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IS THE RULE OF RECOGNITION A RULE?

Anthony J. Sebok*

I. INTRODUCTION

One of Fred Schauer's most interesting and important contributions to American jurisprudence has been to draw our attention to the connection between the theory of rules and legal positivism.¹ Schauer argues that a legal system which adopts his model of rule-based decisionmaking is fundamentally positivist. In this Article I shall argue that legal positivism cannot be rule-based in the way that Schauer believes, and I shall argue that this is a conclusion that does not threaten either Schauer's theory of rules or his commitment to positivism.

My argument will proceed as follows. First, I will review Schauer's theory of rules and I will show why Schauer believes that a rule is a form of "entrenched generalization." I will then briefly review modern theories of legal positivism and establish that every modern positivist, including Schauer, believes that every legal system has a "rule of recognition." Next, I will show how Schauer's theory of rules repro-

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duces itself in his account of the rule of recognition. As we will see, Schauer's positivism, including his account of the rule of recognition, has come under serious attack from other positivists such as Jules Coleman. I will then argue that the very feature of Schauer's positivism upon which his critics have focused—the "limited domain thesis"—is really more a part of his theory of rules than his positivism. I will then argue that Schauer does not think that the rule of recognition is a rule, and I suggest that if that is the case, Schauer's theory of rules should be taken out of his account of the rule of recognition. I conclude this article by arguing that if the ultimate test for law is seen as an entrenched generalization but not as a rule, Schauer can defend the limited domain thesis on grounds that meet the objections of his positivist critics.

II. SCHAUER'S THEORY OF RULES

Schauer's analysis of rules begins with the claim that all rules are generalizations. A generalization, according to Schauer, is the act of connecting a particular (thing or action) with a category that contains the particular and at least one other particular.2 Schauer distinguishes generalizations into two types: descriptive and prescriptive. Descriptive generalization connects a particular with a category that tells us something salient (however trivial) that the particular shares with at least one other particular. For example, saying that "Angus the terrier is a dog" places Angus the terrier into a category (dogs). The act of generalization works—that is, the category "dogs" is salient—because there is at least one other particular which shares the category with Angus (for example, Bonnie, the collie). If for some very strange reason we knew that only Angus possessed the feature that connected him to the category "dog," then the category "dog" would not be salient with regard to Angus, and the statement "Angus is a dog" would not be a descriptive generalization.3

Two features of descriptive generalization are worth noting. First, as Schauer stresses, descriptive generalizing is a contingent activity in which choices must be made.4 Particulars can be connected to a variety of categories, and the selection of a category will turn on the ends to which the generalization will be used. For example, by saying that Angus is a dog, I have actively made a choice by selecting the category "dogs." Second, descriptive generalization requires the "suppression" of the categories not selected. According to Schauer, a de-

3 Id. at 17.
4 Id. at 21.
scriptive generalization "suppresses others, including those marking real differences among the particulars treated as similar by the selected" category.\footnote{Id. at 22.} For example, by saying that Angus is a dog and Bonnie is a dog, I suppress the fact that Angus is a terrier and Bonnie is not.

A prescriptive generalization connects a particular with a category by identifying a causal relevancy between the particular and the category that is shared by at least one other particular.\footnote{Id. at 26.} For example, saying "Angus is a threat to babies because Angus is a dog" describes a causal relevancy (Angus's dogness) between a particular (Angus) and a category (threat to babies). The act of generalization works—that is, the category "threat to babies" is salient—because there is at least one other particular which shares the same causal relevancy with Angus (for example, Bonnie, the collie). Schauer calls the category in a prescriptive generalization its "justification" since it always described some "evil sought to be eradicated or the goal sought to be served."\footnote{Id.}

Connecting the particular to a category in this example of prescriptive generalization required a choice, just like in the earlier example of descriptive generalization. Angus's dogness was chosen because it seemed the most salient causal relevancy given the justification at issue. However, just as with descriptive generalization, the selection of a causal relevancy suppresses other logically possible relevancies.\footnote{Id.} Furthermore, the "causal relevancy" which connects the particular with the category (justification) is obviously itself a descriptive generalization. The set of logically salient descriptive generalizations will always be much larger than the set of causally salient prescriptive generalizations. For example, while the descriptive generalization "Angus is hairy" is correct, a prescriptive generalization that connected Angus with the justification "threat to babies" based on the causal relevancy of Angus's hairiness would be incorrect (unless, of course, babies are allergic to Angus's hair). Therefore, the justification of the prescriptive generalization determines, or at least limits, the range of descriptive generalizations that can be selected as the salient causal relevancy.

We can now move from Schauer's discussion of generalization to his definition of a rule. A prescriptive rule (which is the only type of rule discussed by Schauer) is a synthesis of descriptive and prescriptive generalization, which includes a justification in the causal sense as well as in the logical sense. The set of logically salient descriptive generalizations will always be much larger than the set of causally salient prescriptive generalizations. For example, while the descriptive generalization "Angus is hairy" is correct, a prescriptive generalization that connected Angus with the justification "threat to babies" based on the causal relevancy of Angus's hairiness would be incorrect (unless, of course, babies are allergic to Angus's hair). Therefore, the justification of the prescriptive generalization determines, or at least limits, the range of descriptive generalizations that can be selected as the salient causal relevancy.

Some of the suppressed causal relevancies might be possible alternatives such as hairiness or "having sharp teeth," while others will be simply silly, such as "weighing 17 pounds" or "having a Scottish name."
generalization. According to Schauer, every rule has two parts: a factual predicate (for example, "If $x$") and a consequent that applies if the predicate is satisfied. In a prescriptive rule, the factual predicate is the salient causal relevancy framed as a descriptive generalization. The consequent "prescribes what is to happen when the conditions specified in the factual predicate obtain." The factual predicate and the consequent are the product of the relevant prescriptive generalization. For example, let us assume that after a long discussion about Angus, a rule was enacted that said "no dogs allowed near babies." One day Bonnie the collie wants to enter the nursery. It would be easy to apply the rule to Bonnie. We would use the factual predicate to draw a descriptive generalization (Bonnie is a dog) and identify it with the implicit consequent (if Bonnie enters the nursery she will be removed and/or the baby will become ill). "Dogness" had been identified as causally relevant by the prescriptive generalization "Angus is a threat to baby because Angus is a dog." The prescriptive generalization "Angus is a threat to babies because Angus is a dog" may have been the impetus of the rule and may have provided the rule's justification and factual predicate, but each of the rule's elements can be applied long after Angus is forgotten.

The marriage between descriptive and prescriptive generalizations plays an important role in explaining the specific properties Schauer attributes to rules. Although a prescriptive generalization brings the descriptive generalization together with its justification, the prescriptive generalization, as we saw above, often falls out of the picture. Even if the prescriptive generalization was accurate when it was first used to frame the rule, it is likely to become inaccurate. Thus, the causal relevancy between the descriptive generalization and the justification will ultimately become looser and looser, until the rule becomes either underinclusive or overinclusive, or both. For example, the rule "no dogs allowed near babies," excludes very carefully trained (and very useful) seeing eye dogs, and is therefore overinclusive, in that it does not serve its justification as well as a different rule that made an exception for seeing eye dogs. Conversely, because the rule does not exclude very unruly and uncontrollable chimpan-

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9 Schauer, supra note 2, at 23.
10 Id. Schauer notes that the consequent is often implied. In fact, with legal rules, it is almost always implied. See id. (citing Gideon Gottlieb, The Logic of Choice 36, 39 (1968)).
11 Id. at 32-34.
12 The rule does not serve its justification because we can see now (in a way, perhaps, that we could not before) that the prescriptive generalization used to create the rule was not quite correct. It was not Angus's dogness simpliciter that is causally
zees, it is underinclusive, in that it does not serve its justification as well as a rule that included chimpanzees.

The phenomenon of under and overinclusiveness is "largely eliminable," because the world is very complex, and time reveals those complexities only after we have drawn our prescriptive generalizations.13 According to Schauer, a theory of rules can respond to this fact of the world in one of two ways. One choice is to demand a revision in the descriptive generalization of a rule every time one discovers that the prescriptive generalization upon which it is based has fallen out of step with its justification. This approach to rules treats "the existing [descriptive] generalization of a rule as if it arose in conversation, modifying it when and as it is unfaithful to the rule's underlying justification."14 Schauer calls this "the rule of thumb approach" because under it, "rules themselves add nothing, and become continuously defeasible in the service of their generating justifications."15 The second choice is to refuse to revise a rule's descriptive generalization and to apply it "even in those cases in which that generalization failed to serve its underlying justification."16 Schauer calls this the "entrenchment model" because under this approach, "[descriptive] generalizations become entrenched," and the fact that the descriptive generalization fails to serve its underlying justification "would not prompt reformulating the generalization."17

The two approaches diverge in their view of the relationship between a rule's descriptive generalization and its justification. In a "rule of thumb," the descriptive generalization is "transparent": its weight or force is entirely dependent on the predictive generalization that caused it to be selected. One is therefore invited to look beyond the descriptive generalization to the justification that led to the creation of the rule.18 Under the "entrenched generalization" approach, the descriptive generalization is "opaque": it has an "intrinsic weight" that comes from the fact that it is an "instantiation" or "crystallization" of the earlier determination that the descriptive generalization was relevant to the justification, it was Angus's dogness and lack of training and slight utility.

13 SCHAUER, supra note 2, at 50.  
14 Id. at 51.  
15 Frederick Schauer, Rules, the Rule of Law, and the Constitution, 6 CONST. COMMENTARY 69, 75–76 (1989) [hereinafter Schauer, Constitution].  
16 SCHAUER, supra note 2, at 49.  
17 Id. at 42–45.  
18 Id. at 50; Schauer, Constitution, supra note 15, at 76; Frederick Schauer, Rules and the Rule of Law, 14 HARV. J.L. & PUB. POL’Y 645, 648–49 (1991) [hereinafter Schauer, Law].
causally relevant.\textsuperscript{19} The fact that it is now known that the descriptive generalization does not serve its justification does not lessen its weight or make it any less of an instantiation.\textsuperscript{20}

Schauer believes that the “entrenched generalization” model captures what it means to be a rule. Schauer’s reasons for picking the model of entrenchment over its rival, the “rule of thumb,” is partly based on the conceptual analysis that fills out the balance of \textit{Playing by the Rules} and partly on a form of “descriptive sociology” that would have appealed to H.L.A. Hart.\textsuperscript{21} But Schauer also notes that he does not really care what we call the “entrenched generalization” model.\textsuperscript{22} What Schauer does care about, and what is nonnegotiable for him, is that prescriptive generalization takes only one of two forms—either the rule of thumb or entrenched generalization.

The reason that Schauer cares so much about establishing the mutually exclusive nature of these two forms of generalization is because each model provides the foundation for three rival models of decisionmaking that make up the range of choices available to the designer of a legal system. The first model of decisionmaking is called \textit{particularism} because it treats rules as rules of thumb; under this approach, a decisionmaker may always reformulate a descriptive generalization whenever it is either over or underinclusive.\textsuperscript{23} Particularism essentially treats rules as “continuously malleable,” with the conse-

\textsuperscript{19} Schauer, \textit{Constitution}, supra note 15, at 76.

\textsuperscript{20} A vivid example of an instantiation that exists independent of its justification comes from the Talmud. In the story of the Oven of Akhani, a group of rabbis were arguing over whether a particular oven was susceptible to cleanliness. The majority of rabbis said yes and Rabbi Eliezer said no. After much disputation, Rabbi Eliezer appealed to heaven, and a voice came from heaven that said that Rabbi Eliezer was correct. Rabbi Joshua then “arose and quoted a biblical proof-text, ‘[I]t is not in Heaven.’” Rabbi Joshua’s words have been understood as an argument that the rabbis should follow the law that was given by God in Sinai (the Torah), and that they should ignore God (or at least his heavenly voice) if he contradicted the law that he entrenched there. According to one version of the story, God’s reaction to Rabbi Joshua’s answer was to laugh and say, “My children have defeated me, my children have defeated me.” Suzanne Last Stone, \textit{In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory}, 106 Harv. L. Rev. 813, 841 (1993) (quoting \textit{Babylonian Talmud, Baba Mezia} 59b (1961)).


\textsuperscript{22} If we wanted to, we could stipulate that the “rule of thumb” model captures the true meaning of the word “rule,” in which case Schauer would no longer be attracted to rules and would instead support the entrenched generalization model under its new name. In fact, suggests Schauer, if we really wanted to be perverse, we could even simply abandon the word “rule” and call the first approach to generalization “Mutt” and the second approach “Jeff.” Schauer, \textit{Constitution}, supra note 15, at 72.

\textsuperscript{23} Schauer, \textit{Law}, supra note 18, at 648.
quence that rules never obstruct or frustrate the decisionmaker. The second model is called decisionmaking by *entrenched generalization*; under this approach the decisionmaker may not reformulate a descriptive generalization even when the decisionmaker knows that applying the generalization will produce the "wrong" result... from the perspective of the justification undergirding the single rule" because of the inevitable problem of under or overinclusiveness. This form of decisionmaking treats rules as "sticky" and therefore as a potential source of frustration to the decisionmaker. Schauer concedes that decisionmaking is rarely a pure case of one or the other model, and that the two models represent ideal points at the ends of a continuum. Thus, decisionmaking in the real world will reflect a blend of particularism and entrenchment. The third model of decisionmaking, which Schauer calls *rule-sensitive particularism*, is not, Schauer insists, merely at the midpoint between the two ends of the continuum. Rule-sensitive particularism requires the decisionmaker to reformulate the descriptive generalization whenever it is under or overinclusive, but only after the decisionmaker has balanced the "value of having a rule" against the gain that would be made from the reformulation. While Schauer recognizes the logical possibility of rule-sensitive particularism, he thinks that the same reasons that would lead a decisionmaker to forbear from treating rules as continuously malleable would apply equally to a decisionmaker who sought to determine, on a case-by-case basis, whether to reformulate the descriptive generalization of any given rule.

In the end, whether one prefers particularism or decisionmaking by entrenched generalization depends on one's feelings about the malleability of descriptive generalizations. In Schauer's mind, a decisionmaking procedure that is wholly particularistic may be a good

24 Schauer, *supra* note 2, at 83.
26 Schauer, *supra* note 2, at 87.
29 Schauer, *supra* note 2, at 84.
decisionmaking procedure, but it is not rulelike. Schauer’s reasons for calling decisionmaking by entrenched generalization “rulelike” are parasitic on the failure of particularism to address the problem of continuous malleability: “[T]he absence of continuous malleability... is the feature that is both a necessary and sufficient condition for the exercise of rule-based decisionmaking.”

Therefore, we can see that focusing on the factual predicate of a rule does not really tell us why entrenched generalization is the source of ruleness. What makes a generalization rulelike for Schauer is not just that its factual predicate is an instantiation or a “crystallization” of a predictive generalization. As Schauer himself notes, a generalization is rulelike when it produces a certain relationship between the factual predicate and its justification.

But this only pushes the question to another level: what sort of relationship confers the quality of “ruleness” upon a generalization? Is it a relationship of entailment, or validation, or identity? According to Schauer, the appropriate type of relationship is generated when there is pressure placed upon the factual predicate by the rule’s justification and the factual predicate resists that pressure.

So, ruleness is not denoted by a fact about the over or underinclusive-ness of a generalization, but the linkage of that fact with the rejection of a specific state of affairs (the reformulation of the rule demanded by the rule’s own justification).

It is not a relation of entailment, but of disjunction: “The form of decision-making that we can call rule-based, therefore, exists insofar as instantiations resist efforts to penetrate them in the service of their justifications.”


31 SCHAUER, supra note 2, at 84.

32 "We can recast the idea of a rule into a relationship." Id. at 76; see also Schauer, Constitution, supra note 15, at 76; Schauer, Law, supra note 18, at 649.

33 SCHAUER, supra note 2, at 84 (emphasis added).

34 See Schauer, Formalism, supra note 30, at 535 (“[I]t is exactly a rule’s rigidity, even in the face of applications that would ill serve its purpose, that renders it a rule.”).

35 SCHAUER, supra note 2, at 76 (emphasis added). The use of the active voice, even when applied to something as abstract as a fragment of a linguistic structure, suggests that when a rule is at work, a decision is being made by the rule’s applier.
Schauer's observation that a rule is different from a command helps us understand the crucial role that "resistance" plays in a rule. A command's meaning may be understood without reference to any other norm or reason for action. But, in a rule, the factual predicate is understood as part of a rule only if it is known to be a suboptimal expression of its background justification: "When the crystallization [of the factual predicate] offers at least some resistance to applying the background justification directly to the case at hand, then and only then can we say that the crystallization is a rule." To obey a command, one needs to comply with the content of the command because it is a command, but one need not presuppose a conflict with any other norm. It is the actual tension between an instantiation and its justification that makes a rule rulelike; and, suggests Schauer, to the extent that rules provide reasons for action, those reasons produce the relationship of resistance between a rule's instantiation and its justification.

Schauer's choice of language therefore suggests that he subscribes to a "decision model" of rules. According to the decision model, "when agents adopt rules, they still have the ability not to follow them." Scott J. Shapiro, The Difference That Rules Make, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY (Brian Bix, ed., forthcoming 1998) (manuscript at 7, on file with The Notre Dame Law Review). Shapiro argues that although almost "all the accounts in the [jurisprudential] literature" are versions of the decision model (citing Donald H. Regan, Stephen R. Perry, Heidi M. Hurd, Frederick Schauer, and Joseph Raz), it by no means provides a satisfactory explanation for what it means to follow a rule. Id. at 7-9.

Schauer, supra note 2, at 24 (stating that a rule is different from John Austin's idea of a command).

Schauer, Constitution, supra note 15, at 76 (emphasis added). Larry Alexander has called the phenomenon—factual predicates being unavoidably under and overinclusive—"the gap." Larry Alexander, The Gap, 14 HARV. J.L. & PUB. POL'Y 695, 695-96 (1991). According to my argument, Schauer believes that, rather than being the cause for regret, the gap is a good thing, since without it, rules would not exist. See Schauer, Jurisprudence, supra note 27, at 849 ("[T]he gap is essentially unbridgeable."). I say that Schauer thinks that the gap is a good thing from the perspective of philosophy because it explains why there are rules; but that does not mean that Schauer thinks that rules are necessarily a good thing. See also Schauer, Formalism, supra note 30, at 531. Alexander seems to suggest that only positivist legal theories can support a gap. For example, Alexander argues that Ronald Dworkin's theory of law as integrity cannot accommodate the gap because it cannot explain why and when "the existence of a less than perfect law justifies deviating from what is otherwise morally best." Larry Alexander & Ken Kress, Against Legal Principles, in LAW AND INTERPRETATION 279, 295 (Andrei Marmor ed., 1995) (citing Larry Alexander, Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law, 6 LAW & PHIL. 419, 426-31 (1987)).

Schauer, supra note 2, at 76. Schauer draws a sharp distinction between his theory of rules (how does a rule operate as a reason for action) and his argument for the adoption of rules (when, if ever, should a rule be a reason for action). Id. at 112
III. RULE-BASED DECISIONMAKING AND POSITIVISM

In the Section above we saw that Schauer distinguishes between particularistic decisionmaking and decisionmaking by entrenched generalization, and we saw why Schauer believes that the latter, and not the former, captures the idea of a rule. Clearly, as even Schauer himself recognizes, his concept of a rule covers a much narrower range of phenomena than is typically described by the term "rule" in ordinary language. As I mentioned above, Schauer admits that his reasons for defining ruleness as he does may simply not persuade the reader, although I suspect that his use of the word captures the ordinary language meaning of the term pretty well. The point of Schauer's inquiry into rules has never been primarily to prove that decisionmaking by entrenched generalization fits society's picture of ruleness. The point of his inquiry has been to take the form of decisionmaking he identifies with ruleness and to ask two questions. First, Schauer wants to know to what extent "rule-governed decisionmaking" is present in a given legal system. Second, Schauer wants to determine (or at least discuss) whether a legal system like the American system should incorporate rules. The first is a sociological question. It asks whether a legal system is particularistic or rule-like, and to what degree it is both. The second is a political and legal question. It sets the answer to the first question to one side and asks us to weigh the value of rules in the institutional structures of a legal system.

n.1, 126. This article focuses almost exclusively on the first question. A third question which Schauer almost never addresses is, "In what sense are rules reasons for action?" He basically assumes that they are.

39 Id. at 52 n.18 ("Obviously, my definition is narrower than ordinary language, for ordinary language applies the word 'rule' to a much larger range of phenomena ...") A serious failing of Schauer's "narrow" theory of rules is that it seems incapable of characterizing the "rules" of language.

40 Schauer, Law, supra note 18, at 666 (stating the possibility of descriptive generalization); id. at 678–79 (providing a descriptive account of American law as a system that gives rules "presumptive but not conclusive force"); Frederick Schauer, Constitutional Positivism, 25 Conn. L. Rev. 797, 824 (1993) [hereinafter Schauer, Constitutional Positivism] (contrasting the degree of ruleness in American constitutional law with the degree of ruleness one encounters "the further one moves away from . . . the Supreme Court").

41 Schauer, Law, supra note 18, at 689 ("[I] am emphatically not claiming that rules are always good things to have. I am, however, claiming that rule-based decisionmaking . . . is frequently a good thing, and that it is virtually impossible to imagine a legal system without it.").

42 Schauer, Constitution, supra note 15, at 71; Schauer, Law, supra note 18, at 663; Schauer, Constitutional Positivism, supra note 40, at 825.
Schauer has framed the first question another way: he notes that describing the degree that a legal system is rule-based is simply another way of asking to what extent it is positivist. Schauer recognizes that equalizing of positivism with rules depends on which two definitions of positivism he adopts. The first form of positivism, which Schauer describes as a conceptual account, merely insists that there is no necessary connection between law and morality. The second form of positivism, which Schauer describes as a descriptive account, insists that "the rule of recognition [of the legal system] in any community... must demarcate that community's law from its morality." While Schauer says he does not want to enter into the debate between these two forms of positivism, he is certain that only the second form of positivism has any connection with his account of rules. Schauer thinks that the first form of positivism is incompatible with his account of rules because under it, "a community decision to take as law the ad hoc decisions of one person" could be "accurately described as positivistic." It is important to see why Schauer is committed to this view.

The form of positivism rejected by Schauer is conventionally known as "inclusive" legal positivism or "incorporationism." It is based on two claims. "[F]irst, that it is not necessary in all legal systems that for a norm to be a legal norm it must possess moral value... and second, that what norms count as legal norms in any particular society


45 Schauer, supra note 2, at 198.

46 Id.; see also Schauer, Law, supra note 18, at 666 n.41 (stating that if the first form of positivism is the correct account of positivism, "then so much the worse for positivism," since it cannot explain what the theory of rule-based decisionmaking explains, which is "how a limited set of pedigreable materials appears to dominate the legal consciousness").

47 Schauer, supra note 2, at 198.

is fundamentally a matter of *social conventions*." All positivists agree with the first proposition, which has been called the "separability thesis." The incorporationists and their critics disagree over the interpretation of the second proposition. According to incorporationists, nothing in the second proposition imposes any constraint on the substance of the social conventions that set out the conditions of legality in any given society. The incorporationist thinks that any rule that is described by convergent social behavior can be used as a test of a society's legal norms—for example, its "rule of recognition." For example, the rule "x is a legal norm if and only if it is a dimension of justice or morality in the best critical moral theory" could be a rule of recognition if it were true that, as a matter of social fact, this rule was accepted by the relevant legal officials.

It is important to understand that Schauer does not reject incorporationism because it would allow the rule of recognition to employ a moral norm as its factual predicate. He rejects it because under incorporationism the rule of recognition does not operate as a rule. Since, according to incorporationism, the norms of a legal system may be coextensive with all the norms (moral or otherwise) that would normally bind practical reason in a society, only nonincorporationism requires extensional divergence between law and nonlaw in a


52 Hart, *supra* note 21, at 94; see also Coleman, *Authority and Reason*, *supra* note 48, at 294-95.


positivist legal system. Schauer calls the idea that in every legal system there must be an extensional divergence between a society's legal norms and its nonlegal norms the "limited domain thesis," and he is correct that it clearly separates incorporationism from nonincorporationism. The next step in Schauer's argument is easy. He points out that rule-based decisionmaking presupposes the limited domain thesis: "[B]oth the idea of a rule and the idea of positivism as a limited set of norms entail some extensional divergence between the set of results indicated by a set of rules, . . . and the set of results indicated by the full array of norms otherwise accepted by some decisionmaker."

Schauer therefore sees many parallels between nonincorporationism and his theory of rules. In the same way that an entrenched generalization is unavoidably over or underinclusive relative to its justification, a positivist rule of recognition must limit the law to a set of norms that is more narrow than the set of norms which would otherwise form the basis of a conscientious "all things considered" judgment. Furthermore, notes Schauer, in the same way that rules sometimes generate an answer that is wrong, in light of the purpose or point of the rule, sometimes the answer picked out by "the rule of recognition [will] be the wrong answer from the perspective of the background justifications for the legal system as a whole." Finally, Schauer stresses that it is important to see that the limited domain thesis is really a claim about "systematic isolation," not the separability of law and morality. Nonincorporationism would take the same view of the necessity of extensional divergence regardless of whether the set of nonlegal norms from which the rule of recognition was barred concerned morality, economic efficiency, or aesthetic beauty. In this sense, nonincorporationist positivism is rulelike because it is denoted by the presence of a disjunctive relationship between the norms iden-

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55 Schauer, supra note 2, at 198; Schauer, Law, supra note 18, at 666–67.
57 Schauer, Law, supra note 18, at 667; see also Schauer, supra note 2, at 199.
58 This is a logical truth about the limited domain thesis. It does not mean that a legal system should be entirely positivist, or that a judge in a positivist system should, all things considered, follow all relevant legal rules all the time. See Schauer, Constitutional Positivism, supra note 40, at 825; Frederick Schauer, Critical Notice, 24 Can. J. Phil. 495, 504 (1994) [hereinafter Schauer, Critical Notice] (reviewing Robert Shiner, Norm and Nature: The Movements of Legal Thought (1992)); Frederick Schauer, Fuller's Internal Point of View, 13 Law. & Phil. 285, 299–300 (1994) [hereinafter Schauer, View]; Frederick Schauer, The Questions of Authority, 81 Geo. L.J. 95, 102 (1992).
59 Schauer, supra note 2, at 199.
60 Id. at 198–99.
tified by the rule of recognition and the community’s remaining non-legal norms, and not by any particular constraint on the content of the rule of recognition.

There is a problem with Schauer’s association of rule-based decisionmaking with positivism. The problem is that the rule of recognition is not a rule under Schauer’s theory of rules. According to Hart, the rule of recognition is a social rule (which parallels more or less Schauer’s category of prescriptive rules) because it is an analysis of what people do when they “are following a rule,” as opposed to a generalization about what people “do as a rule.”

A social rule exists when (i) a practice exists; (ii) deviations from the practice engender criticisms; and (iii) the existence of the practice is seen as a good reason for the criticism by the criticizers and the criticized. To be sure, there are important points of overlap between Hart’s theory of social rules and Schauer’s theory of rules as entrenched generalizations. Hart’s idea of a practice serves the same role as Schauer’s idea of a factual predicate, in that compliance with a practice in a social rule is not dependent or motivated by reasons external to the rule. For Hart, if the social rule provides a reason to conform to the norm described by a practice, it can only be because of the fact that it is a convergent social practice, and not because of the content of the norm.

The practice described by the social rule is a “crystallization” of a generalization of which the practice may or may not still be “true” or valid—just like the factual predicate entrenched in a Schauerian rule.

On the other hand, there are two places in which there is a divergence between Hart’s theory of social rules and Schauer’s theory of rules as entrenched generalizations. As we will see below, Schauer takes a very narrow view of Hart’s claim that the rule of recognition must be accepted from “an internal point of view,” and Hart disagrees with Schauer’s claim that the rule of recognition must be based upon a justification broader than the rule itself. It is because of these two points of disagreement that the rule of recognition is not a Schauerian rule.

A. The Rule of Recognition and the Internal Point of View

Every social rule is made up of two parts: “[T]he description of what individuals do as a rule and “their being accepted from an inter-

61 Coleman & Leiter, supra note 48, at 245-46.
62 Hart, supra note 21, at 54-56, 86-88.
63 Hart’s “social rule is constructed from convergent social practices; its content, in other words, is given by what people do . . . .” Coleman, Rules and Social Facts, supra note 43, at 706.
nal point of view." Thus, the rule is "accepted" by the community as evidenced by the fact that it would be considered appropriate to criticize someone for failing to do what the practice requires. In the case of the rule of recognition, the internal point of view "is itself expressed in convergent behaviour: patterns of justification and criticism" among the society's legal officials. Furthermore, it is often thought, although not uncontroversially, that one function of the internal point of view is to explain the normative force of the rule of recognition.

Schauer does not presuppose the internal point of view in his definition of rule-based decisionmaking, and there is nothing in Section II that suggests that an entrenched generalization must be "accepted" by a relevant community in order for it to be a prescriptive rule. Someone could issue a rule to another person without anyone else actively "accepting" the predicate of the rule. Nonetheless, Schauer clearly recognizes that the rule of recognition must be a "social" rule since legal systems are social institutions.

See id. at 299 (arguing that despite the assumption by almost all positivists that the rule of recognition is authoritative because it is a social rule, the internal point of view "is not up to the task" of transforming "what would otherwise be a non-normative description of a convergent practice... into a reason-giving practice"). Schauer questions Coleman's claim that all positivists believe that the rule of recognition is authoritative. Schauer thinks that asking about the source of the rule of recognition's authority is "ask[ing] the wrong question." Schauer, Thick and Thin, supra note 54, at 10.

For example, in an essay on constitutional amendment, Schauer proposes and offers a short constitution that authorizes that Frederick Schauer is the sovereign of the United States. The document is valid by its own terms. Schauer asks how we know that the Schauerian constitution is not the rule of recognition for the United States. His answer is that

[w]e know [this]... because of what we know empirically and factually about the world, because we know that one [the real Constitution] is efficacious and the other not, because we know that one document has been accepted by the American people, by American officials, and by American judges, while the other has been accepted by no one, not even its author.

Frederick Schauer, Amending the Presuppositions of a Constitution, in Responding to Imperfection 145, 153 (Sanford Levinson ed., 1995) (emphasis added) [hereinafter Schauer, Presuppositions]; see also Schauer, supra note 2, at 120 (agreeing with Kelsen and Hart that the existence of the "ultimate" rule of recognition is a matter of social fact).
the community's legal officials.68 But the fact that the rule of recognition must be a practice which legal officials “do as a rule” does not mean that they “accept” the practice in a normative sense. Schauer thinks that nothing in Hart’s idea of the rule of recognition entails “acceptance” in anything but a technical “logico-linguistic sense.”69 According to Schauer, a judge can recognize the normative significance of law (in that it may provide reasons for action to others) without believing that law in fact provides anything other than prudential reasons to act.70 Legal officials criticize others and themselves for all sorts of reasons other than the reason that they think the law has normative significance to them.71 Thus, a Schauerian rule of recognition can account for the internal point of view by taking the position that “acceptance” of a practice under a social rule may have no normative significance.72

B. The Rule of Recognition and Its Justification

As we saw in Part II, Schauer believes that every prescriptive rule has a factual predicate and a justification. The justification is the basis upon which the factual predicate of the rule was selected, and, as we saw above, it is a feature of rules that the factual predicate is “ineliminably” under or overinclusive of its justification. There is no analog to the element of “justification” in Hart’s theory of social rules. If a social rule is a product of convergent social practices, there is no reason to assume that the norm described by the social rule is directed towards a single “evil sought to be eradicated or the goal sought to be served.” Furthermore, were the norms described by the social rule directed towards a single goal or end, there is no reason to assume that Hart would think that the rule is necessarily under or overinclusive. Finally, nowhere does Hart even suggest that if the social rule were over or underinclusive relative to its hypothetical justification, it

68 See, e.g., Coleman, Authority and Reason, supra note 48, at 298 (on the subjects of the rule of recognition). Schauer thinks that it is at least possible, if not likely, that the subjects of the rule of recognition are only the legal system’s judges. See Schauer, Thick and Thin, supra note 54, at 11.

69 Schauer, View, supra note 58, at 288. Schauer suggests elsewhere that he endorses an even weaker sense of acceptance which does not require the convergence of a social practice of criticism at all. See Schauer, supra note 2, at 121.

70 See Schauer, Critical Notice, supra note 58, at 500–01. Schauer calls this the “fact of normativity.” Id. at 506.

71 Schauer, Thick and Thin, supra note 54, at 11–12.

72 Id. at 13 (“[T]he existence of the rule of recognition is one thing, its desirability or morality quite another.”). This is consistent with Raz’s view. See Joseph Raz, Practical Reasons and Norm 193–99 (2d ed. 1990).
would be in some way antithetical to the very idea of a social rule for a 
rule-follower to revise or amend the content of the social rule on the 
theory that others will converge upon the new description. 73 In short, 
ownhere does Hart adopt Schauer’s view that the essence of ruleness 
is the entrenchment of a generalization against the inevitable pressure 
brought against the generalization by its original generative 
justification.

1. The Pedigree Constraint Causes Trouble

The complete absence of anything playing a justificatory role in 
Hart’s theory of social rules explains why Coleman believes that 
Schauer’s limited domain thesis has no role to play in Hart’s rule of 
recognition. 74 According to the limited domain thesis, “the law must 
be only a part of [a] community’s stock of norms.” 75 Coleman argues 
that the limited domain thesis is not entailed by the separability thesis 
because the separability thesis only requires that there be no necessary 
connection between law and morality. The separability thesis says 
nothing about contingent connections between law and morality pro-
duced by the operation of the rule of recognition. 76

Coleman further argues that the limited domain thesis is not en-
tailed by the fact that the rule of recognition is a social convention. 77 
As Coleman notes, Schauer believes that the limited domain thesis 
entails the claim that whether a norm satisfies the rule of recognition 
“is a matter of [its] pedigree.” 78 According to the pedigree constraint, 
the test under which a norm is recognized by the rule of recognition is 
a matter of simple, uncontroversial, and empirically verifiable fact. 79 
Coleman argues that there is no reason to limit the rule of recogni-
tion to pedigree standards, and therefore the limited domain thesis 
must be wrong. Coleman’s argument turns on the claim that 
although the rule of recognition is a social fact, its content is not lim-

73 This is the reason why Hart rejected the claim made by Fuller that positivism 
was “formalistic.” See Hart, supra note 50, at 612 (“It does not follow that, because the 
opposite of a decision reached blindly in the formalist or literalist manner is a deci-
sion intelligently reached by reference to some conception of what ought to be, we 
have a junction of law and morals.”).

74 Coleman’s view is that Hart implicitly embraced incorporationism in the first 
edition of The Concept of Law and explicitly embraced it in his postscript to the second 

75 Coleman, Rules and Social Facts, supra note 43, at 723.

76 Id.

77 Id. at 708.

78 Id. at 719 (citing Schauer, Law, supra note 18, at 666).

79 Id.
it to tests comprised of simple, uncontroversial, and empirically ver-
ifiable fact like a pedigree standard. Coleman argues that even if we
assume, for the sake of argument, that one purpose of the rule of
recognition is to identify the law (at least on behalf of the legal sys-
tem's officials), there is no reason to conclude that a rule of recogni-
tion could not serve that function by adopting a moral standard as its
test for law.80 The job of identifying the law—one of the epistemic
functions of the rule of recognition—can be adequately performed by
standards that are complex, controversial, and normative: “Certainly
in communities that share some fundamental set of values, not only in
the abstract, but in concrete particulars as well, reference to a norm’s
value as a condition of its legality need not render the rule epistemi-
cally inadequate or essentially controversial.”81 Therefore, even if one
grants that the conditions of legality contained in the rule of recogni-
tion must be epistemically adequate (which Coleman ultimately de-
nies), there is no reason to believe that the test for law in a community
could not be a moral standard, and certainly no reason to believe that
the test for law must include only pedigree standards.

2. Why Does Schauer Need the Pedigree Constraint?

Schauer's embrace of pedigree standards is driven by the limited
domain thesis, and the limited domain thesis is deeply interrelated
with Schauer's view that every rule is an instantiation of a justification
which the rule inevitably serves suboptimally. But in the case of the
rule of recognition, it is hard to see what Schauer could possibly mean
by the term “justification.” It is easy to see what is the justification of a
rule like “no dogs allowed near babies.” Likewise, it is pretty easy to
see the justification of the rule “drive at 55 m.p.h.,” as well as why such
a rule is ineliminably under and overinclusive. All this follows from
the fact that Schauer believes that all rules, including legal rules, arise
“within some theory of justification and exist[ ] only relative to it.”82
But unlike a statute, which may have a legislative history, or even a
common law doctrine, which may have a purpose, such as efficiency
or corrective justice, it is hard to imagine what it would mean for the
rule of recognition to have a justification. The idea of the rule of
recognition—which is probably a society's most complex social fact—

80 This is ultimately not conceded by Coleman, but it is unclear if he would disa-
gree with this claim with regard to judges. See Coleman, Authority and Reason, supra
note 48, at 292 (“We have no reason to believe that a rule of recognition must serve
an identification role.”).
82 Schauer, supra note 2, at 86.
having a single justification seems to assume a view of legal systems which is hard to square with modern experience.\footnote{83}

Occasionally Schauer refers to the "larger values" that a legal system serves, but these references seem more a matter of working through the logical consequences of his claim that every rule has a justification than a serious effort to present a credible candidate.\footnote{84} For example, when Schauer illustrates the connection between positivism and rule-based decisionmaking, he says that

\[\text{[a] positivist view of a legal system takes the legal system as a whole to be the instantiation of its background justification (justice, order, or whatever) and, in rule-like fashion, treats that instantiation as entrenched against efforts to view it as merely transparent to the justifications for the system itself.}\footnote{85}

Looking over this claim (which should seem very familiar by now) we can now notice that while the rule of recognition has the \textit{structure of}...
an entrenched generalization, it is missing part of its substance, namely, a justification to which one could credibly connect the rule of recognition's factual predicate. An immediate consequence of discovering that the rule of recognition has no justification is that the limited domain thesis should no longer be important to Schauer. If no identifiable justification is pressuring the rule of recognition, there is no need to distinguish between legal and nonlegal norms. If there is no need to distinguish between legal and nonlegal norms, there is no need for the pedigree constraint and the problems that it brings.

IV. The Idea of Recognition

In the previous section we saw that the rule of recognition is not a rule according to Schauer. This might seem like an embarrassment for Schauer, since he tries to connect his theory of rules with legal positivism. But it may not be such a bad thing for his overall project if it turns out that the rule of recognition is not a rule. I say this for two reasons.

First, Schauer himself does not think that the rule of recognition is a rule. Schauer admits that he really means the "idea of recognition" rather than "the 'rule' of recognition." Furthermore, it turns out that Schauer thinks that Hart should not have called the ultimate positivist test of law the "rule" of recognition:

In referring to the ultimate rule of recognition as a rule, Hart has probably misled us. There is no reason to suppose that the ultimate source of law need be anything that looks at all like a rule, whether simple or complex, or even a collection of rules... The ultimate source of law, therefore, is better described as the practice by which it is determined that some things are to count as law and some things are not.

As Schauer himself realizes, the statement that the "ultimate" rule of recognition is a rule cannot be reconciled with his own carefully constructed theory of rules. If, as he says, all rules "exist against a background of presuppositions," then it would follow that the ultimate rule of recognition exists against a background of presuppositions. But, as we saw above, unlike a statute, the common law, or even a constitution, there is no "presupposition" behind the ultimate rule of recognition. Thankfully, Schauer does not think that the ultimate rule

86 Id. at 199; see also Schauer, Thick and Thin, supra note 54, at 2 n.7 (citing A.W.B. Simpson, The Common Law and Legal Theory, in LEGAL THEORY AND COMMON LAW 8 (W. Twining ed., 1986)).
87 Schauer, Presuppositions, supra note 67, at 150–51.
88 Id. at 159.
of recognition necessarily exists against a background purpose or norm. Schauer notes that "at the level of determining what the ultimate rule of recognition is, questions of efficacy are central . . . 'The foundation rules of a legal system can never be derived . . . they are a political fact.'" By abandoning the idea that the rule of recognition is rulelike, Schauer is left with a position similar to Hart's, which is that all we can ask about the rule of recognition is "whether a particular community has one." Hart never suggested that the rule of recognition had a "point" or purpose, and if Hart's view entails the conclusion that the rule of recognition is not a rule, Schauer has no reason not to agree.

Second, if the rule of recognition is not a rule, Schauer's reasons for embracing the limited domain thesis are quite different than the reasons he had when he thought the rule of recognition was a rule. Recall that the limited domain thesis says that in every legal system there must be an extensional divergence between a society's legal norms and its nonlegal norms. The reason that Schauer's positivism had to embrace the limited domain thesis was that if the rule of recognition was a rule, there had to be a gap between the norm (or norms) that comprised the rule of recognition and the nonlegal norm (or norms) which made up the justification for the rule of recognition. The limited domain of law was portrayed by Schauer as a set of norms that were set apart from a larger set of norms which were by definition the nonlegal norms. The idea of the pedigree constraint was then introduced to explain what sort of norms could make up the set of legal norms. But as Coleman demonstrated, the argument for the pedigree constraint has no independent merit. But for the limitations set out by the pedigree constraint, it is not clear why the conceptual distinction drawn by the limited domain thesis must also be a descriptive distinction. It would appear therefore that the only reason for insisting on the limited domain thesis is that it is logically entailed by the fact that the rule of recognition is an entrenched generalization. But if the rule of recognition is not a rule, then it is not an entrenched generalization, and if it is not an entrenched generalization, there is no need for Schauer to insist on the limited domain thesis.

I think that the argument of the previous paragraph is correct except for the last sentence. One can make an argument for the limited domain thesis that is not based on the rule of recognition being a rule. The idea of an entrenched generalization may have within it

89 Id. at 151-52 (quoting Ilmar Tammelo, The Antinomy of Parliamentary Sovereignty, 44 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 495, 504 (1958)).
90 Coleman, Authority and Reason, supra note 48, at 294 (paraphrasing Hart).
features which can justify the limited domain thesis for reasons separate from those offered by the idea of a Schauerian rule. Let us begin by recalling that Schauer defines a rule as a relationship between a factual predicate and the rule's justification in which the factual predicate "resists" the justification. It is the resistance by the factual predicate that makes it an entrenched generalization. It is important to pause for a moment and consider what the entrenched generalization resists. As Schauer presents it, resistance occurs in response to the inevitable demand by the justification to reformulate the factual predicate of the rule. In Schauer's view, there will always be pressure on the rule applier to reformulate the rule because the factual predicate will invariably be a suboptimal expression of the justification of the rule. Hence, for Schauer, the threat of "continuous malleability" is a product of the "ineliminable" fact that the justification of a rule will always point to norms that better express the point of the rule than the norm "crystallized" in the rule.

This explanation of entrenched generalization falls apart when the entrenched generalization is the rule of recognition and there is no justification that "ineliminably" points to other norms that will optimize the point of having a legal system. But why does the idea of resistance have to be understood as a relationship between a suboptimal instantiation and an optimizable justification? Under Schauer's theory, the relationship of resistance he identifies as central to the idea of ruleness can occur between norms that are simply dissimilar, and not just between a suboptimal norm and its justification. If the point of entrenchment is that it is how we describe resistance to continuous malleability, then the focus should be on the absence of reformulation and not on the content of the norms that would have replaced the entrenched norm. In an important respect, the contents of the norms that would have replaced the entrenched norm are irrelevant.

If Schauer thinks that resistance by a factual predicate to its justification is essential to the definition of a rule (and I think he does), then I suggest that he modify the rule of recognition (which he admits is not a rule) so that it is based upon a theory of entrenched generalization that is not identical to his theory of rules. This modified rule of recognition, which he has called the "practice" of recognition,91 is based not on the resistance of the ultimate legal norm to pressure from its own justification, but on what Schauer has called the "concept of systemic isolation."92 As Schauer himself suggests, the focus of the

91 Schauer, Presuppositions, supra note 67, at 150.
92 Schauer, supra note 2, at 199.
practice of recognition should not be on the law/morality distinction, but rather on the idea that legal norms are simply entrenched *vis-a-vis* all norms: "To the positivist there can be systems whose norms are identified by reference to some identifier that can distinguish *legal* norms from other norms, such as those of politics, morality, economics, or etiquette."93 What is important for Schauer, in the end, is not so much that the ultimate legal norm be extensionally divergent from morality, or that it be pedigreeable, but that it be extensionally divergent from at least *some* of the norms in society.94 If the point of the practice of recognition is that the law must remain systemically isolated, then the real threat to positivism is not the confusion of law and morality, but the collapse of the distinction between legal norms and nonlegal norms.95 But this, of course, is but another way of saying

93 *Id.*

94 This is because only if a rule follower is limited in the norms she is authorized to apply can there be differentiation among decisionmakers in a legal system, a state of affairs which Schauer thinks is desirable. If one replaces the expression "entrenched generalizations" for the word "rules" in the following passage, the relationship between systemic isolation and what Schauer calls "role differentiation" becomes more clear:

This suggests that [rules] are necessarily part of any differentiated decision-making environment that acknowledges the idea of separation of powers in the broadest sense. Where one decisionmaker performs all decisionmaking ... [rules] have little or no role to play. Only when there is role differentiation, and always when there is role differentiation, will [rules] be an essential component of the process of differentiation, of the process of allocating decisionmaking power.

Schauer, *Law,* supra note 18, at 686. The collapse of role differentiation is the equivalent of "a community decision to take as its law the *ad hoc* decisions of one person," a state which Schauer says is utterly incompatible with either rule-based decisionmaking or positivism. *Schauer,* supra note 2, at 198.

95 Schauer, in various articles, stresses that systemic isolation is at the heart of entrenched generalization. See Schauer, *Formalism,* supra note 30, at 535–56. He argues that a system of practical reasoning without some degree of systemic isolation is impossible:

[T]he potential tension between the general goal and its concretized instantiation [in a rule] exists at every level. At one level, the tension is between language and purpose; at the next, it is between that purpose and the deep purpose lying behind it; at the next, between the deep purpose and an even deeper purpose; and so on. When we decide that purpose must not be frustrated by its instantiation, we embark upon a potentially infinite regress . . . .

*Id.* at 534. In the case of the First Amendment, he observes that if one does not presume that the Constitution is an entrenched generalization, then the entire stock of society's norms may become part of the law, since no matter which norm one adopts to explain the First Amendment, there could always be a deeper and more general norm: "[W]hat is the relationship, for example, of a 'public deliberation'
that the practice of recognition requires the limited domain thesis. Now, however, the limited domain thesis is entailed by the fact that the ultimate legal norm, as an entrenched generalization, must resist at least some of the other norms in society, and not by the need to insure that the ultimate legal norm is a pedigree standard. The limited domain thesis can stand on its own bottom, and Schauer can jettison the pedigree constraint without giving up the positivist core of his theory.

V. CONCLUSION

There is a tension between Schauer's theory of rules and his legal positivism. The tension is rooted in the fact that the rule of recognition cannot be a Schauerian rule. Schauer himself recognizes this tension and modifies his positivism by renaming the ultimate legal norm the "idea" or practice or recognition. This Article has been an attempt to explain why Schauer's modification is necessary and why it may be consistent with the core elements of his theory of rule-based decisionmaking. I have argued that the theory of rule-based decisionmaking has two components: the idea of entrenched generalization and the idea that every rule presupposes its own justification. I believe that the practice of recognition is not a rule because it does not presuppose a justification for the legal system, even though it nonetheless instantiates an entrenched generalization. By preserving the role played by entrenched generalization in law without tying it to his theory of rules, I believe Schauer can justify the two most important features of his positivism, the separability thesis and the limited domain thesis.

Clearly, my argument leaves many questions unaddressed. My reformulation of Schauer's positivism retains the limited domain thesis and therefore must be a version of nonincorporationism. And yet I stated that under the practice of recognition the ultimate legal norm could be coextensive with a moral norm, as long as it was extensionally divergent with at least some of the norms in society. It is possible, therefore, that my reformulation of Schauer's positivism is compatible with incorporationism (or at least Coleman's version of it). Although the question of whether Coleman and Schauer agree on more than they realize is beyond the scope of this Article, it is worth noting that Coleman himself suggests that incorporationism entails the same sort of "systemic isolation" that I placed at the heart of Schauer's theory of entrenched generalization. In his argument against Raz's Sources
Thesis, Coleman challenges Raz's claim that incorporationism would always require substantive moral inquiry into the "underlying or justificatory reasons" for a law. Coleman argues that under his theory of incorporationism, if the rule of recognition incorporates morality into the law by saying that "no norm can count as part of the community's law if it violates due process or equal protection, or more generally, the demands of fairness," then the law applier is restricted to testing putative laws against the "aspect" of morality denoted by the rule of recognition. Therefore, argues Coleman, Raz is wrong because the presence of a moral norm does not lead "inevitably" to the incorporation of the entire set of moral norms of which the moral norm is a member. But Coleman's argument against Raz relies, in part, on the concept of "systemic isolation": it is, as Schauer argues, because of its entrenchment that the presence of a moral norm in the rule of recognition does not lead to the "endless" incorporation of all the norms in society. Coleman could be understood as saying that although incorporationism allows the rule of recognition to incorporate some of that society's moral norms, it does not allow the rule of recognition to incorporate that society's complete "stock of norms." If Coleman were to say this, then his incorporationism would be compatible with Schauer's limited domain thesis.

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96 Coleman, Authority and Reason, supra note 48, at 306.
97 Id.
98 See id. at 307.