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Dualistic Legal Phenomena and the Limitations of Positivism

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DUALISTIC LEGAL PHENOMENA AND THE LIMITATIONS OF POSITIVISM

> [A] right can only be secure if its limitations are defined within a framework of principle.
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> —Justice William J. Brennan[1]

Often, in a case of first instance, a judge will reach a decision by an appeal to legal principles. For example, in the 1889 case of *Riggs v. Palmer*[2] a New York court had to decide whether a grandson who had murdered his grandfather could inherit under the will in which his grandfather had named him an heir. The statutes and rules of testamentary law did not prohibit the inheritance. The court, however, invoked the legal principle that no one should be permitted to profit by his own wrong and denied the claim to inheritance. The use of such principles by courts raises an important question for legal theory: Do these principles exist within or without the legal system?[3]

This Note argues that an adequate conception of a legal system must include principles capable of justifying rules and acts. Part I describes two versions of positivist legal theory—one that contains only rules and another that includes principles derived from rules—and demonstrates that Professor Dworkin, while claiming to refute positivism, has actually advanced a theory consistent with the latter version. Part II argues that both versions of positivism are inadequate because they fail to describe and explain adequately some systemic operations, including legal fictions, and some legal phenomena, including adverse possession. Part III outlines a legal theory in which rules and nonderivative principles are equally basic and illustrates how such a theory is capable of describing and explaining complex legal phenomena.

I. Contours of Current Theory

Legal positivism stresses the separation of law and morals. This approach to legal theory is compatible with two different conceptions of a legal system: one that excludes principles from the law and another that includes principles as part of the law, but only insofar as they are derived from the legal rules. The compatibility of positivism with

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1. Lopez v. United States, 373 U.S. 427, 450 (1962) (Brennan, J., dissenting).

2. 115 N.Y. 506, 22 N.E. 188 (1889); see also B. Cardozo, The Nature of the Judicial Process 40–41 (1921) ("Conflicting principles were there in competition for the mastery.").

3. This issue is separate from the question whether any meaningful notion of a legal system must include an appeal to moral principles. This second issue was addressed in the Hart/Fuller exchange. See Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958); Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958).

derivative principles undermines Professor Dworkin's purported refutation of legal positivism.

A. *Two Forms of Legal Positivism*

Legal positivism propounds one primary and two derivative theses about the nature of law. First and most important, it asserts that law does not have any inherent moral value:[4] its existence is independent of the standards that may be used for its evaluation.[5] Second, legal positivism holds that a legal system is primarily[6] a system of rules.[7] Logically all rules are alike: either their operative facts occur and they apply, or their operative facts do not occur and they do not apply.[8] Finally, legal positivism holds that the existence of law is a social fact.[9] The question of its existence has an empirically ascertainable answer in the practices of the community.[10]

To maintain their commitment to a separation of law and morals, positivists must develop a procedure to identify the propositions that

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4. This thesis of positivism was first propounded by John Austin, who announced that "[t]he existence of the law is one thing; its merit or demerit is another." J. Austin, The Province of Jurisprudence Determined 184 (1832).

5. It is this thesis, more than the other two, that is most clearly associated with positivist legal theory. See, e.g., N. MacCormick, Legal Reasoning and Legal Theory 239–40 (1978) (Legal positivism may be "characterized minimally as insisting on the genuine distinction between description of a legal system as it is and normative evaluation of the law which is thus described."). Some scholars have rejected the primacy of this tenet in their characterization of positivism, see infra note 13.

6. See infra notes 17–18 and accompanying text.

7. Professor MacCormick has described "a central tenet of positivist legal theory" as the claim "that every legal system comprises, or at least includes, a set of rules identifiable by reference to common criteria of recognition . . . ." N. MacCormick, supra note 5, at 54. The common criteria of recognition for a legal system are those criteria accepted by the officials of that legal system by reference to which the officials can identify the valid legal rules that it is their acknowledged duty to apply.

8. R. Dworkin, Taking Rights Seriously 24 (1978). "A rule of law is general in terms, stipulating that whenever a given set of operative facts occurs (p), a given legal consequence is to follow (q)." N. MacCormick, supra note 5, at 53–54. Thus, "[w]hen a judge in a given case 'finds facts' amounting to an instance of p, the relevance of the legal rule to the case is established, and the legal consequence q is to be applied." Id. at 54.

9. D. Lyons, Ethics and the Rule of Law 37 (1984).

10. One conducts this empirical inquiry by searching for "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of [law] . . . ." H.L.A. Hart, The Concept of Law 92 (1979). These identifying features of a law constitute the criteria of validity for a particular legal system. They are summarized in "the rule of recognition" for that legal system. The rule of recognition is as much a brute social fact, see D. Lyons, supra note 9, at 37, as are the rules it recognizes. "[T]he rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact." H.L.A. Hart, supra, at 107.

make up a legal system without reference to their normative content.[11] Unable to identify the legally valid propositions by appeal to their grammatical or logical form,[12] positivists have instead focused upon the readily determinable sources of rules and their adoption. By observing the practices of the officials in a particular legal system, positivists can formulate this practice as a rule of recognition—a sufficiently rigorous and definite decision procedure for identifying the legally valid propositions of the legal system.[13] As long as the officials of the system do not deviate from their practices, and the general populace continues to respect these individuals as officials by obeying their rules, positivists will be able to identify these rules as the legally valid propositions without reference to their normative content.[14]

Being committed to the thesis that law is primarily a system of rules, positivists may develop their legal theory in either of two directions. First, they may argne that *only* rules compose the legal system: that there are no *legal* principles. This approach will be called *pure monism*. Second, they may argne that while the legal system is composed of both rules and principles, the legal principles of the system are de-

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11. In this respect, positivists contrast with natural lawyers who require the normative content of a law *properly so called* to be "right, good and just." D. Lyons, supra note 9, at 63.

12. John Austin made this attempt when he focused upon those propositions that were *imperatives*. As Austin discovered, however, the form of a proposition is insufficient to identify it as a law. Austin was finally led to distinguish laws from other imperatives by adding the further conditions that the imperatives of law be coercive imperatives or commands and that they be commanded by the sovereigu, a person or group of persons who are habitually obeyed but who obey no one habitually. J. Austin, supra note 4, at 10–33. More generally, the logical or grammatical form of a proposition is insufficient because the forms of legally valid propositions are too various and because a single form may be extended to legally invalid propositions as well.

13. In defining positivism as a form of proceduralism, some scholars have argued that the essential characteristic of a positivist legal theory is the claim that a decision procedure exists for identifying the legally valid propositions of a legal system. See, e.g., Fletcher, Two Modes of Legal Thought, 90 Yale L.J. 970, 976 (1981). This proceduralist definition of legal positivism, however, is too broad because the existence of a decision procedure is compatible with at least *possible* nonpositivist theories. For example, one can imagine a legal theory which held that the valid propositions of a legal system were only those that the Pope, speaking *ex cathedra*, had articulated. The necessary moral-theological content of these propositions would prevent the theory from being a positivist legal theory (since law would necessarily have a positive moral value) even though a definite decision procedure existed for identifying the legally valid propositions.

14. Professor H.L.A. Hart, for example, is a positivist who explicitly recognizes these two constraints. He has argned that "[t]here are . . . two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rule of recoguition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials." H.L.A. Hart, supra note 10, at 113.

rived from the legal rules. This approach will be called *mixed monism*. Because principles do not come from any identifiable source,[15] mixed monistic positivists are only able to embrace legal principles that are identifiable through their relation to the rules. These rules are, in turn, identifiable by the rule of recognition, whose existence itself is an observable fact. Positivists must exclude principles not derived[16] from the rules of the legal system: their inclusion would break this chain of identification. In this fashion, mixed monistic positivists conceive legal principles as merely epiphenomenal to and parasitic upon rules. While some positivists have maintained that the law is composed exclusively of rules,[17] most contemporary positivists would concede the existence of legal principles.[18]

Both pure and mixed monism are forms of legal monism because they take only one kind of proposition, rules, as basic in legal ontology. In contrast, a theory that embraces nonderivative legal principles takes at least two kinds of propositions, rules and principles, as basic in legal ontology. This latter approach to legal theory will be called *legal dualism*.

In contrast to rules,[19] principles do not operate in an all-or-nothing fashion. Nor do principles attach definite legal consequences to particular kinds of situations.[20] A principle points out a direction in which the decisionmaker should proceed and expresses a value that must be weighed in the decision of any particular case on which it bears. Just as one may be committed in different degrees to different values, so too different principles may carry different degrees of weightiness.[21] The greater the weight of a particular principle, the greater the role that principle will play in a decision.[22] Thus, while the application of rules may be viewed as a relatively mechanical operation, the use of principles requires a more reflective grasp of the weight of competing principles and the inimitable scales of justice.[23]

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15. See infra notes 25–27 and accompanying text.

16. To *derive* principles from a set of rules may be loosely defined as articulating principles that are consistent with the rules and that manifest the coherence of the set.

17. See, e.g., H.L.A. Hart, supra note 10.

18. See, e.g., N. MacCormick, supra note 5.

19. See supra note 8 and accompanying text.

20. See R. Dworkin, supra note 8, at 25–26.

21. See id.

22. Cf. N. MacCormick, supra note 5, at 260 ("a principle . . . is . . . a relatively general norm which from the point of view of the person who holds it as a principle, is regarded as a desirable general norm to adhere to, and which thus has explanatory and justificatory force in relation to particular decisions, or to particular rules for decisions.").

23. This Note does not make a distinction between principles and policies. While Professor Dworkin makes such a distinction, R. Dworkin, supra note 8, at 22–23, it does not appear this distinction can be coherently maintained. See, e.g., Marshall, Positivism, Adjudication, and Democracy *in* Law, Morality and Society 132, 136 (Hacker & Raz eds. 1979). See generally Greenawalt, Policy, Rights and Judicial Decision, 11 Ga. L. Rev.

B. *Professor Dworkin's Failure to Refute Positivism*

Professor Dworkin has argued that principles must be included as part of the legal system, and that positivism is inadequate because the rule of recoguition can neither identify which principles are legal principles nor account for the obligations, with their differential weight, that such principles impose.[24] He claims that one cannot "devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude."[25] Because such an identification and account would be too complex for any social rule to encapsulate, he argues that one can identify a legal principle only "by grappling with a whole set of shifting, developing and interacting standards . . . about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards."[26] Professor Dworkin continues that one "could not bolt all of these together into a single 'rule,' even a complex one . . . ."[27] Since positivism requires a rule of recognition of this kind, he concludes, positivism is incompatible with the existence of legal principles and the legal obligations that these impose.

Ironically, the failure of Professor Dworkin's argument is most easily brought out by showing how his own theory of legal principles, which he offers to overcome the inadequacies he perceives in the positivist adjudicatory model, is in fact compatible with positivism.[28] The most famous of the inadequacies is the "hard case" in which it is unclear whether or how a rule applies. According to Professor Dworkin,

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991 (1977) (critiquing Professor Dworkin's distinction). This Note instead accepts the position of Professor MacCormick that

> when in law or in any other sphere we raise the question whether a given policy goal is desirable or not, we are raising a question of principle. For any goal *g*, to say that it is a goal which *ought* to be secured is to enunciate a principle or a judgment dependent on some unstated but presupposed principle. For this reason, the spheres of principle and of policy are not distinct and mutually opposed, but irretrievably interlocking . . . . To articulate the desirability of some general policy-goal is to state a principle. To state a principle is to frame a possible policy-goal.

N. MacCormick, supra note 5, at 263–64 (emphasis in original).

24. R. Dworkin, supra note 8, at 14–45.

25. Id. at 40.

26. Id.

27. Id.

28. The observation that Professor Dworkin's theory is compatible with a form of positivism is not without precedent. Cf. Coleman, Negative and Positive Positivism, 11 J. Legal Stud. 139, 163 n.15 (1982) (claiming that Professor Dworkin "reveals himself to be much more of a conventionalist than he would have us believe" and that his "notion of justification does not establish the link between law and critical morality necessary to undermine positivism"); MacCormick, "Principles" of Law, 19 Jurid. Rev. 217, 225 (1974) (stating that Professor Dworkin has refined positivism, not undermined it); Ten, The Soundest Theory of Law, 88 Mind 522, 537 (1979) ("[A]lthough it is certain that

positivists claim that in such cases a judge exercises discretion "in the strong sense," that is, "he is simply not bound by standards set by the authority in question."[29] Professor Dworkin, rejecting this adjudicatory model, posits a Herculean judge of superhuman skill and speed. This judge is aware of all legal principles arranged in a complete theory of law. He has discovered these principles through a consideration of all sources of legal authority and has arranged them to provide "a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well."[30] In effect, the Herculean judge considers all prior rules of law to construct a system of principles and then employs this system to determine a new rule of law that covers a case of first instance. The Herculean judge never exercises discretion in the strong sense because he can always offer a reasoned justification consistent with prior law for any case determination he makes. Thus, notwithstanding his earlier argument against the possibility of a rule of recognition, Professor Dworkin's theory must embrace one to enable the Herculean judge to identify the legal rules from which he derives the principles.

Under Professor Dworkin's theory, the existence of legal principles is epiphenomenal to and parasitic upon the existence of legal rules. In effect, the Herculean judicial theory is a mirror that reflects the light of all prior rules of law onto a case of first instance to illuminate the new rule necessary to its decision. Professor Dworkin provides legal principles only to create the required reflective surface. Moreover, it follows that the judicial obligation to consider principles is derived from the judicial obligations that the rules impose. Professor Dworkin has not rejected the conception of law as a model of rules; he has merely modified the model to provide a coherence between old rules and new rules.

Professor Dworkin has articulated a mixed monistic conception of principles that is compatible with positivism.[31] He has unintentionally demonstrated that a version of positivism *is* compatible with the existence of legal principles. Therefore, Professor Dworkin's own theory

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Dworkin strongly disagrees with the legal positivists, it is not as yet clear whether they should disagree with him.").

In the explanation of how Professor Dworkin's theory is compatible with positivism, this Note will focus only on those aspects of his theory necessary for this purpose.

29. R. Dworkin, supra note 8, at 32. For the judge, this authority is the authority of law. Professor Dworkin appears to have in mind an anthropomorphized version of the legal system that fails to command the judge with respect to the standards he ought to deploy—the system has no rule directing the judge to a particular decision. For a discussion of Professor Dworkin's conception of discretion see Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges, 75 Colum. L. Rev. 359 (1975).

30. R. Dworkin, supra note 8, at 116–17.

31. As another mixed monistic positivist has observed: "[M]y own inclination is rather to say that Professor Dworkin has added a highly important rider to analytical positivism than to accept that he has wholly subverted that theory." MacCormick, supra note 28, at 225.

refutes his contention that positivism cannot account for legal principles. While Professor Dworkin claims to have refuted positivism by showing that there can be no direct relation between legal principles and the rule of recognition, all he has shown is that "there is a relationship between the 'rule of recognition' and principles of law, but it is an indirect one."[32]

II. The Refutation of Legal Positivism

Legal monism, like any legal theory, is a theory about the legal phenomena and systemic operations that may compose a legal system. A legal phenomenon is any event, relation, or act to which a legal culture gives special significance. Thus, the *relation* of a woman to her dog is cognized within the legal system as the relation of ownership. The *event* of a child handing a penny to the proprietor of a candy store and the shopkeeper in turn placing a piece of bubble gum in her hand is cognized as an event of purchase. The *act* of one person fatally piercing a saber through the body of another is cognized as an act of murder. By imbuing these acts, events, and relations with special significance, the legal system imposes a normative structure on our lives. Systemic operations are those procedures and techniques within a legal system that permit the creation and modification of legal phenomena. Examples include the procedures of legislation, techniques of legal reasoning, the judicial manipulation of rules with legal fictions, and common law defenses. Different legal systems may create different legal phenomena and employ different systemic operations.[33]

To give a complete account of the normative structure of a particular system, a legal theory must accomplish three goals: first, it must describe the kinds of legal phenomena and operations that exist in that system;[34] second, it must be able to explain the internal structure or anatomy of each kind of legal phenomenon and operation that exists in that system, that is, it must explain in a nonarbitrary fashion why partic-

32. N. MacCormick, supra note 5, at 233.

33. Just as one would expect a capitalist legal system to create a relation of private ownership, one would not expect the legal system of a country formed around an ideological commitment to pure communism to create such a relation. Moreover, one would not expect civil law systems to employ all the judicial techniques present in a common law system. An application of a legal theory to a legal system must be able to account for the existence of the legal phenomena created and the systemic operations employed by that legal system.

34. This is the condition of descriptive adequacy. A theory is descriptively adequate if it has embedded in it a language L such that L has a sufficient array of categories to describe in a manner compatible with the conceptual apparatus of the theory all of the data or phenomena that the theory must explain or systematize. "A vocabulary of terms or concepts thus may be said to represent a means of delimiting and sorting what are taken to be things; it is a device of reference. Concepts or terms are not in themselves, however, capable of conveying propositions [or] beliefs . . . . [These latter] are dependent upon an available conceptual apparatus." I. Scheffler, Science and Subjectivity 37 (1982).

ular types of acts carry the legal significance that they carry and why that legal system contains the particular rules of law it contains;[35] and, third, it must offer an account or conceptualization of that legal system as a whole that allows for the possibility of the existence of each kind of legal phenomenon and operation with its specific structure.[36] If a particular application of a legal theory to a legal system fails to account for all the legal phenomena and operations of that system, then that theory is an inadequate account both of that legal system in particular and of legal systems in general.

While neither pure nor mixed monism necessarily implies positivism, positivism requires the adoption of either a pure or mixed monistic theory.[37] Because pure monistic theory fails to account for a prevalent systemic operation—the legal fiction—and because neither pure nor mixed monistic theory is able to account for the legal phenomenon of adverse possession, monistic theory must be rejected as inadequate. Therefore, positivism specifically and rule-based theories generally must be rejected as inadequate.

A. *Legal Fictions and the Limitations of Pure Monistic Theory*

Pure monism is able to account for neither the use nor the existence of at least one systemic operation—the legal fiction. Only by including principles in the legal system can a theory describe and explain the existence and use of legal fictions.

A legal fiction is a falsehood that the courts treat as a truth. A legal fiction may be propounded as a matter of fact, as when a court declares that "the grantee of a gift has accepted it" in a case in which the grantee of the gift did not know of it and could not possibly have accepted it;[38] or the fiction may be offered with an articulated awareness of its falsity, as when the fiction is preceded by such phrases as "the law presumes,"

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35. This is the condition of sufficient explanatory power. The concept of explanatory power is comparative. A theory *T1* has greater explanatory power than a theory *T2* if either (1) *T1* explains more of the data than *T2*, or (2) *T1* explains the same amount of data as *T2* but with a simpler conceptual apparatus. See C. Hempel, Aspects of Scientific Explanation 278 (1978).

36. The ontic possibility involved in conceptualization relates the first goal of description to the second goal of explanation. In other words, "[c]onceptualization relates both to the idea of categories for the sorting of items [(description)] and to the idea of expectation, belief, or hypothesis as to how items will actually fit available categories [(explanation)]; it links up with the notion of *category* and, also, with the quite different notion of *hypothesis*." I. Scheffler, supra note 34, at 38 (emphasis in original).

37. This Note adopts Professor Dworkin's characterization of the sources of principles as a characterization of the sources of nonderivative principles. Limited to nonderivative principles, therefore, Professor Dworkin's argument is accepted as valid: there can be no rule of recognition for identifying *nonderivative* legal principles. Thus, if the legal principles are not derived from the rules of the legal system, they cannot be identified in a manner consistent with positivism. See supra note 25–27 and accompanying text.

38. See Thompson v. Leach, 1 Eng. Rep. 102 (1698).

"it must be implied" and "the plaintiff must be deemed" or by such adjectives as "constructive" or "implied-in-law."[39] Examples of the latter are the doctrines of attractive nuisance and of respondeat superior.

Pure monists cannot explain why, amidst almost universal opprobrium,[40] the legal fiction continues to exist. Pure monists hold that the law is a system of rules, and that a rule either applies or does not apply. Yet, in a case involving a legal fiction, a particular rule of law applies even though the facts of the case are not the operative facts necessary to establish the relevance of that particular rule of law. If pure monistic positivism were the correct theory, the rule would be regarded as irrelevant and not applied. But the rule is regarded as relevant and it is applied.

Pure monistic positivists cannot give an account of how a rule is established as relevant even though the operative facts of the rule are not present: Can an ordinary act of equestrian showmanship be fictionalized as an act of murder? If not, why can a pacifist felon be deemed the murderer of a man killed by his co-conspirator? To these questions positivists can offer only the nonanswer that the rule is simply relevant because the judge decides it to be so. This is unsatisfactory for two reasons. First, it suggests that judges have unbridled discretion to fictionalize our lives and apply any rule they wish. As an empirical matter this is false. Second, the nonanswer leaves shrouded in mystery precisely the issue it is required to illuminate. We know the judge has decided the case in a specific way—the question is why.

Only by making a distinction between rules and principles can a theory explain systemic operations such as the use of fictions in the law. The use of legal fictions is determined in particular cases by an appeal to principles. These principles determine when a certain rule is or is not relevant, and dictate the appropriate use, if any, of legal fictions. By including principles that supervene the operative facts of a particular rule, a legal theory can explain why that rule is considered relevant to the facts of the case at bar and why its application is legitimate. The

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39. Because it is not always clear how conscious courts are of the falsity of fictions, a legal fiction can be defined as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility." L. Fuller, Legal Fictions 9 (1967).

40. Jurists have long recognized legal fictions as problematic. Bentham described them as "the most pernicious and basest sort of lying." 6 J. Bentbam, Works 582 (Bowering ed. 1843). Rhetorically, he asked and answered his own question: "Fiction of use to justice? Exactly as swindling is to trade." 7 J. Bentham, Works 283 (Bowering ed. 1843). Blackstone said that "while we may applaud the end, we cannot admire the means." 3 W. Blackstone, Commentaries 360 (Lewis ed. 1897). Austin commented that "I rather impute such fictions to the sheer imbecility (or, if you will, to the active and sportive fancies) of their grave and venerable authors, than to any deliberate design, good or evil." 2 J. Austin, Lectures on Jurisprudence 611 (5th ed. 1885). Finally, Williston advised "[i]t is better to state the law in terms of reality, for misapprehension is sure to be caused by fictions." 2 S. Williston, Contracts §§ 1576–77 (1920), quoted in L. Fuller, supra note 39, at 4.

rule is relevant because the principles require an extension of the scope of the rule to that kind of case. The requirements of the principles stand in for the operative facts of the rule. The application is legitimate because the rule is applied in accord with the principles. Thus, the legal fiction is a device which realigns the rules and principles within the legal system when either the scope of the principles exceeds the scope of the rules or the scope of the rules exceeds the scope of the principles.[41]

The development of the doctrine of respondeat superior provides a good example of judicial expansion of the scope of a rule. During the nineteenth century, the courts became committed to the principle that employers should be liable for the harm caused by their employees in performing the duties of their employment. The only rule available for imposing liability, however, was the rule of negligence. The rule clearly did not apply to nonnegligent employers. To extend the scope of the rule to cover these cases and to meet the requirements of this new principle, the court either *deemed* that the employers were negligent in hiring careless employees or declared that the employers *impliedly* commanded their employees to do all the acts that the employees did while performing their duties.[42] Under either fiction, the rule of negligence could be applied. The principle of strict liability thus supervened what previously were the operative facts of the rule and established the rule as relevant to the facts of these cases. The fiction extended the scope of the rule to accord with the principle.

The development of the attractive nuisance doctrine, conversely, was a judicial effort to avoid the application of a rule. Here, too, the courts found it necessary to use a legal fiction. Prior to the attractive nuisance doctrine, landowners were not liable to anyone who trespassed upon their land and was injured.[43] The courts, however, became committed to a principle that one who causes a foreseeable and avoidable injury to a child should be liable for that injury. The old rule prevented realization of this principle. To surmount this obstacle the courts fictionalized an invitation by the landowner to the child to enter upon the land. Since the child had been "invited," the old rule concerning trespassers did not apply, and the principle could be realized without impediment.[44] Here, a contraction of the scope of a rule was

41. Cf. B. Cardozo, supra note 2, at 42–43 ("Such formulas are merely the remedial devices by which a result conceived of as right and just is made to square with principle and with the symmetry of the legal system.").

While the discussion has encompassed only common law fictions, this general analysis is applicable to the statutory fictions of civil law jurisdictions as well. For an important discussion of statutory fictions (Gesetzliche Fiktionen) in German law see K. Larenz, Methodenlehre der Rechtswissenschaft 245–48 (1975).

42. See Wigmore, Responsibility for Tortious Acts, 7 Harv. L. Rev. 315, 383 (1894).

43. See Howland v. Vincent, 51 Mass. (10 Met.) 371 (1845).

44. Keffe v. Milwaukee & St. Paul Ry., 21 Minn. 207 (1875).

required by a principle of the legal system. The contraction was legitimate because it furthered the realization of this principle.[45]

Not only are pure monistic positivists unable to explain why a legal fiction is used in the way it is used, they cannot explain why a legal fiction is used in the first place. Pure monistic positivists might suggest that legal fictions exist to disguise the legislative activity of the judge. However, the question remains: Why disguise judicial legislation? If judicial legislation is legitimate, the judge could simply state an ordinary, nonfictional rule having the same legal consequences as the legal fiction. To explain the existence of legal fictions as deceptions, the pure monist must either claim that judicial legislation is illegitimate per se and that the creation of a legal fiction is a form of judicial cheating, or give reasons why a deceptive fiction is created when an ordinary rule could be articulated specifying the change in the law with greater clarity and candor. Allowing that the legislative activity of a judge is generally legitimate, the existence of deceptive fictions can only be explained by referring to a principle that provides a reason for their creation.[46] Such a principle might be that a judge should not be perceived as a legislator.[47] There may be good reasons for the presence of this principle in a system of law, such as a commitment to the separation of powers. Whatever the reasons for the presence of such a procedural principle, the point remains that the pure monist is finally forced to invoke one or

45. Pure monists may argue that doctrines such as respondeat superiour and attractive nuisance are simply new rules reflecting special operative facts. Even if this is conceded, pure monists are still unable to explain the use of the legal fiction—as opposed to the creation of a new rule—in the first instance. They are similarly unable to explain why a judge may resort to a fiction in one case but not in another. Cf. infra notes 46–47 and accompanying text (making analogous points with respect to the existence of legal fictions).

46. This claim assumes that there is no express decision rule that requires the officials of the legal system to create legal fictions in order to deceive the general public. Decision rules are laws addressed to the officials of the legal system to provide guidelines for their decisions. An example of a decision rule is a rule that requires under certain circumstances a judge to sentence a defendant to a prison term of not less that five years but not greater than ten years. Decision rules are contrasted with conduct rules. Conduct rules are laws addressed to the general public to provide guidelines for their conduct. For a detailed discussion of this distinction see Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984).

47. By analogy to Professor Dan-Cohen's distinction between decision rules and conduct rules, one might call this principle—that a judge should not be perceived as a legislator—a decision principle. Clearly, if such a principle exists in a legal system, it is a principle directed at the officials. Moreover, if it is to be effective, only the officials should be aware of its existence. This latter point suggests that an acoustic separation may occur at the level of principles in a legal system, that is, that some of the principles of a legal system are meant only to be "heard" by the officials but not the general public while others are meant to be "heard" by the general public but not the officials qua officials. For a more detailed discussion of acoustic separation see Dan-Cohen, supra note 46, at 630–34.

more principles to explain the existence of legal fictions within a legal system.

A recognition of legal principles provides more ordinary procedural explanations for the existence of legal fictions as well. One of the many reasons why fictions might be used is that a judge may simply "not know how else to state and explain the new principle he is applying."[48] Moreover, from a systemic perspective, while "[t]he purpose of the fiction consists in making lighter the difficulties connected with the assimilation and elaboration of new, more or less revolutionary, legal principles,"[49] it also consists "in making it possible to leave the traditional learning in its old form, yet without hindering thereby the practical efficiency of the new in any way . . . ."[50]

B. *Legal Phenomena and the Limitations of Monistic Theory*

Legal monism cannot describe, explain, and account for the possibility of all legal phenomena. Pure monism cannot do so for adverse possession because its limitation to an analysis in terms of rules prevents it from developing an adequate narrative structure.[51] Mixed monism cannot account for adverse possession because its principles are not capable of justifying rules and acts.

1. *The Limitations of Pure Monistic Positivism.* — Pure monistic positivism, committed to the proposition that every legal phenomenon can be explained in terms of the application of a single rule, seeks to explain each legal phenomenon in the same manner.[52] First, certain operative

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48. L. Fuller, supra note 39, at 64.

49. Id. at 61 (quoting and translating 3 Ihering, Geist des römischen Rechts 301–06 (6th ed. 1923)).

50. Id. at 61–62.

51. See infra note 53. In light of Professor Dworkin's extensive writings on the use of principles by judges in the ordinary course of their activity, one might question the need for an argument against the adequacy of pure monistic positivism. However, precisely because Professor Dworkin offers only a descriptive account of a judge's use of principles, the pure monist may respond by giving a reductivist model of rules allegedly showing what is "really" going on. To prevent this response an argument is needed which shows that a pure monistic model, given the logic of rules, cannot succeed as an adequate legal theory. This is accomplished by moving beyond descriptive observations, like those of Professor Dworkin, to a consideration of the narrative structure inherent in a pure monistic model. See infra notes 53–57 and accompanying text.

52. Recall that a legal phenomenon is any act, event, or relation imbued with legal significance by the legal culture. Thus, for example, the existence of a contract and of a breach of that contract constitute two distinct legal phenomena. The existence of a relation of contract and of an act of breach must be determined separately within the legal system. Of course, the existence of one legal phenomenon may be relevant to determining the existence of another legal phenomenon: the existence of a contract is relevant to determining whether a particular act is a breach of contract. This relationship, however, does not prevent them from being distinct legal phenomena: the existence of a contract is simply another fact in the world that must be considered in determining the existence of a breach. Only when the legal phenomenon relevant to determining the existence of a subsequent legal phenomenon cannot coexist consistently with this subsequent phe-

facts occur. Second, these operative facts demonstrate the relevance of a particular rule of law. Third, the relevant rule of law is applied and imposes upon these facts a particular legal meaning. These facts together with their legal meaning constitute the legal phenomenon. This analysis shapes the narrative structure of monistic legal discourse.[53] A story is told: fact and episode build upon fact and episode. These facts and episodes have no legal significance; they merely describe what happened. Ultimately, the story climaxes as a rule of law is established as applicable and concludes in the creation of the monistic legal phenomenon. Employing this narrative structure, monistic lawyers impose legal significance or meaning only at the end and *not* at the beginning or middle of the story.

The narrative structure of pure monistic positivism adequately describes many legal phenomena, such as the doctrine of consideration in contract law. Under this doctrinal rule, a contract is generally not formed until each party has given the other some form of consideration for which the other has bargained. Because not every bargained for exchange of promises and perfomances meets the requirements of consideration, this simple doctrine quickly becomes a complex rule.[54] Nonetheless, it is a rule stipulating when a particular event may be imbued with a special legal significance. When the rule applies, a monistic legal phenomenon is created. Williston offers to deliver a lengthy manuscript by Corbin to West Publishing Company if only Corbin will give to him the original peppercorn that has recently come into Corbin's possession. Corbin gives the peppercorn to Williston in return for his promise to deliver the manuscript. Up to this point, the story has described only the events of their lives. But now the story climaxes as a rule of law applies. As Williston stops to peruse the manuscript on his way to West, he realizes, much to his chagrin, that he is under a contractual obligation to proceed.

Some legal phenomena, however, cannot be viewed as the creation of a single rule. In addition, the narrative description of some legal

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nomenon is their distinctness from one another to be questioned; this is the case with a dualistic phenomenon. See infra notes 55–57, 75–102 and accompanying text.

53. A narrative structure is the structure of a narrative description. A narrative description, in turn, describes the internal structure of a legal phenomenon. It may describe the internal structure of a legal phenomenon directly or it may describe a nonlegal structure that becomes a legal structure upon the application of a rule. This latter case is exemplified by the transformation of negotiation into contract upon applying the rule of consideration. The class of narrative structures of a particular legal discourse defines the set of possible narrative descriptions within that discourse. This set, in turn, determines the legal phenomena that may be described within that discourse. Since monistic legal discourse only permits one kind of narrative structure, what is true of this narrative structure is true of monistic narrative descriptions generally.

54. The doctrine of consideration encompasses such disparate topics as prior legal duties, doubtful and invalid claims, multiple exchanges, conditional, illusory and alternative promises, as well as voidable and unenforceable promises. See Restatement (Second) of Contracts §§ 71–80.

phenomena must impose legal significance upon an act, event, or relation that occurs prior to the end of the narration. Therefore, the narrative structure of pure monistic positivism cannot explain all legal phenomena.

Adverse possession, for example, involves two rules: the rule against trespass and the rule that bars the remedy of a disseised owner in an action for ejectment.[55] This establishes from the start that adverse possession cannot be viewed as the creation of a single rule or, equivalently, as a monistic legal phenomenon. Moreover, this legal phenomenon requires that legal significance be imposed at the beginning of the narrative as well as at the end. At the beginning of the narrative description of adverse possession, the adverse claimant is given the legal significance of a trespasser; he has illegally entered upon the land of another. By the end of the narrative, however, the remedy of the disseised owner is barred and the relation of the disseisor to the land is imbued with the legal meaning of ownership. The adverse claimant is then the legal owner of the land under a newly created title.[56]

The description of adverse possession cannot be fit within the single narrative structure of pure monistic legal discourse. The only time at which pure monistic narrators can attribute legal significance is at the conclusion of a narrative. Pure monists, therefore, are forced to tell two different stories: the story of the trespasser and the story of the owner. These two narratives conflict and an ambignity is created: is the possessor an illegal trespasser or the legal owner? This ambiguity becomes especially pronounced once the doctrine of "relation back" is introduced. Under this doctrine, the title received by the successful adverse claimant "relates back to the time of his entry; hence he was the owner all the time, and violated no rights of other people in treating the land as he did."[57] This ambiguity cannot be resolved simply by choosing one narrative as authoritative. To choose one narrative and exclude the other would be to destroy the concept of adverse possession. Adverse possession requires that the legal significance imposed at the conclusion of each of these pure monistic narratives be preserved within a single, continuous narrative. A single, continuous narrative, however, cannot be achieved within a pure monistic model because the operative facts of both rules have obtained, each rule applies, and two conflicting narratives result. Only by reconceptualizing the origin of the legal significance imposed on the acts of the adverse possessor can this ambignity be resolved and the story of adverse possession be told as a single, continuous narrative without contradiction.

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55. Cf. 7 Powell, The Law of Real Property ¶ 1012[2] (1984) (describing adverse possession as barring the remedy in an action for ejectment).

56. See R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property 758 (1984) [hereinafter cited as Cunningham].

57. C. Callahan, Adverse Possession 58–59 (1961).

2. *The Limitations of Mixed Monism.* — Unlike pure monistic positivists, mixed monists include principles in their description and explanation of legal phenomena. In order to describe and explain the transformation of the adverse possessor from trespasser to legal owner, however, the principles deployed must justify the acts of the adverse claimant. The derivative principles of mixed monism cannot do this. Rather, its principles simply describe the way in which the rule of adverse possession *coheres* with the other rules of the legal system.

In seeking to describe adverse possession, mixed monists might first cite the two rules of trespass and adverse possession.[58] Mixed monists would then add to this pure monistic analysis a set of principles derived through a "Herculean" synthesis of all the other existing legal rules.[59] Finally, mixed monists would seek to describe and explain the transformation of the adverse claimant from trespasser to owner by deploying this set of principles.

While the use of principles is necessary to achieve a single, continuous narrative of adverse possession, the narrative structure of adverse possession must permit principles to impose legal significance *directly upon the acts* of the adverse claimant. This imposition is necessary because the acts of the adverse claimant must carry some type of legal significance in order to create a legally significant link with which to connect the illegality of his trespassory acts and the legality of his acts as owner.[60] Unless the principles *justify* a change in the legal status of these acts, the transformation of the adverse possessor from trespasser to legal owner is not possible.

Recognizing this requirement for a single, continuous narrative, mixed monists might claim that the principles derived from the existing law apply directly to the acts of the adverse claimant and thereby justify the transformation of the adverse claimant from illegal trespasser into legal owner. This is possible, however, only if the derived principles also justify the *rule* of adverse possession. This is because a principle justifies an act, all else being equal, if and only if it justifies the rule to the extent that the act falls within its scope.[61] If the principles of mixed

58. These rules, standing alone, however, cannot describe and explain this legal phenomenon. Nor can the mixed monists appeal to some other rule as supported by their derivative principles. Applying rules will generate more incompatible narratives. See supra notes 55–57 and accompanying text.

59. See supra notes 28–31 and accompanying text.

60. See infra note 61 and accompanying text.

61. The classic instance of this equivalence is the proof that rule utilitarianism is equivalent to act utilitarianism. See D. Lyons, The Forms and Limits of Utilitarianism 133, 143–44, 186–87 (1965). Consider either the principle of utility or the principle of self-defense. If either principle justifies the rule of self-defense, then one would say that the principle justifies an act of self-defense as well. The converse is also true. The equivalence thesis has recently come under attack, see D. Regan, Utilitarianism and Cooperation 18–19, 99–100 (1980), but at least one scholar argues persuasively that this attack is a failure. J. Fishkin, The Limits of Obligation 174–75 (1982). A full discussion

monism do not justify the rule of adverse possession, then its principles do not justify the acts of the adverse claimant and cannot supply the justification necessary for a single, continuous narrative of adverse possession.

The derived principles deployed by mixed monists do not themselves justify the rule of adverse possession. Mixed monism embraces a coherence theory of justification.[62] In a legal context, this theory amounts to the claim that a rule is justified as a rule of law[63] if it fits sufficiently well—that is, coheres—with the otherwise existing law.[64]

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of this attack is beyond the scope of this Note. Notwithstanding this recent attack, however, this Note assumes the equivalence thesis is defensible along the lines of Professor Fishkin, id.

62. See R. Dworkin, supra note 8, at 44, 283, 340–42, 360; N. MacCormick, supra note 5, chs. 5, 7; Kress, Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions, 72 Calif. L. Rev. 369 (1984).

Most generally, a coherence theory of justification holds that a proposition is justified if it fits sufficiently well with other propositions held to be justified. See K. Lehrer, Knowledge 154, 165 (1974); cf. N. Rescher, The Coherence Theory of Truth 32, 43–44 (1973) (discussing a coherence theory of *truth*, not justification).

63. It may be preferable to speak of a rule being justified "as a possible rule of law" rather than "as a rule of law." When a judge articulates a set of principles that rationalizes the existing law with some rule, "[h]e does not thereby show that the decision must be as he proposes to give it in the instant case; only that it may be legitimately so given." N. MacCormick, supra note 5, at 126. Moreover, the former phrase makes clear that this Note takes no position with respect to the validity of the "right answer thesis." See Dworkin, No Right Answer? *in* Law, Morality, and Society 58–84 (1979). If the "strong right answer thesis"—that necessarily in every hard case one and only one of the parties has a legal right to win—is true, then there is always only one possible rule of law that is justified. If the "weak right answer thesis"—that possibly there exists a hard case in which one and only one of the parties has a legal right to win—is true, then it is possible that only one possible rule of law is justified. See Galis, The Real and Unrefuted Rights Thesis, 92 Phil. Rev. 197, 218 (1983). If, however, both versions of the "right answer thesis" are false, then there will always be more than one possible rule of law that is justified.

64. Cf. K. Lehrer, supra note 62, at 154 (Noting that the body of propositions, with which the proposed proposition must cohere, must have some special property *k*. In a legal context, this property *k* is "being the existing law.").

Coherence with the existing law is necessary, on a monistic view, because "judges are to do justice according to law . . . . [E]very decision, however acceptable or desirable on . . . [other] . . . grounds, must also be warranted by the law as it is." N. MacCormick, supra note 5, at 107. Thus, the fact that the rule hangs together with the existing law sufficiently well to constitute a coherent whole justifies the rule. Not all mixed monists have recognized this implication of their position. Compare id. (recognizing this implication) with R. Dworkin, supra note 8, at 283, 340–42 (apparently not recognizing this implication). See also Coleman, supra note 28, at 163 n.15 (recognizing that this implication is one that follows from Professor Dworkin's theory).

On this model, however, as the rules of the legal system change, an adopted rule may lose its coherence with the remaining existing law and thereby its justification to be a rule of law. Cf. Cornman, Foundational versus Nonfoundational Theories of Empirical Justification *in* Knowledge and Justification 229, 235, 241–42 (G. Pappas & M. Swain eds. 1978) (relativizing the coherence to a moment of time); R. Dworkin, supra note 8, at 119–21 (allowing that a rule may be disregarded as a mistake even though it was once

All the set of derived principles does is to *demonstrate* that the rule of adverse possession coheres with the other rules of the legal system by *describing* the nature of that coherence.[65] This description of the justification of the rule of adverse possession plays a crucial role in making the rule of adverse possession a part of the legal system. By articulating a set of principles that rationalize the existing law with the rule of adverse possession, mixed monists describe the coherence, thereby showing that the rule is justified.[66]

Describing the justification of a rule, however, is *not* itself justification. The rule of adverse possession is justified *because* it coheres with the other legal rules, *not* because derived principles are invoked that *show* that it coheres. In claiming that their principles justify the acts of the adverse claimant, mixed monists have conflated the justifying function of coherence with the description of coherence. Because the derived principles invoked by mixed monists do not justify the rule of adverse possession, these principles cannot justify the acts of the adverse claimant. Therefore, mixed monists are unable to describe and explain the transformation of the adverse possessor from trespasser to legal owner.

That the principles of the mixed monist are descriptive rather than justificatory is further demonstrated by recognizing that the justification of a rule as a rule of law is independent of the set of principles articulated to rationalize the existing law with other rules. This may be demonstrated by hypothesizing that, at common law, the courts had not adopted a rule governing the status of a trespasser who occupies land under a claim of right.[67] Suppose, further, that a present-day court wishes to adopt the rule of adverse possession and that the court, looking at the currently accepted set of principles, discovers that these principles cannot rationalize the proposed rule of adverse possession with the existing body of rules. Mixed monists concede that the court may adopt the proposed adverse possession rule *provided that* the rule coheres with the rest of the rules of the legal system and that this coherence can be demonstrated. The fact that the set of principles that rationalizes the rule of adverse possession with the existing law had

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regarded as valid). How one determines that it is the older rule that is no longer justified and not the newer rules, whose addition caused the failure of coherence between all the rules of the system, is a problem for this account.

65. Cf. Coleman, supra note 28, at 164 n.15 (Professor Dworkin's "argument that the best theory of law is a moral theory because it consists in a set of moral principles fails primarily because the principles which constitute the best theory do not do so because they are true, but because they best systemize the existing law.").

66. See N. MacCormick, supra note 5, at 107 ("To the extent that existing detailed rules [i.e., the existing law] are or can be rationalized in terms of more general principles, principles whose tenor goes beyond the ambit of already settled rules, a sufficient and sufficiently legal warrant exists to justify as a *legal* decision some novel ruling . . . .") (emphasis in original).

67. See infra note 80.

never been articulated would not be a bar.[68]

Mixed monists cannot claim that their principles are justificatory by arguing that it is the existing law together with their principles that justify the rule of adverse possession. In effect, the set of principles adopted by mixed monists operates as a rule of inference. The existing law is the premise, the rule is the conclusion, and the set of principles permits the inference from the one to the other by demonstrating the existence of a relation of coherence between them.[69] To argue that the derived principles together with the existing law justify adverse possession is merely to adopt a rule of inference as another premise. Such a maneuver is purely semantic.

Mixed monists might attempt to avoid the conclusion that their principles cannot justify the acts of the adverse claimant by arguing that while their principles do not justify acts, they can describe the justification of acts by rationalizing these acts with the existing law. This contention, however, is without merit. A rule is justified as a rule of law because it coheres with other legal rules. Only propositions can cohere with one another. To claim that an act is justified by its coherence with a set of rules involves a category mistake.[70] Acts do not cohere with rules, they fall within or without their scope.

Nor will it do to claim that an act is justified because it falls within the scope of a rule—for example, the rule of adverse possession—that is justified by its coherence with the otherwise existing law. This would

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68. On the mixed monistic adjudicatory model, when judges wish to introduce a novel rule that cannot be rationalized with the existing law by the currently accepted set of principles, they must articulate a new set of principles that does rationalize the new rule with the existing rule. In doing this, judges "rationalize[] the existing law so as to reveal it in the light of a new understanding," N. MacCormick, supra note 5, at 126, by which it is seen to cohere with the novel rule. A judge "does not simply find and state the rationale of the rules," id., but "to a greater or less degree, he makes them rational by stating a principle [or set of principles] capable of embracing them." Id. In this fashion, the judge rationalizes the existing law with the novel rule "which can now be represented as one already 'covered' by 'existing' law." Id. Implicit in this account are three claims: first, that more than one set of principles may rationalize the existing law; second, that it is possible that not every set of principles will rationalize the same novel rule; and, third, that a rule is justified as a rule of law if and only if at least one set of principles exists that rationalizes it with the existing law. The conclusion in the text follows immediately from these three claims as premises.

69. The analogy to logic is instructive. In a logical proof it is the truth of the premises that justifies the ascription of truth to the conclusion. The logical rule of inference merely describes a truth-preserving relation that exists between the premises and the conclusion. Moreover, it is often the case that one may reason to the same conclusion using a variety of different rules of inference. This does not mean that, taking the premises to be true, the conclusion has a different source of justification in each case, but only that there are different ways of demonstrating that the conclusion is justified. Furthermore, a conclusion may be justified as true because it follows from a given set of premises even though no one has ever logically proven it.

70. See generally G. Ryle, The Concept of Mind 16–18 (1949) (defining the concept of category mistake).

be to justify the acts of the adverse claimant by an appeal to the rules of the existing law, including the rule against trespass, and would lead to the reemergence of the problem of dual narratives since the operative facts of both the rule against trespass and the rule of adverse possession obtain.[71] This problem is especially pernicious for the mixed monists since it indicates that the two rules do not cohere—each rule results in a conclusion incompatible with the other. Thus, the assumption that the two rules cohere leads to the conclusion that the two rules do not cohere, thereby reducing to absurdity the assumption necessary for this response.

The mixed monist might attempt to avoid this reductio by claiming that the coherence between these two rules is more complex than previously allowed and thus prevents the problem of dual narratives. In essence, the mixed monist might claim that the principles that describe the coherence are weighted in such a fashion that the rule against trespass applies to certain situations to which the rule of adverse possession does not apply and vice versa. But to index these two rules to different types of situations—for instance, different lengths of occupation by an adverse possessor—is tantamount to applying the principles to the acts within these situations thereby justifying their legal status. The principles of the mixed monist, however, are not justificatory. They are descriptive and, therefore, this attempt to avoid the reductio cannot succeed.[72]

Even if, arguendo, this response could be maintained, a mixed monistic analysis would still fail to meet the condition of explanatory adequacy.[73] A legal theory, to be adequate, must be able to explain why a rule is created and adopted as law as well as why certain kinds of acts are given legal significance while others are not. Mixed monists can answer neither of these questions from within the normative structure of a legal system; they can offer only an ex post rationalization of the legitimacy of a rule and its application. In contrast, a legal theory that embraces nonderivative, justificatory principles can answer both of these questions from within the normative structure of a legal system. The legal significance of a particular act can be explained by the act's

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71. See supra note 57 and accompanying text.

72. Nor is the claim that the principles of the mixed monist are descriptive defeated by an alternate understanding of Professor Dworkin's mixed monistic theory. Professor Dworkin at times seems to claim that the set of derived principles that should be adopted is the set, among all the sets of principles that rationalize the existing law, that best satisfies some other nonderived principle such as a substantive principle of distributive justice. See R. Dworkin, supra note 8, at 126; Dworkin, "Natural" Law Revisited, 34 U. Fla. L. Rev. 165, 165–66, 171 (1982); Galis, supra note 63, at 206–09. Under this reading of Professor Dworkin's work, the set of principles merely describes the coherence of the rule together with the existing law *and* the additional nonderived principle. Thus, even under this reading, the derived principles are not justificatory.

73. For the three conditions of adequacy on a legal theory see supra notes 34–36 and accompanying text.

relation to the nonderivative principles of the legal system. In addition, the creation and adoption of a particular rule governing such an act is conditioned on that rule's encapsulation of the relation between this type of act and the nonderivative legal principles. The rule devolves from the act that is justified by principles.[74]

III. Legal Dualism and the Structure of Dualistic Legal Phenomena

A legal system can be understood adequately only through the application of a dualistic theory. A dualistic conception holds that a legal system is composed of both rules and principles, that neither is dependent for its existence on the existence of the other, and that the absence of either one prevents an adequate understanding of the legal system as a whole. In particular, legal dualism holds that all systemic operations and legal phenomena can be described, explained, and shown possible by reference to rules or principles or both. Moreover, legal dualism holds that legal principles justify legal rules; they do not merely describe the coherence between the existing law and a novel rule. This additional property of principles on a dualistic account permits legal dualism to recognize dualistic legal phenomena whose structure is too complex to be cognized within monistic theory.

Dualistic legal phenomena are those legal phenomena whose description, explanation, and ontic possibility can be accounted for only by first distinguishing within the legal system between rules and nonderivative principles. A dualistic legal phenomenon cannot be viewed as the creation of a single rule. Its narrative description must impose legal significance both before and at the end of its narrative. The internal structure of a dualistic phenomenon is dynamic and can be described only by reference to more than a single moment of time.[75]

The essential trait of a dualistic legal phenomenon is the dynamic structural transformation of the legal status of some person, act, or event. This structural transformation contains three essential moments: the moments of formal illegality, problematic illegality, and

74. Even if one employed a weaker standard of explanatory adequacy it would still be true that a theory embracing nonderivative principles had a greater explanatory power, see supra note 35, than a mixed monistic theory and, in this respect at least, is to be preferred.

75. The contrast between monistic and dualistic legal phenomena may be further heightened by noting that our legal culture does not symbolize the diachronic structure of a dualistic legal phenomenon with a writing such as a certificate of title given to a successful adverse possessor, while our legal culture does often symbolize the synchronic structure of a monistic legal phenomenon with sucb a writing. Often someone is heard saying, while pointing to a writing, "Here is a contract," but no one is ever heard saying, while pointing to a certificate of a newly created title, "Here is an adverse possession." Adverse possession cannot be collapsed into a single moment without losing its transformational character. Througb neither metonymy nor synecdoche can a legal culture represent a dynamic structure with an inert document.

legal illegality.[76] In the moment of formal illegality, an actor within the dualistic narrative has completed some act that is formally proscribed by the legal system. A monistic legal phenomenon is created; a rule has applied that designates the act as illegal. At some point later in the narrative, the actor challenges his illegal status. He acts under a claim of right[77] and appeals to principles that justify his acts and, therefore, the ascription of this right to him. At this point he raises the question of his illegal status as a question of principle and problematizes his characterization as illegal. This is the transformational moment of problematic illegality. The passage from problematic illegality to legal illegality is effected when the officials of the legal system determine that the principles of the system justify the actor's conduct and, therefore, his claim of right. When this structural transformation is complete, the application of the formal rules of the system is modified to realign its result with that required by the principles to which the legal culture is committed. This is the moment of legal illegality.

A. *Principles and Rules*

Monistic theory in general and positivism in particular can neither describe nor explain certain legal phenomena such as adverse possession[78] and the good faith purchaser for value. These legal phenomena require a dualistic theory for their description and explanation.

Under the action of adverse possession, if a trespasser acts under a claim of right for the prescribed statutory period, he is transformed retroactively into the legal owner.[79] This phenomenon can be described and explained as a dualistic structural transformation. First, there is an act of trespass. Second, the trespassory possession is continued under a claim of right for the prescribed statutory period. Third, a newly created title is awarded to the trespasser.

The first transformational moment, the moment of *formal illegality*, follows the narrative structure of monistic legal discourse. The existence of a formal rule makes the act of the adverse claimant illegal. The adverse claimant, without permission or legal right, crosses a boundary line onto the property of another. These operative facts of the rule against trespass establish this rule as relevant. The rule applies and imbues the act of the adverse claimant with the legal meaning of trespass.

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76. See infra note 84.

77. See infra note 80.

78. See supra notes 55–72 and accompanying text.

79. "To establish title by adverse possession, a claimant must demonstrate actual, open and notorious, exclusive, continuous and hostile possession of the premises for the prescribed statutory period under a claim of right or color of title." Powell, supra note 55, at ¶ 1013[1]. Since color of title is only a special basis for a claim of right and is not required in all jurisdictions, this Note will not consider this element of the definition. It is, however, integrable with the approach offered.

With the act of trespass completed, the adverse claimant begins his occupation of the land under a claim of right.[80] He assumes the posture of the legal owner toward the land, thereby creating the moment of *problematic illegality*. In acting as the owner, he rejects his formal illegal status as a trespasser. Only by understanding the rejection of his trespassory status as an appeal to the values and principles that surround and inhere in our concept of ownership can the proprietary behavior of the adverse claimant be understood as constituting a claim of right.[81] Through an appeal to the principles that support the presence of ownership in our society, the adverse claimant rejects the characterization of his acts as the act of a trespasser. The adverse claimant af-

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80. For the adverse claimant to act under a claim of right is for him to act as if he were the owner. Occupation under a claim of right is the central and most important requirement to establishing title by adverse possession. The words "a claim of right" are not a separate substantive requirement of adverse possession. Cf. Callahan, supra note 57, at 67 (the words "add nothing"). The phrase functions, rather, as a summary of the five other requirements concerning the character of the possession. Each of the five requirements characterizes one aspect of proprietary behavior. The requirement that the possession of the land be *actual* requires the degree of physical occupation with which an owner would occupy his land. Cunningham, supra note 56, at 759. The requirement that the possession be *open and notorious* requires that the acts of the adverse claimant upon the surface of the land be visible to the community in the manner in which an owner's acts would be. Id. at 760; Powell, supra note 55, at ¶ 1013[2][b]. The requirement that possession be *exclusive* requires "a type of possession which would characterize an owner's use." Id. at ¶ 1013[2][d]. The requirement that the possession be *continuous* requires that "the [adverse] claimant exercise[] palpable and continuing acts of ownership [over the land] for the duration of the statutory period." Id. at ¶¶ 1013[2][e], 1013[2][i][c]; see Cunningham, supra note 56, at 763. These four requirements concern concrete, observable properties necessary to make the overt behavior of the adverse possessor proprietary.

In contrast, the requirement of hostility concerns the absence of an abstract legal quality—permission. Powell, supra note 55, at ¶ 1013[2]. This requirement most clearly demands that the adverse claimant act as if he were the owner. An owner does not need permission to occupy his land and hostility means "nothing more than that [the occupation] is without permission of the one legally empowered to give permission." Cunningham, supra note 56, at 760. If one seeks permission to occupy the land, then, no matter what other proprietary qualities one's acts evidence, one is clearly not acting as if he were the owner. Nonhostility, therefore, functions as a defeasibility condition on a claim of right. Powell, supra note 55, at ¶ 1013[2][e]; cf. H.L.A. Hart, The Ascription of Responsibility and Rights, Proc. of the Aristotelian Soc'y, 49 (1948–49) (general discussion of defeasibility conditions in the law), reprinted in Logic and Language 145 (Flew ed. 1st series 1960). That nonhostility is a defeasibility condition is made even more obvious by the existence of a presumption of hostility, and hence a claim of right, once the first four requirements are met. Powell, supra note 55, at ¶ 1013[1]. Recognizing nonhostility as a defeasibility condition underscores the character of hostility as the absence of an abstract legal quality in contradistinction to the concrete, observable properties of the other four requirements.

81. The adverse claimant cannot be understood as basing his rejection on the rule against trespass. The operative facts of this rule have occurred and the rule has applied. Nor can the adverse claimant be understood as appealing to the rule of adverse possession to justify his rejection of his status as trespasser. This rule is not relevant until he has already acted under a claim of right for the prescribed statutory period.

firms in counterpoint that his acts are justified as the acts of the owner and that they must be recognized as such if the principles of private property and ownership are to be consistently maintained.[82]

The adverse claimant articulates the question of his legal status as a question of principle. By assuming the posture of a proprietor, the adverse claimant brings into conflict the *principles* of ownership with the formal *rules* that govern it. This invocation of principles, and the conflict it engenders, renders problematic the legal status of the adverse claimant: under the legal norms of our society, he is a trespasser, but under the principles that support those legal forms, he ought to be construed as the rightful owner.

Of course, there are other principles besides the principles of land ownership that the courts must weigh in the balance before they can resolve the problematic status of the adverse claimant; principles of fairness and of social stability must be considered as well. Awarding title to the adverse claimant before the original owner has a chance to disseise the disseisor or to argue his own case for retaining ownership would be unfair to the original owner.[83] Moreover, it would greatly destabilize our legal culture if members of the public believed that they could not rely on the legal forms of our society. To accommodate these competing principles, the officials of the legal system require the adverse claimant to occupy the land for a prescribed statutory period.

The final transformational moment, the moment of *legal illegality*,[84] is achieved when the officials of the legal system resolve the problematic status of the adverse claimant. This resolution must be a principled one because, by acting under a claim of right, the adverse claimant has posed the question of his status as a question of principle. Thus, the officials of the legal system must decide whether extinguishing his claim of right would contravene the basic principles of property ownership. They must determine whether the right the adverse claimant asserts is what we mean within our legal culture by the right of ownership. They do this by focusing upon the proprietary character of the adverse claimant's behavior: was the possession sufficiently actual, notorious, exclusive, continuous, and hostile? That is, were his acts justified by the principles of ownership? If the officials decide that the adverse claim-

82. Such principles might be commitments to promoting the efficient use of land and its free transferability in the marketplace. These commitments may in turn lead to others such as stabilizing uncertain boundaries and quieting uncertain titles.

83. Callahan, supra note 57, at 89. The length of the statutory period in a particular jurisdiction is a function of the weight that the jurisdiction gives to these competing principles. Accordingly, some jurisdictions require a period of as long as thirty years, while others require a period of five. Compare La. Civ. Code Ann. art. 3499 (1961) (30 yrs.) with Cal. Civ. Proc. Code §§ 318, 322 (1962) (5 yrs.)

84. Professor Ackerman has used the phrase "legal illegality" to describe the legally anomolous character of adverse possession. See 1 B. Ackerman, Discovering the Constitution, ch. 5, 30–35 (Summer, 1985) (Forthcoming 1987) [on file at the Columbia Law Review].

ant's behavior was not sufficiently proprietary, then his status will be resolved as that of a trespasser. If, however, they decide that his behavior during the statutory period was sufficiently like that of an owner, then he will be deemed the legal owner and granted a newly created title. This title will relate back to the original act of trespass with the result that he will have never been a trespasser.[85] In effect, this legalizes his earlier formal illegality. The application of the formal rules is modified in order to realign them with the principles to which our legal culture is committed.

Adverse possession is not the only dualistic phenomenon in our legal system. Another is the good faith purchaser for value. The Uniform Commercial Code provides that a "purchaser of goods acquires all title which his transferor had or had power to transfer . . . ."[86] However, a "person with voidable title," such as a person who has acquired goods by criminally defrauding the original owner, "has power to transfer a good title to a good faith purchaser for value."[87] Like adverse possession,[88] the legal phenomenon of the good faith purchaser for value involves a structural transformation: the voidable title of the "bad faith" seller is transformed into a good title through its sale to the good faith purchaser. Equivalently, the transformation may be described as transforming an illegal transaction into a legal one.[89]

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85. This is why the rule of adverse possession is often characterized as barring the remedy of the disseised owner in an action for ejectment. Moreover, this analysis provides an answer to the question posed by one scholar: "How can a statute which merely purports to bar the remedy of a plaintiff give title to a defendant?" Callahan, supra note 57, at 53. It is because the title is transferred that the remedy is barred—a much less mysterious causation.

86. U.C.C. § 2-403(1).

87. Id. The Code identifies four situations in which the seller acquires voidable title from the original owner: when an intermediate seller acquires the goods by deceiving the original owner as to his identity, U.C.C. § 2-403(1)(a); when the seller receives delivery in exchange for a "bad check," id. at § 2-403(1)(b); when the seller bought the goods under a "cash sale," but did not in fact pay for them, id. at § 2-403(1)(c); and when "the delivery was procured [by the seller] through fraud punishable as larcenous under the criminal law." Id. at § 2-403(1)(d).

A purchaser for value is basically any purchaser except a donee. Summers & White, The Uniform Commercial Code § 3-11, at 140–41 (1980). Generally, a person is a good faith purchaser if he "has neither knowledge nor reason to know that there is any title or security claim" on the goods he is buying. 1 Anderson, Uniform Commercial Code § 1-201:38 (1982); see Cooper v. Pacific Auto Ins. Co., 95 Nev. 798, 801–02, 603 P.2d 281, 283 (1979) (A person who, on a Friday night at a bar, purchases an automobile from a seller for less than that seller had paid for it, had a reason to know that there might be a claim upon the car and is not, therefore, a good faith purchaser). The amount of value requested by the seller, however, if sufficiently small relative to the worth of the goods, may provide the purchaser with reason to know that the original owner's rights are being infringed and hence prevent the purchaser from buying in good faith. See Graves Motors, Inc. v. Docar Sales, Inc., 414 F. Supp. 717, 719–20 (E.D. La. 1976); Hollis v. Chamberlin, 243 Ark. 201, 205–06, 419 S.W.2d 116, 118–19 (1967).

88. See supra notes 78–85 and accompanying text.

89. That the provision of the U.C.C. is written in terms of the good faith *purchaser*

The operation of the transformation is much like the internal structure of adverse possession. The moment of formal illegality is the attempt of the seller to illegally sell the goods that he has acquired in a manner that gives him voidable title. The seller acts under a claim of right: he acts as the owner of the goods who has the power to transfer full title to the purchaser.[90] The seller thereby invokes a set of principles to challenge the illegal status of his act. In this case, the principles are those articulating our commitment to promoting a free market and the free transferability of title. The seller, in effect, claims that these principles justify his act. This determines the moment of problematic illegality. Under the formal rules of our system, the transaction is illegal; under the free market principles of our legal culture, however, the transaction is legitimate—it fosters the flow of commerce.

In order to resolve the problematic legal status of the seller, the officials of the legal system must consider other principles as well. If the transaction is legitimated and the title of the good faith purchaser deemed good, then damage is done to the innocent original owner who parts with his goods through the fraudulent conduct of another. Moreover, this resolution might encourage criminal activity by not prohibiting the sale of the criminally obtained goods. If, however, the transaction is held illegal, then the other innocent party, the good faith purchaser for value, is harmed. In addition, such a determination would be a departure from our principles of free transferability of title. This dilemma is resolved, and the moment of legal illegality achieved, by allowing the original owner an action against the seller but not against the good faith purchaser, and by limiting the scope of the transformation to cases in which the original owner has consented, albeit through a deception, to the possession of the goods by the seller.[91] This solution minimizes the harm to the original owner and discourages more egregious criminal acts. It satisfies the competing principles and resolves the dilemma in favor of the good faith purchaser without derogation from the principles of the free market.[92] With this resolu-

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must not mislead the reader. As the language of § 2-403 makes clear, it is the seller "with voidable title" who "has power to transfer a good title." The pivotal moment of the transformation focuses on the seller. The seller begins with a voidable title and ends by selling a good title: this is the transformational aspect of the legal phenomenon that must be explained.

90. If the seller did not act in this manner, then the prospective purchaser could not be said to purchase the goods in good faith.

91. The transformation is prevented in all other cases by holding that a thief has a void, rather than a voidable title. See Allstate Ins. Co. v. Estes, 345 So. 2d 265, 266 (Miss. 1977) (individual who stole car from dealer's lot cannot convey title to good faith purchaser because the thief has no title).

92. See 3 Anderson, supra note 87, at § 2-403:4 ("By favoring the innocent third party, the Uniform Commercial Code endeavors to promote the flow of commerce by placing the burden of ascertaining and preventing fraudulent transactions on the one in the best position to prevent them, the original seller.").

tion, the officials of the legal system deem the voidable title good and the illegal transaction, in effect, legal.

B. *Principles Without Rules*

Not all situations that require legal determination occur with sufficient regularity to warrant the existence of a rule that governs their legal resolution. Some occur only once. Accordingly, only principles are available to determine their legal siguificance. Such legal phenomena are necessarily dualistic. The legality of the ratification of the United States Constitution and the legitimacy of a successful revolutionary government are examples of such phenomena.

The Articles of Confederation provided that they could only be altered if any proposed change was "afterwards confirmed by the Legislatures of every State."[93] The Philadelphia Convention of 1787, which composed and submitted to ratification the United States Constitution, did not abide by this legal form. Instead, the Founders acted ultra vires and included within the proposed constitution an article stating that, when nine states had ratified it, the Constitution would be established among those states.[94] In accordance with this article, after ratification by nine states, they declared the proposed constitution the Constitution of the United States of America.

This historic episode poses a problem for the theory of constitutional lawmaking:[95] Was the ratification of the Constitution legal or illegal? From a monistic point of view the ratification was plainly illegal. A rule existed that dictated the legal form necessary for the process of ratification and the process actually adopted deviated from this form.[96] While monistic theorists must end their narrative description here, dualistic lawyers may simply cite this deviation, together with the legal significance imposed on it, as the inaugural event in a narrative describing the establishment of our constitutional government. Dualistic lawyers may then continue their narrative and explain why the rati-

93. Articles of Confederation art. XIII ("[T]he Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.").

94. U.S. Const. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

95. The approach to this problem used in the Note is based upon the analysis offered by Professor Ackerman. See Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L. J. 1013, 1020 (1984).

96. "The Federalists were . . . perfectly aware of the problematic relationship of their own "Convention" to the preexisting constitutional law of their time," notes Professor Ackerman, "and that, especially in their decision to appeal to nine state 'Conventions' for ratification, the Founders were designing a higher lawmaking procedure that was plainly illegal under the Articles of Confederation." Id. at 1058.

fication of the Constitution, despite its formal illegality, was legitimate and legal.

The narrative that dualistic lawyers tell involves a structural transformation—the transformation of an illegal ratification into a legal ratification. The narrative description of this transformation revolves around the three moments of formal illegality, problematic illegality, and legal illegality.

As in other dualistic phenomena, by acting under a claim of right, the members of the Philadelphia Convention challenged the characterization of their acts as ultra vires and illegal through the invocation of principles—in this case the principles of self-government.[97] The members of the Convention believed that they "might speak for the People with *greater* democratic legitimacy than any assembly whose authority arose only from its legal form."[98] "[I]n all great changes of established governments," Madison observed, "forms ought to give way to substance . . . ."[99] In this fashion, they rendered the character of their acts one of problematic illegality.

No judge existed with sufficient authority to decide whether the acts of the Philadelphia Convention were justified. Instead, the resolution of their problematic status had to wait for the popular acceptance or rejection of their acts. The members of the Philadelphia Convention, as Madison remarked, "must have borne in mind that as the plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities."[100] The end of the story is well-known: the moment of legal illegality was achieved; the transformation completed; the People accepted the act of deviating from legal form as justified and, in an exercise of self-governance, adopted the United States Constitution.

The legitimacy of a successful revolutionary government is another example of a dualistic legal phenomenon that occurs only infrequently. The analysis of this legal phenomenon is analogous to the analysis of the ratification of the United States Constitution. The formal illegality involves the revolutionary acts, while the principles that render these acts problematic are, for example, the principles of self-government. In the moment of legal illegality, the resolution is achieved through popular acceptance of the principles invoked by the revolutionaries.

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97. It is essential to understand the special nature of the Philadelphia Convention. The American Revolution had recently been fought and won. Now a select group of American patriots were asked to convene and constitute a structure of government that would endure and manifest the ideals and values of this revolution. It was to be the American experiment in self-government. Toward this purpose, the Philadelphia Convention acted under a claim of right and "asserted its own right to reverse preexisting higher [constitutional] ratification procedures." Id. at 1060.

98. Id. at 1061 (emphasis in original).

99. The Federalist No. 40, at 252–53 (J. Madison) (C. Rossiter ed. 1961).

100. Id. at 253 (emphasis in original).

A dualistic analysis of revolution has two advantages over a monistic positivist analysis. First, because dualistic lawyers recognize that the illegal acts of the revolutionaries are, in effect, legalized, they need not conclude that the change in governments has resulted in a discontinuity within the legal system. Thus, legal dualists can explain the continuity of laws and legal obligations between regimes. They may hold that a single, continuous legal system has remained in place even though there has been a revolutionary change of government. In contrast, a positivist must recognize some form of discontinuity in all genuine revolutions.[101] Second, a dualistic analysis enables a lawyer to discern legitimate from illegitimate revolutionary governments. If the people endorse the principles motivating the revolutionaries' claim of right, the revolutionary government is legitimate. If the people do not endorse these principles, then the revolutionary government is not legitimate.[102] On a positivist theory, in contrast, this discrimination is not possible. Either all revolutionary governments are considered illegal

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101. In a positivist theory such as Professor Kelsen's, it is impossible to maintain the continuity of the legal system from one regime to its revolutionary successor. This is because, as Professor Kelsen maintains, the identity of a legal system is determined by the chains of validation that relate legal rules and legal acts to their source of legal validity within that system. If a rule or act cannot be related to the system's source of legal validity, then it is not part of that system but part of another. Hence, in Professor Kelsen's view, any deviation from the legal forms of a legal system creates a new legal system. H. Kelsen, General Theory of Law and State 117, 219 (1945).

Professor Hart attempts to circumvent the problem of discontinuity by treating continuity and discontinuity as matters of degree and claiming that the success of some revolutionaries is insufficiently "revolutionary" to disturb the continuity of the legal system. Professor Hart writes that "[t]he stage at which it is right to say . . . that the legal system has finally ceased to exist is a thing not susceptible of any exact determination." H.L.A. Hart, supra note 10, at 115. He claims further that "[a]lthough [a revolution] . . . will always involve the breach of some of the laws of the existing system, it may entail only the legally unauthorized substitution of a new set of individuals as officials, and not a new constitution or legal system." Id. at 114–15.

Essentially, Professor Hart espouses a wait-and-see approach to determining the continuity of a legal system. He must wait and see if the revolutionaries are successful and, if so, how "revolutionary" they really are. The point remains, however, that he believes that, with respect to the "revolutionary" revolutionaries, a break with the past occurs. In this, he is like Professor Kelsen. The category of "unrevolutionary" revolutionaries cannot be coherently maintained. See Finnis, Revolutions and Continuity of Law, *in* Oxford Essays in Jurisprudence 44, 49–50 (A. Simpson ed. 2d series 1973). But if it could be coherently maintained, their acts presumably would be illegal because they deviated from the legal forms. Thus, in Professor Hart's theory, one is confronted with a choice between, on one hand, legality of the revolutionary acts and discontinuity of the legal systems and, on the other hand, illegality of the acts and continuity of the system. In contrast to a dualistic analysis, Professor Hart appears unable to recognize the pair—legality of the acts and continuity of the legal system—even though this seems the most natural colligation. Of course, the dualistic lawyer can recognize the pair—illegality of the acts and discontinuity of the legal systems— as well.

102. While this point is expounded from within a democratic framework, the conditions of legitimacy may be reformulated to align with other ideological perspectives as well.

because they have violated the legal forms of the society in achieving power, or they are all legal because they are now the authors of the rules. In the former case, positivism will reject a government as illegitimate even though it has the support of the governed, while, in the latter case, positivism will legitimate an oppressive regime that has come to power through its military might and without popular acceptance.

CONCLUSION

The exclusive rule orientation of pure monistic positivism cannot offer an adequate account of all legal systems. This failure has led many theorists to adopt a version of mixed monism. This approach, however, is also inadequate. By adhering to the positivist commitment to separating law from any extralegal normative source, mixed monists are led to embrace a conception of legal principles as descriptive, not justificatory. This conception prevents them from describing, explaining, or accounting for the possibility of complex legal phenomena—such as adverse possession—in which the legal status of an act, event, or relation is transformed from illegality to legality.

While legal positivism should be applauded for the analytical clarity that it has brought to jurisprudence by separating it from the speculative metaphysics of a bygone day, legal theorists must recognize the limitations of this approach and accord legal principles a status independent of the rules of a legal system. An illusory departure from positivism, like that of Professor Dworkin, is not enough. Legal dualism offers this necessary independence. Even so, it is not a return to natural law. Legal dualism simply gives the profound insights of the natural lawyers their due: that principled arguments require principles that are justificatory and that, in this respect at least, a legal system must look beyond rules and derivative principles. Maintaining the analytical standards of positivism and these insights of natural law, it is time to take the next step toward a genuine post-positivist reconstruction of legal theory.

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