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Theoretical Disagreement and Interpretation

ABSTRACT

Interpretation is a fundamental feature of legal practice. Yet, we have no complete account of interpretation in law despite the fact that interpretation has received a great deal of attention in the scholarly literature. This essay proposes a theory of interpretation for law. It presupposes and relies on Hart's account of the nature of law and some of the fundamental concepts in his account of law.

KEYWORDS

Interpretation, law, Hart, Dworkin, jurisprudence, legal theory

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1. *Introduction*

Disagreement is a pervasive feature of legal practice. For philosophers, disagreement is a topic of significant interest because, among other reasons, it is not always clear what to make of disagreement. One aspect of disagreement – one that will concern us here – is the fact that disagreements in law seem to come in different forms, or so some would argue. In other words, it might be the case that "disagreement" comes in a variety of forms and that some of these forms are more important than others. Just how they are important, and what they tell us about the nature of law, will be the subject of this paper.

Since the publication of his 1986 book, *Law's Empire,* Ronald Dworkin devoted a fair amount of time to something he called "theoretical disagreement". As he often did, Dworkin discussed the concept of theoretical disagreement in the form of a criticism of legal positivism, specifically the positivism of H.L.A. Hart. Before taking up Dworkin's discussion of theoretical disagreement, I summarize the main features of Hart's discussion of the Rule of Recognition. This discussion is necessary because the Rule of Recognition is at the heart of both legal positivism and Dworkin's claims with respect to positivism's failure to competently address the problem of theoretical disagreement. I will maintain that Hart's account, while incomplete, is not subject to Dworkin's criticisms. In fact, with some material emendations, Hart's positivism is more than capable of explaining disagreement in law, theoretical or otherwise.

2. *Positivism and the Nature of Law*

In the first six chapters of *The Concept of Law*[1] Hart accomplishes two important tasks. First, he demonstrates the inability of the Austinian picture of law to account for key features of the legal system. In its stead, Hart advances an account of law as a system of rules. In the course of doing so, Hart provides an account of the central features of law.

One of Hart's central concerns in *The Concept of Law* is with validity, specifically, legal validity. His question is "what is it that makes a rule a rule of law and not a rule of some other sort?". Rejecting

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[1] HART 1994.

Austin's answer of a habit of obedience to authorities, Hart introduced the master secondary rule, the Rule of Recognition[2]. The Rule of Recognition, Hart argued, was an intersubjective practice among legal officials, which practice certified the legal status of the work of legislatures, courts and other officials as "valid". In other words, the Rule of Recognition provides what Hart described as a "test" for law[3].

There are two important aspects of the Rule of Recognition that need to be highlighted in any discussion of the concept. First, the Rule of Recognition identifies valid sources of law. Although the Rule of Recognition tells us what counts as valid sources of law, it is itself neither valid nor invalid. On pain of infinite regress, the Rule of Recognition is a social, customary practice. In short, one consults the Rule of Recognition for criteria of validity for what may be called "subordinate" legal rules. As an ultimate rule, the Rule of Recognition rests only on an intersubjective consensus manifest in the ongoing practice of officials.

The second point is more important and more controversial. In addition to identifying sources of law (e.g., statutes and precedents) the Rule of Recognition also identifies the customary ways of taking those sources and using them to decide cases. But the Rule of Recognition is not a complete guide to adjudication. The Rule identifies what counts as valid sources of law and it also contains the conventional ways of construing those sources to decide cases. But the Rule of Recognition is not an algorithm: it is not a complete guide to adjudication.

The Rule of Recognition raises a number of problems, some of them epistemic and some metaphysical[4]. While it is clear that the Rule of Recognition imposes a duty on judges to apply valid legal rules[5], it is not always clear what "correct application" consists in. Any account of the Rule of Recognition has to answer the question of the relationship between the validity-certifying aspect of the Rule and its role in adjudication. The reason for this will now become apparent.

3. *Dworkin on Theoretical Disagreement*

In *Law's Empire*[6] Dworkin seeks to explain the nature of disagreement in law. Propositions of law, Dworkin explains, are «all the various statements and claims people make about what the law allows or prohibits or entitles them to have»[7]. Examples of such propositions can be as general as «the Fourteenth Amendment to the US Constitution forbids denial of equal protection of the laws to anyone» to «the law requires Acme Corporation to compensate John Smith for the injury he suffered in its employ last February»[8].

Propositions of law, Dworkin argues, are either true or false. Propositions of law are true or false «in virtue of other [...] propositions». At least that is what «everyone thinks»[9]. So, the proposition "the speed limit in California is 55 miles an hour" is true just in case the California legislature has enacted a statute to that effect. It is the act of the legislature in passing the statute that "makes" the proposition regarding the speed limit true.

2 HART 1994, 94 f.
3 HART 1994, 105.
4 For discussions of the conventional nature of the Rule of Recognition, see MARMOR 2001 and DICKSON 2007, 373-402.
5 For Hart, the "duty" to follow the Rule of Recognition is not a function of morality. Rather, it identifies the perception or attitude (Hart calls it the "internal point of view") officials take to the Rule of Recognition.
6 DWORKIN 1986.
7 DWORKIN 1986, 4.
8 DWORKIN 1986, 4.
9 DWORKIN 1986, 4.

Sometimes lawyers dispute the question whether a statute like the California speed limit statute exists. That is, they dispute the existence of the statute. This kind of disagreement is one of "fact", and is answerable by consulting the appropriate statutory reference. But this sort of disagreement – Dworkin calls it "empirical disagreement" – does not exhaust the types of disagreements lawyers sometimes have. In addition to, and far more important than, empirical disagreement is what Dworkin terms "theoretical disagreement". This type of disagreement is not one about facts but over what Dworkin calls «the true grounds of law»[10]. Unlike empirical disagreement, theoretical disagreement cannot be resolved «by looking in the books where the record of institutional decisions are kept»[11]. More is required.

Dworkin maintains that theoretical disagreement is a fundamental feature of legal practice. He faults «our jurisprudence» (i.e., positivism) for having «no plausible theory of theoretical disagreement»[12]. But when lawyers disagree in ways that might be called "theoretical", what is the nature of their dispute? Dworkin maintains that such disagreements are «about whether statute books and judicial decisions exhaust the pertinent grounds of law»[13].

Before turning to some of the cases Dworkin uses to illustrate his claims about theoretical disagreement, it is important to be clear about just what Dworkin might mean by his characterization of theoretical disagreement as a dispute over the question whether statutes and past judicial decisions exhaust the "grounds of law". There are three claims Dworkin might be making. Importantly, to make his case that positivism has no account of theoretical disagreement, Dworkin has to do more than merely repair shortcomings in the positivist account of law. Dworkin has to show that the positivist account of law is somehow fundamentally misguided.

Recall the positivist view of law and the central claim that legal rules draw their validity from the Rule of Recognition. If Dworkin's claim is that there is more to the Rule of Recognition than just statutes and past judicial decisions, then his criticism is a helpful one. In other words, if there is more to the Rule of Recognition than just statutes and past judicial decisions, say principles, then Dworkin has provided a helpful emendation of our understanding of the Rule of Recognition. More importantly, he has not shown the basic positivist picture of legal validity to be fundamentally in error. All he has shown is that Hart's account of the Rule of Recognition is incomplete. I shall refer to this as the "Helpful Criticism" reading of Dworkin's claims for theoretical disagreement.

A second way of reading Dworkin's claims for theoretical disagreement could be claims about how judges construe the sources of law identified by the Rule of Recognition. Judges often agree that a certain statute states a valid rule of law but disagree about how to apply that rule in a given case. This is a dispute neither about the validity of the Rule of Recognition nor the positivist view of validity. Rather, it is a dispute about the *application* of a particular rule in a given case. I shall call this the "Application Objection" to Hart's account of the Rule of Recognition. Like the Helpful Criticism objection, this criticism does not undermine the basic picture of legal validity set down in *Concept.* The criticism is that in order to decide cases, a judge needs more than just the valid legal rules identified by the Rule of Recognition. The judge needs to know what the rules mean in any given case and, about this, judges sometimes disagree.

Finally, there is what I will refer to as the "Metaphysical Criticism" of Hart's account of the Rule of Recognition. This criticism does represent a fundamental departure from the positivist account of the nature of law in that it finds the grounds of law to transcend institutional practices like legislation and appeals to precedent. On this view, the grounds of law lie not in a social practice (the Rule of Recognition) that

[10] DWORKIN 1986, 6.
[11] DWORKIN 1986, 7.
[12] DWORKIN 1986, 6.
[13] DWORKIN 1986, 5.

confers validity on sources of law, but in some other realm. As Dworkin would put it, the truth of legal propositions turns on the truth of moral propositions. The relationship between moral and legal propositions would be "metaphysical" in that the truth of legal propositions depends not at all on the beliefs of participants in the practice of law as they surely must under the positivist view of the nature of law. In answering the question of the "true grounds of law", a judge would necessarily have to go beyond the bounds of legal practice and into the metaphysical realm.

As Hart himself acknowledged[14], Dworkin's early criticisms of Hart's positivism were deemed to be «sound and important»[15] in that Dworkin drew attention to the important role played by principles in deciding hard cases. In a sentence that was later to prove important in the division of positivism into the Inclusive and Exclusive camps, Dworkin said that principles found their way into law not by virtue of pedigree but owing to «a sense of appropriateness in the profession»[16]. With the acknowledgement that Hart never argued for a test of pedigree as the ground of validity, the stage was set for the appropriation of Dworkin's criticisms by what came to be known as Inclusive Legal Positivists[17].

When we look at the examples Dworkin provides in *Law's Empire*, this reading is not implausible. In *Riggs,* the disagreement was not over the binding quality of the New York Statute of Wills, rather, the dispute was over how the rules in that statute were to be applied in the unusual circumstances posed by the case. We shall return to this way of looking at *Riggs* later. For now, it is enough to say that Dworkin clearly rejects this view of his enterprise because he insists that cases like *Riggs* represent not emendations to existing law but «improved reports of what the law, properly understood, already is». In making these statements, the judges «claim, in other words, that the new statement is required by a correct perception of the true grounds of law even though this has not been recognized previously […]»[18].

Over the years, Dworkin has gestured in the direction of moral or metaphysical realism but has not been successful in importing the metaphysical tools into the legal arena. After his last attempt[19] was roundly criticized[20], Dworkin seems to have abandoned the seductions of metaphysical realism.

We return, then, to the two possible readings of Dworkin's critique of positivism. A careful reading of *Law's Empire* reveals that while Dworkin seems to say that the positivist view of validity is deeply flawed, he never actually disputes the central claims of the positivist account of validity. When Dworkin asks whether statute books and past legal decisions «exhaust the pertinent grounds of law»[21], he is not disputing positivism's claim that these are valid sources of law. He is merely suggesting that the list might be incomplete.

Similarly, when we look at the way Dworkin discusses the cases that he believes illustrate his point, we see that there is no dispute over the sources of law identified in the cases, just a dispute over how best to apply those sources.

4. *Theoretical Disagreement: What Practice Tells Us*

For Dworkin, theoretical disagreement is a central feature of law. Dworkin uses cases like *Riggs* and *TVA* to make the point that a deep understanding of law and legal practice must begin by explaining

[14] See HART 1994, *Postscript*, 255-259.
[15] HART 1994, 225.
[16] DWORKIN 1977, 40.
[17] See COLEMAN 1982.
[18] DWORKIN 1986, 6.
[19] DWORKIN 2004.
[20] PATTERSON 2006.
[21] DWORKIN 1986, 5.

the phenomenon of theoretical disagreement and its central role in explicating the very concept of law. A look at the actual practice of law suggests the situation is otherwise.

I want to show that we cannot truly understand disagreement in law until we understand the phenomenon of agreement, specifically agreement in legal judgments. To put the point more strongly, disagreement can only occur against the background of pervasive agreement in judgment[22]. Thus, Dworkin starts in the wrong place and, as a result, vastly overstates the importance of theoretical disagreement.

I start with the observation that, as Brian Leiter recently put it, «there is *massive* and *pervasive* agreement about the law throughout the system»[23]. Given this sociological fact, how are we to account for it? There are two aspects to this pervasive «agreement in judgment»[24] that require attention. The first is the fact that lawyers, judges and other institutional officials agree about what is the case as a matter of law. The second issue is the question is whether or not they agree for the same reasons.

There is overwhelming of sociological, academic and institutional evidence to support the proposition that in the vast majority of cases, there is little if any question about the state of the law. Of course, when I speak here of "cases" I do not mean to refer to litigated cases, for these account for a miniscule portion of the total number of instances where, on a quotidian basis, lawyers and legal officials answer the question "what is the law on this question"? Anyone making the case for global indeterminacy with respect to law has a massive sociological impediment to sustaining their claim.

Now to the second issue. One of the principal features of Hart's arguments about the Rule of Recognition is that it supplies a "test for law". But no test can be adequate if participants apply different criteria to reach the same result. In other words, agreement in judgment has to be motivated by the same materials for the Rule of Recognition to do the job Hart took it to do.

Observation of the ordinary work of lawyers shows a practice suffused by a thick web of mutual intelligibility. To take just one example, contract interpretation starts with the text. The ordinary meaning of terms is given prima facie authority. Similarly, statutes are consulted for all manner of rules from conveyancing to tax and regulatory matters. Even the US Constitution, about which there is so much controversy, enjoys a deep and hermeneutically transparent structure[25].

[22] SCHAUER 1985, 407 («A theory, or at least a set of insights, about easy cases is the necessary first step toward development of a theory for dealing with hard cases»). POSTEMA 1987, 316 («Disagreement, even substantial disagreement, then, has a place in a world of common meanings»).

[23] LEITER 2009, 1227. See also PATTERSON 1996, 92 («Much of the lawyer's work involves no sort of "interpretation" or "theory" whatsoever»).

[24] «If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgements. This seems to abolish all logic, but does not do so. – It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call 'measuring' is partly determined by a certain constancy in results of measurement». WITTGENSTEIN 1953, para. 242.

[25] See SCHAUER 1985, *supra* nt. 22. «Once we recognize the ways in which many rarely litigated constitutional provisions have a profound effect on the nature and direction of American public life, excluding those provisions from the attention of the constitutional theorist is counterintuitive. It is not simply a matter of dividing the universe of constitutional theory between the lawyers and the political scientists. The structural provisions of the Constitution, including and perhaps especially those that never see the judicial system, represent a critical source of the public's attitude towards this Constitution and towards constitutionalism in general. This attitude, in turn, is an ever-present consideration in the kinds of issues and disputes with which constitutional lawyers, *qua* lawyers, deal. Controversies about congressional control of Supreme Court jurisdiction, the virtues or vices of selective avoidance of decision, and even the design of more particular substantive doctrines constantly take account of the ways in which the judiciary is poised with or against the body politic, and with or against the other branches of government. Constitutional adjudication exists within a framework held together by acceptance of the Constitution as this nation's constitutive and governing instrument. The existence of this acceptance, as well as the location and seriousness of the cracks in its welds, is a product of the nonlitigated portions of the document as much as, if not more than, the litigated. Constitutional adjudication is intimately and frequently concerned with those general attitudes about the Constitution

5. *Forms of Legal Argument*

«Legal philosophers must [...] study the different modes of argumentation that legal participants actually use when engaging in legal reasoning»[26].

I want to make the case that the dispute in *Riggs* is about nothing more than the meaning of the New York Statute of Wills. To make this argument, I will spell out just what I mean when I say that the dispute was about the meaning of the statute and nothing more. Briefly, my argument is that the dispute in *Riggs* is a typical example of a legal interpretive dispute. In such a dispute, there will be agreement over the object of interpretation, typically a statute or a controlling precedent. What is disputed is how to construe that authoritative source. I characterize this dispute as one about the meaning of the authoritative source. I shall now set the stage for sustaining this claim.

Law, as Dworkin reminds us, is an argumentative practice[27]. As such, lawyers conduct their arguments within a shared mode of discourse. Legal discourse is structured around identifiable forms of argument that lawyers use to sustain claims about the law. Importantly, the claims I have in mind are statements about what the law is on a given question. For example, the proposition at issue in *Riggs* – that Elmer was entitled to his legacy – is one that is resolved by lawyers using forms of argument each accepts as "valid"[28].

As I said, the fundamental form of legal expression is assertion. Argument in law begins with an assertion that something is true as a matter of law. All legal claims, from claims that a statute is unconstitutional to the averment that a contract is unenforceable, are examples of legal assertions, claims that the purported proposition is true *as a matter of law*.

Lawyers appraise the truth and falsity of legal assertions through forms of legal argument. The forms of argument are themselves neither true nor false. Rather, the forms of legal argument are the means by which lawyers show the truth and falsity of legal propositions[29]. The forms of argument are the grammar of legal justification. They are immanent in the sense that they make possible the assertion of claims for the truth of legal propositions which are then disputed, evaluated, and judged by all who are competent in their use (technique).

There are six forms of legal argument in the American system of law. While some are more familiar than others in different departments of law[30], these six forms comprise a complete list of the argumentative tools of American law. The forms of argument in law are:

> Textual: taking the words of an authoritative legal text (e.g., a constitution, statute, contract or trust) at face value, i.e., in accordance with their ordinary meaning;

that are by no means necessarily produced by or peculiar to adjudication, however, because preserving and operating within this framework is in part the responsibility of the courts. Unlitigated portions of the Constitution remain important influences in many ways on the process of adjudication, and drawing an artificial line between the litigated and the settled clauses for the purpose of selecting the respective turfs of the law schools and the political science departments neglects a major factor in constitutional adjudication». SCHAUER 1985, 403 f. (notes omitted).

[26] SHAPIRO 2007, 36.

[27] As he puts it: «Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense by and within the practice; the practice consists in large part in deploying and arguing about these propositions». DWORKIN 1986, 13.

[28] I will later make the case that these forms of argument are part of the Rule of Recognition. Hart never identified them as such but I will argue that they are part of the Rule of Recognition and that their identification as such completes the picture of the Rule of Recognition.

[29] «Propositions of law are typically statements not of what "law" is but of what *the law* is, i.e. what the law of some system permits or requires or empowers people to do». HART 1994, 247.

[30] The phrase «departments of Law» is Dworkin's. See DWORKIN 1986, *supra* nt. 1, 250-254.

Doctrinal: applying rules generated from previously decided cases (precedents);
Historical/Intentional: relying on the intentions of the Framers (constitution), legislature (statute), or parties to an agreement (contract);
Prudential: weighing or assessing the consequences (in terms of "costs") of a particular rule;
Structural: inferring rules from relationships created by the structures created by the Constitution or statute; and
Ethical: deriving rules from the moral ethos established by the Constitution or by statute[31].

With this framework at hand, let us return to *Riggs* and see if it illuminates the dispute there. Having executed a valid will, Francis Palmer intended to leave the bulk of his estate to his grandson, Elmer. Upon the remarriage of his widower grandfather, Elmer feared he would lose his inheritance. To prevent this turn of events, Elmer killed his grandfather by poison.

There was no dispute about the requisite statute at the center of issue in the case. The New York Statute of Wills articulated what all probate statutes require: where there is a valid will, a dead testator, and a named beneficiary, the latter is given the testator's property according to the dictates of the will. The proposition of law upon which the parties focused is simple: Elmer was entitled to his grandfather's property in accordance with the dictates of his grandfather's will. Elmer's argument was grounded in the unambiguous language of the New York Statute of Wills.

Before we consider the arguments for and against the asserted proposition of law, a few preliminary remarks are in order. They concern the concept of understanding and its relationship to the forms of argument discussed earlier. As argued above, understanding is exhibited by participants in legal practice through their unreflective employment of the forms of argument to show the truth of legal propositions. To see this, consider a case in which murder is not an element of the facts – the normal probate context. Once validated by the probate court, the will of the testator dictates the devolution of property of the testator. This requirement is gleaned from a straightforward reading of the Statute of Wills. In short, textual argument is sufficient to show the truth of the proposition that the beneficiary of a valid will is to be given property in accordance with the dictates of the will. What, then, turns a case of understanding into one where the need for interpretation arises?

6. *Interpretation*

The need for interpretation is actuated by facts. In *Riggs,* the actuating fact was the murder of the testator by his grandson. But why is this fact an actuating event? Not only does the majority opinion show why the murder actuates the need for interpretation, the opinion shows how the state of the law explains the legal (that is, interpretive) significance of the murder. In other words, we need to explain how understanding (that is, the unreflective act of probating the will in the normal course of things) broke down as the court tried to come to terms with the significance of the murder as the event that precipitated the breakdown in understanding.

The majority opinion in *Riggs* is a sophisticated doctrinal argument. As Professor Dworkin has taught us, the opinion makes good use of the common law maxim: no man shall profit from his own wrong[32]. But there is more to the opinion than mere recitation of an equitable maxim. When we look at

[31] The six forms of argument in American law, paraphrased in modern terms here, were first explicated by Philip Bobbitt. See BOBBIT 1982. Structural argument in the constitutional context was first articulated by Charles Black. See BLACK 1969.

[32] See DWORKIN 1977, 14-45; DWORKIN 1986, *supra* nt. 1, 15-20.

the ways in which Judge Earl showed the true state of the law, we see why the facts themselves make it clear that a straightforward reading of the requisite statute was all but impossible.

The majority opinion begins in classic fashion with the distinction between law and equity. The distinction is embraced in full measure by the common law systems of both the United States and England and can be traced back to the writings of Aristotle. The sheer breadth and diversity of classic writers on the role of equity within all departments of law should cause an educated legal mind to experience a sense of unease when confronted with the facts in *Riggs*.

Having shown how the "no man shall profit from his own wrong" principle is a constitutive feature of law in the most general way (that is, the law and equity distinction), Judge Earl then demonstrated the reach of the principle throughout varied departments of law. Citing cases from the law of wills and insurance, Earl made a strong case for the proposition that precedents both directly on point (that is, the law of wills), as well as those from related departments of law, support an exception to the ordinary meaning of the words of the statute. That is, Earl made a doctrinal argument to the effect that the words of a valid legislative enactment (here, the Statute of Wills) are to be given their normal force and effect unless there is some exception demonstrated by the facts. In short, Judge Earl did not change the law; he clarified it (by pointing to an underlying and well-established legal principle).

By contrast, Judge Gray, in dissent, argued for a straightforward reading of the words of the statute. Claiming that the court was «bound by the rigid rules of law»[33], Gray argued that Elmer is being twice punished for his offense. In a clever rebuttal to Judge Gray, the majority pointed out that he begged the question of whether Elmer was entitled to receive his victim's property under the will. The point was that the very question before the court was whether the property rightfully belonged to Elmer or not. Judge Gray did not seem to notice his error.

What does *Riggs* teach us about interpretation in law? First, in terms of the forms of argument, it is clear that without the complicating factor of the murder of the testator, the textual argument is decisive. Without the murder of the testator, it is true as a matter of law that Elmer was entitled to receive his grandfather's property according to the dictates of the Statute of Wills. It is only when the complication of the murder is added to the facts that lawyers dispute the true state of the law.

How did Judge Earl persuade enough of his colleagues to see the law as he did? Three factors suggest themselves. First, the majority opinion did no damage to the existing state of the law. I will call this the interpretive principle of minimal mutilation[34]. In other words, deciding against Elmer did not put in question the efficacy of any other element of the New York Statute of Wills. Second, through its decision, the majority demonstrated that its conclusion was consistent with everything else it knew to be true about the law of wills. I shall refer to this as coherence[35]. Finally, the opinion shows how a decision against Elmer comports with similar decisions in other departments of law. I shall refer to this aspect as generality[36]. Taken together, minimal mutilation, coherence, and generality are the three aspects of the majority's opinion that support the notion that its interpretation of the law is more persuasive than that offered by the dissenting opinion.

[33] New York Court of Appeals, *Riggs v. Palmer*, 22 N.E. 191 (Gray, J., dissenting).

[34] See QUINE, ULLIAN 1978, 66 f. (discussing the virtue of conservatism); see also HARMAN, THOMSON 1996, 12 («It is rational to make the least change in one's view that is necessary in order to obtain greater coherence in what one believes»); see HART, SACKS 1994, 147 (discussing reasoned elaboration).

[35] The idea of coherence is apt. See CONDREN 1985, 148 («[A]t its most general level, coherence refers to the ways in which parts are interconnected to form a whole; and at a similar level of generality, the appraisive category of coherence is an abridgment of the range of questions one asks of a text in terms of its parts and the closeness of their interrelationships»).

[36] QUINE, ULIIAN, 1978, *supra* nt. 33, 73 («The wider the range of application of a hypothesis, the more general it is»).

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