

# The “Hart-Dworkin” Debate:

## A Short Guide for the Perplexed

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For the past four decades, Anglo-American legal philosophy has been preoccupied – some might say obsessed – with something called the “Hart-Dworkin” debate. Since the appearance in 1967 of “The Model of Rules I,” Ronald Dworkin’s seminal critique of H. L. A. Hart’s theory of legal positivism, countless books and articles have been written either defending Hart against Dworkin’s objections or defending Dworkin against Hart’s defenders.<sup>2</sup> Recently, in fact, there has been a significant uptick in enthusiasm for the debate from its already lofty levels, an escalation no doubt attributable to the publication of the second edition of *The Concept of Law*, which contained Hart’s much anticipated, but alas posthumous, answer to Dworkin in a postscript. Predictably, the postscript generated a vigorous metadepbate about its

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<sup>2</sup> Ronald Dworkin, “The Model of Rules I,” reprinted in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

cogency, with some arguing that Hart was wrong to reply to Dworkin in the way that he did<sup>3</sup> and others countering that such criticisms of Hart are unfounded.<sup>4</sup>

In this essay, I will not take sides in this controversy over Hart's reply to Dworkin. I will be interested, rather, in a more preliminary matter, namely, in attempting to set out the basic subject matter of the debate. My chief concern, therefore, will be to identify the core issue around which the Hart-Dworkin debate is organized. Is the debate, for example, about whether the law contains principles *as well as* rules? Or does it concern whether judges have discretion in hard cases? Is it about the proper way to interpret legal texts in the American legal system? Or is it about the very possibility of conceptual jurisprudence?

To pinpoint the core of the debate, I will examine at some length the main argumentative strategies employed by each side to advance their cause. Thus, I will begin by exploring Dworkin's characterization and critique of Hart's positivism and will then follow up by presenting the rebuttals offered by Hart and his followers. My hope is that by laying bear the basic structure of the debate, we will be able not only to explain why the jurisprudential community has been fixated on this controversy,

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3 See Scott J. Shapiro, "On Hart's Way Out," in *Hart's Postscript: Essays on the Postscript to the Concept of Law*, ed. J. Coleman (Oxford: Oxford University Press, 2001); "Law, Morality and the Guidance of Conduct," *Legal Theory* 6 (2000): 127–70; Jules L. Coleman, "Incorporationism, Conventionality and the Practical Difference Thesis," in *Hart's Postscript*.

4 See Kenneth Einar Himma, "H. L. A. Hart and the Practical Difference Thesis," *Legal Theory* 6 (2000): 1–43; W. J. Waluchow, "Authority and the Practical Difference Thesis," *Legal Theory* 6 (2000): 45–81; Matthew Kramer, "How Morality Can Enter the Law," *Legal Theory* 6 (2000): 83–108; Matthew Kramer, "Throwing Light on the Role that Moral Principles Play in the Law," *Legal Theory* 8 (2002): 115–43.

but also to determine the most profitable direction for the debate to proceed in the future.

Capturing the essence of a philosophical debate, however, can be a tricky business for several different reasons. First, as in any debate, participants may not agree on what they are arguing about. One side may firmly believe that the issue is whether X is true, whereas the other supposes that it is whether Y is true. Notoriously, the Hart-Dworkin debate began on just such a note. In “The Model of Rules I,” Dworkin claimed that the dispute between him and Hart concerned whether the law is a model of rules. This formulation of the debate, though, is misleading – and has misled several generations of law students – because, as it is now generally recognized, Hart never claimed that the law is simply a model of rules (in Dworkin’s sense of “rule”), nor is he committed to such a position.<sup>5</sup>

Second, philosophical debates are hard to characterize because, unlike formal debates, they are not usually about just one issue. In philosophy, everything is ultimately connected to everything else, and hence philosophical controversies tend to range over many different, though in-the-end related, questions. Thus, the Hart-Dworkin debate concerns such disparate issues as the existence of judicial

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5 In the Postscript, Hart accepts some responsibility for the confusion: “Much credit is due to Dworkin for having shown and illustrated [the] importance [of legal principles] and their role in legal reasoning, and certainly it was a serious mistake on my part not to have stressed their non-conclusive force.” H. L. A. Hart, *The Concept of Law*, eds. Penelope Bulloch and Joseph Raz (Oxford: Clarendon Press, 1994), 263. Yet he goes on to disavow Dworkin’s interpretation of his views: “But I certainly did not in my use of the word ‘rule’ claim that legal systems comprise only ‘all or nothing’ standards or near conclusive rules.”

discretion,<sup>6</sup> the role of policy in adjudication,<sup>7</sup> the ontological foundations of rules,<sup>8</sup> the possibility of descriptive jurisprudence,<sup>9</sup> the function of law,<sup>10</sup> the objectivity of value,<sup>11</sup> the vagueness of concepts,<sup>12</sup> and the nature of legal inference.<sup>13</sup>

Third and last, philosophical debates are difficult to represent because they are typically moving targets. Philosophers are remarkably agile advocates and tend to shift their positions to accommodate the objections of their opponents. The critique of legal positivism that Dworkin offered in 1967, for example, differs dramatically from the one that he presented in 1986. Any description must, therefore, attempt to capture this fluidity by treating the debate as an evolving entity that over time adapts to rational pressures coming from without and within.

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6 Compare Ronald Dworkin, “Judicial Discretion,” *Journal of Philosophy* 60 (1963): 624–638 and “Model of Rules I” with Hart’s *Concept of Law*, Ch. 7.

7 Compare Dworkin’s “Hard Cases” in *Taking Rights Seriously* with Hart’s *Concept of Law*, 128–36; Kent Greenawalt, “Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges,” *Columbia Law Review* 75 (1975): 359, 391.

8 Compare Dworkin’s “The Model of Rules II,” reprinted in *Taking Rights Seriously*, with Hart’s *The Concept of Law*, 55–7 and 254–9.

9 Compare Ronald Dworkin’s *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), Chs. 1–2; Stephen Perry’s “Interpretation and Methodology in Legal Theory,” in *Law and Interpretation*, ed. A. Marmor (Oxford: Clarendon Press, 1995); and Jeremy Waldron’s “Ethical (or Normative) Positivism,” in *Hart’s Postscript with Hart’s Concept of Law*, vi, 248–50 and Jules Coleman’s *The Practice of Principle* (Oxford: Oxford University Press, 2001) Ch. 12.

10 Compare Dworkin’s *Law’s Empire*, 93 with Hart’s *Concept of Law*, 249.

11 Compare Dworkin’s “On Objectivity and Interpretation,” in *A Matter of Interpretation, Law’s Empire*, 76–86. and “Objectivity and Truth: You’d Better Believe It,” *Philosophy & Public Affairs* 25 (1996): 87–139 with Hart’s “American Jurisprudence through English Eyes: The Nightmare and the Noble Dream,” in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 139–40, and “Legal Duty and Obligation,” in *Essays on Bentham* (Oxford: Clarendon Press, 1982) 149, 159.

12 Compare Dworkin’s “Is There Really No Right Answer in Hard Cases?” reprinted in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), and “On Gaps in the Law,” in *Controversies about the Law’s Ontology*, eds. Neil MacCormick and Paul Amselek (Edinburgh: Edinburgh University Press, 1991) with Hart’s *Concept of Law*, 123–36, Joseph Raz’s “Legal Reasons, Sources and Gaps,” in *The Authority of Law* (Oxford: Clarendon Press, 1979), and Timothy Endicott’s *Vagueness in Law* (Oxford: Clarendon Press, 2000), esp. Chs. 4 and 8.

13 Compare Dworkin’s “The Model of Rules I,” 41 and “Model of Rules II” with Hart’s *Concept of Law*, Chs. 5 and 6.

Despite these complications, I think that there is an important unity to the Hart-Dworkin debate that can be described in a relatively straightforward manner. I will suggest in what follows that the debate is organized around one of the most profound issues in the philosophy of law, namely, the relation between legality and morality. Dworkin's basic strategy throughout the course of the debate has been to argue that, in one form or another, legality is ultimately determined not by social facts alone, but by moral facts as well. In other words, the existence and content of positive law is, in the final analysis, governed by the existence and content of the moral law. This contention, therefore, directly challenges and threatens to undermine the positivist picture about the nature of law, in which legality is never determined by morality but rather by social practice. For if judges must consider what morality requires in order to decide what the law requires, social facts alone cannot determine the content of the law. As one might expect, the response by Hart and his followers has been to argue that this dependence of legality on morality is either merely apparent or does not, in fact, undermine the social foundations of law and legal systems.

Because the Hart-Dworkin debate is, as mentioned earlier, a dynamic entity, I will try also to show how Dworkin modified his critique to circumvent the responses of Hart's followers. As we will see, however, virtually no attention has been paid to this latter challenge, which is especially surprising given that none of the previous positivistic defenses are helpful against it. I will then sketch out a possible response

positivists might offer to this extremely powerful objection. My aim in this last part of the paper will be not merely to defend positivism, but also to show why it is important that it be defended. As I will argue, the primacy that positivism affords to social facts reflects a fundamental truth about law, namely, that the law guides conduct through the authoritative settlement of moral and political issues. Moral facts cannot ultimately determine the law, as I will show, because they would unsettle the very questions that the law aims to resolve.

## **1. THE OPENING BLAST**

Whatever else the Hart-Dworkin debate is about, it is at least about the validity of Hart's version of legal positivism. To understand the debate, therefore, we must first examine how Dworkin characterized its core commitments. Once this has been set out in Section A, we will turn to Dworkin's first critique of that position in Section B.

### **A. Three Theses**

In "The Model of Rules I," Dworkin sets out three theses to which he believes Hart and most legal positivists are committed.

- (1) "The law of a community can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed."

(2) “The set of these valid legal rules is exhaustive of ‘the law,’ so that if someone’s case is not clearly covered by such a rule (because there is none that seem appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by ‘applying the law.’ It must be decided by some official, like a judge, ‘exercising his discretion.’”

(3) “To say that someone has a ‘legal obligation’ is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something.”<sup>14</sup>

Because this description of Hart’s theory is somewhat idiosyncratic, we should dwell on it for a moment.

The first thing to notice about the first proposition, which we can call the Pedigree Thesis, is that although Dworkin portrays it as a singular commitment, it is in fact a composite claim. The initial part asserts that in any community that has a legal system, there exists a master rule for distinguishing law from non-law. The latter part places an important restriction on this rule: the criteria of legality set out by the master rule may refer only to social facts – in particular, to whether the rule has the appropriate social “pedigree” or source. Such a rule may, for example, require that the norms related to certain subject matter be enacted solely by the legislature by majority vote, or it may recognize the actions of other bodies, such as courts or administrative agencies, in these regards. The master rule of any legal system, however, may not set out criteria of legality that either refer to a norm’s moral

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14 Ronald Dworkin, “The Model of Rules I,” 17.

properties or require for their implementation the exercise of moral reasoning. No master rule, therefore, may condition legality on morality.

Dworkin clearly intends the Pedigree Thesis to capture Hart's doctrine of the rule of recognition.<sup>15</sup> One might question, however, whether it does so. For example, Hart nowhere imposes a pedigree requirement on the rule of recognition; indeed, in certain places, he specifically allows that the criteria of legality may explicitly refer to moral considerations.<sup>16</sup> In addition to being too strong, the Pedigree Thesis is too weak. For Hart specifically claims that the rule of recognition is a "social" rule, that is, a convention among judges to treat certain rules as authoritative. The Pedigree Thesis, however, places no social requirement on the master rule. Thus, a test for legality may satisfy the Pedigree Thesis and still not be a rule of recognition in Hart's sense.

The second positivistic thesis holds that the law consists solely in legal rules. Accordingly, if a case is not clearly covered by an existing legal rule, either because there seems to be no applicable legal rule or because the rule contains vague or ambiguous terms, the deciding judge cannot apply the law but must exercise his or her discretion to resolve the case. Call this the Discretion Thesis. Finally, the third thesis is the counterpart of the Discretion Thesis for "legal obligation": it claims that legal obligations can be generated only by legal rules. Call this the Obligation Thesis.

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<sup>15</sup> Ibid., 39.

<sup>16</sup> See, for example, Hart's *Concept of Law*, 204.

Whereas the Pedigree Thesis is at least recognizable as a colorable commitment of Hart's theory, the Discretion and Obligation Theses do not seem to state peculiarly positivistic positions. After all, what else does the law consist in if not *rules*? And where else would legal obligations arise if not from them? To understand the distinctive nature of the Discretion and Obligation Theses, we must first understand what Dworkin means by a "rule" and how rules differ from other norms that he calls "principles."

In Dworkin's terminology, rules are "all or nothing" standards.<sup>17</sup> When a valid rule applies in a given case, it is conclusive or, as a lawyer would say, "dispositive." Because valid rules are conclusive reasons for action, they cannot conflict. If two rules conflict, then one of them cannot be a valid rule.

By contrast, principles do not dispose of the cases to which they apply.<sup>18</sup> They lend justificatory support to various courses of actions, but they are not necessarily conclusive. Valid principles, therefore, may conflict and typically do. Moreover, in contrast to rules, principles have "weight." When valid principles conflict, the proper method for resolving the conflict is to select the position that is supported by the principles that have the greatest aggregate weight.

Given the logical distinction between these two types of norms, we can see that the Discretion and Obligation Theses are far from trivial. The Discretion Thesis

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<sup>17</sup> Ronald Dworkin, "The Model of Rules I," 24.

<sup>18</sup> *Ibid.*, 25–7.

holds that the law consists solely of legal rules; no principles, in other words, are legal principles. Likewise, the Obligation Thesis states that legal obligations can be generated only by legal rules. Where legal rules are inapplicable, legal obligations do not exist, and judges by necessity must look beyond the law to decide the case.

## **B. Against Judicial Discretion**

In “The Model of Rules I,” Dworkin argues that legal positivism, so characterized, cannot account for the manifest existence of legal principles. Hart’s theory, or any such positivistic account, is a “model of and for a system of rules”<sup>19</sup> and, as such, must be rejected.

Dworkin begins his critique by arguing that the Discretion Thesis is implausible insofar as it ignores the many cases where judges regard themselves as bound by law even though no rules are clearly applicable. In *Henningsen v. Bloomfield Motors*, for example, the court was asked to hold an automobile maker liable for injuries sustained as the result of defective manufacturing despite the fact that the injured plaintiff signed a waiver of liability.<sup>20</sup> The court could find no explicit rule that would authorize it to ignore such a waiver but nevertheless held for the plaintiff. In support of its decision it cited a number of legal principles, including “freedom of contract is not such an immutable doctrine as to admit of no

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<sup>19</sup> Ibid., 22.

<sup>20</sup> 32 N.J. 358, 161 A.2d 69 (1960), discussed in Dworkin, *Taking Rights Seriously*, 25–6.

qualification in the area in which we are concerned”<sup>21</sup> and “in a society such as ours the automobile manufacturer is under a special obligation in connection with the construction, promotion, and sale of his cars.”<sup>22</sup> These principles, the court reasoned, were of such great importance that they outweighed contrary principles, such as those supporting the freedom to contract, which militated in favor of enforcing the waiver.

According to Dworkin, *Henningsen* was not an aberration. “Once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, law books cite them, legal historians celebrate them.”<sup>23</sup> In fact, legal principles are most conspicuously at play in hard cases, where they guide and constrain judicial decision making in the absence of legal rules. Legal positivism ignores the existence of these norms precisely because it holds, via the Discretion Thesis, that cases such as *Henningsen* are not governed by law. Legal positivism, in other words, is a model of rules only.

Dworkin is careful to point out that there are several “weak” senses in which judges must exercise discretion even in hard cases.<sup>24</sup> Judges must exercise discretion in the sense that they are required to use their judgment in reasoning from legal principles to legal conclusions. At least sometimes as well, they have discretion in the sense that they have the final say in a particular case. Dworkin denies, however,

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21 32 N.J. 388, 161 A.2d 86.

22 32 N.J. 387, 161 A.2d 85.

23 Dworkin, “Model of Rules I,” 28.

24 *Ibid.*, 31–4.

that judges must exercise what he calls “strong” discretion, namely, the idea that they must look beyond the law and apply extralegal standards to resolve the case at hand. Once one recognizes the existence of legal principles, Dworkin claims, it becomes clear that judges are bound by legal standards even in hard cases.

### **C. Content, Not Pedigree**

According to Dworkin, the pervasiveness of legal principles not only falsifies the Discretion Thesis, it also discredits the Pedigree Thesis. This is so because the legality of principles depends, at least sometimes, simply on their content.

The origin of [the *Henningsen* principles] as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense being sustained. If it no longer seemed unfair to allow people to profit by their wrongs, or fair to place special burdens upon oligopolies that manufacture potentially dangerous machines, these principles would no longer play much role in new cases, even if they had never been overruled or repealed.<sup>25</sup>

Insofar as positivism requires legality to be purely a function of pedigree, it cannot account for the existence of principles such as those operative in *Henningsen*, whose legal recognition is conditioned on the moral perception that, for example, it is “fair

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<sup>25</sup> Ibid., 40.

to place special burdens upon oligopolies that manufacture potentially dangerous machines.’<sup>26</sup>

Dworkin does not, of course, claim that pedigree is legally irrelevant. He concedes that legal principles usually have institutional support and that having such support is normally crucial to their legality. “True, if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. ... Unless we could find some such institutional support, we would probably fail to make out our case.”<sup>27</sup> Dworkin does, however, deny that a positivistic master rule could be constructed that would test a principle based on its institutional support.

We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rule) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of the other standards. We could not bolt all of these together into a single ‘rule’, even a complex one, and if we could the result would bear little to Hart’s picture of a rule of recognition, which is the picture of a fairly stable master rule specifying ‘some feature or features, possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule.’<sup>28</sup>

Dworkin’s argument appears to be this: the legal impact of a principle’s institutional support on its legality and weight is itself determined by principles, namely, those

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26 Ibid.

27 Ibid.

28 Ibid., citing Hart’s *The Concept of Law*, 94.

relating to institutions and their authority. For example, whether a judge should recognize the principles in *Henningsen* and, if so, how much weight to attribute to them depends on a whole constellation of principles relating to the institutional authority of common law courts, their relations to legislatures, and to ordinary moral practices. These institutional principles, in turn, are supported by very broad principles of political morality.<sup>29</sup> Dworkin believes that no rule could be fashioned that accurately reflects the verdicts of all these political principles, presumably because the possibilities that would have to be considered and codified are infinite in number. Moreover, these principles and their weights fluctuate over time, based on their own degree of institutional support, and hence any resulting master rule would fail to be stable.

According to Dworkin, therefore, the Pedigree Thesis must be rejected for two reasons. First, legal principles are sometimes binding on judges simply because of their intrinsic moral properties and not because of their pedigree. Second, even when these principles are binding in virtue of their pedigree, it is not possible to formulate a stable rule that picks out a principle based on its degree of institutional support. Having previously disposed of the Discretion Thesis, Dworkin concludes that legal positivism must be rejected as an adequate theory of law.

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<sup>29</sup> See Dworkin, "Model of Rules I, 41: "We might argue, for example, that the use we make of earlier cases and statutes is supported by a particular analysis of the point of the practice of legislation or the doctrine of precedent, or by the principles of democratic theory, or by a particular position on the proper division of authority between national and local institutions, or some-thing else of that sort."

## 2. THE ISSUE

Dworkin is often criticized for having ascribed to Hart a highly implausible view, namely, that the law consists solely of rules, never of principles. When Hart spoke of legal rules, it is usually pointed out, he did not mean to single out only “all or nothing” standards that cannot conflict and lack the dimension of weight.<sup>30</sup> He simply intended to refer to standards that are binding in a particular legal system and have as their function the guidance and evaluation of conduct.

These criticisms are not entirely fair, however. Understood charitably, Dworkin’s attribution to Hart was an exercise in charitable interpretation. On this reading, Dworkin was not reporting anything that Hart actually said; rather, he was attempting to explain Hart’s doctrine of strong discretion by attributing to him a view that he never expressed but nonetheless held. Why, Dworkin asked, did Hart believe that judges are not bound by law in hard cases, despite the fact that they appeal to principles to resolve such cases? It must be, he answered, that Hart did not believe that these principles are part of the law. If the law contains only rules, then when the rules “run out,” so must the law.

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<sup>30</sup> See, for example, Raz, “Legal Principles and the Limits of Law,” *Yale Law Journal* 81 (1972):823, 845; Shapiro, “On Hart’s Way Out,” 163; Leiter, “Beyond the Hart-Dworkin Debate,” *American Journal of Jurisprudence* 48 (2003):17, 20; and Lyons, “Principles, Positivism and Legal Theory,” *Yale Law Journal* 87 (1977):415, 422. See also Hart’s comments in the Postscript to his *Concept of Law*, as I quoted in footnote 5.

Although Dworkin's interpretation of Hart is fair, I don't think it is the best explanation for Hart's theory of judicial discretion. Its major defect stems from the fact that Hart explicitly offered a very different, and more plausible, explanation for his doctrine of strong discretion. According to Hart, judicial discretion is a necessary byproduct of the inherent indeterminacy of social guidance. It is impossible, Hart argued, to transmit to others standards of conduct that settle every contingency in advance. Guidance by precedent is imperfect because, although the exemplar is identified, the relevant standard of similarity is not. Although common sense will eliminate certain similarity standards as inappropriate, there will always be a healthy number of conflicting standards that will seem more or less reasonable. Whereas guidance by legislation might settle some of these doubts, Hart maintained that the use of general terms in statutes cannot eliminate them all. This is so because of the "open texture" of language. "In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will be plain cases constantly recurring in similar contexts to which general expressions were clearly applicable ... but there will also be cases where it is not clear whether they apply or not."<sup>31</sup>

Thus, Hart's doctrine about judicial discretion is not predicated on a model of rules. It rests, rather, on a picture of law that privileges social acts of authoritative guidance. For Hart, a legal rule is a standard that has been identified and selected as

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31 Hart, *Concept of Law*, 123.

binding by some social act, be it an individual directive, a legislative enactment, a judicial decision, an administrative ruling, or a social custom. Judicial discretion is inevitable, according to Hart, because it is impossible for social acts to pick out standards that resolve every conceivable question.

As we can see, the debate between Hart and Dworkin does not concern whether the law contains principles as well as rules. This cannot be *the* issue of the debate because it was never *an* issue of the debate.<sup>32</sup> Contrary to Dworkin's interpretation, Hart never embraced the model of rules, either explicitly or implicitly.

Nor would it be accurate to claim that the core issue of the debate revolves around the question of judicial discretion. To be sure, Hart and Dworkin did disagree about whether judges have strong discretion in hard cases. Yet this dispute is a derivative one: both sides take their positions on judicial discretion because of their very different theories about the nature of law.

As we have just seen, Hart held that judges must sometimes exercise strong discretion because he takes the law to consist in those standards socially designated as authoritative. Dworkin, on the other hand, believes that judges do not have strong discretion precisely because he denies the centrality of social guidance to determining the existence or content of legal rules. Recall that the point of Dworkin's

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<sup>32</sup> Although no one disputes that the law contains principles as well as rules, some have objected to the way Dworkin distinguishes between these two classes of norms. In particular, they have argued that rules do not always operate in an "all or nothing" fashion. See, for example, Raz, "Legal Principles and the Limits of Law" and George Christie, "The Model of Principles," *Duke Law Journal* 17 (1968):649. For Dworkin's response, see Dworkin, "Models of Rules II," 71–80.

critique in “The Model of Rules I” is to show that the law contains norms that are binding even though they have not been the subject of past social guidance. They are binding, rather, because of their moral content. Moreover, even with respect to those norms that have been the subject of past social guidance, the bindingness of those norms, according to Dworkin, does not depend on the fact that they have been socially designated as binding. They are binding because the principles of political morality make them binding. Thus, even when social guidance runs out, the law does not, for moral guidance does not.

The “real” debate between Hart and Dworkin, therefore, concerns the clash of two very different models of law. Should law be understood to consist in those standards socially designated as authoritative? Or is it constituted by those standards morally designated as authoritative? Are the ultimate determinants of law social facts alone or moral facts as well? Dworkin’s challenge purports to demonstrate that we must choose the latter. As we will see, the positivist response has been to argue that Dworkin has shown no such thing.

### **3. THE RESPONSES**

The traditional moniker “the Hart-Dworkin debate” is slightly deceiving, for it tends to create the impression that Hart and Dworkin have been the sole participants in the debate. In point of fact, however, Hart never directly responded in writing to

Dworkin's critique during his lifetime.<sup>33</sup> He apparently left to others the task of defending his theory.

In this section, I will survey the two main responses offered by Hart's followers to Dworkin's challenge. As we will see, some positivists accepted Dworkin's characterization of legal positivism but rejected his proposed explanation for why legal principles are part of the law. For them, legal norms are never valid because of their moral content – the principles that Dworkin cites either have social pedigrees or they are not law. Others accepted Dworkin's explanation for the legality of principles as conceptually possible, and even empirically plausible, but rejected his characterization of legal positivism. For these theorists, legal principles can be valid in virtue of their moral content without rejecting the core commitments of legal positivism.

### **A. Exclusive Legal Positivism**

Although Hart himself seemed to reject the Pedigree Thesis, some legal positivists agreed with Dworkin about its centrality to positivism and, hence, enthusiastically embraced it. For them, tests of legality must always distinguish law from non-law based exclusively on their social source and must be implementable without resort to

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<sup>33</sup> Hart did criticize Dworkin's positive proposals on several occasions. See Hart, "Legal Duty and Obligation," 147–53; "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream," 137–41; "Law in the Perspective of Philosophy," in *Essays in Jurisprudence and Philosophy*, 153–8; and "Comment on Dworkin, 'Legal Theory and the Problem of Sense'," in *Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart*, ed. Ruth Gavison (Oxford: Clarendon Press, 1987).

moral reasoning. Traditionally, these positivists have been known as “hard” or “exclusive” legal positivists.<sup>34</sup>

How, then, do exclusive legal positivists respond to Dworkin’s claim that judges are often bound by principles that have no pedigree? One reply has been to point out that these norms do have pedigrees, appearances notwithstanding.<sup>35</sup> For these principles typically have been used by courts over a period of time as the basis for their decisions. This usage amounts to the existence of a “judicial custom,” thereby constituting an adequate social pedigree from the perspective of the Pedigree Thesis.

The weakness of this response, however, is that judges often take themselves to be obligated to apply principles that seem entirely novel. As Dworkin pointed out, no court before *Henningsen* applied the principle that automobile manufacturers are subject to a greater standard of care. Yet that court nevertheless felt compelled to apply that norm.

Accordingly, exclusive legal positivists have offered a second, more nuanced response. They concede that judges are sometimes legally obligated to apply

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34 Joseph Raz, exclusive legal positivism’s leading advocate, refers to his view as the commitment to the Sources Thesis. The Sources Thesis was first set out in “Legal Positivism and the Sources of Law,” in Raz, *The Authority of Law* and received its most vigorous defense in his “Authority, Law and Morality,” reprinted in Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994). Raz further develops his position in Joseph Raz, *The Concept of a Legal System*, 2nd ed. (Oxford: Clarendon Press, 1980) 211–12; “Problems about the Nature of Law,” “The Inner Morality of Law,” and “The Autonomy of Legal Reasoning,” all appearing in *Ethics in the Public Domain*; and “Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment,” *Legal Theory* 4 (1998):1.

35 See, for example, Genaro Carrio, *Legal Principles and Legal Positivism*, (Buenos Aires: Abeledo-Perrot, 1971), 25.

principles that lack any institutional pedigree. But this fact, they contend, does not impugn the Pedigree Thesis. For in such cases, judges are simply under a legal obligation to apply *extralegal* standards.

According to this second response, first made prominent by Joseph Raz, Dworkin's critique assumes that the law of a system consists of all those standards that judges of that system are required to apply.<sup>36</sup> From this it follows, of course, that if judges are required to apply moral principles that lack pedigrees, these principles must be *legal* principles. However, Raz argues, this assumption is mistaken. In choice of laws cases, for example, judges are often required to apply the law of a foreign jurisdiction. Yet the obligation to apply foreign rules does not transmute them into local rules. The distinction between normative systems is preserved even when one system borrows from another. Analogously, Raz claims, the judicial obligation to look to morality does not ipso facto incorporate morality into the law.<sup>37</sup>

According to Raz, therefore, when pedigreed standards run out, judges are under a legal obligation to look to moral principles to resolve the case at hand. Furthermore, in such cases, judges are exercising strong discretion insofar as they are obligated to look beyond the law and apply these extralegal principles to the case at hand. Strong discretion does not, therefore, entail the existence of "extra-legal

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36 See Joseph Raz, "Postscript to 'Legal Principles and the Limits of Law'," in *Ronald Dworkin and Contemporary Jurisprudence*, ed. Marshall Cohen (Totowa, NJ: Rowman & Allanheld, 1983), 84–5.

37 Raz, *The Authority of Law*, 46.

principles [a judge] is *free* to apply if he *wishes*.”<sup>38</sup> Rather, judges are legally constrained to apply certain extralegal principles, namely, the morally best ones.<sup>39</sup>

## B. Inclusive Legal Positivism

Most legal positivists, however, have not taken the exclusivist route. Instead, they have sought to deflect Dworkin’s critique by rejecting his characterization of positivism. Legal positivism, they have argued, does not prohibit moral tests of legality.<sup>40</sup> Hence, even if Dworkin is right and judges are sometimes obligated to apply principles that lack pedigrees in mature systems such as our own, positivism would remain unscathed. Positivists who embrace this position are usually known as “soft” or “inclusive” legal positivists.

This response to Dworkin begins by setting out a more traditional version of legal positivism, one that sees it as defined by two commitments. The first thesis, sometimes called the “Separability Thesis,” denies any necessary connection between legality and morality. For the positivist, there is some possible legal system where the

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38 Dworkin, “Model of Rules I,” 29 (emphasis added).

39 See, for example, Joseph Raz, “Legal Principles and the Limits of Law,” 847–8. Timothy Endicott has recently argued that when judges are legally required to apply moral principles to plug a gap in the law, and those principles dictate a unique solution, judges lack strong discretion. This represents somewhat of a compromise view: with Dworkin, Endicott believes that judges do not always have strong discretion in hard cases; with Raz, he believes that in these situations, judges are making, not finding, law. See Timothy Endicott, “Raz on Gaps – The Surprising Part,” in *Rights, Culture and Law*, ed. L. H. Meyer, S. L. Paulson, and T. W. Pogge (Oxford: Oxford University Press, 2003).

40 For this type of response see Philip Soper, “Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute,” *Michigan Law Review* 75 (1977): 473; David Lyons, “Principles, Positivism and Legal Theory,” *Yale Law Journal* 87 (1977): 415; Jules Coleman, “Negative and Positive Positivism,” in *Markets, Morals and the Law* (Cambridge: Cambridge University Press, 1988); Wilfred Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

legality of a norm does not depend on any of its moral properties: in that system, an unjust law is still a law. The second thesis, sometimes known as the “Social Fact Thesis,” holds that the existence and content of the law are ultimately determined by certain facts about social groups. Legal facts are grounded, in the final analysis, on social, not moral, facts.

Clearly, the Separability Thesis does not rule out master tests that incorporate moral criteria of legality. It states simply that tests of legality need not be moralized, not that they *could* not. Would the existence of such tests, however, offend the Social Fact Thesis? Not necessarily, according to the inclusive legal positivist. The Social Fact Thesis would be satisfied, on this view, just in case such tests of legality themselves have social pedigrees. For as long as the criteria of legality are set out in a rule whose existence is underwritten by a social fact, the law would have the appropriate social foundations.

In fact, the inclusive legal positivist points out that Hart’s master rule, the rule of recognition, has the requisite pedigree. As mentioned earlier, the rule of recognition is necessarily a *social* rule – it is a convention among judges to recognize certain norms that bear certain characteristics as binding. The Social Fact Thesis is compatible with rules of recognition that set out nonpedigree, moral criteria of legality, for, contrary to the exclusive positivist, it does not require every legal rule to have a social source – it merely requires that the rule of recognition have one. Thus, as long as legal positivism’s commitment to social facts can be satisfied by the

existence of a social rule of recognition, there is no bar to treating morality as a condition of legality.<sup>41</sup>

The simplicity of this response, however, is offset by a hidden weakness. It would seem that the inclusive legal positivist cannot claim that the rule of recognition requires judges to resolve hard cases by resorting to moral principles and still maintain that the rule of recognition is a social rule. The difficulty stems from the fact, as Dworkin pointed out in “The Model of Rules II,”<sup>42</sup> that the contents of social rules are determined by agreement. A social rule imposes an obligation to *p* if and only if members of the group agree that *p* is required. Controversy about the requirements of a social rule, thus, seems impossible: social rules rest on agreement, whereas controversy entails disagreement.

Yet, the objection continues, in hard cases, judges disagree with one another about which principles they are required to apply. If the rule of recognition required judges to apply moral principles, hard cases would, therefore, involve controversy about the content of the rule of recognition. However, as mentioned above, controversy about a social rule is impossible. Hence, if inclusive legal positivists

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41 Some positivists took a slightly different tack: they claimed that as long as a norm is morally derivable from a legal norm that has a pedigree, the morally derivable norm need not have a pedigree to be law. Suppose, for example, that a norm imposing a duty of reasonable care on everyone has a legally appropriate pedigree and that reasonable care requires homeowners to clear snow from the sidewalk in front of their house. These positivists – sometimes called “incorporationists” – hold that the snow-clearing norm is a legal norm despite its lack of a pedigree because it is morally entailed by a pedigreed norm. For such a response, see Rolf Sartorius, “Social Policy and Judicial Legislation,” *American Philosophical Quarterly* 8 (1971): 151.

42 Ronald Dworkin, “The Model of Rules II.”

maintain that the rule of recognition requires hard cases to be resolved by reference to moral principles, then the rule of recognition cannot be a social rule.

In “Negative and Positive Positivism,” Jules Coleman showed how to overcome this objection.<sup>43</sup> Coleman distinguished between two types of disagreements. The first type involves disputes over the content of the rule of recognition. Call these “content disputes.” By contrast, certain disagreements presuppose consensus about the content of a rule but involve disputes about its implementation. Call these “application disputes.”

Coleman suggested that we see hard cases as involving disputes about the applicability of the rule of recognition. They are application disputes, not content disputes. In controversial cases, there exists an accepted convention among judges to look toward the principles of morality to resolve legal disputes. When judges disagree about which principles to apply, they are disagreeing over the correct application of the rule of recognition, not about its content. All judges agree, in other words, that the rule of recognition requires them to look toward moral principles in adjudication, thereby making those moral principles valid law. They simply disagree about which principles are moral principles (and hence legal principles).

It should be noted that Hart eventually endorsed Coleman’s strategy in the Postscript to *The Concept of Law*. First, Hart rejected Dworkin’s contention that exclusive legal positivism was the only true positivism. “In addition to such pedigree

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43 Coleman, “Negative and Positive Positivism,” 20.

matters the rule of recognition may supply tests relating not to the factual content of laws but to their conformity with substantive moral values or principles.”<sup>44</sup> Moreover, he dismissed Dworkin’s inference that controversy entails the absence of a convention. “Judges may be agreed on the relevance of such tests as something settled by established judicial practice even though they disagree as to what the tests require in particular cases.”<sup>45</sup>

## 4. ACT TWO

A detailed examination and comparison of these two versions of legal positivism, and their respective responses to the Dworkin, are clearly beyond the scope of this essay. I will, however, simply assert without argument that Hart’s followers have succeeded in blunting the force of Dworkin’s critique in “The Model of Rules I.” The fact that judges are sometimes obligated to apply moral principles in hard cases does not show, by itself, that legal positivism is false. This is not to say, of course, that such a critique could not be made out but only that Dworkin has yet to make it.

Perhaps Dworkin sensed the impasse as well, for his critique changed dramatically after “The Model of Rules I.” As we will see, the new objection, first broached in “The Model of Rules II” but fully developed only in *Law’s Empire*, attempts to show that legal positivists are unable to account for a certain type of

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44 Hart, *Concept of Law*, 258.

45 *Ibid.*, 258–9.

disagreements that legal participants frequently have, namely, those that concern the proper method for interpreting the law. The only plausible explanation for how such disagreements are possible, Dworkin claimed, is that they are moral disputes. Contrary to legal positivists, therefore, Dworkin argued that the law does not rest on social facts alone but is ultimately grounded in considerations of political morality as well as institutional legitimacy .

As we will see, this critique of positivism is extremely powerful. Moreover, none of the responses to the first critique mentioned earlier are effective against it. Whether positivists have any defense against it is a matter to which I will return at the end of the essay.

### **A. Theoretical Legal Disagreements**

At the beginning of *Law's Empire*, Dworkin argues that the law is a social phenomenon that has a special structure. Legal practice, he claims, is “argumentative,”<sup>46</sup> by which he means that the practice consists largely in participants advancing various claims about what the law demands and defending such claims by offering reasons for them. “Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are

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<sup>46</sup> Dworkin, *Law's Empire*, 13.

given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions.”<sup>47</sup>

To understand the law as a social phenomenon, then, one must appreciate that, for the most part, it is a practice of argumentation. Legal philosophers must, therefore, study the different modes of argumentation that legal participants actually use when engaging in legal reasoning. However, as Dworkin argues, modern jurisprudence fails utterly in this regard. Following the dominant approaches in legal philosophy, he claims, many of the disagreements that legal participants engage in either do not exist or are complete nonsense.

To formulate this charge, Dworkin begins by introducing two related sets of distinctions. He first distinguishes between “propositions of law” and “grounds of law.”<sup>48</sup> A proposition of law is a statement about the content of the law in a particular legal system, such as “the law forbids states to deny anyone equal protection within the meaning of the Fourteenth Amendment” and “the law requires Acme Corporation to compensate John Smith for the injury he suffered in its employ in February.” Propositions of law may be true or false. The proposition “motorists are not legally permitted to drive in California over 65 miles per hour” is true, whereas “motorists are not legally permitted to drive in California after sunset” is false.

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47 Ibid.

48 Ibid., 4.

Propositions of law are true in virtue of the “grounds of law.” In California, for example, propositions of law are true (roughly speaking) if a majority of state legislators vote for bills that contain texts to those effects and the governor then signs it. These acts of legislation make propositions of California law true and hence are grounds of law in the California legal system.

Given the distinction between propositions and grounds of law, Dworkin argues that two different types of legal disagreements are possible.<sup>49</sup> The first type involves disagreements about whether the grounds of law have in fact obtained. Parties could dispute, for example, whether Congress passed a certain law by the requisite majorities or whether the president vetoed the bill. Dworkin calls these “empirical disagreements.”

The second type of disagreement does not relate to whether the grounds of law have obtained; rather, it involves conflicting claims about what the grounds of law are. For example, one party to a dispute might argue that a statute is valid because Congress has the authority to enact a certain kind of legislation and has so acted. The second party might concede that the formal conditions for enactment have been met but nevertheless claim that Congress lacks the authority to so legislate. These parties are not embroiled in an empirical disagreement inasmuch as they agree about the historical record. According to Dworkin, they are engaged in a “theoretical” disagreement about the law. They are disagreeing about the identity of

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<sup>49</sup> Ibid., 4–6.

the grounds of law, that is, about what must take place in their legal system before a proposition of law can be said to be true or false.

With these distinctions in tow, Dworkin declares: “Incredibly, our jurisprudence has no plausible theory of theoretical disagreement in law.”<sup>50</sup> This is so because “our jurisprudence” is committed to a “plain-fact” view of law.

The plain fact view, according to Dworkin, consists of two basic tenets. First, it maintains that the grounds of law in any community are fixed by consensus among legal officials. If officials agree that facts of type *f* are grounds of law in their system, then facts of type *f* are grounds of law in their system. Second, it holds that the only types of facts that may be grounds of law are those of *plain historical fact*.

The law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past. If some body of that sort has decided that workmen can recover compensation for injuries by fellow workmen, then that is the law. If it has decided the other way, then that is the law. So questions of law can always be answered by looking in the books where the records of institutional decisions are kept.<sup>51</sup>

As Dworkin convincingly argues, the plain-fact view cannot countenance the possibility of theoretical legal disagreements. For if, according to its first tenet, legal participants must always agree on the grounds of law, then it follows that they cannot disagree about the grounds of law. Any genuine disagreement about the law must

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50 Ibid., 6.

51 Ibid., 7.

involve conflicting claims about the existence or nonexistence of plain historical facts. They must, in other words, be purely empirical disagreements.

## **B. The Prevalence of Theoretical Disagreements**

Dworkin proceeds to argue that, *pace* the plain-fact view, theoretical disagreements do exist in the law. He makes his case by presenting numerous examples where it is plausible to suppose that legal participants all agree about the historical record but dispute their legal significance. For example, in *Tennessee Valley Authority v. Hill*, several conservation groups sued the Tennessee Valley Authority (TVA) to prevent them from completing a \$100 million dollar dam project.<sup>52</sup> They claimed that the dam would threaten the existence of the snail darter – a three-inch fish of no particular scientific, aesthetic, or economic interest – and hence would violate the Endangered Species Act of 1973. The TVA, however, argued that the Endangered Species Act did not apply to a project authorized, funded, and substantially constructed before it was passed and, hence, should not be construed to prohibit the dam's completion.

The Supreme Court sided with the conservationists. Although Chief Justice Burger, writing for the majority, admitted that halting the project would involve an enormous waste of public funds and, from a policy perspective, could not be justified, he noted that the text clearly requires the government to terminate projects

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<sup>52</sup> *Tennessee Valley Authority v. Hill*, 437 US 153 (1978).

posing risks to species designated as “endangered.” Furthermore, he could find no indication that Congress intended otherwise. Burger thus concluded that the Court had no choice but to issue the injunction, even at so late a date.

The dissent, led by Justice Powell, argued that courts should not construe texts to lead to absurd results, except where it can be demonstrated that such results were intended by the legislature. Because it would be ludicrous to shut down a nearly completed \$100 million construction project simply to save an unimportant, albeit endangered, fish and because Congress did not clearly endorse this result, the Court is obligated to give an interpretation that “accords with some modicum of common sense and the public weal.”<sup>53</sup>

Dworkin argues that the disagreement between Burger and Powell is ultimately theoretical in nature.<sup>54</sup> Both sides agreed that the Endangered Species Act of 1973 is valid law, that halting the construction of the dam is terribly wasteful even in the light of the benefits to the snail darter, and that Congress never considered this type of case when drafting or voting on the legislation. Their disagreement concerned the legal relevance of these plain facts. According to Burger, the plain meaning of the text should control even when absurdities follow unless compelling evidence can be found to show that Congress did not intend the absurd result. Powell, on the other hand, argued that plain meaning should not control when absurdities follow unless compelling evidence can be found that Congress *did* intend the absurd result.

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<sup>53</sup> Ibid., 196.

<sup>54</sup> Dworkin, *Law's Empire*, 23.

Those who subscribe to the plain-fact view are, of course, aware that legal participants often seem as though they are engaged in theoretical disagreements. But, they claim, appearances are deceiving. In these types of cases, when participants seem to be disagreeing about what the law is, they are actually disagreeing about what the law ought to be. According to the plain-fact view, therefore, the debate between Burger and Powell concerned the law's repair. Burger should be understood as seeking to *extend* the reach of the Endangered Species Act to construction projects that were substantially completed by the time the act was passed. Powell, on the other hand, should be taken as arguing that the Act, in the light of the wasteful consequences of such an expansion, should not be so expanded.

If judges are not actually engaging in theoretical disagreements, why do judges act as though they are? The standard answer supplied by the plain-fact view is that judges are trying to conceal the true "legislative" nature of their actions. In systems of separated powers, where legislatures alone are authorized to make law and judges are required to apply it, it is dangerous for judges to admit that they are exercising discretion and attempting to repair the law. Courts preserve their legitimacy when they act as though there really is law "out there" to discover rather than admitting that the law is sometimes indeterminate and that they are filling in the gaps.

Dworkin finds this response implausible for two reasons. First, he cannot see why, if the plain-fact explanation is true, the general public has yet to uncover the

ruse. “If lawyers all agree there is no decisive law in cases like our sample cases, then why has this view not become part of our popular political culture long ago?”<sup>55</sup> Second, Dworkin points out that if judges were seeking to repair, not report, the law, it would be difficult in many cases to explain why they end up deciding as they do. In *TVA*, for example, Burger claimed that halting the dam’s construction was disfavored from a policy perspective. If he wanted to repair the law, why did he come to such a decision? By Burger’s own admission, the Court’s ruling would result in an enormous waste of public funds for no apparent benefit.<sup>56</sup>

Dworkin infers from *TVA v. Hill* and cases like it that theoretical disagreements not only take place but abound. Because the plain-fact view cannot account for the possibility of these disputes, Dworkin concludes that it does not capture the argumentative structure of legal practice and as a result must be rejected.

### **C. The Possibility of Theoretical Disagreements**

How, then, are theoretical disagreements possible? Dworkin’s explanation centers on the claim that legal interpretation is, at bottom, “constructive” interpretation. Constructive interpretation is the process of “imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it

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<sup>55</sup> *Ibid.*, 37.

<sup>56</sup> Likewise, in *Riggs v. Palmer*, Judge Gray argued in dissent that beneficiaries who murder testators should be permitted to collect their bequests, even though this interpretation of the Statute of Wills results in absurdity. If judges are supposed to be acting in these cases as legislators, as the plain-fact view urges, then their actions are inexplicable – they routinely choose the less socially beneficial course of action.

is taken to belong.”<sup>57</sup> A purpose makes an object the best that it can be when it both “fits” *and* “justifies” the object better than any rival purpose. A purpose “fits” the object to the extent that it recommends that the object exists or that it has the properties it has. A purpose is “justified” to the extent that it is a purpose worth pursuing.

To determine which facts are grounds of law in a particular legal system, Dworkin believes that the interpreter must engage in constructive interpretation. She must first impute a point to the particular practice that presents it in its best light, namely, one that best fits and morally justifies it. Then, she must use this point to ascertain the grounds of law for the particular system.

By treating the determination of legal grounds as a process of constructive interpretation, Dworkin is able to account neatly for the possibility of theoretical interpretations in law. Disagreements about the grounds of law are predicated on disagreements about the moral value of law and/or law’s relation to practice. Thus, unlike the plain-fact view, this account need not treat theoretical disagreements as incoherent or insincere: insofar as the content of the law is dependent on which principles portray legal practice in its morally best light, genuine *moral* disagreements will induce genuine *legal* disagreements.

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<sup>57</sup> Dworkin, *Law’s Empire*, 52.

## 5. THE TWO CRITIQUES COMPARED

Dworkin's critique of legal positivism in *Law's Empire* has many similarities to the one he put forth in "The Model of Rules I." Both characterize positivism as committed to a Pedigree Thesis. Both claim that positivism cannot explain judicial behavior in hard cases. And both maintain that the proper explanation for such behavior involves understanding judges looking to morality to resolve the legal matters at hand. Despite these commonalities, however, Dworkin's latter critique is a vastly different and, as we will soon see, more effective one.

The distinction between critiques becomes plain when the first is recast using the terminology of the second. To translate between critiques, we start by noting that a "criterion of legality" (in the language of the first critique) tests whether certain "grounds of law" (in the language of the second critique) obtain in a particular case. For example, the criterion "All rules passed by both houses of Congress that regulate interstate commerce are laws of the United States" takes the facts of bicameral passage and regulation of interstate commerce as grounds of law in the U.S. legal system. Thus, instead of speaking of kinds of criteria of legality, we can speak simply in terms of the kinds of grounds of law that these criteria set out.

On this translation, the first critique can be understood as purporting to show that in hard cases judges take morally relevant facts to be grounds of law. It does this by examining cases such as *Henningsen* where judges regard themselves as bound by

principles whose legal authority derives from their moral content. But positivism is committed to the plain-fact view, which precludes moral grounds of law. Hence, the first critique concludes that legal positivism cannot explain judicial behavior in hard cases.

Whereas the first critique seeks to exploit the alleged fact that judges often take the grounds of law to be moral in nature, the second critique tries to capitalize on the alleged fact that judges often disagree with one another about what the grounds of law are. The dispute in *TVA*, for example, was grounded in a dispute about whether to privilege the statutory text even in the face of absurd results. Positivism cannot explain such disagreements, the second critique concludes, because it is committed to the plain-fact view, according to which the grounds of law are fixed by agreement.

Thus, though both *Henningsen* and *TVA* are hard cases, they are hard for different reasons. *Henningsen* is hard because, although the court agreed on the grounds of law, figuring out whether those grounds obtain in the particular case is a demanding question that reasonable people may disagree about. *TVA* is hard because to determine the correct outcome of the case, the court had to first resolve what the grounds of law are, and reasonable people can disagree about that question as well.

As we saw earlier, hard cases like *Henningsen* are not hard for the positivist to accommodate. For example, the positivist may take the exclusivist route and claim that, in such cases, judges are legally obligated to apply extralegal norms. Or she can

take the inclusive route and simply admit that the grounds of law can be moral in nature, provided that there is a convention among judges to regard those facts as the grounds of law. But cases like *TVA* cannot be explained away in either manner. For it is common ground between exclusive and inclusive legal positivists that the grounds of law are determined by convention. How can they account for disagreements about the legal bindingness of certain facts whose bindingness, by hypothesis, requires the existence of agreement on their bindingness?<sup>58</sup>

Curiously, positivists have had little to say about this problem. Indeed, it is one of the great ironies of modern jurisprudence that in spite of the huge amount of ink spilled on the Hart-Dworkin debate, so little attention has been paid to this second, more powerful objection. To be sure, legal positivists have relentlessly attacked Dworkin's positive theory of constructive interpretation. Yet they have made almost no effort to defend their own theory against Dworkin's negative

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58 It is important not to conflate the objection from theoretical disagreements with the argument Dworkin calls the "semantic sting." In *Law's Empire*, Dworkin introduces the semantic sting argument *after* he makes the objection from theoretical disagreements. See *Ibid.*, 43–4. The semantic sting is used to explain why positivists require the grounds of law to be determined by consensus. Dworkin hypothesizes that positivists insist on consensus because they tacitly subscribe to a criterial semantics, according to which concepts may be shared only if the criteria for the proper application of the concepts are shared. Thus, a criterial semantics for the concept of law would require that community members can share the same concept of law – and hence have meaningful dialogue about their law – only if they share the same criteria for the application of the concept. Since the criteria for the application of the concept of, say, U.S. law are just the grounds of U.S. law, a criterial semantics demands that communities share the same grounds of law in order to share the same concept of law. Dworkin argues that criterial semantics is defective precisely because criterial semantics is unable to account for theoretical legal disagreements. This is the semantic sting argument. Notice that the semantic sting argument is no objection to positivism if positivism is not committed to criterial semantics. See, for example, Joseph Raz, "Two Views of the Nature of the Law: A Partial Comparison," in *Hart's Postscript*; Jules Coleman and Ori Simchen, "Law," 9 *Legal Theory* 9 (2003): 1.

arguments in *Law's Empire*. They have made no attempt to show how theoretical legal disagreements are possible.

One explanation for this neglect may be that positivists have not recognized that these later objections differ in kind from the earlier ones. They may have thought that their responses to the “Model of Rules I” critique are equally applicable to the *Law's Empire* critique. This, we have just seen, is a mistake. Dworkin’s later critique seeks to show that the grounds of law cannot be determined by convention, whereas the positivistic responses to the earlier critique presuppose that the grounds of law are indeed fixed conventionally. There is another possibility, however. Positivists may have recognized the differing nature of the second critique and may simply be unmoved. For they might still cling to the repair argument: they might maintain that theoretical disagreements about the law are impossible, that when judges appear to be occupied by such disputes they are, for various political reasons, really engaged in covert arguments about repairing the law, and that nothing Dworkin has said has given them any reason to think otherwise.

To be fair to the positivist, it must be said that Dworkin’s specific responses to the positivist argument about repair are not particularly compelling. Recall that Dworkin objected to the repair argument by wondering why, if the positivist is correct, the public has yet to pick up on the judicial ruse. But the explanation for such a fact – if it is indeed a fact – is simple: the law is a professional practice and lay persons are either ignorant of its ground rules or too intimidated by legal officials to

challenge them. Dworkin also argued that the repair argument makes it difficult to explain why judges make the rulings they make. If Burger were interested in repairing the law, Dworkin reasoned, he would not have shut down the construction project to save the snail darter. But this objection overlooks the possibility that Burger had bigger fish to fry. Burger might have wanted to repair not the specific statute itself but rather the norms of statutory interpretation. His concern, in other words, might have been with denying judges the discretion to deviate from the statutory text when they happen to disagree with its result. Understood in this way, Burger's ruling in favor of the snail darter was a rational choice for legal repair.

Although Dworkin's objections to the repair argument are not, to my mind, convincing, I think that it would be a mistake to dismiss his entire critique so quickly. For it is relatively simple to refashion his objections in such a way that the repair argument no longer looks particularly attractive. One need notice only that judges are not the only ones who engage in theoretical disagreements – legal scholars do so as well. The law reviews, after all, are filled with articles arguing for the legal propriety of one interpretive methodology over another. Indeed, the great disputations of legal theory – those between originalism and dynamism, textualism and purposivism, documentarianism and doctrinalism – have been precisely about theoretical disagreements in the law. Judges may have a great political interest in hiding the true nature of their activities, but scholars generally do not. No doubt, some theorists tailor their interpretive theories to fit their politics. But if theoretical disagreements

were incoherent, trying to convince one's peers in this manner would be folly, for surely they would see right through it.

Positivists, therefore, appear to be in an awkward position. If they wish to deny the existence of theoretical legal disagreements, they are forced to say that legal scholars are so confused about the practice they study that they routinely engage in incoherent argumentation. This result is unattractive but perhaps not fatal. For it cannot be demanded that legal theories fit every lawyerly preconception. Lawyers can certainly be wrong about the practice in which they participate. What the positivist must show, however, is that there are compelling theoretical reasons to either dismiss or reinterpret the self-understanding of these experts. Whether this can be shown is a question that positivists have yet to face.<sup>59</sup>

## **6. ACCOUNTING FOR THEORETICAL DISAGREEMENTS**

There is one more option available to the positivist. Instead of trying to explain away theoretical disagreements, she might nevertheless attempt to account for them within

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<sup>59</sup> There is a third possible reason why positivists have misjudged the force of Dworkin's critique: they may have conflated the objection from theoretical disagreements with the semantic sting argument, as discussed in the previous note. The thought goes as follows: since positivism is not committed to criterial semantics and since the semantic sting argument is an objection to criterial semantics, the semantic sting argument poses no threat to positivism. This is true, of course, but given that the semantic sting argument is not the same as the objection from theoretical disagreements, the failure of the former is irrelevant to the success of the latter.

a positivistic framework. She might, in other words, show how proper interpretive methodology might be anchored in social facts. It is to this possibility that we now turn.

### **A. Looking for Social Facts**

The first step in accounting for theoretical disagreements in a positivistic framework, I believe, is to concede that the plain-fact view, or any other account that privileges interpretive conventions as the sole source of proper methodology, ought to be rejected. Because theoretical disagreements abound in the law, interpretive methodology may be fixed in ways other than specific social agreement about which methodologies are proper.<sup>60</sup> The positivist should also agree with Dworkin that when theoretical disagreements abound, ascertaining proper interpretive methodology involves attributing a purpose to legal practice. One cannot understand disagreements over interpretive methodology unless one sees them as disputes about the point of engaging in the practice of law. Finally, the positivist should also maintain with Dworkin that in such cases proper interpretive methodology for a particular legal system is primarily a function of which methodology best harmonizes with the objectives of that system.

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<sup>60</sup> It should be noted that sometimes courts settle theoretical disagreements. See, for example, *Edwards v. Canada* (Attorney General) [1930] A.C. 124, where the Privy Council rejected originalism as an appropriate method of constitutional interpretation. I thank Les Green for making this point to me.

Here, however, the agreement must end. Although ascertaining interpretive methodology involves attributing a purpose to legal practice, the positivist cannot, of course, treat this attributive process in a Dworkinian manner, namely, as an exercise in moral and political philosophy. The positivist, rather, must seek *social facts*. The fact that some set of goals and values represents the purposes of a certain legal system must be a fact about certain social groups that is ascertainable by empirical, rather than moral, reasoning. Proper interpretive methodology would then be established by determining which methodology best harmonized with these goals and values. In this way, the positivist will have blunted Dworkin's critique: by claiming that interpretive methodology is a function of empirically derivable objectives, the positivist will have grounded the law in social fact. Moreover, the positivist will have established the social foundations of law in a manner that does not rely on specific conventions about proper interpretive methodology, thereby accounting for the possibility of theoretical disagreements. Theoretical disagreements would simply be a product of disputes over which purposes are in fact the objectives of the system or about which methodology best harmonizes with those objectives.

This proposed response, of course, is purely schematic, for it does not specify how the political objectives are to be ascertained. The proposal does not tell us, for example, whose objectives are relevant to determining the purposes of a legal system, nor how these objectives must be related to the actual behavior of legal participants. No doubt, these are questions that any adequate positivistic theory of legal

interpretation must address. The above proposal, however, merely sets out a strategy: it claims that for the positivists to account for the possibility of theoretical disagreements, they should drop their conventionality requirement, concede that proper methodology is a function of systemic purpose, and yet maintain nevertheless that systemic purpose is a matter of social fact.

## B. Settling on an Ideology

To be sure, it is not enough for positivists to advance a theory of legal interpretation that grounds interpretive methodology in social facts. Their account must be plausible as well. What, then, would a plausible positivist theory of legal interpretation look like? Although space limitations prohibit a detailed exposition of such an account, I will attempt in the remainder of this section to sketch the outlines of one such theory.<sup>61</sup>

The proper task of the legal interpreter, I would like to suggest, is to impute to legal practice the political objectives that the current designers of the legal system sought to achieve.<sup>62</sup> The purposes that are legally relevant, in other words, are those that *explain*, rather than justify, the current practice. These objectives might be

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61 I explore these issues in much greater detail in *Interpretation and the Economy of Trust* (forthcoming).

62 Because legal systems always contain mechanisms for revision, the designers of a system will change as the structure of the system is intentionally revised. The designers of the present American system include not only the framers and ratifiers of the Constitution of 1787, but the numerous agents over the past two hundred years who have changed the complexion of the system. The framers and ratifiers of the 14th Amendment are as much the designers of the current regime as the framers and ratifiers of the original constitution. How the objectives of a system change as the institutional structure is revised is a complex question that I cannot explore here.

laudable ones, such as promoting democratic self-rule and protecting individual liberty, or they may be more morally suspect, such as seeking to implement the will of God or hastening the proletariat revolution. The proper methodology for a particular legal system would be the one that best harmonizes with the ideological objectives of those who designed the current system, regardless of the moral palatability of their ideology.

According to this proposal, proper interpretive methodology is grounded in social fact because the specific purposes of a legal system are matters of social fact. Whether a legal system ought to be understood as advancing some political goal G or realizing some value V depends on whether those with authority to design the system designed it to advance G or realize V. To uncover the political objectives of a legal system, the interpreter must analyze its institutional structure and determine which goals and values best explain why the legal system has its current shape. Thus, one might conclude that a system that made provisions for voting, representation, elections, and some protection for public deliberation is a system in which democratic self-rule is prized. By contrast, an institutional structure that empowered clerics to decide matters of principle and policy and minimized the degree to which secular forces can affect the direction of the law would be a system in which religious values are designed to be promoted.

It should be emphasized that the reason to privilege the objectives of legal designers in legal interpretation is not simply motivated by the desire to answer

Dworkin's objections. More importantly, deference to the ideology of designers is necessary if designers are to do their job, *which is to settle questions about which specific objectives the group should pursue*.<sup>63</sup>

To see why this is so, let us start with the idea that the fundamental function of all legal systems is to achieve certain very general political and moral objectives. These objectives include the maintenance of order, the prevention of undesirable and wrongful behavior, the promotion of distributive justice, the protection of rights, the provision of facilities for private ordering, and the fair settling of disputes. How legal systems should go about attaining these objectives, of course, is likely to be a complex and contentious matter. What rights do individuals have and which deserve legal protection? Which distribution of goods is the just distribution? Against which moral metric is behavior to be assessed? These questions are apt to provoke serious doubts and disagreements. It is reasonable to suppose that without some mechanism for settling on which specific goals and values the legal system ought to pursue, there is a significant risk that the massive amount of coordinated behavior necessary for the law to achieve its moral mission will not take place.<sup>64</sup>

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63 Not every legal system has designers or has been designed. In some cases, the structure of a legal system, or some part thereof, is the result of custom. In these situations, there may be no ideology that underlies the system's institutional structure and thus no way to resolve theoretical disagreements (indeed, in these cases theoretical disagreements are not even possible). I say that there *may* be no ideology because legal officials may theorize previously untheorized customary aspects of a certain system and develop the system in the direction of this new ideology. These officials will then be considered designers, and theoretical disagreements can be resolved by reference to their ideology.

64 Even in those rare instances where there is a very broad consensus in the community on which specific political objectives to pursue, how conflicts between them should be adjudicated, and how they ought to be implemented institutionally, there will still be a pressing need to have mechanisms

It is one of the primary functions of legal designers to resolve these very issues. They settle questions about specific political objectives through the process of institutional design, that is, by distributing rights and responsibilities in such a way that the exercise of the allocated powers and the observance of the assigned duties achieve the goals and realize the values they wish to promote. In this way, the behavior of members of the community will be channeled in the direction of the selected objectives. This is not to say that the law's fundamental functions will be achieved simply through deference to the institutional structure designed by those in authority. Indeed, if the designers are untrustworthy and design the system poorly, the broad moral objectives mentioned earlier are guaranteed not to be met. The point, rather, is that if those in authority are basically trustworthy, which is what the law always supposes, deferring to the designers' judgments about how to attain the fundamental aims of the system is a highly effective strategy for actually attaining those ends.<sup>65</sup>

Once it is recognized that legal designers play this "settling" function, one can see why their resolutions concerning particular ends and values must be privileged when ascertaining interpretive methodology. For if members of the group are permitted to engage in moral and political philosophy to determine the proper

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that can quell dissent, should it arise. Given that in politics not everyone wins, there is always the threat that the loser will challenge the results, and without some way of settling these sorts of disputes, the ability of the legal system to achieve its fundamental ends will be significantly imperiled.

<sup>65</sup> It should be clear that this argument does not entail that members of the community are always morally obligated to defer to the system designers. For when those in authority are not trustworthy, or otherwise not entitled to deference, there may be no reason to defer to their judgments about fundamental aims.

justification for legal practice, they would effectively unsettle these matters. We might say that accounts of legal interpretation such as Dworkin's defeat the purpose of having legal authorities – they allow subjects to reopen the questions that authorities resolved by designing a legal system. After all, the judgments of designers are just more fodder for constructive interpretation. Their judgments will receive only the amount of deference that the Dworkinian interpreter deems to be morally appropriate in the light of current practice. To make that judgment, the interpreter will be forced to engage in abstract philosophical reflection and confront questions that have baffled humanity for the past few millennia.

Once we see the necessity of deferring to authoritative settlements about *which* particular objectives to pursue, the same argument counsels respect for decisions about *how* specifically they ought to be pursued. For authorities don't will just the *ends*, they will the *means* as well. It is also their task, in other words, to determine how to allocate rights and responsibilities based on their assessments of the competence and character of various members of the group. If, after having designed a particular institutional arrangement, those members were then to ask themselves afresh "Which assignment of power to me would best justify the practice?" they would be undoing precisely what the designers intended to do.

To preserve the ability of legal designers to design (and redesign) a legal system, the interpreter must defer not merely to the designers' decisions about specific political objectives, but also to those decisions concerning roles and trust.

Thus, the interpreter must figure out how those with authority to design the system divided labor and which roles they entrusted to various participants. She must also determine which judgments or claims of trust and distrust underwrite such a division of labor. Thus, for example, broad grants of power to certain participants, with comparatively few attendant duties, might evidence high degrees of confidence in the competence and character of those individuals, whereas highly diffused distribution of power, with few opportunities for the exercise of discretion, might suggest low degrees of trust instead.

How should an interpreter process this information about ends and means? The interpreter might begin by drawing up a list of possible interpretive methodologies and attempting to ascertain their basic properties. She should try to discover, for example, whether certain methodologies require a great deal of expertise to implement or comparatively little, and whether they are easy to abuse or hard to manipulate. Having ascertained the basic properties of the candidate methodologies, the interpreter should then attempt to extract certain information from the institutional structure of the legal system in question. She ought to ascertain the attitudes of those who designed the system regarding the competence and character of certain participants, as well as the objectives that they are entrusted to promote. Finally, the interpreter should apply the information culled from the first two tasks to determine proper interpretive methodology. She must try to figure out which interpretive methodologies best further the extracted goals in the light of the

extracted attitudes of trust. The relationship between interpretive method and systemic ideology can often be quite complex, but it can also be rather simple. Here is an example of a straightforward connection: an interpretive methodology that requires for its effective implementation a high degree of competence or moral character will be inappropriate for systems where high degrees of trust are inappropriate; instead, hermeneutic procedures that are easier to apply and less subject to abuse – perhaps ones that defer to plain meaning, instead of purpose – would be more fitting.

As mentioned previously, a virtue of this type of proposal is that, insofar as interpretive methodology is not determined by a specific convention about proper interpretive methodology, it is able to account for the possibility of theoretical disagreements. Participants in a practice can disagree over proper interpretive methodology because they disagree about any of the steps mentioned above. They might disagree about the demands imposed by particular methodologies, the ideological purposes of the system, its distribution of trust and distrust, or which methodology best harmonizes with such purposes and judgments of competence and character.

Notice further that this theory is strongly positivistic. Because it takes a regime's animating ideology as its touchstone, this account may end up recommending an interpretive methodology based on a morally questionable set of beliefs and values. The legal system in question, for example, may exist to promote

racial inequality or religious intolerance; it may embody ridiculous views about human nature and the limits of cognition. Nevertheless, the positivist interpreter takes this ideology as given and seeks to determine which interpretive methodology best harmonizes with it.

This account of legal interpretation is positivistic in the most important sense, namely, it roots interpretive methodology in *social facts*. That a legal system has a certain ideology is a fact about the behavior and attitudes of social groups. The account privileges social facts, as mentioned earlier, not out of fanatical desire to save positivism at all cost, but because the alternative would render legal systems incoherent. Imputing to legal systems purposes, division of roles, and judgments of trustworthiness that are morally justified undercuts the basic division of labor between those with authority to settle such matters and those under a duty to implement such settlements.

It is possible, then, for the positivist to maintain that the grounds of law are determined by social facts *and* to account for theoretical disagreements about those very grounds, Dworkin's contention in *Law's Empire* notwithstanding. The commitment to the social foundations of law, I have tried to show, can be satisfied in the absence of a specific convention about proper interpretive methodology just in case a consensus exists about the factors that ultimately determine interpretive methodology. The law will be grounded in social facts, that is, if the current designers agree about the basic objectives of the system, the competence and

character of participants, and the proper distribution of roles.<sup>66</sup> The fact that interpretive methodology is determined by these factors not only renders theoretical disagreements possible, it explains why they are so prevalent. For it is highly likely that participants will disagree with one another about what these shared understandings are and which methodologies are best supported by them.

To be sure, it is a consequence of this approach that, in the absence of these shared understandings, disagreements about proper interpretive methodology will be irresolvable. And even if shared understandings do exist, they may be quite thin and thus will provide neither side much leverage in interpretive debates. I am not sure, however, that these implications undermine the solution I am offering. First, although thin shared understandings may not determine a unique methodology, they might nevertheless rule out certain interpretive stances. There may be no right answer to these disputes, but there are usually wrong ones. Second, and more important, a theory of law should account for the *intelligibility* of theoretical disagreements, not necessarily provide a resolution of them. An adequate theory, in other words, ought to show that it makes sense for participants to disagree with each other about the grounds of law. Whether a unique solution to these disputes actually exists is an entirely different, and contingent, matter, and a jurisprudential theory should not, indeed must not, demand one just because participants think that there is one.

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<sup>66</sup> Similarly, there must exist a shared understanding among participants in the system about who the designers are and which institutional structures they have created.

## 7. THE FUTURE OF THE HART-DWORKIN DEBATE

In a recent article, “Beyond the Hart-Dworkin Debate,” Brian Leiter makes the following provocative claim:

The moment now seems opportune to step back and ask whether the Hart/Dworkin debate deserves to play the same organizing role in the jurisprudential curriculum of the twenty-first century that it played at the close of the twentieth. I am inclined to answer that question in the negative, though not, to be sure, because I can envision a jurisprudential future without Hart’s masterful work at its center. Rather, it seems to me – and, I venture, many others by now – that on the particulars of the Hart/Dworkin debate, there has been a clear victor, so much so that even the heuristic value of the Dworkinian criticisms of Hart may now be in doubt.<sup>67</sup>

Needless to say, Leiter thinks that Hart has been the clear winner and that, given this resounding victory, the Hart-Dworkin debate no longer deserves the scholarly and pedagogical pride of place that it has been accorded for the past four decades.

To some extent, I agree with Leiter. If we identify the Hart-Dworkin debate solely by Dworkin’s criticisms in “The Model of Rules I” and the discussion generated by them, which is how Leiter and many others understand it, then I think that the positivists clearly have “won,” at least in the sense that they have successfully parried Dworkin’s challenge. Narrowly construed, the Hart-Dworkin

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<sup>67</sup> Leiter, “Beyond the Hart-Dworkin Debate,” 18.

debate is indeed past its intellectual sell-by date. For whether positivism can account for the fact that judges are often required to apply nonpedigreed principles in hard cases is a question that, as lawyers say, has been asked and answered.

Yet, as I have tried to show, Dworkin's critique of Hart and legal positivism did not end with "The Model of Rules I." His challenge evolved over time and, in the process, became resistant to the existing positivistic defenses. Thus, I part company with Leiter when he writes that "The point is not, I hasten to add, that there remain no challenges to legal positivism, but rather that the significant issues that face legal positivists are now different, often in kind, from the ones Dworkin made famous." I have argued, however, that positivism is particularly vulnerable to Dworkin's critique in *Law's Empire*. To overlook this challenge, which most positivists have done, is to ignore the most serious threat facing legal positivism at the beginning of the twenty-first century.

Reports of the demise of the Hart-Dworkin debate, therefore, would be greatly exaggerated. The particulars have changed, but the basic issue, and its fundamental importance, remains the same today as it did forty years ago. Is the law ultimately grounded in social facts alone, or do moral facts also determine the existence and content of the law? Only the future will tell who has the right to claim victory in this debate.