LAW'S BOUNDARIES

Adam Perry*

1. Introduction

Saxby and Brook were friends who liked to gamble. Every year they made a trip from England to Monte Carlo to play roulette. Brook would pay their expenses, Saxby would advance Brook money to gamble, and they would settle the difference on their return, with interest accruing on outstanding amounts. Brook was not a very successful gambler and he often borrowed large sums from Saxby. In 1905, he borrowed £3080. On the pair's final trip in 1906, Brook borrowed £1070. Shortly after they returned to England, Brook died, with both debts outstanding.

Saxby sued the executrix of Brook's estate, a woman named Fulton, to get his money back. The issue in *Saxby v Fulton*[1], heard before the High Court of England and Wales, was whether the debts were recoverable. Under English law at the time, gambling debts could be recovered only if they were incurred to play a game lawful where it was played. Roulette was prohibited in England. However, because roulette was permitted in Monte Carlo, Bray J held that Saxby was entitled to recover the total of the two debts, ie £4150, plus interest.

---

* Associate Professor, University of Oxford. For comments I thank Tara Alberts, Thomas Adams, Hasan Dindjer, Andrea Dolcetti, James Edwards, Kate Greasley, Ori Herstein, Sandy Steel, and Leah Trueblood. I also thank the participants at the Legal Philosophy Workshop and the New Directions in the Philosophy of Law conference, where I presented earlier drafts. I would be grateful for suggestions and criticisms, no matter how small, at adam.perry@law.ox.ac.uk.

[1] *Saxby v Fulton*, [1909] 2 KB 208.

This simple case illustrates a hard problem in jurisprudence. The problem is figuring out which norms are part of English law, or the law of some other specific legal system. To start, we can set aside norms which cannot be laws, of any legal system. For example, it may be that moral norms cannot be laws. This, of course, is one of the issues which divides inclusive and exclusive legal positivists. Next, we can set aside norms which are not relevant in deciding on people's rights and duties within the legal system in question. Ancient Egyptian law is not part of English law, for example, partly because it has no bearing on people's rights and duties within English law.

Even after we set aside these two types of norms, there remain norms which do not belong to English law. The norm which permits roulette, for example, can be a law. Indeed, it is a law – of Monte Carlo. It is also relevant within English law. In *Saxby*, for instance, the roulette norm was relevant to deciding whether under English law Saxby had a right to recover his money and Fulton a duty to repay it. Nonetheless, the roulette norm is not part of English law. Foreign laws are nothing special. Lots of norms can in principle be laws, are relevant within English law, and yet are not part of English law. The list includes norms of games, sports, clubs, associations, contracts, grammar, constitutional practice, mercantile custom, unions, universities, and corporations. Something distinguish these norms from norms of English law, but it is hard to say exactly what it is.

A norm which is part of a legal system is *local* to that system. A norm which can be a law, which is relevant in deciding people's rights and duties within a legal system, but is not part of that system is *adopted* by that system.[2] What distinguishes local and adopted norms? Call this *the boundary question.* My primary aim is to answer the boundary question.

---

[2] JOSEPH RAZ, PRACTICAL REASON AND NORMS 153 (rev. edn. 1990). What I am calling "adoption" is sometimes called "application": see Kevin Clermont, *Degrees of Deference: Applying v Adopting Another Sovereign's Law*, 103 CORNELL LAW REVIEW 243-310 (2018).

This is not an aim worth pursuing, according to Ronald Dworkin. 'It is of course important what we take to be relevant to deciding what legal rights and duties people and officials have', he said. 'But nothing important turns on which part of what is relevant we describe as "the law"'[3]. Occasionally, there may be good linguistic reasons to call a norm "a law" or to refuse to do so. Usually, though, '[e]ither choice would be defensible, and it would not matter what choice we make'[4]. I think that Dworkin was wrong. The answer to the boundary question is often of great practical importance. Showing why is my secondary aim in this article.

Here is how the discussion proceeds. I start by setting out three existing answers to the boundary question (§2-4). None suceed. I then argue for my own answer. I introduce and refine a distinction used by some constitutional scholars between direct and indirect legal relevance (§5-6). Local norms are directly relevant (§7). By contrast, adopted norms are merely indirectly relevant (§8). Thus, local and adopted norms are distinguished by the directness of their relevance (§9). Why does this matter, practically speaking? The distinction between local and adopted norms makes a practical difference to the legal rights and duties people will be determined to have (§10). I consider several possible objections to my analysis (§11), before summarising the discussion (§12).

2. Control

A natural first thought is that a norm's membership in a legal system depends on who can control that norm. Matthew Kramer says:

> Exactly because the foreign laws and the norms of the club and associations are subject to the control of people outside [the local system], the occasional application of those norms and laws

[3] RONALD DWORKIN, JUSTICE IN ROBES 238 (2006).
[4] *Id.* at 239.

> within [that system] should not be regarded as the incorporation of them into [that system's] matrix of legal norms.[5]

In my terminology, Kramer's test says: a norm adopted by some legal system is subject to the control of people external to that system. A norm local to that system is not.

Kramer's test deals well with certain examples. The norm that permits roulette is not part of English law because it is subject to the control of Monte Carlo officials. By contrast, the norm that says that a gambling debt is recoverable only if it is incurred to play a lawful game is part of English law because it is not subject to the control of anyone outside of the English legal system.

While there is much to like about Kramer's test, it suffers from a number of problems. Suppose that you and I agree that any dispute arising under our contract will be resolved according to South African customary law. Customary law, Kramer says, 'is not really within anyone's effective control'[6]. So, South African customary law is not really under anyone's control, including the control of anyone external to the English legal system. If an English court relies on South African customary law to resolve our dispute, Kramer seems to be committed to the view that it becomes part of English law. But it does not.

Similarly, judges often use semantic and grammatical norms to help decide cases. These norms are not under anyone's control; they are 'free-floating'[7], to use Kramer's term. When these norms are legally relevant, it would seem that Kramer's test wrongly counts them as local laws. Now, Kramer recognises that judges rely on

---

[5] Matthew Kramer, *How Moral Principles Enter into Law*, 6 LEGAL THEORY 83-108, 104 (2000).

[6] Matthew Kramer, *How Moral Principles Enter into Law*, 6 LEGAL THEORY 83-108, 105 (2000).

[7] Matthew Kramer, *How Moral Principles Enter into Law*, 6 LEGAL THEORY 83-108, 105 (2000).

semantic and grammatical norms. But he denies that they 'serve as justificatory bases for official decisions'[8]. He says:

> When judges have to explain why they are deciding a case one way as opposed to another, they do not invoke grammatical rules such as the rule against split infinitives. Instead, they have to invoke some statute[s], judicial doctrine[s], customary norm[s], moral norm[s], or other decision-determining standard[s].[9]

I agree that judges do not treat semantic and grammatical norms as an independent basis for legal decisions, a point I will return to in §8. But it is false that judges do not treat such norms as reasons for reaching one decision over another.

Consider *Smith v United States*[10]. The United States Criminal Code imposed a criminal penalty on whoever 'during and in relation to any crime of violence or drug trafficking crime … uses … a firearm'. The issue for the United States Supreme Court was whether the penalty applied to the "use" of a MAC-10 automatic weapon in trade for cocaine. To help resolve this issue, the court consulted the dictionary definition of "to use". Partly because the accused's "use" of the MAC-10 'fell squarely'[11] within this definition, the court found that the penalty applied. Here, the semantic norms reflected in the dictionary definition of "to use" provided a crucial premise in the reasoning which led to an overall conclusion about the accused's liability. The semantic norms helped to justify that conclusion, in other words. And yet these norms did not thereby become part of American law.[12]

---

[8] *Id.* at 106.

[9] *Id.* Footnote omitted.

[10] *Smith v United States*, 508 US 223 (1993).

[11] *Id.* at 228-9. For discussion, see Pamela Hobbs, *Defining the Law: (Mis)using the Dictionary to Decide Cases*, 13 DISCOURSE STUDIES 327 -347 (2011).

[12] In a footnote to the block quote, above, Kramer says:

So far, I have been pointing to adopted norms which are not under anyone's control.[13] In addition, there are adopted norms which are under local control. For example, many administrative policies, which are not laws, are under the control of government ministers, who wield law-making power. There is also reason to think that Kramer's test is underinclusive, because some norms which are under external control are also part of local law. For instance, some legal systems incorporate international treaty law into local law. And yet treaty law may be under the control of external actors (eg other states, international organisations,

---

> In highly unusual circumstances … rules of grammar or pronunciation could indeed serve as the justificatory bases for official decisions. … In such circumstnaces, the aforementioed rules are indeed legal norms.

Matthew Kramer, *How Moral Principles Enter into Law*, 6 LEGAL THEORY 83–108, 106 (2000). Perhaps Kramer would bite the bullet and say that the norms governing the phrase 'to use' *are* part of American law. This is counterintuitive, to say the least.

[13] Other alleged counterexamples are the norms of arithmetic, logic, rationality, etc. These norms are not under anyone's control. They are also relevant within English law. In *Saxby*, for example, to calculate how much Fulton owed Saxby, Bray J applied a norm of arithmetic according to which 3080 + 1070 = 4150. According to Kramer's test, it seems to follow that the norms of arithmetic and the like are part of English law – which, of course, they are not. See RONALD DWORKIN, JUSTICE IN ROBES 239 (2006); Dan Priel, *Review of* Where Law and Morality Meet, 69 MODERN LAW REVIEW 114–119, 116 (2006). Kramer's response is that what might appear to be norms of arithmetic, logic, rationality, etc 'are not norms at all'. These 'rules' are 'universally quantified modal propositions which declare how things necessarily are'. They 'do not prescribe how things ought to be or how people ought to behave'; they are concerned 'only with what is'. Matthew Kramer, *Why the Axioms and Theorems of Arithmetic are not Legal Norms*, 27 OXFORD JOURNAL OF LEGAL STUDIES 555–562, 559, 561 (2007). Kramer's response has not satisfied all of his critics. See Dan Priel, *Free-Floating from Reality*, 21 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 429–445, 432–436 (2008). I propose to set aside the merits of this debate, for three reasons. First, the normativity of each of arithmetic, logic, and rationality are large and hotly contested topics. Second, as the main text indicates, there are many other counterexamples to Kramer's test. Third, the answer I eventually defend is capable of excluding standards of arithmetic and the like, if they are norms. See text at note 47.

international courts). So, despite its attractions, Kramer's test must be rejected.

3. Creation

Scott Shapiro flips Kramer's idea on its head. According to Shapiro, what matters is not the lack of control that external institutions have over a norm, but a specific type of control local institutions have over them. Shapiro says that 'for two enacted rules to be part of the same system they must have been created according to the power-conferring provisions of the same shared plan', where each legal system has a shared 'master plan'.[14] Thus, I take it that Shapiro would distinguish local and adopted norms as follows: whereas norms local to a legal system are created under powers conferred within that system, norms adopted by it are not.

Monte Carlo law is not created under the power-conferring norms of English law. Neither is South African customary law or the norms of grammar. Shapiro's test correctly says that none of these norms are part of English law. By contrast, the norm that a gambling debt is recoverable only if it is incurred to play a lawful game was created by English judges and legislators using powers conferred within English law. Shapiro's test correctly says that the debt-recovery norm is part of English law.

Although Shapiro's test is initially plausible, I think it is pretty clear that it yields unacceptable results. Consider the norms of English customary law. Customary norms emerge through the

---

[14] Scott J. Shapiro, *What is the Rule of Recognition (and Does it Exist)?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 256 (Matthew Adler & Kenneth Einar Himma eds., 2009). For a similar proposal, see L Green, *Legal Positivism*, The Stanford Encyclopedia of Philosophy (Edward Zalta ed., Spring 2018) ('Moral standards, logic, mathematics, principles of statistical inference, or English grammar, though all properly applied in cases, are not themselves the law, for legal organs have applicative but not creative power over them').

accretion of certain attitudes and actions in a group.[15] They are not created through the exercise of a power conferred by any norm. Hence, they cannot be created under powers conferred by the norms of any legal system. Hence, according to Shapiro's test, English customary law cannot be part of English law. To be clear, I grant that customary norms are part of a legal system in virtue of norms of that system. We could say that customary norms are laws of a legal system in virtue of its 'master plan', or in virtue of recognition under certain of its rules. What we must not say – and this is all that matters for assessing Shapiro's test – is that customary norms are themselves created under powers conferred within the legal system. They are not.[16]

Let us suppose, for the sake of argument, that customary norms *are* created under powers conferred within a legal system. It would follow that international customary law is created under powers conferred within a legal system. Which system? The answer is certainly not: the Israel legal system. We know that because many norms of international customary law pre-date the Israel legal system, and a norm cannot arise in a legal system that does not yet exist. According to Shapiro's test, this means that international customary law cannot be part of the Israel legal system. On the contrary, though, '[a]s in most states, in Israel, too, international custom is automatically part of municipal law'.[17] It is 'part of the law of the land'[18].

Finally, consider the relationship between European Union law and United Kingdom law. Certain types of EU law are given effect

---

[15] Consider, for example, the practice theory of customary or social norms in HLA HART, THE CONCEPT OF LAW (3rd edn, OUP 2012) 55-57, 255. I provide an account of the actions and attitudes which ground a customary or social norm in Adam Perry, *The Internal Aspect of Social Rules*, 35 OXFORD JOURNAL OF LEGAL STUDIES 300 (2015),

[16] I thank an anonymous reviewer for pushing me to clarify this point.

[17] Ruth Lapidoth, *International Law within the Israel Legal System*, 24 ISRAEL LAW REVIEW 451, 452 (1990), dating this understanding to 1951.

[18] MALCOLM SHAW, INTERNATIONAL LAW 166 (8th edn. 2006).

in the UK through a domestic statute, the European Communities Act 1972.[19] The key section is s 2(1), which says:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ….

As s 2(1) acknowledges, EU law is 'created … by or under the Treaties'. It is not created under powers conferred within UK law.[20] According to Shapiro's test, it follows that EU law cannot be part of UK law. But this is at odds with how those who work within the law think. They think that EU law is part of UK law. The European Court of Justice, for example, takes the view that EU law is 'an integral part of the legal system of the member states' and 'forms part of the law of those states'[21]. The Supreme Court of the UK agrees. 'EU law [is] a source of UK law', it says, and forms 'part of

---

[19] On 'dynamic incorporation' of foreign norms generally, see Michael Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103 (2008).

[20] A possible objection goes like this: UK law confers treaty-making powers. The Treaties referred to in s 2(1) are created (partly) under these powers. The norms created under powers conferred by the Treaties are therefore indirectly created under powers conferred by UK law. Let us grant this for the sake of argument. It would follow by Shapiro's test that treaties entered into by the UK, and relevant within UK law, are part of UK law (because such treaties would be created under powers conferred within UK law). But that is false: treaty law is not automatically incorporated into UK law. So, if the objection is incorrect, then Shapiro's test is underinclusive. If it is correct, then the test is overinclusive. I thank Jeremias Prassl for discussion on this point.

[21] Case 6/64 *Costa v ENEL* [1964] ECR 585, 593. For a discussion of membership of EU law within domestic law, see Julie Dickson, *How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union* 2 PROBLEMA 9, 9-50, 31-35 (2008).

its domestic law'[22]. So, not all laws of a legal system are created under powers conferred within that system. Shapiro's test must also be rejected.

4. Support

Kramer and Shapiro both focus on who has the power to make or change the norm at issue. By contrast, for Joseph Raz, '[t]he reasons for enforcing a norm, and the attitude of the courts and the legislature to its enforcement, are the crucial factors'[23]. Raz says:

> Norms are 'adopted' by a system … if, and only if, they fulfil one of two tests. The first test requires that they belong to another normative system which is practised by its norm subjects and be recognized as long as they remain in force in such a system as applying to the same norm subjects. In this case they must be recognized because the system intends to respect the way that the community regulates its activities, regardless of whether the same regulation would have been otherwise adopted. The alternative test requires that they be norms which were made by or with the consent of their norm subjects by the use of powers conferred by the system in order to enable individuals to arrange their own affairs as they desire.[24]

Simplifying a bit, the idea is that adopted norms are either (1) norms of another system recognised out of respect for the way that some community regulates its own affairs; or (2) norms created under local powers designed to help people manage their affairs as they like. Local norms meet neither condition. The first half of the test is meant to exclude foreign laws. The second half excludes 'contracts, the regulations of commercial companies, and the like'[25]. What is

---

[22] *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, [60], [62].
[23] Joseph Raz, *The Identity of a Legal System*, 59 CALIFORNIA LAW REVIEW 795-815, 815 (1971).
[24] JOSEPH RAZ, PRACTICAL REASON AND NORMS 153 (rev. edn. 1990).
[25] *Id.*

supposed to unite these conditions is the idea that one of the law's functions is to 'support other social arrangements and groups'[26].

Raz's test is both underinclusive and overinclusive, however. It is underinclusive because it counts as adopted at least some norms of provinces and states in federal systems. For example, the law of Canada grants Quebec the power to make laws with respect to education, partly to enable Quebec to arrange its affairs as it desires. These laws are made in some sense with the 'consent' of those subject to those laws, ie the people of Quebec. According to (2), Quebec's education laws are not part of the Canadian legal system. But, as Keith Culver and Michael Giudice note, Quebec's laws 'are thought of, spoken of, and function as norms of law in Canada, and would be very oddly characterized … only as norms capable of being adopted by a federal system'[27].

Raz's test is overinclusive because some adopted norms are applied by judges for reasons that have nothing to do with supporting other social arrangements and groups. In *R v North and East Devon Health Authority, ex parte Coughlan*[28], for example, a health authority promised Coughlan that she would have a home for life in a new nursing facility if she agreed to move from the hospital where she had been living for the previous 20 years. Coughlan agreed. After she had moved, the health authority tried to renege on its promise. Coughlan complained and the Court of Appeal for England and Wales agreed with her: by trying to break its promise, the health authority had acted unlawfully.

Coughlan is a seminal case in the development of what in English law is known as the "doctrine of legitimate expectations". Roughly, that doctrine says that a public body has a legal duty to keep its promises. Under the doctrine of legitimate expectations, English courts regularly enforce promises by public bodies. These promises are not created through the exercise of a legal power. Nor are they

---

[26] *Id.*

[27] KEITH CULVER & MICHAEL GIUDICE, LEGALITY'S BORDERS 50 (2010).

[28] *R v North and East Devon Health Authority, ex parte Coughlan,* [2001] Q.B. 213 (C.A.).

enforced out of 'respect' for the way that administrators seek to regulate their activities. Rather, judges enforce these promises because they think it is unfair for the government to say one thing and do another, at least if a person relies on what the government has said, as Coughlan did.[29] In such cases, a norm (the promise) is legally relevant, not excluded by either condition in Raz's test, and yet is not a law.

So concludes my survey of the existing answers to the boundary question. It has not, I am afraid, been a very fruitful survey. Each answer is vulnerable to obvious counterexamples. Later, I will show why there is a kernel of truth in each of the existing answers. For now, it is time to explore a new way of thinking of the boundary question.

5. A doctrinal perspective

Thus far, I have focused on how legal philosophers have approached the boundary question. But they are not the only ones to think about law's boundaries. Doctrinal scholars think about law's boundaries, too. Of doctrinal scholars, I think that constitutional scholars have come closest to the truth.

In Commonwealth jurisdictions, a "constitutional convention" is a term of art for a non-legal norm of a constitution. Conventions play a central role in many Commonwealth constitutions. For example, there is a convention of the British constitution that the monarch will grant royal assent to bills passed by Parliament. Were the Queen to refuse assent to such a bill, she would act unconstitutionally but not – and this is the point – unlawfully. Because of their practical importance, constitutional scholars have

---

[29] *See eg Council of Civil Services Unions v Ministers for the Civil Service*, [1985] A.D. 374, 415; *R v IRC, ex parte MFK Underwriting*, [1990] 1 All E.R. 91, 111. There are other possible rationales for the doctrine, but none fit well with Raz's test. See Adam Perry and Farrah Ahmed, *The Coherence of the Doctrine of Legitimate Expectations*, 73 CAMBRIDGE LAW JOURNAL 61-85 (2014).

thought a lot about the nature of constitutional conventions. In particular, they have wondered: what is the difference between a law and a convention? The standard answer, originating with AV Dicey, is that conventions are not laws because courts 'recognise' or 'enforce' laws, whereas they do not recognise or enforce conventions.[30]

To this standard answer there is a standard criticism: sometimes, courts *do* recognise and enforce conventions.[31] Dicey's critics have in mind cases like *Copyright Owners Reproduction Society Ltd v EMI*[32]. In the 1920s, the Imperial Parliament at Westminster had the legal power to legislate for Australia. However, there was a constitutional convention according to which the Imperial Parliament would not legislate for Australia without its consent. The question in this case was whether a 1928 copyright statute of the Imperial Parliament extended to Australia, in which event the defendant record companies would have to pay higher royalties than they would otherwise. The High Court of Australia reasoned to a conclusion this way: In light of the consent convention, if Australia did not consent to a statute, Parliament would be presumed *not* to intend the statute to apply to Australia. Because Australia did not consent to the 1928 statute, Parliament should be presumed not to intend the 1928 statute to apply to Australia. Nothing in the statute rebutted that presumption. Therefore, the statute did not apply to Australia.

Cases like *Copyright Owners* seem to show, contra Dicey, that conventions have legal consequences. However, just as Dicey has critics, he has defenders. These defenders admit that judges give legal effect to conventions. But they maintain that judges do not give conventions legal effect *in the same way* as they do laws. The

---

[30] ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 292 (15th edn, 1915).

[31] See eg IVOR JENNINGS, THE LAW AND THE CONSTITUTION 117 (1959).

[32] *Copyright Owners Reproduction Society Ltd v EMI*, [1958] 100 C.L.R. 597 (H.C.).

British constitutional scholar Geoffrey Marshall writes that in cases like *Copyright Owners*:

> [T]he courts did not apply or enforce conventions in the sense of treating them as direct sources of law …. It might be said here that the courts were applying law not convention and that the notice taken of the conventions merely helped to clarify what the existing law was in various ways.[33]

And a little later Marshall concludes:

> A distinction can be seen, therefore, between using conventions [in the ways described] and directly applying them or enforcing them as law.[34]

Marshall's idea, I take it, is that whereas laws are 'directly' applied or enforced, conventions are merely 'indirectly'[35] applied or enforced. There is also the suggestion that conventions are legally significant through or by virtue of their influence on laws.[36]

The quotes above are vague and the claims made in them are not fully developed. Neither Marshall nor Dicey's other defenders test the distinction between direct and indirect relevance against examples beyond the constitutional sphere. Still, Marshall was onto something important. The difference between direct and indirect relevance is, I think, the key to distinguishing local and adopted norms. In the sections following, I state the distinction between the two types of relevance precisely, then apply the distinction to the two types of norms.

---

[33] GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS 15 (1987).

[34] *Id.*

[35] *Id.*

[36] For similar views, see N.W. Barber, *Laws and Constitutional Conventions*, 125 LAW QUARTERLY REVIEW 294-309 (2009); Nicolas Aroney, *Laws and Conventions*, *in* CONSTITUTIONAL CONVENTIONS IN WESTMINSTER SYSTEMS (Brian Galligan & Scott Brenton eds., 2015).

6. Direct and indirect relevance

To see the difference between direct and indirect relevance clearly, suppose that a norm of English law says that a deceased person's property goes to the person's next of kin if he or she dies intestate. If this norm applies to a case, then the norm establishes the truth of a conclusion about rights and duties as a matter of English law, namely, that the next of kin has a right to the deceased's property. That conclusion may be defeasible: the right may not be absolute. It may be that the norm is not essential for the conclusion: perhaps the next of kin would have been entitled to the property anyway, by some other route. But, if the norm applies, then on its own it makes true a conclusion about people's rights and duties within English law.[37] The norm leads to that conclusion directly, we can say.

Not everything of legal relevance is of direct relevance. Suppose the following are facts in a case:

> that the makers of the intestacy norm intended it to mean such-and-such
> that so-and-so died intestate
> that so-and-so is related to the deceased by such-and-such degree of consanguinity

Of these facts, the first is (at least on certain theories of interpretation) relevant to the *content* of the intestacy norm. The second is relevant to the *applicability* of that norm in a case. The third is relevant to the *exact consequences* of the norm in a case, ie to working out who exactly is the next of kin and thus who exactly has a right to inherit. Each fact helps in deciding on people's rights and duties. Each 'figures in the truth conditions of propositions of law'[38], to use Dworkin's phrase. But the legal relevance of each is mediated

---

[37] I have benefited here from Luís Duarte d'Almeida, *What is it to Apply the Law?* (working paper; manuscript on file with the author); see also JOHN GARDNER, LAW AS A LEAP OF FAITH 76-77 (2007).

[38] RONALD DWORKIN, JUSTICE IN ROBES 4 (2006).

or indirect – it occurs through or via the fact's impact on the intestacy norm.

It is not only facts which are indirectly relevant. Some norms play a similar role: they are relevant to deciding on people's rights and duties because they are relevant to deciding on the content, applicability, or exact consequences of some other norm. I stipulate the following definitions, for a legal system L:

Direct relevance	A norm is directly relevant within L if and only if (1) it is relevant to deciding on people's rights and duties within L, (2) not merely because it is relevant to deciding on the interpretation, applicability, or consequences of some other norm.
Indirect relevance	A norm is indirectly relevant within L if and only if (1) it is relevant to deciding on people's rights and duties within L, (2) because it is relevant to deciding on the interpretation, applicability, or consequences of a norm of direct relevance within L.

Two clarifications are in order. First, under these definitions, a norm can be of both direct and indirect relevance. That is, a norm can be relevant in its own right (direct relevance) *and* relevant to the meaning or operation of a norm which is directly relevant (indirect relevance). Second, there is no suggestion that a norm's content, applicability, and consequences can be sharply differentiated. One can easily blur into the other.

7. The relevance of local norms

In all of my examples, the local norms are directly relevant. If the debt-recovery norm applies in *Saxby*, then it follows directly that Saxby has a right to recover the debts. If the criminal firearms penalty applies in *Smith*, then it follows directly that Smith is liable to a term in prison. If the doctrine of legitimate expectations applies

in *Coughlan*, then, without more, we can infer that the health authority has a legal duty to provide Coughlan with a home. And so on. The norms in these examples do not always apply; but when they apply, in combination with the facts of the case, they suffice to yield certain conclusions within local law.[39]

Are these examples generalisable? That is, is every local norm directly relevant? The question requires some careful handling. Suppose that a local law says that you are entitled to compensation for personal injuries suffered while driving, provided you were driving in a lawful manner at the time. To decide on whether the compensation norm applies, we need to decide on whether you complied with various road traffic norms (eg speed limits). So, the road traffic norms bear on the applicability of the compensation norm. What this shows is that a local norm may be both indirectly and directly relevant. While the road traffic laws are indirectly relevant when deciding on compensation, they are directly relevant to deciding on a range of other rights and duties (eg the speed at which you are legally permitted to drive).

It is true, however, that legal systems do contain laws which are of mere indirect relevance. Here is s 6 of Britain's Interpretation Act 1978:

> In any act, unless the contrary intention appears, -
> (a) words importing the masculine gender include the feminine;
> (b) words importing the feminine gender include the masculine;
> (c) words in the singular include the plural and words in the plural include the singular.

This provision is not directly relevant: it does not, on its own, establish the truth of any conclusion about people's rights and duties. Rather the section's legal effects arise indirectly, through or via norms which use either the masculine or the feminine but not both, or the singular or plural but not both. There are many similar

---

[39] See JOHN GARDNER, LAW AS A LEAP OF FAITH 77 (2007).

examples: other legal definitions, limits on the territorial or temporal applicability of norms, laws which establish legal categories and statuses, and so on.

These examples show that some laws are merely indirectly relevant. But they do not show that some legal norms are merely indirectly relevant. To explain why, I want to borrow Raz's distinction between norms and rules.[40] Although some norms are rules, some norms are not (an order, say, is a norm but not a rule, because it is specific not general). More importantly for my purposes, although some rules are norms, some are not. As Raz says:

> [Some] rules … are neither mandatory norms nor power-conferring or permissive norms. … Such rules are not norms. They do not have any normative force because they do not in themselves guide behaviour; they do, however, guide behaviour indirectly. They have an indirect normative force because they are logically related to the other norms of the … [system] which are norms. They partly determine the interpretation and application of these norms and for this reason they are regarded as rules of the [system].[41]

Rules which are not norms can be 'explained by explaining their logical relations to [rules] which are norms'. 'Their whole point and function', Raz says, 'is exhausted by their impact' on the rules which are norms. Section 6 of the Interpretation Act 1978 is a good example. It does not impose a duty, confer a power, or grant a permission. It does guide conduct, but 'indirectly', through its impact on the interpretation of other rules. So, s 6 lays down a law which is rule but not a norm. In general, laws which establish

---

[40] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 168ff, 224 (2ND ed. 1980); JOSEPH RAZ, PRACTICAL REASON AND NORMS 117 (rev. edn. 1990). For a similar distinction, see also Tony Honoré, *Real Laws*, *in* MAKING LAW BIND (1987).

[41] JOSEPH RAZ, PRACTICAL REASON AND NORMS 117 (1990). Raz is in this quote talking about norms of a game, not a legal system, but his treatment of legal norms is very similar.

definitions, territorial limits, statuses, categories, and so on are rules but not norms.

Let us reserve the term "rule" for a rule which is not a norm and "norm" for a rule which is a norm. Using this terminology, it is not the case that local *rules* are of direct relevance. What is true, however, and what Raz in the block quote above would seem to agree with, is that local *norms* are of direct relevance.

8. The relevance of adopted norms

By contrast, while adopted norms are of direct relevance within their own normative system, they are of mere indirect relevance within the system which adopts them.

In some cases, an adopted norm is relevant because it bears on the applicability of a local norm. In *Saxby*, there is a norm of English law which says that a debt is recoverable if it is incurred to play a lawful game. Bray J had a duty to apply this local norm, if it was applicable. But was it applicable? To answer that question, Bray J needed to determine whether Saxby loaned Brook money for a game lawful where it was played. To make that determination, Bray J needed to apply Monte Carlo law. So, to work out whether the English norm applied to this case, Bray J needed to first apply Monte Carlo law. Monte Carlo law is relevant to Saxby and Fulton's rights and duties, but only insofar as it mattered to the applicability of the debt-recovery norm.

In other cases, an adopted norm is relevant because it bears on the interpretation of a local norm. Recall *Smith*. The United States Supreme Court needed to interpret the term "to use" in the Criminal Code. The court thought the issue turned on the proper use of the term in ordinary contexts. Thus, to resolve the legal issue, the court relied on semantic norms. These norms were legally relevant – they helped in deciding Smith's liability to a criminal penalty – but indirectly, through their significance for the interpretation of a norm of direct relevance.

Similarly, in *Copyright Owners*, the High Court was tasked with interpreting a statute of the Imperial Parliament. The court

reasoned that the Parliament would not intend to act contrary to a constitutional convention. There were two possible interpretations open to the court, one of which would include Australia within the statute's scope, one of which would not. On the first interpretation, the Parliament would have acted contrary to a constitutional convention. So, the court inferred that Parliament intended the latter interpretation. Thus, the convention was relevant to the rights and duties of the parties, but indirectly, via its relevance for the meaning of the statute.

In still other cases, an adopted norm is relevant to deciding on the exact consequences of a local norm. Consider a fresh example, this time of a game. During a break from music practice, Blake and Galloway and four friends began to 'engage in some horseplay'[42]. Blake threw a bit of bark at Galloway's leg. Galloway picked it up and threw it back at Blake – striking him in the eye, causing serious injury. Blake sued Galloway, claiming that he had breached a duty of care to Blake. In *Blake v Galloway*[43], Dyson LJ said that the horseplay was 'conducted in accordance with certain tacitly agreed understandings or conventions'[44]. Those tacitly agreed norms included:

> [T]hat the objects that were being thrown were restricted to twigs, pieces of bark and other similar relatively harmless material that happened to be lying around on the ground; they were being thrown in the general directions of the participants in a somewhat random fashion, and not being aimed at any particular parts of their bodies; and they were being thrown in a good-natured way, without any intention of causing harm.[45]

These norms of horseplay were not directly relevant: they did not in their own right establish any conclusion within English law.

---

[42] *Blake v Galloway*, [2004] 1 WLR 2844 (EWCA).
[43] *Id.* at [1].
[44] *Id.* at [13].
[45] *Id.* at [13].

Rather, they were relevant in determining the exact content of the duty of care Galloway owed to Blake. In essence, Galloway had a duty not to act contrary to the horseplay norms. Because Dyson LJ thought that Galloway had acted 'in accordance with the tacit understandings or conventions of the game in which the claimant participated'[46], he held that Galloway was not liable for the injury he caused to Blake. Thus, the norms of the game were relevant to deciding on the parties' duties and rights, but at one step remove from the norms of tort law.

Returning to *Saxby*, once Bray J finds that the debt-recovery norm applies to the case, he is committed to reaching some conclusion on the basis of that norm. But what, exactly, does Saxby have a right to? How much money, exactly, does Fulton have a duty to pay him? Saxby loaned Brook £3080 in 1905 and £1070 in 1906. Saxby is entitled to the total of these amounts, plus interest. To work out the total, Bray J needed to apply arithmetical standards of addition and multiplication.[47] These arithmetical standards were indirectly relevant: they were relevant to deciding the parties' rights and duties because they were relevant to deciding what, exactly, a norm of English law required.

Adopted norms can be indirectly relevant in more than one way. In *Coughlan*, the health authority's promise triggered the application of the doctrine of legitimate expectations. In addition, that promise figured in the determination of what, exactly, the doctrine of legitimate expectations required the health authority to do – in this case, to allow Coughlan to stay in her nursing home.

These are only six examples, but it is easy to see how to extend the analysis. Judges have regard to the norms of clubs and corporations and universities – when those norms shed light on the

---

[46] *Id.* at [14].

[47] This assumes, of course, that there are norms (as opposed to non-normative rules) of arithmetic, and that these are the sort of norms that can be laws. See note 13. If either assumption fails, then the conclusion – that norms of arithmetic are not local norms – still holds; only the explanation differs.

meaning or operation of local norms. Judges apply the promises and agreements in contracts – because they trigger the norms in the law of contracts. Adopted norms are legally relevant, but always and only indirectly.

9. A difference in relevance

Local and adopted norms can be distinguished by the directness of their relevance. Here, then, is my answer to the boundary question: the norms that are local to a legal system – ie, part of a legal system – are directly relevant within it. By contrast, the norms adopted by a legal system are merely indirectly relevant within it.

Why should you endorse this test?

First, and most importantly, my test is extensionally adequate. It classifies all of the uncontroversial cases of adopted and local norms correctly, something which none of the existing tests do. Second, this test captures what I think is an intuitive thought about legal systems, namely, that the norms of that system have primary importance in determining rights and duties within that system. Third, the test is consistent with the most careful doctrinal thinking about law's boundaries.

Fourth, my test reveals a connection between adopted norms and something else of legal relevance which is not part of a legal system – namely, the facts of a case. The facts of a case bear on the meaning, applicability, or exact consequences of local norms. In these ways, they play auxiliary or facilitative roles in decision-making. Adopted norms play the same roles. It may be no coincidence, then, that conflicts of laws scholars say that matters of foreign law are matters of fact.[48]

Two further considerations in favour of the test I propose are that it shows the practical importance of the boundary question, and

---

[48] See RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS 3–4 (1998). Admittedly, conflicts of laws scholars tend to have in mind matters of pleading and proof.

that it shows the respect in which each of Kramer's, Shapiro's, and Raz's tests are plausible. I explain both points in the next section.

10. Practical implications

Dworkin says that 'nothing important'[49] turns on the boundary question. The question is merely 'taxonomic'[50], he claims. If Dworkin means that it does not much matter what we use the word "law" to refer to, then I agree. But I take Dworkin to be making the more interesting claim that membership in a legal system is not of practical importance because relevance within a legal system does not track membership within it. Understood this way, Raz claims something similar. There are sometimes 'procedural differences' relevant to 'standards that are part of the law or merely enforceable according to law', Raz says, but 'much of the time the practical implications of a standard are the same either way'[51]. I think this claim is a mistake: it is often of great practical importance whether a norm is local or adopted. The test I propose can tell us why.

Compare two scenarios. The first is the real *Saxby*, in which a norm permitting roulette is adopted by English law. In the second scenario, this norm is also part of English law. There is probably no practical difference between these scenarios for Saxby and Fulton: either way, Saxby is entitled to his money back. But for anyone who wants to play roulette in England, there is a world of difference. If you play roulette in London, in the first scenario, you break the law;

---

[49] RONALD DWORKIN, JUSTICE IN ROBES 238 (2006).

[50] *Id.*

[51] Joseph Raz, *Incorporation by Law* 10 LEGAL THEORY 1, 12 (2004). The contingent differences are not, however, limited to matters of proof and pleading. For example, a common difference between a local versus an adopted norm is that local officials' interpretations of the norm will be conclusive of its content in the first but not the second case. On this and other differences, see the helpful analysis in Kevin Clermont, *Degrees of Deference: Applying v Adopting Another Sovereign's Law*, 103 CORNELL LAW REVIEW 243-310, 258-265 (2018).

in the second, you do not. It only makes sense to think that adoption does not matter if we narrow the discussion to the particular case in which a norm is adopted. Once we widen our perspective to take into account other cases, the practical importance of the question comes into focus.

Someone might object that I am not comparing like with like. With respect to *Saxby*, they will say: the content of the Monte Carlo norm is that, *in Monte Carlo*, roulette is permitted. Were a norm with the same content part of English law, it would not matter at all to would-be roulette players in London, because the norm would not apply to their activities. However, there is no reason to assume that the Monte Carlo norm is territorially bounded: many laws apply extra-territorially. Moreover, even when a law applies only within its system's territory, this limit will not be part of the content of *that* law. A general rule will establish the territorial extent of the norms of a system.[52] Whether such a rule is adopted in addition to the laws which it regulates is a contingent matter, one which is resolved differently under different conflicts of laws regimes.[53]

This example and others like it illustrate that the relevance of an adopted norm is closely circumscribed. If an adopted norm bears on the content or operation of a local norm, then the judge properly takes it into account. That is the case in the real *Saxby*. If an adopted norm does *not* bear on the meaning or operation of a local norm, then it has no legal effect. Because the norm of Monte Carlo law is not relevant to the application of English law in the London scenario, there is no cause to take it into account. By contrast, were it a local law, it would have legal effect, even if applying it was not a means of working out the content or significance of other local

---

[52] That territorial limits are usually abstracted from particular norms is argued for at length in chapter 7 of JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM (2nd edn. 1980).

[53] The applicability of the laws of a system are governed, in part, by its choice of law rules. Whether jurisdiction A will give effect to the choice of law rules of jurisdiction B, as well as to B's substantive rules, is part of the traditional *renvoi* problem, a problem resolved in many different ways.

laws. So, whether a norm is adopted or local matters, practically speaking, because it makes a difference to the conditions under which it is relevant.

Once we see the practical importance of the boundary question, we can better appreciate what the existing answers to that question get right. If a norm is local, then it has a direct impact on people's rights and duties. Naturally, a political community will want to restrict such impacts to norms which it chooses. That is how the community ensures it is self-governing. Even more naturally, a community will want to *deny* such impacts to norms over which external actors have a decisive say. Otherwise it would be subject to an alien will. Shapiro and Kramer's proposals now take on a new significance. That a norm is not created locally, or can be manipulated externally, are both strong reasons *not* to give a norm *direct* effect in local law. By contrast, what Raz identifies are reasons – comity and personal autonomy – *to* give a norm *indirect* effect in local law. Although Kramer's, Shapiro's, and Raz's tests are presented as answers to the boundary question, they are more plausible as answers to a different, normative question, namely: where *should* a legal system draw its boundaries? That is an interesting and important question – it is just not my question.

11. Objections

I imagine you might have several objections.

First, you might worry that it is circular to distinguish laws from other norms in terms of legal relevance. I agree that it would be circular – were we to need to know which norms are laws to know which norms are legally relevant. But we do not. We can know which norms help to make various propositions of law true without knowing which are laws. Indeed, the whole point of the boundary question is that the class of norms which are part of the truth conditions of propositions of law is larger than the class of norms which are laws.

The second objection is more challenging. My test gives us a way to distinguish *local norms* from *adopted norms*: only local norms are

directly relevant. There is no difficulty distinguishing *local rules* from *adopted norms*: only adopted norms impose duties, confer powers, or grant permissions. However, in addition, there are surely adopted rules, ie rules which are locally relevant but which are not part of local law. For example, a Monte Carlo rule which defines "roulette" might be of relevance in working out Saxby's rights within English law. How, then, are we to distinguish *local rules* from *adopted rules*? Not by the directness of their relevance: both are merely indirectly relevant. Not by their character either: both are rules which are not norms. Given that my test is an answer to the boundary question, and the boundary question is about norms not rules, this worry does not present a frontal challenge. But it would reflect poorly on my test were it to provide no indication of how to distinguish local and adopted rules. Certainly it would leave us without a way to draw law's boundaries generally.

To show how to defeat the objection, it will help to have an example to work with. During the Cold War, the then-Ms Karsov was arrested for anti-state activities in Poland. She was kept in terrible prison conditions, and her health steadily deteriorated. One of her friends, Mr Szechter, offered to marry her, as a ruse to allow her to escape the country. Ms Karzov agreed, the two married, and they fled to England. Once safely in London, the couple asked the High Court to declare the marriage null. In *Szecther v Szecther*[54], the judge explained that under English law, 'no marriage is valid if by the law of either party's domicile one party does not consent to marry the other'[55]. Here, both parties were domiciled in Poland when they married. Under Polish law, consent is present only if the choice to marry is 'unconstrained'[56]. Because Ms Karzov's choice was driven by fear, were the case to come before a Polish court, the marriage 'would be held to be void'[57]. Thus, under English law, the

---

[54] *Szechter v Szechter* [1971] P. 286 (HC).
[55] *Id.* at 294–5.
[56] *Id.* at 296.
[57] *Id.* at 296.

marriage was void as well. The judge accordingly issued a decree of nullity.

This case features two validity rules: one English, the other Polish. Neither is a norm. Both are indirectly relevant within English law: the Polish rule bears on the applicability of the English rule, which in turn bears on the operation of various norms of English law. What, then, sets the two rules apart? Here is one thing.[58] The judge in *Szecther v Szechter* treats the Polish rule as relevant because it is part of Polish law. What makes the rule part of Polish law is its relations with norms of Polish law (eg norms about the rights and duties of parties to a marriage). We know, on independent grounds (ie the test of directness of relevance), that the norms of Polish law are not part of English law. So, the Polish validity rule is relevant within English law in part because it is related to norms which are *not* part of English law. That is no part of why the English validity rule is relevant. Thus, the rules are not relevant for the same reason. In general, adopted rules are locally relevant (if they are locally relevant) in part because of their relevance for non-local norms; local rules are not relevant for that reason.

Finally, I imagine you might worry that my test is superficial. Although I have said what it is for a norm to be directly relevant, and I have said that local norms are directly relevant, I have not said how a norm comes to be directly relevant. I have not said by virtue of what facts or features a norm makes a direct difference to people's rights and duties. Without such an account, you might doubt that my answer to the boundary question provides a deep explanation of

---

[58] In this case, the Polish rule happens to be indirectly relevant at a further remove compared with the English rule. If it is 'one step' from a norm of English law to a conclusion about legal rights and duties within English law, then it is 'two steps' from the English validity rule to such a conclusion, and 'three steps' from the Polish rule. But it is not universally true that adopted rules are relevant at a further remove than local rules. Think of an English rule which defines a term used in an English rule setting out a territorial boundary: the definitional rule is at least three steps removed from any conclusion within English law.

the boundaries of legal systems. Now, I am not sure that I must respond to this challenge. It seems to me that my test is no more superficial than any of the existing tests. Be that as it may, let me outline one possible response.

According to HLA Hart's original theory of law, a norm becomes part of a legal system by virtue of being "recognised" under a rule of recognition.[59] The fact of its recognition provides judges (among other law-applying officials) with a reason to apply or act on the norm – that is, to treat the norm as a basis for deciding on people's rights and duties. If a norm is picked out by a rule of recognition, then judges have a reason to treat the norm as relevant, independent of whether it bears on the meaning or operation of another norm. They have a reason to treat it as directly relevant, in other words. But this same reason establishes that the norm *is* part of the legal system. So, it establishes that the norm *is* of direct relevance. So, a norm is directly relevant because it is picked out by a rule of recognition.

If this is right, then it might seem to expose to me to another objection. Was this not a long way to read to find out that Hart was right, you might complain? Could I not have simply said that I agreed with Hart and skipped the last 20-odd pages? No, for three reasons. First, many philosophers have thought that Hart had no way to distinguish between (1) the norms of a legal system and (2) the norms which are not part of that legal system but which judges of that system have a reason to apply.[60] The norms within (2) include the norms of foreign legal systems, games, clubs, and so on – all of the norms listed in §1. Bray J, for instance, did as he ought

---

[59] H.L.A. HART, THE CONCEPT OF LAW (3rd edn. 2012).

[60] eg Joseph Raz, *The Identity of a Legal System*, 59 CALIFORNIA LAW REVIEW 795-815, 814-5 (1971); Scott J. Shapiro, *What is the Rule of Recognition (and Does it Exist)?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 246-7 (Matthew Adler & Kenneth Einar Himma eds., 2009). Hart eventually – and, I would say, mistakenly – accepted the criticism: H.L.A. Hart, *Kelsen's Doctrine of the Unity of Law*, *in* ETHICS AND SOCIAL JUSTICE 195–96 (Howard Kiefer & Milton Munitz eds., 1970).

to by applying norms of Monte Carlo law. This criticism of Hart is unsound, however. Judges have a reason to act on the norms of their own system because a rule of recognition picks those rules out. Judges have a reason to act on other norms, if they do, because doing so helps them to work out the meaning or implications of the rules of their system. The reasons in the two cases are different. So, Hart could have deflected the criticism. That might seem obvious at this point, but if so, it is because of the framework and examples set out earlier in this article. Second, I am not agreeing with Hart. I am simply invoking Hart's theory to show that we are not without resources to explain how a norm comes to be directly relevant. Finally, while my test may be consistent with Hart's theory, it does not depend on its correctness. Even if you do not agree with that theory – indeed, even if you are not a positivist – you can endorse my test.

12. Summary

We need to answer the boundary question to know what is a law of a system and what is not. But the existing answers to the boundary question are inadequate. Kramer believes that local but not adopted norms are free from non-local control. Shapiro says that local but not adopted norms are created locally. Raz, meanwhile, claims that judges rely on local and adopted norms for different reasons. On reflection, though, each proposal is vulnerable to obvious counterexamples. I have tried to take a different approach. I have looked beyond the philosophy of law to what doctrinal scholars say about law's boundaries. And I have tried to build up a test using a wide range of examples of judicial engagement with what everyone would accept are adopted norms. The resulting answer is that, while many norms are relevant to deciding on rights and duties within a legal system, only the norms which belong to that system are directly relevant. This answer has many virtues, among them that explains why leading legal philosophers favoured other proposals. It also answer shows that the boundary questions is important, not

only for our understanding of the nature of law, but also practically, for what it says about how rights and duties are determined.