvious in using the Holmes story to chide the majority for ignoring the rules) is connected to the theme of this paper. People *do* miss the point, tending to think that mechanical law application leaves a judge free of responsibility

he decided them according to law and according to his vision of the proper role of court and legislature. That is, to be sure, deciding cases; but it is also doing justice.

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for the result. Moreover, it is not only ordinary views that make the mistake of claiming the moral high ground for judicial restraint without considering that both restraint and activism result from an "actively" chosen political theory. *See* Chemerinsky, *supra* note 50 ("[b]oth liberals and conservatives are fond of characterizing the decisions that they don't like as judicial activism."). It is also recent academic discussion about the nature of rules and the inevitable "gap" produced by following them that makes many think "playing the game according to the rules," must inevitably result in injustice. That charge, if correct, means that judges who follow the rules cannot even in theory always "do justice," even if they tried to and were perfectly omniscient—a claim that is both contestable and, if true, undermines the attempt to connect Holmes' view of his role with a theory of justice. For an example of this ongoing dispute about the connection between rule-following and justice, *compare* Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695 (1991); *and* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES (2001), (rules must inevitably result in unjust applications), *with* PHILIP SOPER, THE ETHICS OF DEFERENCE: LEARNING FROM LAW'S MORALS 74-76 (2002) (following rules is justified deference to the decision of legislators who in good faith do the best they can in choosing between (inevitably gappy) rules and (invariably vague) standards.). *See also* Herz, *supra* note 61, at 132-33; FREDERICK SCHAUER, PLAYING BY THE RULES 162 (1991) ("One form of taking responsibility consists in taking the responsibility for leaving certain responsibilities to others").