ADJUDICATING IN THE KINGDOM OF ENDS: A CONSTRUCTIVIST RESPONSE TO THE HART/DWORKIN DEBATE

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In the late 1960s, the opposing ideologies of legal philosophers H.L.A. Hart and Ronald Dworkin began to define the now-ubiquitous debate over the relationship between morality and law; specifically, whether or to what extent the latter is derived from the former. Hart's position asserts that, although there can be overlap between the law and moral imperatives, laws are not derived from moral conceptions. Thus, it is inappropriate for a judge to consider morality in adjudication, even when current legal rules do not resolve a particular dispute. Dworkin's philosophy counters by pointing out that legal principles (not only rules) play an essential role in judicial decision making, even in the application of settled law. Dworkin argues that it is the application of these principles, with due consideration for moral concepts, that leads to the correct resolution of cases in unsettled areas of the law. The debate between adherents of these philosophies, however, has largely served to demonstrate that neither concept is an adequate framework for improving the processes of real-life adjudication.

Perhaps reacting to the current disfavor of the concept of an "activist judge," recent Supreme Court appointees have given short shrift to the idea of jurisprudential philosophy, likening an ideal judge to an umpire who mechanically applies hard-line rules. The author takes issue with these ideas, however, arguing that our modern legal system is too complex to be effectively dealt with by judges who turn a blind eye to jurisprudential philosophy. Acknowledging the limitations of the Hart and Dworkin poles of the law and morality debate, the author turns to Christine Korsgaard's Kantian constructivist moral theory, which posits that moral truths are not concepts to be "discovered," but rather that they are constructed by means of practical reasoning.

I. INTRODUCTION

In a legal system that places an enormous amount of power in the judiciary, questions concerning the proper role of the judge are paramount. The current relevance of judicial philosophy when discussing the modern Supreme Court cannot be overstated—both Chief Justice Roberts and Justice Sotomayor have turned to the common "judge as umpire" analogy to describe their role as adjudicator.[1] These proclamations, however, do nothing but "perpetuate the legal fiction of judicial neutrality and fidelity to a set of principles that are devoid of meaning when interpreted without the aid of extrinsic tools."[2] Furthermore, they ignore the probable assumption that the law is a complex web of rules, values, precedents, rights, and principles that requires a delicate and highly specialized degree of reason to navigate. The law is simply too complex to equate the role of the judge with that of a sports officiator.

The importance of adjudicatory jurisprudence extends far beyond its use as a mask of judicial neutrality.[3] Instead, a theory of adjudicatory jurisprudence is essential to understanding the law and its purpose.[4] Oftentimes, the law provides a rule so clear that the judge need not refer to a complex theory of adjudication to justify his or her decision. For example, a rigid statute of limitations requires no use of judicial discretion, only an application of the rule, as Justice Roberts would have it.[5] An extreme view, such as that of Langdell, is that the judge develops a "mastery of [principles and doctrines] as to be able to apply them with constant facility and certainly to the ever-tangled skein of human affairs."[6] In many cases, however, the judge fails to successfully utilize this type of mechanical jurisprudence. For example, the judge may draw upon personal experience to reach outside the supposed machine of the law.[7]

The debate concerning the place of personal bias in adjudication on both a descriptive and prescriptive level remains pertinent. Supreme Court nominees cite mechanical jurisprudence as an ideal form of adjudication whereas some legal scholars abhor the notion for masking an

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1. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 78–79 (2010) (statement of J. Sotomayor); John W. Whitehead & John M. Beckett, *A Dysfunctional Supreme Court: Remedies and a Comparative Analysis*, 4 CHARLESTON L. REV. 171, 200–01 (2009).

2. Whitehead & Beckett, *supra* note 1, at 202.

3. *See supra* note 2 and accompanying text.

4. *See* Keith A. Swisher, *The Moral Judge*, 56 DRAKE L. REV. 637, 642–43 (2008) (arguing that the merit of adjudication involves imposition of the judge's morality in such a way that the law serves a notion of "justice").

5. *See supra* note 1 and accompanying text.

6. *See* Chistopher C. Langdell, *A Selection of Cases on the Law of Contracts*, *in* AMERICAN LEGAL HISTORY 355, 356 (Kermit L. Hall et al. eds., 3d ed. 2005).

7. *See* Kermit L. Hall et al., *Note: Critics of Langdellian Assumptions*, *in* AMERICAN LEGAL HISTORY, *supra* note 6, at 357, 357. Oliver Wendell Holmes argues, for example, that "[t]he life of the law has not been logic; it has been experience" and further accuses Langdell of treating the law as an obscure vision of Hegelian logic. *Id.*

otherwise indeterminate legal system.[8] A thorough analysis of each extreme theory is beyond the scope of this Note, but the driving inquiry will be a new assessment of the fundamental processes of judicial reasoning.

Any sound theory of legal reasoning must account for the heated debate concerning the judge's true role as a decision maker. Modern jurisprudence has reached an impasse concerning the proper role of the adjudicator.[9] The clash between H.L.A Hart and his former pupil, Ronald Dworkin, has been at the center of this philosophical discussion since the mid- to late-twentieth century.[10] Although the debate between these two prominent philosophers has produced an enormous amount of invaluable scholarship, it has not produced a single cohesive theory of legal reasoning.[11]

Part II of this Note begins by contextualizing the debate between Hart and Dworkin in order to show that their respective theories are modern reinterpretations of legal positivism and natural law. Next, Part II explores and analyzes the competing theories of Hart and Dworkin, showing that neither gives an accurate account of adjudicatory jurisprudence. Part II concludes by providing background information on Christine Korsgaard's Kantian constructivism, which will be used as the foundation for establishing a constructivist theory of legal reasoning. Part III analyzes the applicability of Kantian constructivism to a theory of legal reasoning. More specifically, it argues that a constructivist theory can avoid positivism's moral nihilism while avoiding the pitfalls of Dworkin's quasi-substantive realism. Part III concludes by tracing the sources of legal and moral principles. Finally, Part IV provides a recommendation for the practical applications of a constructivist theory and the criticisms it may face.

II. BACKGROUND

One could trace the evolution of jurisprudence in the twentieth century by studying the debate between Hart and Dworkin. Although fruitful, the debate has produced no definitive theory of jurisprudence. Section A traces the roots of Hart and Dworkin's theories to traditional formulations of positivism and natural law, respectively. Section B explains Hart's positivist conception of the law, and Section C introduces the relevant aspects of Dworkin's quasi-natural law theory. Section D provides information on Christine Korsgaard, a preeminent metaethicist whose ideas have yet to be directly applied to a theory of jurisprudence.

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8.   *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 467 (1987); Whitehead & Beckett, *supra* note 1, at 200–01.

9.   Ira H. Peak, Jr., *Dworkin and Hart on "The Law": A Polanyian Reconsideration*, 18 TRADITION & DISCOVERY, no. 2, 1991 at 22, 22–26.

10.   Michael Bayles, *Hart vs. Dworkin*, 10 L. & PHIL. 349, 349 (1991).

11.   *See* Peak, *supra* note 9, at 26 (characterizing the impasse as Hart's inability to account for the judge's use of principles in a strictly positivist framework and Dworkin's inability to develop an epistemological justification for identifying principles); *see also infra* Part III.A.1–2.

A. Natural Law Versus Legal Positivism

1. Natural Law

Natural law theory, exemplified preeminently by Saint Thomas Aquinas, posits that the content of law is determined by principles of nature.[12] Natural law assumes that the principles and standards underlying a legal system reflect some natural "higher law."[13] For example, a judge deciding a custody dispute may claim that a mother has a natural right to see her child.[14] Principles derived from nature, therefore, give moral content to the black letter law. Furthermore, these natural principles are objective, universal, and true, meaning that any positive law in violation of these natural principles is no law at all.[15]

One point of contention involves what is meant by a "higher law."[16] For some, the reference to a higher law "can be derived from divine revelation, religious texts, a careful study of human nature, or consideration of nature."[17] For others, the reference to a higher law is metaphorical and "reflects our mixed intuitions about the moral status of law."[18] Those apprehensive to assert the existence of a divine law choose the metaphor of natural law because of the willingness to admit that the law has at least some moral weight independent of human codification.[19] Alternatively, the use of a metaphor may simply reflect the uncertainty as to whether the notion of "higher law" is an ontological or epistemological concern.[20]

Natural law, as a foundation for legal thought, has far reaching implications concerning the process of legal reasoning and adjudication. For example, Aquinas distinguished between divine law (religious law and scripture), eternal law (laws of the universe), positive law (human-made law), and natural law.[21] For Aquinas, natural law is "the participation of the [e]ternal law by rational creatures."[22] Thus, positive laws are subservient to the eternal law, meaning certain "unnatural" positive laws

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12. *See* Peak, *supra* note 9, at 22.
13. Brian Bix, *Natural Law Theory*, *in* PHILOSOPHY OF LAW 8, 8 (Joel Feinberg & Jules Coleman eds., 7th ed. 2004).
14. Or, to state the process more realistically, a statute preserving custody rights is justified by natural law.
15. Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 1, 2 (Robert P. George ed., 1996).
16. *See* Bix, *supra* note 13, at 8.
17. *Id.*
18. *Id.*; *see also* John Austin, *A Positivist Conception of Law*, *in* PHILOSOPHY OF LAW, *supra* note 13, at 24, 24 (arguing that a divine law is "the only natural law of which it is possible to speak without a metaphor").
19. *See* Bix, *supra* note 13, at 8.
20. In other words, if the existence of "higher law" is an ontological claim, then there are problems with identifying its source and location, whereas if it is merely an epistemological claim, then the only task is coming to know what the "higher law" is.
21. *Id.* at 9.
22. HOWARD P. KAINZ, NATURAL LAW: AN INTRODUCTION AND RE-EXAMINATION 17 (2004).

are invalid.[23]   Aquinas's entire theory of validity in legal reasoning is based on an assumption that some "higher law" exists. Although modern philosophers have attempted to flesh out the content of natural law,[24] the basic thesis that certain "higher" principles should guide judicial decision making remains an important pole in contemporary theories of jurisprudence.[25]

2.   *Legal Positivism*

Legal positivism stands in stark contrast to natural law. The traditional legal positivist movement was pioneered by John Austin, whose "jurisprudence has long been regarded in the Anglo-American tradition as the leading work in opposition to natural law theory."[26] Austin argued that every law or rule is merely a "command" issued by the political sovereign against its subjects.[27] Austin limits the concept of law to the positive restrictions placed on individuals by their government. Thus, a judge under Austin's conception of the law acts only as an adjudicatory agent of the political sovereign, not a decider of moral right and wrong.

Austin's conception of the law results in an amoral process of adjudication. Because the judge simply enforces commands of the political sovereign, there is "no 'necessary connection' between law and moral[ity]."[28] Whereas natural law theorists, such as Aquinas, assumed that positive law can be grounded in principles of "higher law," Austin grounds positive law in the will of the political sovereign.[29] Thus, the morality of a law plays no role in determining its validity, defying Saint Augustine's assertion that "an unjust law is no law at all."[30] In fact, for most positivists,[31] law and morality occupy two entirely distinct intellectual domains.[32]

3.   *Modern Relevance*

The debate between Hart and Dworkin is best contextualized by the way each philosopher places his theory between the two poles of natural

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23.   *Id.*

24.   *See, e.g.*, Bix, *supra* note 13, at 12 (describing John Finnis's identification of certain basic goods: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion).

25.   *See id.* at 13–18.

26.   Peak, *supra* note 9, at 23.

27.   Austin, *supra* note 18, at 25, 33.

28.   Greenawalt, *supra* note 15, at 2.

29.   Peak, *supra* note 9, at 23.

30.   AUGUSTINE, ON FREE CHOICE OF THE WILL 8 (Thomas Williams trans., Hackett Publ'g Co. 1993) (n.d.).

31.   Some positivists, such as Jules Coleman, defend a type of "inclusive positivism" where "moral criteria [should] figure in tests for identifying valid law, but only if the legal community has adopted a convention that so stipulates." Tom Lininger, *On Dworkin and Borkin'*, 105 MICH. L. REV. 1315, 1318 n.12 (2007) (quoting RONALD DWORKIN, JUSTICE IN ROBES 188 (2006)).

32.   *See id.* at 1319 (arguing that Dworkin's theory is in stark opposition to positivism because he suggests that law and morality are "coextensive"); *see also* Peak, *supra* note 9, at 22.

law and legal positivism.[33] Hart's theory lies near the pole of legal positivism, and Dworkin's work hovers near the pole of natural law.[34] Despite the modern reinterpretation of traditional notions of jurisprudence, the same fundamental question remains central to contemporary theories of jurisprudence: What is the role of morality in a legal system?[35] Both Hart and Dworkin establish nuanced theories of jurisprudence that deviate substantially from traditional notions of natural law and legal positivism, but the answer to this question remains a central concern of contemporary jurisprudence.[36] Analyzing the theories of Hart and Dworkin sheds light on how to answer this age-old question in a contemporary framework.[37]

B. Hart: A Positivist Conception of Law in the Twentieth Century

1. Elements of the Law

a. Criticism of Austin

Hart begins his theory by criticizing Austin's over-simplified theory of law as command.[38] Hart argues that Austin fails to provide a truly descriptive account of the law for multiple reasons. First, Hart notes that positive laws are universally applicable within a political society, even to agents of the political sovereign, and that it becomes conceptually difficult to imagine a political sovereign barking orders at itself.[39] In other words, the political sovereign is no sovereign at all. Second, Hart demonstrates that there are certain laws, such as those which confer legal powers or create legal relations, which can hardly be understood as commands.[40] Hart concludes that "the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule."[41]

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33. Peak, *supra* note 9, at 22–23.

34. This is not to say that their respective theories can be equated with these two poles; indeed, Hart's concept of judicial discretion still places him far from the extreme positivism of Austin, whereas Dworkin's theories of principles places his work apart from traditional theories of natural law. *See infra* Part II.B–C.

35. *See* DWORKIN, *supra* note 31, at 1.

36. *Id.*

37. *See* Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 18 (2003).

38. *See supra* Part II.A.2.

39. H.L.A. Hart, *A More Recent Positivist Conception of Law*, *in* PHILOSOPHY OF LAW, *supra* note 13, at 36, 36.

40. *Id.*

41. *Id.* at 37.

b. Obligation and Rules

Hart makes an important distinction between "being obliged" and "having an obligation."[42] For Hart, the state of being obliged is "a psychological [statement] referring to the beliefs and motives with which an action was done."[43] Imagine, for example, a mugger threatening a pedestrian at gunpoint.[44] The pedestrian cannot be said to have an obligation toward the mugger, at least not in the same way that, for example, a soldier has an obligation to defend his or her country.[45] Rather, the notion of the pedestrian "being obliged" is simply a description of her reasons for acting (i.e., fear, apprehension).[46] Hart concludes that one should not reduce the concept of obligation to fear of repercussions but should understand that being under an obligation implies the existence of a rule.[47]

Hart also distinguished primary rules from secondary rules.[48] Primary rules are the rules of obligation imposed by the law in a mature legal system or by social pressure in a prelegal system.[49] For Hart, primary rules concern the types of actions proscribed in certain wrongdoings such as "crime" or "tort."[50] Primary rules, therefore, are the rules which reflect an obligation to obey the law. Secondary rules, on the other hand, are rules that relate to primary rules by specifying the technical and systemic quality of the law.[51] These secondary rules do not impose new obligations, but they allow for the modification of primary rules through rules of adjudication and change.[52] Furthermore, Hart posits a secondary "rule of recognition" that determines the criteria for recognizing the validity of rules in a legal system.[53] For Hart, primary rules of obligation paired with the secondary rules of change, adjudication, and recognition create a mostly determinate system of law.[54]

2. Morality

Though Hart keeps law and morality conceptually distinct, he does not deny that there is often an overlap between the content of law and

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42. *Id.* at 37–38.

43. *Id.* at 38.

44. *See id.* at 37–38.

45. *See id.*

46. *See id.* at 38.

47. *Id.* at 39.

48. *See id.* at 41–44; *see also* NEIL MACCORMICK, H.L.A. HART 20 (1981).

49. MACCORMICK, *supra* note 48, at 20. For a longer discussion of the role of social pressure and obligation, see Hart, *supra* note 39, at 39–41 (establishing that having an obligation presupposes the presence of a rule, then arguing that these obligations come from social pressures "necessary to the maintenance of social life").

50. MACCORMICK, *supra* note 48, at 20.

51. *See id.*

52. *See id.* at 20–21.

53. *Id.* at 21.

54. *Id.* In the United States, for example, the transparency of an amendable constitution and the adjudicative force of the Supreme Court simultaneously legitimize and validate federal law.

morality.[55] Hart admits that those who exercise legal powers of adjudication and change may see it fit to ensure conformity with moral principles for purposes of efficacy.[56] This is not to say, however, that the law is in any way *derived* from moral principles, only that law may be created with certain moral aims.[57] Thus, while one may find moral content within the substantive rules of a legal system, by no means does this moral content have anything to do with determining the validity of those laws.

3. Judicial Discretion

Along with his intricate descriptive analysis of the law, Hart proposed a theory of judicial reasoning.[58] Certain statutes may be ambiguous as to the meaning of certain words or phrases. For example, a statute prohibiting the possession of firearms may not define what "firearm" means in the context of the statute. Although a pistol or rifle may be considered a firearm, may a slingshot, BB gun, or nuclear warhead be considered a firearm as well? Hart recognized that "[t]here must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."[59] In cases involving the hypothetical firearm statute, there may be a settled meaning as to what constitutes a "firearm." If the meaning of "firearm" remains unsettled, however, the judge cannot mechanically apply the law. Hart calls this the "problem[] of the penumbra."[60]

One might predict that a strictly positivist conception of the law, no matter how comprehensive, will run into problems when the content of the law runs out. The problem of judicial uncertainty haunts almost all positivist theories and Hart's is no exception.[61] When the law does run out (that is, when the actions proscribed by rules and duties are uncertain), judicial determinations "cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules."[62] In somewhat of a legal realist move, Hart argues

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55. *Id.* at 24 ("[T]here is always some overlap in the content of legal and moral orders and considerable reciprocal influence between them.").

56. *Id.*

57. *See id.*

58. E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 473 & n.2 (1977) (pointing out that Hart did not claim to be defining the law, only that he was offering a conceptual theory of the law). *See also* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

59. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

60. *Id.*

61. *See id.* ("[A] penumbra of uncertainty must surround all legal rules . . . .").

62. *Id.* at 607–08.

that judges may use discretion to determine an outcome "in light of aims, purposes, and policies" of social well-being.[63]

A major implication of Hart's adjudicatory jurisprudence is that the judge is allowed to make decisions free of both legal and moral restraint in penumbral cases. In the penumbra, rules no longer limit the judge's discretion nor do logic or moral principles.[64] This is an obvious concern for any natural law theorist, for the law becomes some arbitrary notion of personal preference. Hart seems to downplay this concern when he claims that "to be occupied with the penumbra is one thing, to be preoccupied with it another."[65] Regardless of Hart's somewhat dismissive thoughts on the problem of the penumbra, Dworkin focuses intently on the adjudication of penumbral cases to establish a theory of jurisprudence in direct opposition to modern positivism.

C.   Dworkin and the Law As Integrity

1.   Rules and Principles

Dworkin argues that Hart's positivist conception of the law omits principles, which serve a critical function in legal reasoning.[66] Principles cover various norms and standards present in judicial decision making.[67] Principles can be differentiated from rules on two counts. First, rules are inherently determinative when applicable.[68] That is, applying rules yields a determined outcome without reference to alternative methods of reasoning, so long as the rules are clear in their method of application. Principles, on the other hand, are not inherently determinative.[69] This is not to say that applying principles cannot produce a correct outcome, rather, principles do not determine judicial outcomes as a matter of causal necessity.[70] For example, the principle of contractual autonomy[71] will not always determine the outcome of a case, for a contract may violate other established rules or principles (i.e., one cannot contract for the murder of another). Second, principles can be weighed, whereas rules can only be applied.[72] A judge, therefore, may consider conflicting principles with an appropriate balancing test, yet a balancing test would not be an appropriate measure for applying rules.

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63.   *Id.* at 614.

64.   *See supra* note 59 and accompanying text.

65.   Hart, *supra* note 59, at 615.

66.   *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–27 (1977); Bayles, *supra* note 10, at 350.

67.   *See* Bayles, *supra* note 10, at 350–52.

68.   *See id.* at 351.

69.   *See id.*

70.   *See id.*

71.   *See* Lochner v. New York, 198 U.S. 45, 53 (1905).

72.   *See* Bayles, *supra* note 10, at 351.

Dworkin further argues that principles are binding law. Positivists argue that there must be some ultimate test for identifying binding law, such as Hart's rule of recognition.[73] For positivists, the problem with principles is the lack of systematic identification.[74] For example, the judge cannot consult a tome of principles in the process of adjudication, which makes principles nonbinding. Dworkin, however, argues that to dismiss the notion of principles based on a positivist conception of law begs the question,[75] for principles are undeniably present in the U.S. system of law.[76] Moreover, judges frequently cite normative values in the process of adjudication.[77] Though citation of normative values would be extralegal in Hart's conceptual framework, Dworkin finds that such assertions are made by judges and are an integral part of the U.S. legal system.[78] For Dworkin, even the application of rules requires adherence to principles, such as the principle of legislative supremacy and stare decisis.[79] Because positivism cannot account for the judge's use of principles in decision making, Dworkin concludes that Hart's theory is conceptually flawed.[80]

2. *Judicial Discretion*

Because the judge may refer to principles in certain cases, Dworkin offers a new account of judicial discretion. Dworkin makes an important distinction between "strong" discretion and "weak" discretion. Weak discretion is used when "the standards an official must apply cannot be applied mechanically but demand the use of judgment."[81] A judge uses weak discretion when determining the applicable rule or asserting final judicial authority.[82] For example, a judge may exercise "weak" discretion when determining an appropriate amount of child support. This discretion is "weak" in the sense that the judge is still bound to state guidelines defining the factors used to determine child support.[83] Dworkin has no problem with the judge using this type of discretion because it is inescapable, yet trivial.[84] Descriptively, the judge is not a machine and must therefore use some faculty of reason and judgment to properly adjudicate a case.

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73.   *See* Soper, *supra* note 58, at 474.
74.   *See id.* at 476.
75.   *See* DWORKIN, *supra* note 66, at 36 ("[W]e are interested in the status of principles because we want to evaluate the positivists' model. The positivist cannot defend his theory of a rule of recognition by fiat; if principles are not amenable to a test he must show some other reason why they cannot count as law.").
76.   *See id.*
77.   For example, a judge employs the concept of "fairness" when applying an equitable doctrine.
78.   *See id.* at 36–39.
79.   Bayles, *supra* note 10, at 352–53.
80.   *See* DWORKIN, *supra* note 66, at 39.
81.   *Id.* at 31.
82.   *See id.* at 32.
83.   *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/505(a)(1) (West 2010).
84.   *See* DWORKIN, *supra* note 66, at 33–34; Bayles, *supra* note 10, at 361.

Strong discretion, on the other hand, is a type of discretion where the judge is not bound to any authoritative standard.[85] This would arise in cases of apparent first precedent. Dworkin worries that this is the type of discretion that Hart endorses in penumbral cases;[86] "[i]f judges have strong discretion, then cases will not be settled by pre-existing law."[87] The result, for Dworkin, is that in penumbral cases, judges would be creating legislation and enforcing this legislation on the parties ex post facto.[88] Dworkin contends that Hart's theory is descriptively flawed because it allows for ex post facto enforcements.[89] Naturally, Dworkin also makes a normative claim that allowing ex post facto enforcements is contrary to the rule of law itself.[90]

3.   Law As Integrity and the Right Answer Thesis

Defying the traditional positivist separation of law and morality, Dworkin argues that in penumbral cases there is always a "right" answer based on the application of appropriate principles seen through the lens of morality.[91] There are several propositions that support this viewpoint. First, "[t]he concept of law is that it justifies state coercion, and the best interpretation is the morally best one reasonably fitting the data."[92] Therefore, one's acceptance of the law is a moral determination. Second, the law exists as an interconnected web of evolving precedents, principles, and legislative regimes.[93] The notion of constructive principles and their intricate interconnectedness can be described as the theory of "law as integrity."[94] As Dworkin puts it, "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[95]

From the theory of law as integrity, Dworkin argues that in penumbral cases there is always one correct answer.[96] The right answer thesis provides that "there is almost always a correct answer" because "the requisite principles should be sufficient to provide answers for all cases" in a legal system with a mature history.[97] In other words, principles grounded in morality ensure that judges never use strong discretion in penumbral,

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85.   Bayles, *supra* note 10, at 361–62; *see also* DWORKIN, *supra* note 66, at 32.
86.   *See* Bayles, *supra* note 10, at 362.
87.   *Id.*
88.   *Id.*
89.   *Id.*
90.   *Id.*
91.   *Id.* at 361, 365–66.
92.   *Id.* at 365.
93.   *See id.* at 365–66.
94.   RONALD DWORKIN, LAW'S EMPIRE 95–96, 225 (1986).
95.   *Id.* at 225.
96.   Bayles, *supra* note 10, at 366.
97.   *Id.*

or, as Dworkin calls them, "hard" cases.[98] A discussion of the sources of normative principles is a major point of discussion in Part III of this Note.

D.   Korsgaard and Kantian Constructivism

Though not directly related to the current debate in adjudicatory jurisprudence, Christine Korsgaard's theory of moral constructivism plays a large role in the next part of this Note. Therefore, some background information will be helpful. Korsgaard's philosophy can be seen as somewhat of a middle ground between moral nihilism[99] and moral realism.[100] The nihilists deny the existence of any universal law, whereas the moral realists, thinking much like natural law theorists, assert that universal moral principles exist in nature or in the divine.[101]

Many contemporary philosophers, whether they are skeptics, relativists, subjectivists, or nihilists, have doubted the authority of moral obligations.[102] This doubt comes from the dubious nature of moral obligation.[103] Morality certainly makes demands on us, and oftentimes these demands conflict with our personal interests. What exactly is it, then, that makes moral obligations authoritative? Korsgaard calls this "the normative question," and it serves as the primary focus of her moral philosophy.[104]

1.   Substantive Realism Versus Procedural Realism

Assuming that skepticism, relativism, nihilism, etc., are unfavorable positions, one must alternatively endorse some type of moral realism.[105] Korsgaard distinguishes between *substantive* realism and *procedural* realism. According to Korsgaard, "[s]ubstantive moral realism is the view that there are answers to moral questions *because* there are moral facts or truths, which [moral] questions ask *about*."[106] Substantive realism, therefore, posits the existence of intrinsically normative entities which

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98.   *See id.* at 361, 364–67.

99.   *See, e.g.*, J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 38–42 (1977). Mackie's argument from queerness serves as a more contemporary indictment of substantive realism.

100.   *See, e.g.*, A.I. Melden, *Introduction* to H.A. Prichard, *Does Moral Philosophy Rest on a Mistake* (1912), *reprinted in* ETHICAL THEORIES: A BOOK OF READINGS 321 (A.I. Melden ed., 1950) (explaining H.A. Prichard's theory that moral values are irreducible and must be grasped through one's intuition).

101.   MACKIE, *supra* note 99, at 15 ("There are no objective values."); Geoffrey Sayre-McCord, *Introduction: The Many Moral Realisms*, *in* ESSAYS ON MORAL REALISM 1, 2–3 (Geoffrey Sayre-McCord ed., 1988) (pointing out that many philosophers tried to reconcile morality with naturalism but were criticized for committing what Moore called the "Naturalistic Fallacy").

102.   *See* MACKIE, *supra* note 99, at 15–18, 38–42.

103.   *See id.* at 38–42; Sayre-McCord, *supra* note 101, at 2–4.

104.   CHRISTINE M. KORSGAARD ET AL., THE SOURCES OF NORMATIVITY 7–10, 15–16 (1996).

105.   *Id.* at 34 ("[R]ealism is seen by many as the only hope for ethics, the only option to skepticism, relativism, subjectivism, and all the various ways of thinking the subject is hopeless.").

106.   *Id.* at 35.

exist independent of practical reason.[107] When asked, "What ought I to do?," the substantive realist might say something like, "Do what pleases the most amount of people." The line of questioning, however, stops there, for the substantive realist assumes that a utilitarian principle (or any other type of principle for that matter) is simply a normative matter of fact.[108] In this way, the substantive realist sees ethics as a branch of knowledge in which intrinsically normative entities are discoverable.[109]

By introducing the concept of procedural realism, Korsgaard seeks to find a medium between the two extremes. Procedural realism is a way to posit the existence of moral truths while avoiding skepticism concerning the ontological status of moral principles.[110] According to Korsgaard, procedural realism merely holds that there are correct and incorrect ways of answering moral questions *without* appealing to some intrinsically normative entity.[111] In other words, moral claims are truth apt, but their validity is not derived from an external moral "fact." From where, then, is their validity derived? Korsgaard believes that we can derive truth from practical reason:

> [M]oral conclusions are the dictates of practical reason, or the projections of human sentiments, or the results of some constructive procedure . . . . As long as there is some correct or best procedure for answering moral questions, there is some way of applying the concepts of the right and the good. And as long as there is some way of applying the concepts of the right and the good, we will have moral and more generally normative truth.[112]

This argument is markedly pragmatic, but the crux of her theory is an emphasis on the use of practical reasons in the determination of correct procedure. Korsgaard's turn to procedural realism is so unique because she finds a way to endorse Kantianism in a contemporary context. The procedural realist finds truth in moral claims *because* the correct procedure (i.e., practical reason) has been used.[113] The substantive realist, on the other hand, thinks procedure is just a tool for discovering moral facts.[114] This is a primary example of why Korsgaard and Kant can be called "constructivists."

2. *Korsgaard's Critics*

Korsgaard responds to the critics of substantive realism without turning to nihilism, making her theory quite attractive to someone who still believes in right and wrong. Still, many critics have criticized Kors-

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107. *See id.* at 35–37.
108. *See id.* at 36–37.
109. *Id.*
110. *See id.* at 35–36.
111. *Id.* at 35.
112. *Id.*
113. *Id.* at 36–37.
114. *Id.* at 37.

gaard's moral constructivism from both a skeptical and substantive realist view. In an essay responding to Korsgaard, Nadeem J.Z. Hussain and Nishi Shah question the viability of constructivism as a principle theory of metaethics and raise a key concern: What exactly constitutes a "correct procedure" in the first place, and what are my reasons for following it?[115] In *Reasons and the Good*, Roger Crisp argues that if no criterion for correct procedure is given, then Korsgaard is just a nihilist.[116] Conversely, Crisp argues that any reason one could give for determining correct procedure would have to reference an intrinsically normative entity, meaning Korsgaard is just a substantive realist all along.[117] One might view the U.S. legal system as paradigmatic of the correct procedure for making valid moral claims. Although the traditional natural law theorists have looked at the supremacy of moral categories over rules, it is more likely that the law is a manifestation of practically constructed moral principles.[118]

III. ANALYSIS

This Part shows how a theory of Kantian constructivism may help resolve the problems that arose from the debate between Hart and Dworkin. First, Section A describes the fundamental problems with Hart and Dworkin and explains that constructivism is the better alternative to both theories. Second, Section B describes how practical reasoning, which serves as the foundation of constructivism, plays an integral role in the practice of law. Third, Section C sets forth a prescriptive theory of constructivist jurisprudence that requires the judge to adjudicate within the boundaries of the moral law. Finally, Section D provides a justification for why the judge must act in accordance with identified moral obligations.

A. A Constructivist Response to the Hart/Dworkin Debate

1. Hart and Moral Nihilism

In his later works, Hart shifted from a general descriptive theory of the law to a focus on the relationship between reasons and action, concluding that rules themselves are the true reasons for both the judge's actions and the subject being judged.[119] This conclusion is puzzling for the moral legal theorist, for Hart seems to be stripping the judge and the le-

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115. *See* Nadeem J.Z. Hussain & Nishi Shah, *Misunderstanding Metaethics: Korsgaard's Rejection of Realism*, *in* 1 OXFORD STUDIES IN METAETHICS 265, 289–93 (2006).

116. ROGER CRISP, REASONS AND THE GOOD 54–56 (2006).

117. *Id.* at 52–56.

118. Dworkin's theory of "law as integrity" provides a descriptive explanation of these practically constructed principles. *See infra* Part III.C.1.c.

119. *See* H.L.A. HART, *Commands and Authoritative Legal Reasons*, *in* ESSAYS ON BENTHAM 243, 255–61 (1982); John Finnis, *On Hart's Ways: Law As Reason and As Fact*, 52 AM. J. JURIS. 25, 41–42 (2007).

gal subject of their moral agency. Hart's later work also expresses complete disbelief in the existence of objective practical reasons, both legal and moral, which raises similar moral concerns.[120] All of this adds up to a grave concern that Hartian positivism would legitimize a "wicked" legal system, full of rules contrary to universal conceptions of morality.[121]

The true failure of Hart's theory is that the law becomes a breeding ground for moral nihilism. Hart admits that when adjudicating in the penumbra, the judge may exercise strong discretion.[122] Because many tough moral considerations would implicate the penumbra in judicial proceedings, the judge may look outside of the law and reference personal preference rather than moral or legal obligation.[123] In other words, when the law runs out, the judge may adjudicate absent any moral sensibilities. Conversely, Dworkin argues that the existence of positive law is grounded in the existence of moral law.[124] Thus, moral obligations still apply when adjudicating in the penumbra.[125]

Though Hart and Dworkin mainly feud over the correct descriptive theory of the law,[126] the moral implications of Hart's theory are highly objectionable. If the law is conceptually and practically distinct from morality, then the law may encompass principles that are manifestly immoral. For example, certain wicked and evil laws might be enacted by the legislature, and the judge would be bound by the rule of recognition to enforce these laws.[127] A more important, and perhaps less obvious, implication of Hart's theory is that the separation of law and morals makes it sound as if moral principles are simply one of the many extralegal standards the judge may resort to when exercising strong discretion.[128] The implied notion that a judge may choose *not* to resort to morality as an extralegal standard creates an unacceptable risk of moral nihilism.[129] Some positivists, namely Joseph Raz, have responded to this line of argument by claiming that extralegal moral principles bind the

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120. Finnis, *supra* note 119, at 47.

121. *See* DWORKIN, *supra* note 66, at 342.

122. *See supra* note 62 and accompanying text.

123. *See* HART, *supra* note 58, at 12, 185 (2d ed. 1994). This also follows for Hart, since the judge self-imposes an "internal" point of view that recognizes the rule of law as the only obligation of adjudication. *See id.* at 56–58.

124. Bayles, *supra* note 10, at 375–76; Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed* 5 (Univ. of Mich. Law Sch., Pub. Law & Legal Theory Working Paper No. 77, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968657.

125. Granted, Dworkin does not believe that the law ever really runs out in any sense, *see supra* Part II.C.3, but the real point is that in all steps of the adjudicative process, the judge is still bound to moral obligations, not just rules. *See* Shapiro, *supra* note 124, at 22.

126. *See* Shapiro, *supra* note 124, at 3–4 ("[T]he Hart-Dworkin debate concerns such disparate issues as the existence of judicial discretion, the role of policy in adjudication, the ontological foundations of rules, the possibility of descriptive jurisprudence, the function of law, the objectivity of value, the vagueness of concepts, and the nature of legal inference.").

127. *See* Bayles, *supra* note 10, at 375–76.

128. Many positivists responded to the critique of arbitrary and limitless discretion by claiming that within the penumbra, the judge is still legally obligated to apply *some* extralegal principle. *See* Shapiro, *supra* note 124, at 20–21.

129. *See id.*

judge when exercising strong discretion.[130] Raz holds, however, that law and morality are still distinct normative concepts, and a judicial obligation to look to morality does not necessarily incorporate morality into the law.[131]

Though Raz formulates a novel response to the threat of moral nihilism, there are two important objections. First, the very idea that a judge ceases to apply legal rules and begins to apply moral ones is conceptually awkward. Have moral principles not been applicable in cases that do not require strong discretion? The idea of morality itself entails a conception of universal and perpetual applicability.[132] The idea that moral principles only "kick in" when other principles run out misconstrues the very concept of a moral principle in the first place. The second objection arises directly from this conceptual confusion, that is, it seems as if moral principles are somehow superseded by legal ones. One could infer from Raz's argument that the judge need not make moral considerations unless the rules run out. This line of thinking trivializes moral principles on the whole. Furthermore, under a positivist theory of law, there may be instances in which justice itself precedes any legal obligation the judge has.[133] For example, a judge has no obligation to enforce a rule that mandates the torture of children.

Although Hart and his followers conceptualized a very persuasive, descriptive theory of the law, the potential moral hazard associated with positivism is too great. This is not to say that Hartain positivism is an untenable position, rather, there may be another approach that avoids the risk of moral nihilism.

2. *Dworkin and Moral Realism*

In the aggregate, Dworkin's right answer thesis, description of legal principles, and definition of law as integrity[134] function as a response to the problems in morality associated with positivism.[135] There are, however, epistemological and ontological problems with Dworkin's theory.[136]

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130. *Id.* at 21.
131. *Id.*
132. *See* BERNARD GERT, MORALITY: ITS NATURE AND JUSTIFICATION 8 (rev. ed. 2005) ("[H]ardly anyone denies that morality must be such that a person who adopts it must also propose its adoption by everyone.").
133. *See* B.C. HUTCHENS, LEVINAS: A GUIDE FOR THE PERPLEXED 100 (2004).
134. *See supra* Part II.C.
135. *See* Bayles, *supra* note 10, at 375–80.
136. *See* Sharon Street, *Objectivity and Truth: You'd Better Rethink It*, PHIL. & PUB. AFF. (forthcoming) (manuscript at 5), http://homepages.nyu.edu/~jrs477/Sharon%20Street%20-%20Objectivity%20and%20Truth.pdf ("Dworkin's endorsement of *realism*—understood exactly as he himself wishes to understand it, namely as an 'internal' normative claim—involves a stark refusal to integrate the practical point of view (from which we make judgments about what we have reason to do), with the theoretical point of view (from which we inquire into the causal origins of, among other things, our judgments about what we have reason to do), and that this refusal renders the position deeply unstable."); Matthew Tokson, Is There Really No Right Answer to Hard Moral Questions?: Moral Realism and Dworkin's Right Answer Thesis 1 (May 18, 2008) (unpublished manuscript), *available at*

Mainly, law as integrity fails to adequately address the sources of normative principles.[137] Thus, certain fundamental questions go largely unanswered: Where do principles come from? What is their metaphysical or ontological status? If legal principles embody moral concepts, then why *ought* the judge act upon them when adjudicating? In one of his lesser-known essays, Dworkin endorses a peculiar type of ametaphysical moral realism.[138] Dworkin argues that seeking some nonmoral justification for the validity of moral principles is a misguided inquiry.[139] In other words, the charge that morality lacks a concrete metaphysical and epistemological justification misunderstands the very concept of morality itself. According to Dworkin, there really are objective and normative facts in the universe, but any further inquiry into the source of these normative facts is fruitless.[140]

One principal objection to Dworkin is that an ametaphysical conception of morality is completely inadequate. To admit that there really are objective normative truths, while refusing to explore their sources, is a type of restraint that most philosophers would refuse to accept. It would be like meeting God and not wanting to ask him any questions.

Furthermore, Dworkin's alternate theory of realism may be no different than a traditional theory of realism. Korsgaard defines moral realism as "the view that propositions employing moral concepts may have truth values because moral concepts describe or refer to normative entities or facts that exist independently of those concepts themselves."[141] Dworkin's theory does not fit this definition exactly, because he does not think these normative entities exist independent of the concepts themselves.[142] Why then, according to Dworkin, are principles truth apt? Dworkin has no answer to this question.[143] One could plausibly infer, therefore, that Dworkin really *does* think there is a justification for normative entities external to the concept itself, but he would rather not talk about it. Thus, Dworkin may have been a substantive realist all along who tried to shield himself from criticism by calling an apple an orange.

If Dworkin's position does not really differ from that of traditional substantive realists, then he is open to the same scathing criticism from

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http://ssrn.com/abstract=1250503 ("[Dworkin] leaves us wanting some further and more concrete elaboration of how and on what basis we might be formulating our moral claims.").

137. *See* Tokson, *supra* note 136, at 1.

138. *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 127–28 (1996).

139. *See id.* at 127. ("[Some realists] declare that there really are objective and normative properties or facts in the universe, which is true. But they declare this in language that strives for metaphysical resonance, as if its truth was to be discovered in some philosophical domain other than that of substantive evaluation.").

140. *Id.* at 127–28.

141. Christine M. Korsgaard, *Realism and Constructivism in Twentieth-Century Moral Philosophy*, *in* PHILOSOPHY IN AMERICA AT THE TURN OF THE CENTURY 99, 100 (2003).

142. *See* Dworkin, *supra* note 138, at 127–28.

143. *See id.* at 128.

the most extreme moral skeptics.[144] J.L. Mackie's moral error theory is one of the most well-known criticisms of moral realism.[145] Mackie first makes an argument from relativity, stemming from the observation that different cultures observe various moral principles.[146] Mackie concludes that in order for this to be the case, different cultures must have inferior epistemic access to moral facts, which seems like an absurd proposition.[147] Mackie then makes his famous "argument from queerness," which has two strands: one metaphysical and one epistemological.[148] The metaphysical strand argues that if moral realists are correct, then one must posit the existence of moral properties in the world as having "qualities or relations of a very strange sort, utterly different from anything else in the universe."[149] The epistemic strand follows, for to come to know these strange properties would require "some special faculty of moral perception or intuition, utterly different from our ordinary ways of knowing everything else."[150] Mackie's critique of moral realism is particularly convincing in the context of legal theory, for proper adjudication requires the type of inquiry that Mackie believes to be impossible. Moral realism, therefore, even as Dworkin sees it, is not an appropriate theory of adjudicative jurisprudence.

3. Constructivism

If Hart's theory risks moral nihilism and Dworkin's succumbs to the criticisms of moral realism, then the resolution of the Hart/Dworkin debate should be a theory that avoids both pitfalls. Korsgaard and Dworkin both believe that moral claims are truth apt, but sharply disagree as to how the inquiry should proceed.[151] Constructivism should appeal to the legal philosopher because it identifies the necessary connection between morality and the law while exploring the sources of this connection.[152] What exactly, then, is constructivism? Though there are many types of constructivism,[153] they mostly share the basic pragmatic view that objective normative truths are human constructs rather than objects of discovery.[154]

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144. *See, e.g.*, MACKIE, *supra* note 99, at 15–49.
145. *See id.* Dworkin, in fact, directly addresses Mackie's critique under the assumption that it does not extend to his theory of moral realism. *See* Dworkin, *supra* note 138, at 113–14.
146. MACKIE, *supra* note 99, at 36–38.
147. *See id.*
148. *Id.* at 38–42.
149. *Id.* at 38.
150. *Id.*
151. *See supra* notes 97, 112 and accompanying text.
152. The connection is necessary because both legal and moral principles come from the same exercise of practical reason, that is, the adjudicative process. *See infra* Part III.C–D.
153. *See, e.g.*, ANDREW KUPER, DEMOCRACY BEYOND BORDERS: JUSTICE AND REPRESENTATION IN GLOBAL INSTITUTIONS 8–10 (2004) (describing the process of a Rawlsian constructivism, which is markedly different from a Kantian constructivism).
154. *See* Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, 542–43 (1996) ("[T]he objectivist claim is itself the value judgment, not support for it." (emphasis

Korsgaard's constructivist theory focuses on the importance of practical reasoning as a human construct. For Korsgaard, "[p]ractical philosophy . . . is not a matter of finding knowledge to apply in practice. It is . . . rather the use of reason to solve practical problems."[155] In other words, the development of a practical theory should not be an abstract inquiry where knowledge is somehow *discovered*. Rather, the development of a practical theory should be *practical* in the sense that there is some problem that needs to be solved. For Korsgaard, the concept of morality and the concept of law are each the name of the practical problem and also its solution.[156] For example, Kant recognized there was a problem associated with free agency in that we are not told what we ought to do.[157] Kant, however, asserted that by simply reflecting upon our own agency, we can reach the categorical imperative that tells us what we ought to do.[158] In this sense, the very concept of morality both identifies a problem and offers a practical solution to that problem. Korsgaard concludes that "normative concepts are not . . . the names of objects or of facts or of the components of facts that we encounter in the world. They are the names of the solutions of problems, problems to which we give names to mark them out as objects for practical thought."[159]

One might object that Korsgaard's account of normative concepts is peculiar in that every other type of concept (e.g., scientific reasoning) seeks to describe something in the world, whereas normative concepts just point to practical problems and their solutions.[160] Korsgaard argues, however, that the identification of practical problems and their solutions is not as foreign a process as one might think.[161] Take, for example, the concept of a "chair," which exists simply because the physical construction of humans makes it possible, and often necessary, for us to sit down.[162] The first person to conceive of the "chair" was also likely the first person to construct a chair based on such a conception.[163] An important implication is that the conception of a chair as a practical problem and as a solution to that practical problem *precedes* any physical or descriptive conception of the chair. In other words, the concept of "chair" may refer to the problem of needing to sit down more than a physical description of the form of a chair itself. Korsgaard argues that normative

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omitted)). This line of argument parallels Kant's transcendental turn in the *Prolegomena*—just as causality is necessary for our very conceptions of the phenomenal realm, objective moral claims are necessary to describe a nuanced normative world. *See* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 62–63 (Gary Hatfield ed. & trans., Cambridge Univ. Press rev. ed. 2004) (n.d.).

155. Korsgaard, *supra* note 141, at 115.
156. *Id.*
157. *Id.* at 116.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 116–17.
162. *Id.* at 117.
163. *Id.*

concepts exist as references to the same type of real-world problems that the concept of "chair" refers to.[164]

Given that adjudicative jurisprudence concerns what the judge ought to do, Korsgaard's argument is highly relevant. If normative concepts simply refer to practical problems and their solutions, then there does not need to be any type of external justification for asserting their objective truth. The result of Korsgaard's theory is that the justification of normative concepts is *internal*.[165] Thus, adjudication that relies on concepts constructed from practical reasoning are not subject to Mackie's criticism, for "our use of the concept when guided by the correct conception *constructs* an essentially human reality—the just society, the Kingdom of Ends—that solves the problem from which the concept springs. The truths that result describe that constructed reality."[166] There is nothing relative or "queer" about moral concepts when understood in this way.

B. *The Importance of Practical Reasoning in the Practice of Law*

Before discussing the process of practical reasoning in the context of adjudication, it is important to note precisely why practical reasoning is the appropriate avenue for reaching a decision. Practical reasoning, as used in this Note, refers to the general human capacity to resolve conflict through some action. Korsgaard argues that practical reasoning is the appropriate mechanism for identifying normative concepts in a constructivist framework.[167] The justification for any truth claim made in a constructivist framework comes from the notion that the correct *process* (i.e., practical reasoning) was employed.[168] Therefore, it is crucial to show that the judge can and should use practical reasoning when reaching a decision.

Practicing law immerses one in practical reasoning activities.[169] Whether a lawyer must make a strategic choice, or whether a judge must reach a decision and reflect on the content and structure of his or her thinking, the grasp of practical reasoning in the law is inescapable. In fact, Aquinas argued that all laws are "universal propositions of practical reason."[170] In furtherance of this proposition, John Finnis argues that "to understand a legal system, let alone to participate in upholding, applying

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164. *Id.*

165. *See* Matthew E. Silverstein, Normative Authority and the Foundation of Ethics 105 (2008) (unpublished PhD dissertation Univ. Mich.) (on file with author).

166. Korsgaard, *supra* note 141, at 117.

167. *See supra* note 112 and accompanying text.

168. Here, the importance of Korsgaard's articulation of procedural realism, discussed *supra* Part II.D.1, becomes apparent. In order for truth claims to be valid, they must rely on the procedure of practical reasoning. If the incorrect procedure is used, a reference to objective normative truths is invalid. Thus, a judge may not be justified in his or her decision if it is based on a moral claim derived from instrumental reasoning.

169. John Finnis, *Foundations of Practical Reason Revisited*, 50 AM. J. JURIS. 109, 109 (2005).

170. *Id.* (internal quotation marks omitted).

and developing one, is to engage with practical reason, in a manner that invites awareness of, and opportunity for reflection upon, its structure, shape, process, criteria, and logic as a set of reasons for action."[171]

For Korsgaard, it should be no surprise that adjudication involves the practice of practical reasoning, considering the law itself is an attempt to solve a practical problem. Korsgaard references Rawls's concept of justice to identify the problem, which she calls the "distribution problem."[172] People will engage in a cooperative scheme because it will benefit all participants, but they must decide how associates' "benefits and burdens are to be distributed."[173] This general problem in political philosophy requires a practical solution. Practical reasoning is used to construct moral principles that attempt to solve this problem. Furthermore, these moral principles inform the creation of legal principles that try to address the problem more specifically. The law, therefore, is an ongoing engagement of practical reason in response to the practical problem raised by distribution.[174] Practical reason, therefore, is not only an invaluable practice for the judge, it is a necessary component of judicial agency.

C.   A Constructivist Theory of Jurisprudence

1.   Hard Cases

Law can be described as the intersection of the moral and the practical, which creates situations in which the judge must make seemingly arbitrary determinations to reach a sound and practical opinion. Hart claimed that such situations arose in the penumbra of judicial reasoning, in which case the judge exercises strong discretion to reach a decision.[175] Dworkin, perturbed by the concept of strong discretion and arbitrary decision making, attempted to bind the judge to substantive principles.[176] Hard cases, therefore, seem to be the most controversial area concerning theories of adjudicative jurisprudence; it is where this theory of constructivism will begin.

a.   A Prescriptive Approach

Although a descriptive constructivist interpretation of the law would be a worthy scholarly pursuit, this Note's primary purpose is to lay the foundation for what the judge *ought* to do when adjudicating.[177] The

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171. *Id.* at 110.
172. Korsgaard, *supra* note 141, at 115–16.
173. *Id.*
174. *Id.* at 116.
175. *See supra* Part II.B.3.
176. *See supra* Part II.C.2.
177. Many cases, for example, involve practical reasoning that utilizes economic and political calculations. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905). These are apt for description in a Rawlsian constructivist sense but not in a Kantian constructivist sense because the issues decided do

core thesis of constructivist adjudication is that the judge employs practical reasoning to come to the right decision. What, then, is the correct implementation of practical reasoning in the context of judicial decision making? Could not one simply argue that using strong discretion or relying on legal principles are equally viable methods of practical reasoning? Fortunately, Kant and Korsgaard develop a more structured approach to understanding the proper use of practical reasoning.[178]

First, the judge must properly frame the practical problem, for "a clear statement of the problem is also a statement of the solution."[179] The problem may be more ubiquitous than it seems. For example, one could argue that *Lawrence v. Texas* was about whether consensual homosexual sodomy was a fundamental right.[180] Conversely, one might argue that the practical problem to be resolved was whether homosexual sodomy fell into a broader recognized fundamental right of privacy.[181] The distinction is crucial, for the practical solution to the problem will differ wildly depending on how the problem is framed. If the problem is framed narrowly, then the practical solution will not take broader social policies and the moral principles necessary for proper resolution into consideration. If the practical problem implicates a broader social conception of privacy, however, the solution will require the judge to confront broad principles to be universalized into moral law.

This brings us to the second step of practical reasoning, which Korsgaard calls the "reflective endorsement method."[182] When judges are faced with a practical problem that implicates a moral determination, they must confront the principle and decide whether it can be universalized.[183] Korsgaard borrows this model of reflective endorsement from Kant, who argued that rational determinations must be related to free will.[184] Kant defined free will as a rational causality that is effective without alien causes, such as desires and inclinations of a person.[185] Free will, then, is a purely rational guiding principle of our actions. Because the

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not implicate moral law. One implication might be that there is a hierarchy of judicial reasoning where moral concerns are tantamount. The better interpretation is that most landmark judicial decisions employ the same process of practical reasoning but with conflicting baseline rationales (i.e., utilitarianism vs. deontological ethics).

178. *See* KORSGAARD, *supra* note 104, at 35 ("[M]oral conclusions are the dictates of practical reason . . . ."); Swisher, *supra* note 4, at 651–52 (discussing Kant's categorical imperative in the formulation of moral law).

179. KORSGAARD, *supra* note 104, at 49.

180. 539 U.S. 558, 562 (2003) ("The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.").

181. Justice Kennedy framed the issue broadly and asked "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty." *Id.* at 564. This is contrary to the *Bowers* formulation of the issue, which asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

182. KORSGAARD, *supra* note 104, at 50–51.

183. *See id.* at 98.

184. *See id.* at 97.

185. *Id.*

will is a practical reason, however, it cannot be conceived of as acting for no reason—there must be some law that governs the will itself.[186]

b. Kant and the Content of Moral Law

Judges must determine the law that is to govern their will. In other words, if a judge chooses to adopt a certain practical solution to a practical problem, that choice itself (which is a function of free will) must be governed by some principle. This principle is Kant's first formulation of the "categorical imperative," which tells us to act only upon maxims that we could will to be law.[187] The first formulation of the categorical imperative, however, does not offer much guidance concerning the *content* of the law, only that whatever principle the judge might choose to adopt must take the form of *some law*.[188] Thus, when faced with a practical problem, the judge must endorse some principle that takes the form of a universal law.

The final step in the process of the judge's practical reasoning involves determining the content of a universalizable principle.[189] Here, Korsgaard makes a distinction between "the categorical imperative" and "the moral law."[190] The moral law is the law that governs in the "Kingdom of Ends," what Kant calls the republic of all rational beings.[191] For Korsgaard, "[t]he moral law tells us to act only on maxims that all rational beings could agree to act on together in a workable cooperative system."[192]

In hard cases, judges will often decide whether an individual endorsement of a particular policy (i.e., maxims) is sufficiently universalizable to will as law.[193] Kant offers the test of contradiction in conception to describe the type of maxims that all rational beings could agree to act on together.[194] The contradiction in conception test asks whether the maxim can be universalized without contradicting the very purpose of the maxim in the first place.[195] For example, borrowing money from a friend under the false premise that you will pay it back is not universalizable, because no one would lend money out if everyone did this, and the initial goal of the maxim would never be achieved.

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186. *Id.* at 98.
187. *Id.*
188. *Id.*
189. *Id.* at 99–100.
190. *Id.* at 98–99.
191. *Id.* at 99.
192. *Id.*
193. Swisher, *supra* note 4, at 651 ("[T]he framework for determining maxims and laws involves the following: maxims involve a particular subject, while laws involve every subject (performing the same action in a particular circumstance). Reason enables the actor to generate laws from maxims and prevents inappropriate maxims from becoming moral laws.").
194. *See* KORSGAARD, *supra* note 104, at 99.
195. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 50 (Thomas Kingsmill Abbott trans., Wilder Publ'ns 2008) (1785).

Judges may apply the test of contradiction in conception in a variety of ways. Historically, for example, a judge might have looked at the fugitive slave clause[196] and asked whether slavery was a universalizable maxim. A judge might ask, "What happens if everyone is a slave owner?" This leads to a clear contradiction in conception, for it is impossible for everyone to be a slave owner, meaning the goal of universalizing special rights to slave owners through the fugitive slave clause is morally impermissible. A modern hard case might require a judge to endorse same-sex marriage as a universalizable maxim.[197] Recognizing the legal union between homosexual couples does not seem to implicate any contradiction in conception, for universalizing that privilege does not contradict the very goal of the maxim. Same-sex marriage, therefore, would pass Kant's moral scrutiny.[198]

Although it may seem strange to conceive of judicial reasoning in terms of universalizing maxims, judges must ask themselves these types of questions all the time.[199] For example, judges may decide not to adhere to precedent but then quickly ask themselves what would happen if judges never adhered to precedent.[200] Furthermore, the concept of universalizability accords with the sense of fairness embodied in the equal protection clause.[201] People generally agree that everyone should be treated equally unless a rational basis exists for discrimination.[202] A natural effect of this belief mirrors Kant's first formulation of the categorical imperative—"treat others as you wish to be treated."[203]

There are, however, significant limitations concerning the applicability of the categorical imperative to a theory of adjudicative jurisprudence.[204] First, the contradiction in conception test allows for "false negatives" and "false positives."[205] Inconsistent outcomes in conception when using the test may confuse judges who seek to identify certain categories of moral obligation to guide their decision making. Second, the contradiction in conception test presumes that the judge could accurately predict the outcome of a proposed maxim in order to "discern a clear

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196. U.S. CONST. art. IV, § 2, cl. 3.

197. *See, e.g.*, Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 963 (1998).

198. This conclusion is limited in the sense that same-sex marriage is not, per se, immoral. This is much different from the slavery example, because a judge is not obligated to endorse morally impermissible laws, whereas under Kant's theory a judge is under no obligation to affirm laws that are not morally suspect. There may simply be laws that are morally permissible but not practical.

199. Swisher, *supra* note 4, at 652.

200. *Id.*

201. *See id.*

202. *Id.*

203. *See id.*

204. Marcia Baron, *Kantian Ethics*, *in* THREE METHODS OF ETHICS: A DEBATE 3, 71–75 (Marcia W. Baron et al. eds., 1997); Swisher, *supra* note 4, at 653.

205. Baron, *supra* note 204, at 71. False positives refer to instances where a contradiction appears, yet the maxim seems intuitively permissible. False negatives refer to instances where no contradiction is detected, but the maxim appears to be wholly inadmissible.

impossibility."[206] In many cases, this would appear to be a nearly impossible empirical inquiry, which is especially strange given Kant's emphasis on the rational over the empirical.

Applying the contradiction in conception test yields practical limitations, but Kant's theory is mostly relevant to the process of adjudication because it embodies the spirit of reason itself.[207] The categorical imperative contains basic assumptions that help discern moral law from personal preference. For example, universalizability, treating others as you wish to be treated, and reasonableness appear to be unobjectionable guidelines for proper adjudication.[208] Although Kant's moral theory may serve a limited purpose, the judge should nevertheless adjudicate with the aforementioned principles in mind.

c.   Law As Integrity Revisited

Although the categorical imperative may prove inadequate to determine the outcome of many judicial decisions, it is important for the judge to decide legal issues with practical reasoning. From a descriptive standpoint, Dworkin's theory of the law as integrity mostly captures the importance of practical reasoning in the law.[209] One can view principles as the ever-evolving practical solutions to social, moral, and economic problems.[210] Furthermore, the law itself is a continuous evolution of principles, rules, and legal precedents. When the correct procedure is employed, the judge should always find the "right" answer.[211]

Dworkin's theory presents a comprehensive analysis of how the judge might employ practical reasoning to reach the correct answer in hard cases. Dworkin's problem, however, lies in the epistemological and metaphysical justifications for the tools of practical reasoning that he utilizes.[212] Where do principles come from? More importantly, why must the judge *act* according to the obligations imposed by principles? Dworkin resorts to a sort of quasi-realism to answer these questions, which exposes him to various critiques of moral realism.[213] The true value of a constructivist theory of adjudicative jurisprudence is that it captures Dworkin's intricate description of the judicial process while avoiding the pitfalls of moral realism. Before considering the normative sources of a judge's moral obligations, it is important to consider a threshold objection to a constructivist theory of adjudicative jurisprudence.

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206.   *See* Swisher, *supra* note 4, at 653.
207.   *See id.* at 653–54.
208.   *Id.*
209.   *See supra* Part II.C.3.
210.   *See* Korsgaard, *supra* note 141, at 115–16.
211.   *See supra* Part II.C.3.
212.   *See supra* Part III.A.2.
213.   *See supra* Part III.A.2.

2.   Easy Cases

One might immediately object to a constructivist theory of adjudicatory jurisprudence on the ground that it offers an overly complex description of the law, particularly considering that most cases are easy.[214] Most cases do not require a judge to exercise the type of strong discretion that Dworkin objected to.[215] For example, in a typical statutory rape charge, the judge would simply apply the appropriate strict liability statute to the facts.[216] This process of adjudication is almost mechanical, for the judge simply consults the rule and determines whether the age of the victim met or exceeded the statutory age of consent. After observing the simplicity of this process of adjudication, one might ask where the complex process of practical reasoning entered the picture. In other words, why do we need an elaborate constructivism to explain easy cases? Furthermore, why is constructivism descriptively useful when the vast majority of cases need not rely on it? Such questions suggest that a positivist conception of the law is correct, for "judges can . . . identify the law and apply it without reference to considerations about what the law ought to be in the circumstances."[217]

The argument that an overly complex theory of constructivism can only apply to hard cases misunderstands the foundation upon which constructivism lies. Adjudication of easy cases still follows the same process of practical reasoning employed in hard cases, just on an easier scale.[218] Although hard cases might require an elaborate application of practical reasoning, there is nothing inherently complex about practical reasoning itself. Every matter of adjudication requires the resolution of a problem, which is exactly what practical reasoning is used for. If the problem is not complex, then an analytical application of a rule sufficiently resolves the practical problem at hand.[219] Furthermore, one could argue that reason itself is a constructed normative concept, meaning that even when the judge appears to be making "simple" rulings, he or she indirectly relies on the previously constructed concept of analytical reason to reach a decision.[220] If various normative principles have been previously con-

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214.   That is, most cases only require judicial discretion in the weak sense. This assertion raises a novel threshold question beyond the scope of this Note. Many legal scholars of the critical legal studies movement argue that the law is radically indeterminate, meaning that the very acknowledgement of easy cases is a conceptual misnomer. *See generally* Solum, *supra* note 8.

215.   *See supra* Part II.C.2.

216.   *See* 65 AM. JUR. 2d Rape § 11 (2010).

217.   ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 95 (2d ed. 2005) (emphasis omitted).

218.   *See* Korsgaard, *supra* note 141, at 117 ("Theories will vary in how extensively constructivist they are, because different normative 'objects' are constructed in different constructivist theories.").

219.   Dworkin responds to the same criticism in a similar fashion, arguing that law as integrity applies to easy cases when any competent interpretation of law requires obvious application of an applicable rule. *See* DWORKIN, *supra* note 94, at 265–66.

220.   *See* Korsgaard, *supra* note 141, at 117–18. *But see* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 17 (1998) (arguing that the consideration of reasons as *constructed* normative concepts is circular).

structed, the case is easy because all the hard work has already been done.[221]

D.   The Normative Question and the Law

Now that the threshold objection to constructivist jurisprudence has been overcome, we can explore the normative sources of a judge's moral obligation. A constructivist theory of adjudicative jurisprudence can only work if the sources of normativity can be identified from a nonrealist perspective. It has already been shown how constructivism and procedural realism can justify moral and legal principles from a nonrealist perspective, but it has not been shown why a judge must act according to those principles. If we are to fully develop a theory of adjudicative jurisprudence, we must pinpoint the normative sources of the obligation to follow moral and legal principles.

1.   The Problem of Action

a.   Definition of "Ought"

A significant problem in the philosophy of action arises when one discusses why a judge "ought" to do anything.[222] When one claims that a judge "ought" to adhere to moral principles, it is ambiguous whether this deontic expression serves as a simple prescription, or whether it refers to an existing set of norms.[223] If "ought" is a simple prescription, then a judge need not consider any sense of obligation to be binding.[224] On the other hand, if "ought" just describes a set of norms, then there is no prescriptive quality for the judge to obey or disobey.[225] Although a complex analysis of this problem is well beyond the scope of this Note, we will assume for our purposes that the term "ought" has both a prescriptive quality *and* describes a set of norms that the judge must obey.

b.   An Intuitive Response

Some scholars argue that one who asks, "Why ought I be moral?" misunderstands the very nature of morality.[226] In fact, "[t]o ask this question is to suggest that one has some rationally intelligible alternative to being engaged with morality. But one has no such alternative. It is part of human nature to be engaged with morality . . . ."[227] This claim, howev-

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221.   *See* Korsgaard, *supra* note 141, at 117–18. This shows not only why easy cases are not problematic for constructivism, but how constructivism helps differentiate hard cases from easy cases.

222.   *See* Eugenio Bulygin, *Norms, Normative Propositions, and Legal Statements*, *in* 3 CONTEMPORARY PHILOSOPHY: PHILOSOPHY OF ACTION 127, 127 (Guttorm Fløistad ed., 1982).

223.   *Id.*

224.   *See id.*

225.   *See id.*

226.   *See, e.g.*, John Gardner, *Nearly Natural Law*, 52 AM. J. JURIS. 1, 2 (2007).

227.   *Id.*

er, conflates the process of identifying moral obligations with the normative source of those obligations. Although the process of identifying categories of moral obligation may be unavoidable,[228] acting according to an identified obligation may not be. Humans do not always act rationally, and though someone may recognize a moral obligation, some weakness of will may prevent acting according that obligation.[229] For example, a soldier who recognizes a moral obligation not to abandon his or her platoon may nevertheless retreat in a moment of cowardice. Although a judge might be less likely to succumb to some weakness of will when drafting an opinion, there remains a need to pinpoint the sources of the obligation to *act* morally.

2. Practical Identity and the Judge

Korsgaard offers a compelling argument that identifies the sources of moral obligation.[230] Korsgaard asserts that as fully reflective agents we not only endorse specific principles, but we must conceive of ourselves as the *type* of person who would endorse such principles.[231] In other words, fully reflective agents cannot *just* endorse a principle; they must also endorse a conception of their own identity as the type of person who would endorse such a principle.[232] Korsgaard defines this conception as one's "practical identity" and claims that "without it you cannot have reasons to act."[233] One's practical identity serves as a baseline for decision making, since one may endorse or reject personal impulses by determining whether it is consistent with one's practical identity.[234]

This line of argument is highly relevant to a theory of adjudicative jurisprudence, for being a judge may in itself be a conception of one's practical identity. When judges must endorse a principle, they might ask themselves, "Am I the type of person who endorses this principle?" Hopefully, the fact that one is a judge has a significant impact on the construction of practical identity. To identify one's self as "judge" or "adjudicator" typically entails a conscious endorsement of normative concepts embodied by the profession such as fairness, justice, truth, and morality.[235] Judges, therefore, cannot merely identify moral concepts; they must

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228. *See supra* Part III.C.1.b.
229. *See* David O. Brink, *The Significance of Desire*, *in* 3 OXFORD STUDIES IN METAETHICS 5, 38 (Russ Shafer-Landau ed., 2008).
230. *See* MICHAEL E. BRATMAN, *Review of Korsgaard's* The Sources of Normativity, *in* FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 265, 266–67 (1999).
231. *Id.* at 266; KORSGAARD, *supra* note 104, at 120.
232. BRATMAN, *supra* note 230, at 266.
233. KORSGAARD, *supra* note 104, at 120.
234. *Id.*
235. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 138 (1998) ("Decisions about justice are not assertions of personal preferences, nor are they applications of ordinary morality. They are legal judgments grounded in the methods and sources of authority of the professional culture.").

act according to those concepts in fulfillment of their practical identities.[236]

Although one would hope that most judges endorse a conception of their practical identity that involves commitment to a moral obligation, it is certainly possible that a judge simply does not identify with the typical normative concepts associated with being a judge. For example, a bigoted judge may find that his or her racist beliefs supersede any conception of fairness in the construction of his or her practical identity. Moreover, the content of one's practical identity is contingent upon shifting beliefs, which means a sense of obligation to act morally may be unstable.[237] For example, an aging judge may care less about his or her profession, meaning his or her practical identity has less force, thus alleviating a sense of obligation.

Regardless of the contingency of one's practical identity, an obligation to act morally comes from the judge's own humanity.[238] For Korsgaard, rational reflection may cause judges to reconsider their practical identities.[239] What is not contingent, however, is that one must be governed by *some* conception of practical identity, "[f]or unless you are committed to some conception of your practical identity, you will lose your grip on yourself as having any reason to do one thing rather than the another—and with it, your grip on yourself as having any reason live and act at all."[240] The implication of this necessity is that at the most basic level judges must endorse the practical conception of their own *humanity*. It is impossible to conceive of a practical identity where one does not value one's own humanity. For Korsgaard, to value yourself as a human being is to have a moral identity, which rationally requires valuing others' humanity.[241] Whereas most actions spring from one's "contingent and local" identities, the normative force of those actions spring from conception of our own humanity.[242] Thus, "all value depends on the value of humanity," meaning "[m]oral identity and the obligations it carries with it are therefore inescapable and pervasive."[243] The fully reflective judge, therefore, must be cognizant of self-humanity, which entails recognition of an obligation-imposing moral identity.

E.   *Summary of Analysis*

The purpose of this Note's analysis is to show how Korsgaard's philosophy functions as a response to criticisms of Hart and Dworkin and as an independent theory of adjudicative jurisprudence. Hart's positivism

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236.   *See* KORSGAARD, *supra* note 104, at 120–21.
237.   *See id.* at 120.
238.   *Id.* at 121.
239.   *Id.* at 120.
240.   *Id.* at 120–21.
241.   *See id.* at 121–22.
242.   *Id.* at 121.
243.   *Id.* at 121–22.

presents a risk of moral nihilism, for the complete separation of law and morals strips the judge of his or her moral agency.[244] Dworkin's theory, though descriptively accurate, fails to account for the sources of normative principles without endorsing some type of moral realism.[245] Constructivism captures Dworkin's intricate description of the law while avoiding the pitfalls of moral realism. Constructivism also provides a method for adjudicating both hard and easy cases while identifying the judge's moral obligations.

IV. RECOMMENDATION

A constructivist theory of adjudicative jurisprudence helps to recognize and legitimize the sophisticated role of the judge without compromising the principle of objectivity in the law. The resurgence of mechanical jurisprudence in recent Supreme Court confirmation hearings drastically oversimplifies the process of adjudication, while reducing the law's objectivity to a legal fiction. Judges cannot simply view themselves as umpires of the law, for the law is a complex web of principles that requires much more than the application of rules. Endorsing the myth of mechanical jurisprudence compromises the integrity of the legal system, because many will see the judge as a judicial activist wearing a mask of objectivity. Though not addressed specifically in this Note, the normative force of the law is critical for a functioning society.[246] We want a judiciary, therefore, that is both objective and trustworthy—traits embodied by constructivism.

Although some consider philosophy to be a wholly impractical intellectual pursuit,[247] constructivism can be a source of tremendous practical value for the judge. First, the judge can actually use Kantian methods of practical reasoning to identify moral boundaries in hard cases. Constructivism also emphasizes the importance of framing legal issues, which the judge can incorporate into the decision-making process. Second, one could see the resurgence of mechanical jurisprudence as a preemptive political response to a future charge of judicial activism. Activism, however, is an overly broad term that may encompass judicial actions that are unjustifiably stigmatized. For example, deciding a case based on

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244. *See supra* Part III.A.1.
245. See *supra* Part III.A.2.
246. *See, e.g.*, Austin, *supra* note 18, at 24.
247. *See* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1998) ("Moral theory is not something that judges are, or can be, made comfortable with or good at, it is socially divisive, and it does not mesh with the actual issues in cases."). *But see* Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1792 ("[T]heory's influence does not require pervasive ethical change: it can lead to changes in laws and institutions that have a practical effect even when people on the whole remain recalcitrant."). Furthermore, Kant himself thought theorizing about judgment produces more theory, not judgment. Hamish Stewart, *Is Judgment Inscrutable?*, 11 CAN. J.L. & JURIS. 417, 417 (1998). Still, there is value to moral theorizing even if there are no immediate practical implications. *See generally* Jason Brennan, *Beyond the Bottom Line: The Theoretical Aims of Moral Theorizing*, 28 OXFORD JOURNAL OF LEGAL STUDIES [O.J.L.S.] 277 (2008).

moral obligation may be objectionable, because it appears as if the judge imbues personal preference into the law. Constructivism, however, teaches us that the appeal to morality is wholly objective. Thus, the judge's appeal to morality does not imbue personal preference into the law; it merely recognizes that the dictates of practical reason are still controlling in the context of adjudication.

Although this Note is not meant to be a comprehensive analysis of the process of adjudication, there may be some immediate conceptual concerns raised against a constructivist theory of jurisprudence. Most of the criticisms that apply directly to Korsgaard would carry over. For example, some critics claim that Korsgaard's very framing of the normative question is flawed.[248] Furthermore, criticisms concerning the use of practical identity to identify the sources of moral obligation are likely to be raised. Regardless of these criticisms, this Note is meant to draw attention to the importance of analyzing the sources of moral and legal principles. The debate between Hart and Dworkin has grown stale as a matter of descriptive analysis. This may be partially due to the lack of a fully realized theory of normativity. Future inquiries into jurisprudence, therefore, should focus on the sources of normativity, legal principles, and moral obligations—a type of metajurisprudence that will enhance our knowledge of the law as a whole.

V. CONCLUSION

This Note demonstrates the need to develop a new theory of adjudicative jurisprudence that describes both the process of judicial reasoning and the sources of moral and legal obligations. The Hart/Dworkin debate dominated the field of jurisprudence in the second half of the twentieth century, but both theories contain fundamental flaws. Constructivism is an attempt to show how judges might utilize practical reasoning to both adjudicate and construct obligation-imposing moral principles. When the tools of practical reasoning are employed in the correct manner, we have a theory of jurisprudence that is sophisticated, determinate, moral, and objective. Though constructivism may face immediate objections, this Note, if anything, attempts to shift the focus of adjudicative jurisprudence from stale descriptive theories to inquiries exploring the sources of normativity in the law.

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248.   Silverstein, *supra* note 165, at 29.