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Professor Dworkin's Views on Legal Positivism†

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The expression "legal positivism" is intolerably ambiguous. It has been used in the past and is still used to designate a heterogeneous variety of attitudes, theses, conceptions and doctrines, all of which concern in different ways the social phenomenon known as "law." Some of them are incompatible with each other. Others are interconnected by family ties. That is why in most cases it will not do to try to identify the general trend of ideas of a given jurist by saying that he is a positivist. Furthermore, when someone directs his attacks, indiscriminately, against "legal positivism," it may be quite confusing if he fails to state in what sense he is using that expression.

In 1958 H.L.A. Hart published his famous essay *Positivism and the Separation of Law and Morals*.¹ This was among the first fruitful attempts to identify and distinguish the various attitudes, theses, conceptions and doctrines concealed by the label "legal positivism" and either held by or attributed to thinkers considered to be positivists. Hart's work threw considerable light on the subject. Increasing clarity was sought and achieved immediately thereafter.

In 1960, at a seminar held in Bellagio, Italy, under sponsorship of the Rockefeller Foundation, a number of first-rate thinkers took part in discussions designed to pursue this task of elucidation and analysis. This was the first time that common law and civil law jurists met to work towards the clarification of a subject of common interest in the field of jurisprudence: the analysis of the concept of

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¹ Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

legal positivism. Among those present at the Bellagio seminar were Professors Norberto Bobbio, from the University of Turin; H.L.A. Hart, from Oxford University; Alessandro Passerin d'Entreves, from the University of Milan; Alf Ross from the University of Copenhagen; Renato Treves, from the University of Milan and a group of younger American, British and Italian scholars.

In the following year, 1961, two illuminating papers were published: Bobbio's *Sul Positivismo Giuridico*² (*On Legal Positivism*) and Alf Ross' *Validity and the Conflict between Legal Positivism and Natural Law*.³ A few years later, Professor Uberto ScarPELLI also published a book on legal positivism.⁴ All of these contributions partake of what might be called "the spirit of Bellagio."

This movement started by Hart's essay represented a valuable conquest. Some of the clarifications it achieved have a permanent value. Issues which previously had been subjected to inaccurate or confused treatment were distinctly seen. For the first time clarifying distinctions were drawn and elaborated, rendering intelligible many of the things concealed by a careless use of the label "legal positivism." Thus, it became possible to appraise the degree of accuracy of the criticisms indiscriminately aimed from different viewpoints at legal positivism.

In the last ten or twelve years, we have witnessed a renewal of objections to legal positivism. They have been raised by a distinguished American jurist and philosopher, Professor Ronald Dworkin, a scholar of many gifts. Those criticisms are compiled in his book *Taking Rights Seriously*.⁵ Dworkin has focused his attack on the work of Hart. His criticisms have triggered a rich literature in Anglo-American academia and today constitute the core of a thought provoking debate. Unfortunately the exchange of ideas has been confined hitherto to the Anglo-American world. It is like a family quarrel; jurists and philosophers from civil law countries have kept apart from the debate.

I am convinced that those who, by education, do not belong to the Anglo-American legal tradition may have some interesting points to make about Dworkin's criticism. The discussion is far too important to be confined to a family circle. Moreover, I am afraid that due to the heat of the discussion—in which Hart so far has hardly participated—some of the conquests secured through the joint effort of

² Bobbio, *Sul positivismo giuridico*, LII RIVISTA DI FILOSOFIA 14 (1961), reprinted in N. BOBBIO, *IL PROBLEMA DEL POSITIVISMO GIURIDICO* (THE PROBLEM OF LEGAL POSITIVISM) (1961).

³ IV RIVISTA JURIDICA DE BUENOS AIRES 46 (1961).

⁴ *Cos'è il Positivismo Giuridico* (1965).

⁵ R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

analysis which I mentioned earlier might be lost. This would be unfortunate indeed.

For many years and as a rule, the legal theory developed within the cultural orbit of common law countries and the legal theory developed within the cultural orbit of civil law countries have almost ignored each other. It is immaterial who is most to blame for such regrettable mutual indifference. One of the great merits of Hart's work is that it has traversed the barriers which separated those two large domains of legal culture. His seminal book, *The Concept of Law*,⁶ which testifies to the influence of continental thinkers, was promptly translated into the main languages of the world and, in turn, exerted considerable influence in most important academic centers.

It is dismaying to see that Dworkin's detailed objections to legal positivism, as well as the rich literature that has ensued, have not yet gone beyond the cultural boundaries of English-speaking countries. This may be seen as a symptom that Anglo-American jurists and continental jurists have become confined again to their respective domains. The fact that in a book as important as *Taking Rights Seriously*, which launches a frontal attack against legal positivism, the names of Alf Ross and Norberto Bobbio are not even mentioned, and their contributions to legal positivism or to the analysis of the concept of legal positivism not even acknowledged, is to be considered no less symptomatic of that circumstance. This article deals with Dworkin's view on legal positivism not because I think I am entitled to intrude in a family quarrel but rather to try to take the discussion outside of the family circle.

DIFFERENT MEANINGS OF "LEGAL POSITIVISM"

The word "law" is ambiguous. Yet, it is clear that in expressions such as "French law is very different from the law of the Soviet Union," the word designates a social phenomenon, a complex technique of social control characteristic of communities which have achieved a certain degree of development. In the expression "slavery is against the law," the word "law" designates certain ultimate principles of justice which, some believe, are embedded in the fabric of the universe and can be partially discovered by human reasoning. Whatever their nature or status, those principles serve, *inter alia*, as a standard for the criticism of the various legal systems in force in different communities. In order to refer to law as a social

⁶ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

phenomenon conditioned by experience (and to an extent not to be belittled, conditioning it in turn) the expression "positive law" is used. The expression "natural law" is mainly used to refer to the latter set of ultimate principles embodying ideals of justice.

The existence of positive law as a social phenomenon placed on the same level as positive morality has given rise to the heterogeneous set of attitudes, theses, conceptions and doctrines ambiguously designated by the expression "legal positivism." In his aforementioned essay *On Legal Positivism*,⁷ Bobbio identifies three distinct meanings of "legal positivism."

Legal Positivism as an Approach

The expression "legal positivism" is used to designate a certain *approach* to theoretical and practical problems raised by the existence of positive legal systems. Such an approach claims that merely because the demand a rule imposes, or the rights or powers it confers, are incompatible with the requirements of justice or morals, it does not follow that such rule is not a rule of positive law. This approach is usually expressed by saying that there is not a necessary connection between law and morals, although it does not exclude the existence of many other connections of different types between them.

The position of adherents of legal positivism as an approach is opposed by those who are committed to the attitudes called "natural law" doctrines; they argue that an allegedly legal rule which is incompatible with the demands of justice or morals is not a genuine legal rule, even if enacted by a competent official acting within his area of competence.

Legal Positivism as an Ideology

The expression "legal positivism" is also used to designate an ideology. It is an evaluative attitude regarding positive law which holds, in its extreme version, that there is a moral duty to comply with the demands of the rules and standards of positive law, whatever their content.

Legal Positivism as a Theory

Finally, the expression "legal positivism" is used to designate a

⁷ Bobbio, *supra* note 2.

set of allegedly true theories, conceptions and theses about positive law; its provisions ("laws"); the so-called "sources" of law; the properties or characteristics of legal systems; and finally, the role played by those, particularly judges, who "apply" the provisions of positive law to concrete cases. These theses are all interrelated. Bobbio refers to them by means of the expression "legal positivism as a theory." The theses or conceptions which comprise the core of "legal positivism as a theory" are, briefly, the following:

Positive law is the will of the state or the will of the sovereign. Laws are commands. There is no other genuine "source" of law than legislation (in its broad sense); other putative sources (*e.g.*, custom, judge-made law) are merely secondary or apparent sources. Every legal system is a closed, gapless, complete and coherent whole. Finally, judges have no other function than to deduce, from the rules of positive law, the answer to the concrete cases that come before them. For this purpose they need not resort to standards or rules not belonging to the legal system, since every case can and should be solved through the application of the standards and rules of the system itself.

Implications and Interrelations of the Three Meanings of Positivism

A positivist thinker in the first meaning of "legal positivism," that is to say, legal positivism as an approach, has to reject the claims of legal positivism as an ideology, for if there is no necessary connection between law and morals, there cannot exist a moral duty to obey the rules of positive law whatever their content. There is a moral obligation to obey them only if their content is compatible with the demands of morality.

By adopting legal positivism as an approach—the viewpoint according to which there is no necessary connection between law and morals—we are not bound to accept the truth of any of the theses or conceptions that characterize legal positivism as a theory. It is not a contradiction to assert that there is no necessary connection between law and morals, and to assert as well that one of the theses or conceptions of legal positivism as a theory, or all of them, are false.

Legal positivism as an ideology—the evaluative attitude which in its extreme version contends that there is the moral obligation to obey positive law regardless of the content of its requirements—is affected by a serious practical inconsistency. In his aforementioned essay, Alf Ross calls that ideology "quasi-positivism," and unmasks

it as a perverse form of natural law doctrine.⁸

This practical inconsistency is brought to light when one compares the position of one who accepts legal positivism as an ideology with that of one who advocates "legal positivism as an approach," on the one hand, and with that of an orthodox follower of natural law ways of thinking, on the other. The adherent of legal positivism as an approach may coherently argue that since a legal rule retains its status as such despite conflicts with the demands of morality, there is no unconditional moral obligation to obey legal rules. The existence of a moral obligation to obey will depend on the content of the rule in question. An orthodox follower of natural law ways of thinking, in turn, may coherently argue that if a rule must conform to the requirements of morality to be a genuine legal rule, there is either the moral obligation to obey legal rules, or, at least no moral obligation to disobey them.

The adherent of legal positivism as an approach uses or presupposes a broad concept of law under which the expression "immoral legal rule" is not self-contradictory, because the absence of incompatibility between the requirements of a rule and those of morality is not one of the criteria he applies in order to call something a "legal rule." The orthodox follower of natural law ways of thinking uses or presupposes a restricted concept of law under which the expression "immoral or unjust legal rule" is self-contradictory; from his standpoint, the presence of such incompatibility is a sufficient condition for a rule not to be a legal rule.

The quasi-positivist—one who adheres to legal positivism as an ideology—uses or presupposes the broad concept of law characteristic of legal positivism as an approach, according to which there may be morally iniquitous rules, but he adopts the moral attitude of the orthodox follower of natural law ways of thinking for whom there cannot be iniquitous legal rules. As a result of this *mélange*, the quasi-positivist inconsistently adopts a moral attitude according to which there is an unconditional moral duty to obey the rules of positive law whatever their content. It is clear that the presupposition or use of the broad positivism as an approach concept of law makes it impossible to defend a moral position that is only defensible if the restricted, natural law concept is used or presupposed. In addition to concealing a practical inconsistency, the quasi-positivist's position is perverse. We may rightly level at it the charges which Gustav Radbruch leveled indiscriminately at legal

⁸ Ross, *supra* note 3.

positivism in his famous recantation.⁹ It is beyond the scope of this article, however, to examine the relationship between legal positivism as an ideology and legal positivism as a theory.

To conclude, it is worthwhile to emphasize something implicit in the above, namely, that the only feature shared by the three different things which, following Bobbio, I shall call "legal positivism as an approach," "legal positivism as an ideology" and "legal positivism as a theory," is that all of them use or presuppose a broad concept of law, in contrast with natural law conceptions which, as we have seen, use or presuppose a restricted one.

HART'S POSITIVISM

Professor Dworkin has severely criticized legal positivism as "the conceptual part" of what he calls "the ruling theory of law."¹⁰ I intend to assess the merits of his criticism. Dworkin has attempted to eliminate the ambiguity which, we have seen, affects the expression "legal positivism." To this end, Dworkin has not developed an analysis of the type undertaken by Hart, Bobbio and Ross in the three essays I mentioned earlier, but has rather resorted to a different method, which consists of identifying the target of his attack through what we perhaps may call the verbal equivalent of an ostensive definition. Indeed, in the preface to *Taking Rights Seriously*, Dworkin says the following: "The most powerful contemporary version of positivism is that proposed by H.L.A. Hart, and it is Hart's version which is criticized in this book."¹¹ He later adds: "I want to examine the soundness of legal positivism, particularly in the powerful form that Professor H.L.A. Hart has given to it."¹²

In order to assess the soundness of Dworkin's antipositivist criticism, characterized generically as objections to Hart's brand of positivism, it will be useful to begin by asking, with the assistance of Bobbio's analytical scheme and terminology, if Hart may be considered a positivist because he adopts the positivist approach, that is, the contention that there is no necessary connection between law and morality; or whether he could be considered a positivist because he asserts, as an advocate of legal positivism as an ideology, that there exists a moral duty to obey even iniquitous legal rules. Finally, we shall ask whether if in addition to being considered a positivist

⁹ Radbruch, *Gesetzliches Unrecht und Ubergesetzliches Recht*, 1 *Suddeutsche Juristenzeitung* 105 (1946), reprinted in G. RADBRUCH, *RECHTSPHILOSOPHIE* 347 (5th ed. 1956).

¹⁰ R. DWORKIN, *supra* note 5, at vii-xii.

¹¹ *Id.* at ix.

¹² *Id.* at 16.

in one of those mutually exclusive senses, Hart can be regarded as a supporter of legal positivism as a theory, inasmuch as he upholds some of the theses or conceptions about law, the "laws," the "sources" of law, legal systems, and interpretation or adjudication, usually called positivistic; that is, if he does adhere to legal positivism as a theory, totally or in part.

Hart and Legal Positivism as an Approach: The Doctrine of the Separation of Law and Morals

In his 1958 paper,¹³ Hart expounds clearly the doctrine of the separation of law and morals and explains why Bentham and Austin deemed it necessary to insist on it. Their basic aim he argues, was to remove an obstacle to the criticism, and hence the reform, of English legal institutions. The way in which Hart goes about these tasks shows quite clearly that he considers it advantageous to insist on that point of view, which cannot and should not be confused with other theses Bentham and Austin held, some of which Hart considers indefensible, or with the views of others, also indefensible, which have been attributed to legal positivism.

Hart states the doctrine of the separation of law and morals, as propounded by Bentham and Austin, in this way:

What both Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an express constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.¹⁴

In a chapter of *The Concept of Law* titled *Law and Morals*,¹⁵ Hart notes that the expression "legal positivism" (like the expression "natural law") "has come to be used for a range of different theses about law and morals," and then adds the following: "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."

In that same chapter Hart states the theoretical and practical advantages resulting from accepting "the simple positivistic doctrine that morally iniquitous rules may still be law."¹⁶ In other

¹³ Hart, *supra* note 1.

¹⁴ *Id.* at 599.

¹⁵ H.L.A. HART, *supra* note 6, at 181-82.

¹⁶ *Id.* at 207.

words, he states the advantages of using the broader sense of "law" implicit in that doctrine and absent in the restricted sense characteristic of natural law doctrines.

There is no doubt, therefore, that Hart is a positivist in so far as he upholds legal positivism as an approach, that is to say, as a method to face the problems raised by the existence of immoral or iniquitous legal rules. Later we shall see whether Dworkin's objections to Hart's positivism are aimed at this or at something else.

*Hart and Legal Positivism as an Ideology: The Moral
Obligation to Obey the Rules of Positive Law*

Because Hart accepts legal positivism as an approach, he is bound to reject legal positivism as an ideology. And he has done so quite explicitly. It is well known that Radbruch's famous recantation blamed largely legal positivism, as it was understood and practiced by the judges and jurists of Nazi Germany, for having contributed to undermining the capacity to resist that atrocious regime by presenting, under the alleged influence of legal positivism, the requirements and punishments exacted by Hitler and his Reich as duties and sanctions set by the law. Radbruch contended that the slogan *Gesetz ist Gesetz* (Law is Law) may involve the acceptance as morally binding laws even the most iniquitous demands of a despotic regime. It is notorious, however, that the "positivism" to which Radbruch alleged German judges and jurists to have adhered is actually what I have called, using Alf Ross' terminology, quasi-positivism.¹⁷ In dealing with Radbruch's criticisms, Hart draws attention to the fact that his contention

is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: "Ought this rule of law to be obeyed?" Surely the true liberal answer to any sinister use of the slogan "law is law" or of the distinction between law and morals is, "Very well, but that does not conclude the question. Law is no morality; do not let it supplant morality."¹⁸

This paragraph is distinctly representative of Hart's position. Nowhere does he assert the existence of a moral obligation to obey legal rules merely because they are legal rules. Dworkin, for his part, does not take Hart to task for being a "positivist" in the derogatory

¹⁷ See note 9 & accompanying text *supra*.

¹⁸ Hart, *supra* note 1, at 618.

sense the word takes on when it is used to identify someone as a supporter of legal positivism as an ideology.

Hart and Legal Positivism as a Theory

We still have to see whether Hart may be considered a positivist in the sense that he adheres to one or more of the theses or theories usually called positivistic.

Positive Law as the Will of the State or of the Sovereign: Legal Rules as Imperatives

Hart has been highly critical of the Austinian conception which views law as an emanation of the will of the sovereign. The whole of chapter IV of *The Concept of Law* is devoted to this; it does not seem necessary to go over or to summarize his numerous objections.¹⁹ Furthermore, he has argued in favor of extending the meaning of the word "law" to include the so-called "international law."²⁰ This set of rules and practices can hardly be conceived of as originating in the will of the state.

Hart rejects the Austinian model, based on primitive notions of "sovereign," "command" and "habit of obedience." Instead he substitutes an analysis of the concept of law based on the complex social phenomenon of the acceptance of ultimate rules of recognition which establish the criteria by which each community decides whether a given rule is part of its law. Whatever the degree of accuracy of this alternative model, it certainly cannot be mistaken for either Austin's model or for any other positivistic theory that sees law as the "will" of the state.

Hart is similarly severe in his condemnation of the thesis, also upheld by Austin, which views laws as commands or imperatives. He takes exception to this aspect of the Austinian conception chiefly on the grounds that it is blind to the widespread social phenomenon of shared acceptance of rules. Hart believes that only a thorough understanding of this phenomenon makes possible a fruitful analysis of the concept of law.

His argument tries to show in detail that laws cannot be thought of as commands, from which they differ in content, functions, modes of origin, and scope. Whatever the degree of accuracy of this detailed reasoning, it obviates any reasonable contention that Hart

¹⁹ H.L.A. HART, *supra* note 6, at 49-76 (ch. IV).

²⁰ *Id.* at 208-31 (ch. X).

supports some version of the imperativistic thesis, a thesis considered by many as part of legal positivism as a theory.

The Theory of the "Sources" of Law: The Role of Legislation

In the so-called positivistic theory of the "sources" of law, legislation, that is, the deliberate and explicit creation of general legal rules, is held to be the only genuine source of law. Hart does not subscribe to this theory. His rules of recognition enable us to identify non-legislative norms as rules of the system. Nothing prevents the rules of recognition from admitting, as autonomous "sources" of law, customs and the general rules which can be derived from decisions of concrete cases. General customs and common law rules are not enacted law; neither of them are the outcome of a deliberate and explicit act of creation of general rules. No argument is needed in order to demonstrate the truth of the assertion that customs are not enacted. Let us examine the view Hart takes of rules derived from judicial decisions.

In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be by the fact of their having been enacted by a specific body . . . or their relation to judicial decisions.²¹

Later Hart deals with one of the consequences derived from the fact that rules of adjudication are accepted in a given community, that is, that there is a widespread acceptance of rules conferring judicial powers upon certain persons and a special status upon their decisions. That consequence is the following:

[I]f courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a "source" of law. It is true that this form of rule of recognition, inseparable from the minimum form of jurisdiction, will be very imperfect. Unlike an authoritative text or a statute book, judgments may not be couched in general terms and their use as authoritative guides to the rules depends on a somewhat shaky inference from particular decisions, and the reliability of this must fluctuate

²¹ *Id.* at 92.

both with the skill of the interpreter and the consistency of the judges.²²

The indeterminacies derived from the acknowledgement of precedents as a criterion of legal validity are of a more complex kind than those associated with legislation. The latter indeterminacies result from the open texture of the language in which the canonical texts of the rules are couched. Rules to be drawn from precedents are affected by a different type of indeterminacy. As Hart points out, at least in English law, these other more complex kinds of indeterminacies are the result of two factors: first, that "there is no single method of determining the rule for which a given authoritative precedent is authority" and, second, that "there is no authoritative or uniquely correct formulation of any rule to be extracted from cases."²³ This contraposition between the features of legislation and precedent, as "sources" of law, shows that in Hart's view rules derived from precedents are not enacted laws.

The most patent demonstration that Hart cannot be considered as an advocate of the so-called positivistic theory of the sources of law, or of the overvaluation of legislation characteristic of that theory, is found in the following. The rules of recognition which in each community establish the ultimate criteria of legal validity are part of the system in a fundamental way. Those are not enacted rules, nor could they be so. When referring to the formula "what the Queen in Parliament enacts is law"—an oversimplified version of the rules of recognition of English law—Hart says that

it is not a rule on the same level as the "laws strictly so called" which it is used to identify. Even if it were enacted by statute, this would not reduce it to the level of a statute; for the legal status of such an enactment necessarily would depend on the fact that the rule existed antecedently to and independently of the enactment. Moreover as we have shown . . . its existence, unlike that of a statute, must consist in an actual practice.²⁴

The Legal System as a Closed, Complete, Gapless and Coherent Whole: The Function of Judges

In Hart's view, the legal system is neither closed, nor complete nor gapless—and neither is it necessarily coherent. The uncertainties deriving from the open texture of the language of legislation, and

²² *Id.* at 94-95.

²³ *Id.* at 131.

²⁴ *Id.* at 108.

other more complex uncertainties pertaining to judge-made law, prevent us from ascribing those properties to the legal system. Even the rules of recognition may present areas of indeterminacy similar to those arising from precedents which do not derive from the open texture of language, since recognition rules are not expressed in forms of words invested with authority, but rather must be "extracted" from the practices which constitute them.

In view of those indeterminacies, which prevent us from asserting that the legal system is complete, closed and gapless, it follows that judges cannot limit their role to the purely deductive function that the "positivistic" theory assigns to them. Under the label of "formalism," Hart has examined and criticized the mechanistic or automatic theory of judicial function, traditionally considered as "positivistic."²⁵

It is something of a paradox that some of Dworkin's main objections to legal positivism (that is, to Hart) are based on views which, in their conclusions, although not their premises, are similar to the "positivistic" theories which Hart expressly rejects. For it is Dworkin, and not Hart, who claims, as "positivistic" theorists do, that judges limit themselves to the acknowledgment of pre-existing rights and therefore, that their role cannot be considered a "creative" one in any non-trivial meaning of the term. And it is Dworkin, and not Hart, who holds, as "positivistic" theorists do, that the law always has a single correct answer to even the hardest cases that may arise.

By way of summary of this brief examination of Hart's positivism, we may say the following. Hart is a positivist inasmuch as he adheres to legal positivism as an approach or, in other words, inasmuch as he deems it beneficial, both from the theoretical and the practical points of view, to insist on the distinction between law and morals. As a supporter of that approach to the problems raised by the existence of positive law, and particularly of iniquitous rules, Hart is undeniably a positivist. However, if we understand by "legal positivism" what Bobbio calls "legal positivism as an ideology" and Ross "quasi-positivism," Hart is indisputably an *antipositivist*, inasmuch as he emphatically denies the existence of an unconditional moral obligation to obey positive law. Finally, if we take "legal positivism" in the sense that we have called, after Bobbio, "legal positivism as a theory," Hart is not a positivist, since he does not subscribe to any of the theses called "positivistic" in that sense.

²⁵ *Id.* at 121-32.

ON DWORKIN'S SO-CALLED ANTIPOSITIVISTIC CRITICISM

Preliminary

We shall now examine Dworkin's so-called antipositivistic criticism. By way of introduction and to help clarify what I mean to expound, it seems desirable to draw attention to the following facts.

First: It is obvious that Hart flatly rejects legal positivism as an ideology and all its implications. He asserts that there is no unconditional moral duty to obey the rules of positive law. Dworkin does not take him to task for participating in this perversion, and consequently, I shall not pursue this topic.

Second: Several of Dworkin's objections seem to refer to legal positivism as an approach; that is, to the appropriateness of insisting on the fact that there is no necessary connection between law and morals. If such a connection did exist, then positivism as an approach, and therefore Hart's position, would be indefensible.

Some of the texts included in the first edition of *Taking Rights Seriously* seem to indicate that this is one of the main differences Dworkin has with legal positivism.²⁸ One of my aims here will be to determine to what extent that appearance is matched by the facts, that is, to what extent is Dworkin an antipositivist in the sense that he asserts the existence of a necessary connection between law and morals. To this end, we shall have to examine some texts published by Dworkin since the publication of the first edition of *Taking Rights Seriously*. Paradoxical as this may sound, it is my contention that these new texts permit us to assert that Dworkin is no less a positivist than is Hart, for Dworkin also argues that not every norm of positive law is a moral rule and, conversely, that not every moral rule is a rule of positive law. And he does this so emphatically that he even calls "absurd" the contrary position. These subsequent

²⁸ See for example how these texts have been understood by D.A.J. Richards, in *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1081 (1977):

This general interpretation of legal reasoning in adjudication has been used by Dworkin to defend a form of natural law theory, in specific opposition to Hart's legal positivism. Legal reasoning, Dworkin argues, draws upon and invokes principles that courts slowly develop through a long process of precedent and reasoning. These principles are often moral ones. Accordingly, legal reasoning depends on moral reasoning, in the sense that moral principles play a central role in legal reasoning, especially in hard cases. Therefore, the central thesis of legal positivism, the separation of law and morals, is false; legal and moral reasoning cannot logically be separated. For Dworkin the plausible theoretical interpretation of legal reasoning requires the truth of natural law theory.

texts illuminate a good deal of the obscurity on this subject in the previous writings compiled in the first edition of *Taking Rights Seriously*.

Third: As we have seen, Hart does not subscribe to any of the theses or doctrines that usually are part of legal positivism as a theory. On the contrary, he asserts and defends theses and doctrines rigorously incompatible with them. To the extent that Dworkin's criticisms are aimed at the theses Hart defends, they are not objections against legal positivism in any of the ordinary senses of the expression "legal positivism."

Fourth: Dworkin's criticisms concern certain theories which he ascribes to Hart, regarding law, the "laws," the "sources" of law, legal systems and judicial function. Some of those criticisms are open to the serious objection that they refer to theses or theories that are not Hart's.

First, I shall deal with one of the questions I have just mentioned, and which is of great significance, namely: What is Dworkin's position concerning legal positivism as an approach? This question may be reformulated as follows: What is Dworkin's attitude regarding the "simple positivistic doctrine that morally iniquitous laws may still be law"?

Dworkin and Legal Positivism as an Approach

By paraphrasing Austin in terminology which reflects his own legal philosophy, Hart characterized legal positivism as an approach in the following manner: unless it results otherwise from the rules of recognition of the system, from the mere fact that a rule violates moral standards it does not follow that it is not a rule of law, and conversely, from the mere fact that a rule is morally desirable it does not follow that it is a rule of law.²⁷ The position I am going to maintain and defend is the following: If Hart is regarded as a positivist because he adopts that attitude, then Dworkin is a positivist. As far as *that* aspect is concerned, there are no substantial differences between one and the other, when we take into account Dworkin's latest contributions.

One of Dworkin's latest contributions to the positivism vs. anti-positivism debate is his essay *Seven Critics*,²⁸ in which Dworkin deals with several objections raised mainly by American jurists. For

²⁷ See note 14 & accompanying text *supra*.

²⁸ Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977) (following publication of TAKING RIGHTS SERIOUSLY, *supra* note 5).

reasons that will soon become clear, we shall focus our attention on some of Dworkin's answers to criticisms or remarks advanced by Professors David A.J. Richards and Kent Greenawalt. I shall do so not because I think any less highly of the other critics and of Dworkin's replies to them, but rather because in answering the above mentioned critics, Dworkin has been very explicit concerning topics directly bearing on the question we are dealing with now.

Professor Richards has remarked that legal principles can be identified as such by the role they play in judicial reasoning. Like legal rules, they depend at bottom on an issue of fact, that is, the critical attitudes of judges. Thus, Richards concludes that

it is in principle possible to draw the familiar positivist distinction between the law as it is (including principles as well as rules) and the law as it ought to be. Legal principles are not necessarily morally justified. Indeed, it is possible that the principles legally binding on a judge may be so morally defective that the unmitigated application of those principles would still violate the judge's moral duties. Distinctions of this kind can still be drawn Dworkin at this point seems to elide the distinction between legal and moral principles. From the fact that legal principles are sometimes moral principles he unwarrantably infers that they always are. But judges do not have the abstract legal right to declare illegal whatever is immoral or to enforce whatever they believe to be morally right, as the thesis of natural law would suppose. Dworkin's examples of the use of moral principles as legal principles reflect only a narrow connection of law and morals descriptive of one sort of fact pattern. They do not justify any general claim of a necessary logical connection between law and morals.²⁹

In his reply to Richards' criticisms and remarks, Dworkin states that Richards "is rightly anxious to resist the absurd view that the law is always morally sound or (to put the same point in a more revolutionary way) that a morally bad law cannot be the law."³⁰ He goes on to add that Richards "wants to say that a principle that is 'legally binding' on judges may nevertheless be a very nasty principle, so nasty that it may even be the judge's duty to refuse to apply it. I said much the same things a few pages ago."³¹

To further clarify his position in the face of Richards' objections, Dworkin goes on to say that

²⁹ Richards, *supra* note 26, at 1094-96.

³⁰ Dworkin, *supra* note 28, at 1253.

³¹ *Id.* (Dworkin is referring here to a passage included in his answers to Greenawalt's criticisms, see note 34 & accompanying text *infra*).

in some cases the answer to the question of what the law requires may depend on (though it is never identical with) the question of what background morality requires This is not only in cases in which some legislative source deliberately embeds moral tests in legal rules, but also in cases in which it is controversial what the law requires because no legislative source has said anything decisive at all. It is not only when legal principles embodying moral concepts are concededly decisive of legal arguments, but also when the question in play is just the question of what principles are to be taken as decisive.

*But of course it does not follow from any of this either that the law is always morally right, or that what is morally right is always the law, even in hard cases.*³²

The closing sentence of the passage just quoted asserts without qualification the thesis that defines positivism as an approach: the denial of any necessary connection between law and morals. But there is more. In the same answer to Richards, Dworkin asks himself: "Do I think that legal principles are always moral principles?" He answers: "There is an ambiguity here. The proposition might mean that legal principles are always sound or correct moral principles, and if that is what it means then, as I have just been at pains to repeat, *I do not think that.*"³³

Greenawalt's remarks and Dworkin's answer are also relevant to our inquiry. In his paper *Policy, Rights and Judicial Decision*, Greenawalt argues:

Certainly we can imagine a country . . . , in which the thesis that a judge must decide upon institutionalized rights would lead him to decide difficult cases in morally reprehensible ways. I do not think that is a judge's legal duty. When authoritative legal sources leave an issue genuinely in doubt, I think a judge properly decides in accordance with firm convictions of moral rightness and social welfare that command wide support, even if these convictions are at variance with the theory that best would justify existing legal standards. Indeed, if the judge's convictions are very firm and if the issue involved is of great moral or social significance, I think a judge may follow these convictions even if he does not think they are shared by most members of the community. . . .

. . . [A] judge is often warranted in drawing from nonlegal sources to resolve issues of moral rightness and social welfare, and sometimes these may outweigh what he thinks are the contrary implications of a fine weighing of all "legal" values. . . .

³² *Id.* at 1254 (emphasis added; *even in hard cases*, emphasis in original).

³³ *Id.* (emphasis added).

I believe that a judge is sometimes justified in "striking out on his own" even when he recognizes he has little support.³⁴

These are Greenawalt's relevant remarks. Let us see now Dworkin's reaction. In the last section of his long and elaborate answer to the former's criticisms, Dworkin states that he does not "want to deny that realistic cases can be found that present true conflicts between legal and moral rights, if not in America, then in those despotic countries, Nazi Germany and present South Africa, to which jurisprudence often turns." And immediately afterwards he admits that

there are cases in which the institutional right is clearly settled by established legal materials, like a statute, and clearly conflicts with background moral rights. In these cases the judge seeking to do what is morally right is faced with a familiar sort of conflict: the institutional right provides a genuine reason, the importance of which will vary with the general justice or wickedness of the system as a whole, for a decision one way, but certain considerations of morality present an important reason against it. If the judge decides that the reason supplied by the background moral rights are so strong that he has a moral duty to do what he can to support these rights, then it may be that he must lie, because he cannot be of any help unless he is understood as saying, in his official role, that the legal rights are different from what he believes they are.

. . . I agree with Prof. Hart, however, that it would be unwise to make this lie a matter of jurisprudential theory, by saying that in such a case the legal rights are in fact just what morality requires. We do well enough, in such a case, with the accurate description, which is that legal and moral rights here conflict.³⁵

I firmly believe that in the face of what the quoted passages so clearly say, we should conclude that Dworkin does not reject but rather adheres to, "the simple positivistic doctrine that morally iniquitous rules may still be law,"³⁶ and that he does not deny, but rather affirms the "simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality"³⁷ It is true that in the same essay, *Seven Critics*, Dworkin states that "some positivists' thesis, that legal rights and moral rights are conceptually distinct is . . . wrong."³⁸ But it is also true that the only reason he gives to support that assertion is that "[b]ackground moral rights enter into . . . , the calculation of

³⁴ Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1051-53 (1977).

³⁵ Dworkin, *supra* note 28, at 1239-40.

³⁶ H.L.A. HART, *supra* note 6, at 207.

³⁷ *Id.* at 181-82.

³⁸ Dworkin, *supra* note 28, at 1240.

what legal rights people have when the standard materials provide uncertain guidance."³⁹ I must confess that I cannot follow this argument. Even if it is true that "when the standard materials provide uncertain guidance, background moral rights enter into the calculation of what legal rights people have," that does not entail that the positivists' thesis, asserting that legal rights and moral rights are *conceptually* distinct, is wrong. If, as Dworkin admits, legal rights and moral rights may and do sometimes conflict, and if, as he states, the question of what the law requires is *never* identical with the question of what background morality requires, then surely Dworkin is confused and legal rights and moral rights *are* conceptually distinct.

There might be a way to explain Dworkin's confusion and, at the same time, to explain why the fundamental coincidence between his attitude and legal positivism as an approach was hidden or obscured in his writings prior to *Seven Critics*. Dworkin has elaborated his objections against legal positivism taking, expressly or tacitly, the American legal system as his main point of reference. Perhaps the most characteristic features of the latter are: (a) that its Constitution expressly incorporates fundamental moral principles and turns them into ultimate criteria of legal validity of the subordinate rules of the system, and (b) that American judges, through the practice of judicial review, refuse to acknowledge as valid rules of the system those which do not satisfy such moral standards. In the United States there is, therefore, a close connection between the demands of law and the demands of morality insofar as the concordance with certain moral standards is one of the criteria used to decide whether a rule is a valid norm of positive law. But this does not affect the positivistic doctrine of the separation between law and morals, for that connection, however close, is neither necessary nor conceptual, but only contingent. It depends on the fact that the practices of the judges of the system show that they accept and apply as criteria of legal validity moral standards embodied in the Constitution.

Actually, for a close connection of that sort to exist, it is enough that the practices of the judges of any given community show that they do systematically use certain moral standards as criteria of legal validity, even if neither the Constitution, nor the laws, nor any formal act whatever sanctioned the adoption of such moral standards as criteria of legal validity. The acknowledgment of that *fact* makes it possible to assert—even in the absence of express constitutional or legal provisions—that in a given community the criteria of

³⁹ *Id.*

legal validity have "absorbed" the content of some moral principles. From this it does not follow, however, that there exists a *necessary* connection between law and morals, because, as we have said, the acceptance of this criterion of validity is a question of fact.

To quote Hart, we can assert that

[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. . . . No "positivist" could deny that these are facts If this is what is meant by the necessary connection of law and morals, its existence should be conceded.⁴⁰

This influence makes itself felt not only in the content of the subordinate rules of the system through direct action over them by means of the judges' interpretations and the manner in which they solve hard cases. It can also make itself felt on the content of the ultimate criteria of legal validity, and thus, less directly but not less efficaciously, on the subordinate rules of the system.

One might thus conclude an examination of Dworkin's views on legal positivism with the following summary.

First: As we have seen, Hart can only be considered a positivist insofar as he adheres to legal positivism as an approach: he supports "the simple positivistic doctrine that morally iniquitous rules may still be law." Dworkin also adheres to legal positivism as an approach since he upholds the same doctrine.

Second: Dworkin's criticisms of Hart's conception do not constitute an attack against legal positivism as a theory, for Hart does not accept the particular theses or conceptions usually called positivistic. Rather he rejects them *in toto*.

Third: Hence, whatever the discrepancies between Dworkin and Hart, such discrepancies should not be considered as one more round in the match between positivists and antipositivists. The views of Hart's which Dworkin has criticized do not belong to legal positivism. Dworkin's criticisms are not antipositivistic criticisms.

There is a temptation to close one's analysis at this point. A good deal more remains to be said about Dworkin's criticisms of Hart, however, even if these cannot be characterized as antipositivist in any of the usual senses of the expression. We are not dealing with a mere question of labels. Even if under an inadequate label, Dworkin has addressed important criticisms against Hart. They deserve to

⁴⁰ H.L.A. HART, *supra* note 6, at 191-200.

be considered and evaluated, independently of the banner hoisted by the attacker as he launched his assault.

AN EVALUATION OF DWORKIN'S MAIN CRITICISMS

Dworkin's Main Criticisms

All the Law is not Enacted Law

Dworkin attributes to Hart a thesis that leads to the conclusion that all law is exclusively "the product of deliberate and purposeful decision by men and women planning, through such decision, to change the community through general obedience to the rules their decisions create."⁴¹ He attributes to Hart the rejection of the idea "that legal rights can pre-exist any form of legislation."⁴² This is tantamount to criticizing Hart for upholding a theory on the "sources" of law similar to the one that has been put forward by the supporters of legal positivism as a theory.

Law is More than a System of Specific Rules

Dworkin attributes to Hart the presentation of law as a system of rules (taking these to be provisions referring to specific actions) that operate in an all or nothing fashion, and whose exceptions are susceptible of exhaustive enumeration. Dworkin further takes issue with that "model of rules" because, in his opinion, it conceals the fact that in every system of law there are legal principles which, in addition to not being the product of any explicit or deliberate decision, are logically distinct from rules. According to Dworkin, to say that principles are logically distinct from rules is to say that: (a) they do not refer to specific actions; (b) they are not applied in an all or nothing fashion; and (c) they perform a special role in the justification of judicial decisions, in the sense that they may be superseded by other principles for a large variety of reasons *not* subject to exhaustive enumeration. Principles possess a dimension of "weight" which rules lack that accounts for that peculiar role.

As an example of a rule, Dworkin cites an interdiction which prohibits driving on a highway at over fifty miles per hour. As an example of a principle, Dworkin points to the notion that no one shall be permitted to benefit from his own wrong.

⁴¹ R. DWORIN, *supra* note 5, at x.

⁴² *Id.* at xi.

The "Rule of Recognition" does not Apply to Principles

Dworkin attributes to Hart the view that in every community where there is law, legal rules are identified by a "master rule" (or "rule of recognition") which contains criteria of identification not related to the content of the rules, but rather exclusively to their mode of origin or pedigree. Those criteria—in Dworkin's view—only apply to enacted law and do not apply to principles which typically are not enacted law.

Hart's Theory of Judicial Function Allows Too Much Judicial Discretion

Dworkin attributes to Hart a mistaken theory of the judicial function (or adjudication), which stems from having adopted the "model of rules." According to that theory, in Dworkin's version, if a case is not clearly covered by the specific rules which constitute the law, the judge is free to decide it as he wishes, exercising his "discretion" in the strong sense of this term, which excludes all type of duty. He is free to apply general rules created *ex post facto* by himself, as if he were a legislator, guided solely by considerations of social policy and morality of the type usually taken into account by legislators when laying down general rules.

The Social Rules Theory of Duty Cannot Justify the Existence of All Types of Duty

Dworkin attributes to Hart a theory according to which duties of every type, even judges' duty to apply the law, presuppose the existence of social rules that constitute them. Dworkin calls this the *social rules theory of duty* and summarizes it in this way:

Duties exist when social rules exist providing for such duties. Social rules exist when the practice-conditions for such rules are met. These practice conditions are met when the members of a community behave in a certain way; this behavior *constitutes* a social rule, and imposes a duty. Suppose that a group of churchgoers follows this practice: (a) each man removes his hat before entering church, (b) when a man is asked why he does so, he refers to "the rule" that requires him to do so, and (c) when someone forgets to remove his hat before entering church, he is criticized and perhaps even punished by the others. In those circumstances, according to Hart, practice-conditions for a duty-imposing rule are met. The community "has" the social rule to the effect that men must not wear hats in church, and

that social rule imposes a duty not to wear hats in church. . . .
 The existence of a social rule, and therefore the existence of the
 duty, is simply a matter of fact."⁴³

Dworkin contends that the so-called social rule theory is false as a general theory purporting to account for the existence of obligations of every type, and false with regard to its application to the duty of judges. He contends that only a normative rule, based on the existence of a certain *normative state of affairs*, can justify the existence of duties of all types. This cannot be done by a *social rule* that only takes into account or describes a certain *factual state of affairs*.

Evaluation of the Criticisms

The Theory that All Law is Enacted Law

I have explained above why there is no valid reason whatever for attributing to Hart the theory that all law is the product of a deliberate and explicit act of creation of general rules. That is to say why Hart cannot be charged with arguing that the only genuine "source" of law is legislation. Some customs are laws; rules extracted from past judicial decisions are laws; rules of recognition may be sensibly considered part of the law. None of them are enacted law. Dworkin's criticisms in this regard are based on something Hart has never claimed nor implied.

The Theory that Law is a System of Specific Rules

Chapter II of *Taking Rights Seriously*, entitled *The Model of Rules I*, reproduces without significant modification the essay *The Model of Rules*, originally published in 1967.⁴⁴ That essay gave rise to a number of criticisms, which Dworkin attempted to refute in his 1972 article, *Social Rules and Legal Theory*,⁴⁵ which constitutes the third chapter, *The Model of Rules II*, of *Taking Rights Seriously*.

I first criticized Dworkin's 1967 article in 1971, in a booklet, *Legal Principles and Legal Positivism*.⁴⁶ I was convinced that Dworkin's criticisms of the so-called "model of rules" were largely due to a misunderstanding of what Hart means by "rule." I still hold that opinion, based on the text of the second chapter of *Taking Rights*

⁴³ *Id.* at 50 (footnote omitted).

⁴⁴ Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted in *ESSAYS IN LEGAL PHILOSOPHY* 25 (R. Summers ed. 1968).

⁴⁵ 81 YALE L.J. 855 (1972).

⁴⁶ G. CARRIÓ, *LEGAL PRINCIPLES AND LEGAL POSITIVISM* (Buenos Aires, 1971).

Seriously, where the 1967 paper, containing those same mistakes, is reproduced, and on the fact that in his 1972 reply—now incorporated intact into his book—Dworkin has not answered the charge that he misinterpreted what Hart means by “rule.” My objection from 1971 remains valid today: in his attacks against legal positivism, and with regard to the meaning Hart attaches to the word “rule,” Dworkin has failed to take into account the “model of rules” actually used in *The Concept of Law*. Hart’s model can be described as follows: The law of a community is a set of rules. The word “rule” does not apply exclusively to patterns like “speed on highways shall not exceed 50 miles an hour.” This is a *specific* rule and such specific rules are merely one of the various types of rules which make up a legal order. In addition there are general standards which limit in a peculiar fashion the administrative bodies charged with their application; further there are variable standards which, like that of “due care,” do not require specific conduct. These standards are rules in a broad sense of “rule.”⁴⁷ There is nothing in the meaning of “rule” that precludes a pattern of the type of “no one shall be permitted to benefit from his own wrong” from being considered a rule of a legal order. Whether such a rule can be so considered depends instead on other considerations. Moreover, all rules, even specific ones, have what can be loosely called an “open texture” or have exceptions which are not exhaustively specifiable in advance.⁴⁸ Furthermore, “[a] rule that ends with the word ‘unless . . .’ is still a rule,”⁴⁹ and “we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. . . .”⁵⁰ Therefore, it is not true that rules are always applicable in an “all-or-nothing” fashion. Nor is it true that rules permit, at least in theory, exhaustive enumeration of all their exceptions. For this to be so, one would be required to be able to foresee all possible attending circumstances, and this is plainly impossible. Conflicts between rules cannot always be solved by denying the validity of one of them. Not infrequently a decision—which may well assume the form of a compromise—must be based on the relative “weight” of each rule in the context of the specific case in hand.⁵¹ The dimension of weight is not the exclusive

⁴⁷ H.L.A. HART, *supra* note 6, at 127-30, 249-50.

⁴⁸ *Id.* at 135.

⁴⁹ *Id.* at 136.

⁵⁰ *Id.* at 125.

⁵¹ *Id.* at 125-26.

property of patterns such as the one which says that "no one shall be permitted to take advantage of his own wrong."

The Content of the Rules of Recognition

Dworkin argues that according to Hart the ultimate rules that establish the criteria of legal validity of a given system enable us to identify subordinate rules only by their manner of creation or "pedigree," not by their content. That is why, he argues, in Hart's conception principles are left out of the picture.

In Hart's view, the criteria of legal validity enforced in a given community derive from the practices of officials, particularly judges, and, in a complementary fashion, from the acquiescence of the rest of the population in the results of those practices. Hence, formulation of the rules of recognition may be a very troublesome task, for it is not always possible to accurately determine which criteria are actually accepted. Just like common law rules, rules of recognition have no canonical formulation, although they are *used* daily by judges who apply subordinate rules tacitly identified by reference to rules of recognition.

Nothing in the concept of "rules of recognition" prevents us from accepting the fact, therefore, that the criteria actually used by judges to identify the subordinate rules of the system may include references to their content. It may happen that in a given community the only customs held to be legal or legally "binding" are customs compatible with the demands of morality. Or judges may accept as valid only those laws which, in addition to having been properly approved by a body competent to do so, do not violate an unwritten catalogue of individual rights and liberties.

Let us imagine a country which lacks a written constitution. Let us imagine further that in that community judges and other officials systematically refuse to consider valid those rules which, despite satisfaction of tests of their formal regularity, are, for instance, opposed to the precepts of the *Koran*. Every "correct" formulation of the rules of recognition of such an imaginary Islamic Republic, would have to include among the criteria of legal validity the absence of incompatibility between the content of the rules and the precepts of the *Koran*. This would not be a criterion exclusively related to the mode of origin or pedigree, since it takes into account the content of the rules. A "master rule"—to use Dworkin's terminology—embodying criteria of such a type, would be, for Hart, a rule of recognition.

On Hart's Theory of Adjudication

Hart's writings on this topic are not sufficiently comprehensive and detailed to enable us to speak of *his* theory of judicial function. Moreover, the views he has entertained in this respect have evolved along the years. Nevertheless, one may contrast the position Dworkin attributes to Hart with the position that seems reasonable to attribute to Hart on the basis of the material at hand.

First, let us see Dworkin's version:

Legal positivism provides a theory of hard cases. When a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance, then the judge has, according to that theory, a "discretion" to decide the case either way. His opinion is written in language that seems to assume that one or the other party had a pre-existing right to win the suit, but that idea is only a fiction. In reality he has legislated new legal rights, and then applied them retrospectively to the case at hand.

. . . .
The set of . . . valid legal rules is exhaustive of "the law," so that if someone's case is not clearly covered by such a rule . . . then that case cannot be decided by "applying the law." It must be decided by some official, like a judge, "exercising his discretion," which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.

. . . .
. . . [W]hen a judge runs out of rules he has discretion, in the sense that he is not bound by any standards from the authority of law⁵²

The general theory of adjudication Dworkin ascribes to Hart can be summarized as follows: In deciding a case the judge starts by examining the rules of the system. If they provide the answer, the judge's decision is easily reached, and the case is an easy one. If, on the contrary, the case is a *hard one* because there are no rules whose areas of clear meaning cover the case, the judge simply sets aside the rules of law, and acting like a legislator, creates a new general rule—one which he considers the most adequate from the point of view of social policy or morality—and applies it retrospectively to the case at hand, which is thus decided.

Hart seems to have always held the following two beliefs. First, that the indeterminacies the open texture of legislative language

⁵² R. DWORKIN, *supra* note 5, at 81, 17, 34.

creates in rules, and the difficulties involved in extracting common law general rules from the decisions of concrete cases, combine to prevent us from adequately describing the practice of judges in terms of a mere deduction, starting from pre-established premises unequivocally and accurately formulated. Second, that a judge confronted with a hard case must undertake a creative task, for every decision not wholly governed by the rules of the system contains elements of creation. To refer to the predicament of a judge in hard cases, Hart has used the word "discretion."

Dworkin distinguishes several meanings of "discretion." In what he calls the "weak" sense, it means "good judgment." He contends that Hart's theory of adjudication, however, requires use of the word in what Dworkin calls its "strong" sense. In this strong sense, to say that a judge exercises discretion means that he is free to decide the case in favor of either the plaintiff or the defendant, because he is not legally bound to decide it in one way or another. This does not mean that he cannot be criticized for not having used good judgment ("discretion" in the weak sense) in arriving at his decision. However, the decision cannot be criticized as contrary to law, because the law fails to impose a duty on him, but rather confers a power to decide either way ("discretion" in the strong sense). Dworkin claims that such a theory of the judicial function does not do justice to the complexity of the situation. He offers an alternative I shall address below.

We must pause now to examine whether the theory of adjudication Dworkin attributes to Hart is actually grounded in Hart's scanty references to the subject of judicial reasoning. To do that, we must take into account three different stages of Hart's thinking.

The first stage in Hart's developing attitude toward judicial reasoning is revealed in certain passages of *Positivism and the Separation of Law and Morals*,⁵³ which seem to justify Dworkin's interpretation. In dealing with an argument of Fuller's, Hart concedes that "in interpreting legal rules there are some cases which we find after reflection to be so natural an elaboration or articulation of the rule that to think of and refer to this as 'legislation,' 'making law,' or a 'fiat' on our part would be misleading."⁵⁴ But immediately thereafter Hart notes "how rare in the law is the phenomenon" mentioned in the preceding passage and "how exceptional is this feeling that one way of deciding a case is imposed upon us as the only natural or rational elaboration of some rule. Surely it cannot be

⁵³ Hart, *supra* note 1.

⁵⁴ *Id.* at 628.

doubted that, for most cases of interpretation, the language of choice between alternatives, 'judicial legislation' or even 'fiat' (though not arbitrary fiat) better conveys the realities of the situation."⁵⁵

The second stage, which seems to testify to a change of Hart's attitude, is found in *The Concept of Law*.⁵⁶ Hart neither says nor suggests that when dealing with hard cases judges ignore or set aside existing legal material and behave as legislators. On the contrary, what judges do, according to Hart, is to apply "criteria of relevance and closeness of resemblance [which] depend on many complex factors running through the legal system,"⁵⁷ and thereby "display characteristic judicial virtues, the special appropriateness of which . . . explains why some feel reluctant to call such judicial activity 'legislative.'"⁵⁸ Among these "judicial virtues" Hart mentions "a concern to deploy some acceptable general principle as a reasoned basis for decision."⁵⁹ Hart says that to characterize all these features "would be to characterize whatever is specific or peculiar in legal reasoning."⁶⁰ Hart does not undertake this task in *The Concept of Law*, nor is it his purpose to do so. The few relevant passages quoted or referred to are an insufficient basis for a full-fledged theory of adjudication.

There is a third stage in the evolution of Hart's thinking on this point. In his study, *Problems of Philosophy of Law*,⁶¹ Hart makes more explicit his ideas on the role of judges and the characteristic features of judicial reasoning, particularly with reference to hard cases. He asserts the following: First, that it "is of crucial importance that cases for decision do not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. These include a wide variety of individual and social interests, social and political aims, and standards of morality and justice; and they may be formulated in general terms as principles, policies and standards."⁶² Second, that "[i]t may well be that terms like 'choice,' 'discretion,' and 'judicial legislation' fail to do justice to the phenomenology of considered

⁵⁵ *Id.* at 629.

⁵⁶ H.L.A. HART, *supra* note 6, at 124, 200.

⁵⁷ *Id.* at 124.

⁵⁸ *Id.* at 200.

⁵⁹ *Id.*

⁶⁰ *Id.* at 124.

⁶¹ Hart, *Problems of Philosophy of Law*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY 264 (P. Edwards ed. 1967).

⁶² *Id.* at 271.

decision: its felt involuntary or even inevitable character which often marks the termination of deliberation on conflicting considerations. *Very often* the decision to include a new case in the scope of a rule or to exclude it is guided by the sense that this is the 'natural' continuation of a line of decisions or carries out the 'spirit' of a rule."⁶³

This is a far cry from Hart's assertion of 1958. The same phenomenon that in *Positivism and the Separation of Law and Morals* had been described as rare, even exceptional, is now presented as occurring "very often."

At the end of the passages, Hart adds that

however it may be in moral argument, in the law it seems difficult to substantiate the claim that a judge confronted with a set of conflicting considerations must always assume that there is a single uniquely correct resolution of the conflict and attempt to demonstrate that he has discovered it.⁶⁴

In chapter IV of *Taking Rights Seriously*, Dworkin expounds a theory of adjudication which deals mainly with decisions of hard cases controlled by common law. He claims precisely what Hart has rejected in the text above, namely, that there is always a single correct solution for every case; a uniquely right answer that is there to be discovered by the judge. For this purpose, it is enough for the judge to be able to find and formulate the best theory justifying *all* existent legal material in force (constitutional clauses, statutes and their purposes, common law rules and legal principles underlying them). Once found and formulated, the theory shall contain the solution of the case, no matter how complex the latter might be. To carry out this feat, Dworkin resorts to a mythical figure: Hercules, the omniscient judge.⁶⁵

Perhaps the issue can be placed in a more adequate context by widening the list of views on adjudication and relating them to hard cases. Thus, we might speak of five different views: (1) The so-called "positivist" or "formalist" theory which holds that "a legal system is a 'closed logical system' in which correct decisions can be deduced from predetermined legal rules by logical means alone."⁶⁶ Consequently, there are no hard cases under this theory. (2) The "realist" or "sceptical" view where there are no rules so decisions are the

⁶³ *Id.* (emphasis added).

⁶⁴ *Id.*

⁶⁵ See R. DWORKIN, *supra* note 5, at 81-130. The discovery of new dimensions for fresh Herculean feats is independent of Dworkin's objections to the theory of adjudication he has ascribed to Hart.

⁶⁶ H.L.A. HART, *supra* note 6, at 253 note (*Legal Positivism*).

product of the personal preferences or even the prejudices of judges. The "grounds" of their decisions are a posteriori rationalizations. It does not make sense to speak of hard cases under this view. (3) The theory Dworkin has attributed to Hart, that when confronted with hard cases judges set aside the law, which has proved useless, and act like legislators. (4) The theory that can be extracted, or rather extrapolated, from Hart's writings since 1960, that when confronted with hard cases, judges exercise typical judicial virtues which cannot be adequately described by means of expressions such as "judicial legislation," "choice," "discretion," or "fiat." In deciding hard cases, judges apply "criteria of relevance and closeness of resemblance" that "depend on many complex factors running through a legal system." It very often happens that after such a deliberation the solution of the case may appear as natural or even as necessary. But there are no good reasons to claim that there is always a uniquely correct answer that is to be discovered; hence, it does not make sense to struggle to find it. Many times judges must strike a balance between arguments of equivalent strength, equally based on the legal materials that have guided their deliberations. Sometimes the guidance may be very tenuous. (5) Dworkin's theory that there is always a single correct answer. It is the one dictated by the best justifying theory of all standard legal materials in force.

My evaluation of Dworkin's criticisms on this topic boils down to the following contention. In criticizing Hart's position, Dworkin has not taken into account what Hart has written about the subject since 1960.

Before leaving the topic, I should like to make a few remarks concerning Dworkin's own theory of adjudication, which purports to be descriptive as well as normative. It is a part (and can only be thoroughly understood as such) of a much wider conception of political philosophy: the so-called "rights thesis."⁶⁷ The descriptive claim of Dworkin's theory of adjudication purports to explain how American judges operate with United States legal materials in order to decide hard cases arising in the areas of constitutional law, statutory law, and common law. For obvious reasons, I am not qualified to judge whether the description is true to the facts. I think I am qualified, though, to say that even if Dworkin has produced a description true to the facts, it cannot be used to criticize, on the basis of the truth of its assertions, the positivistic doctrine of the separa-

⁶⁷ See R. DWORIN, *supra* note 5, at 87-90. Critical analysis of the rights thesis and the normative aspects of Dworkin's theory of adjudication is beyond the scope of the present inquiry.

tion of law and morals. I realize that in stating the reasons which support this contention I am guilty of repetition, but the point has been overlooked so often that it is worthwhile insisting on it once more. Even if Dworkin's description of the practices of American judges is true to the facts, it cannot be invoked as a counter example to legal positivism as an approach, for as I have already pointed out, the Constitution has incorporated moral standards as criteria of legal validity, and American judges, as Dworkin tells us, do apply those moral standards as such ultimate criteria. Because of these circumstances, the connection existing in this country between law and morals, however close and pervasive, is not a necessary or conceptual connection, but a *factual* one. It springs from the fact that judges effectively accept and apply as criteria of legal validity the moral standards adopted by the Constitution.

The So-Called Social Rule Theory of Duty and the Sense in Which Judges are "Bound" to Apply the Law

In 1972, Dworkin published *Social Rules and Legal Theory*, which constitutes the third chapter of *Taking Rights Seriously*. Dworkin attempted therein to refute the main objections raised against his 1967 essay *The Model of Rules*. Among the criticism he attempted to refute was the claim that his first antipositivist attack, based on the existence of legal principles as something different from legal rules, could be made to fit within Hart's concept. It had been argued⁶⁸ that the concept of rule used by Hart was broad enough to include Dworkin's principles which, moreover, might be captured by Hart's rule of recognition. Dworkin had also been criticized for his use of something in the nature of an empirical method for identifying the legal principles that are a part of the law of a community and distinguishing them from extra-legal standards: the so-called doctrine of "institutional support." Some of Dworkin's critics maintained that ultimately this was tantamount to accepting, as positivists do, that certain social facts, and only social facts, afford *the* distinctive criterion for anything that in a community counts and should count as law.⁶⁹

In his reply Dworkin sought to destroy any claim that his standpoint was similar to Hart's. To that end, he tried to emphasize his disagreement with Hart. In so doing, Dworkin claimed to point out a central conflict between himself and Hart which his critics had not

⁶⁸ See p. 233 *supra*.

⁶⁹ See, e.g., Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151 (1971).

taken up. (The reason it had not been taken up by the critics, I might add, is that the point did not follow from the theses and arguments of the 1967 article.) Be that as it may, Dworkin noted that his basic disagreement with Hart was over Hart's elaboration of a general concept of duty, valid for all types of duty, whereby a necessary condition for any type of obligation is the existence in the relevant community of the shared acceptance of a social rule constituting that duty.

Dworkin claimed that Hart, after expounding this general theory of duty—which Dworkin calls the social rule theory of duty—asserted that it accounts for the judge's duty to apply the law. Dworkin criticizes the social rule theory of duty and, specifically, its alleged application to the judges' normative position within the legal system. He asserted that for a duty to exist it is not a necessary condition that a certain factual state of affairs which can be described in terms of a social rule should exist. So "[a] vegetarian might say, for example, that we have no right to kill animals for food because of the fundamental moral rule that it is always wrong to take life in any form or under any circumstance. Obviously no social rule exists to that effect . . ."⁷⁰ The assertion of a social rule, Dworkin adds, is true or warranted if a certain factual state of affairs obtains; that is to say, if the members of a community *believe* they have a certain duty and behave as if their belief were true. Moreover, this factual state of affairs is not sufficient, Dworkin points out, to assert the existence of any duty. Only if a normative state of affairs actually obtains, that is, only if the members of the community *do* have a duty—as opposed to merely believing that they have it—is the assertion of a normative rule true or warranted.⁷¹ Social facts, however regular, and human beliefs, however sincere, do not justify the assertion of any duty. Social rules and normative rules are very different in kind. If we limit ourselves to assert a social rule we are merely referring to regularities of behavior and to human beliefs. No combination of such factual elements can yield a genuine duty. This is Dworkin's criticism, in a nutshell.

In his criticisms, Dworkin makes two assumptions: First, that Hart's analysis of the general concept of obligation or duty purports to account for duties of every kind, even those which do not derive from social phenomena such as positive law or social morality. Second, that Hart's rules of recognition, which specify the ultimate

⁷⁰ R. DWORKIN, *supra* note 5, at 52.

⁷¹ *Id.* at 51.

criteria of validity of a legal system, are rules which impose upon judges the duty to apply the standards identified by means of those criteria, in the same sense in which, for example, rules of positive law and social morality impose the duty of not killing other human beings.⁷²

There are several objections to these two fundamental points that Dworkin takes for granted in his criticism of the social rule theory of duty and its alleged application to the normative predicament of judges.

First is a point related to the scope of Hart's analysis of the general concept of duty; it seems to me that in attempting to analyze what he calls "the general idea of obligation," Hart has tried to elucidate the meaning of the statement that a man has (or does not have) a duty under any given set of social rules (social morality, positive law, rules of protocol, rules of etiquette). It is a truism that there exist different social moralities, different legal systems, and, in general, different sets of social rules making different demands on human beings. Some of these demands are conceived of as duties or obligations. It is, at any rate, *this* concept of duty that Hart has tried to elucidate. That is why he compares the social phenomenon which, in his view, is a necessary condition to render *that* concept of duty intelligible, namely, the shared acceptance of rules, with a different social phenomenon, the existence of a mere social habit, which does not and may not yield duties of any kind.⁷³ Moreover, Hart's analysis of the general concept of duty is a central part of an enterprise whose main objective is "to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion and morality *as types of social phenomenon*."⁷⁴ The concept of duty Hart analyzes can be called "general" in the sense that it applies to all duties, arising out of various social phenomena such as social morality and positive law. It is not "general" in the sense that it applies to other non-social dimensions of morality: *e.g.*, "true," "rational" or "enlightened"

⁷² A detailed discussion of the divergence between Dworkin and Hart on this issue is outside the scope of this article, as is an analysis of the extent to which Dworkin's criticisms of the social rule theory of duty are compatible with his acceptance of legal positivism as an approach. See notes 27-32 & accompanying text *supra*. One must bear in mind that Dworkin's criticisms are based on the idea that the existence of a duty can only be asserted if what he mysteriously calls a "normative state of affairs" obtains. R. DWORKIN, *supra* note 5, at 51. This notion of a "normative state of affairs" seems to echo natural law doctrines which Dworkin has repudiated in other contexts. See, *e.g.*, Dworkin, *supra* note 28, at 1250, 1257.

⁷³ H.L.A. HART, *supra* note 6, at 9-11, 54-59.

⁷⁴ *Id.* at 17 (emphasis added).

morality, or to the morality of saints, heroes or other individual moralities. In these different domains we may and usually do speak of duties, and obviously the use of the concept in such contexts presupposes no shared acceptance of any social rule. Hart's analysis of the concept of duty must be so interpreted. If we bear that interpretation in mind, and keep ourselves within its limits, we shall be able to see that most of Dworkin's general criticisms of what he calls the social rule theory of duty lose their relevance.

Let us examine the second point. Dworkin says that Hart "advances both a general theory about the concept of obligation and duty, and a specific application of that theory to the duty of judges to enforce the law."⁷⁵ A few lines before, he stated that after Hart has analyzed the general concept of obligation in terms of what Dworkin calls the social rule theory of duty, "Hart . . . applies this analysis to the issue of judicial duty."⁷⁶

I think that Dworkin is wrong. Hart does not apply his analysis of the general concept of obligation to the judges' highly complex position in the legal system. He nowhere maintains that such an analysis may be applied *tout court* to elucidate the normative status of judges under the legal system. On the contrary, in *The Concept of Law* there are numerous indications that things are far from being so simple. The highly complex normative status of judges cannot be presented in terms of this impoverishing dilemma: either judges are bound to apply the law in the same sense that ordinary citizens are bound to pay taxes—that is, because there are rules of exactly the same type, although a different content, which impose on judges and taxpayers their respective duties—or, judges are not legally bound to apply the law and consequently, are legally free to do whatever they wish.

The dilemma is false, however, because the normative status of judges fits neither of the two alternatives. Hart is anxious to show the rich complexity of the judges' position within the legal system. Their normative status is obviously very different from that of ordinary citizens. If we limit our comparison to the area of duties, we should say that the relevant difference is not merely one of having different legal duties but of having duties in a different sense of "duty." This different sense of "legal duty" is not analyzed in *The Concept of Law*, though we may there find many hints indicating how and where to look in undertaking the task.

Suppose that we accept, without questioning its accuracy, Hart's

⁷⁵ R. DWORKIN, *supra* note 5, at 51.

⁷⁶ *Id.* at 50.

account of the normative status of judges within a typical municipal legal system. We should have to say, then, that such normative status is characterized by peculiar features sharply distinguishing the judges' position from that of ordinary citizens. Those features reflect the different contributions made by judges and ordinary citizens to the existence of the legal system. Citizens and officials, particularly judges, have different relationships to the rules of law identifiable by the criteria of the rules of recognition.⁷⁷ While ordinary citizens must only obey the rules identified by means of the ultimate criteria contained in those fundamental rules, judges must explicitly acknowledge the latter and regard them as common standards of judicial behavior.⁷⁸ The word "obey" does not "describe well what judges do when they apply the system's rule of recognition and recognize a statute as valid law and use it in the determination of disputes."⁷⁹ The "merely personal concern with the rules, which is all the ordinary citizen *may* have in obeying them, cannot characterize the attitude of the courts to the rules with which they operate as courts."⁸⁰ Standards of correct adjudication "could not indeed continue to exist unless most of the judges of the time adhered to them"⁸¹

All these passages, and many more scattered throughout *The Concept of Law*, clearly show, I think, that in Hart's view judges as such and ordinary citizens do not have legal duties in the same sense of "legal duty." That view, however, is not developed in *The Concept of Law*. This is, of course, a sin of omission, but it is not a venial one. The analysis of the concept of legal duty explicitly carried out by Hart is therefore incomplete. If not all legal duties are to be analyzed on the basis of the same elements, we need an elaborate elucidation of the different sense of "legal duty," which remains wanting in Hart, in order to be able to understand the sense in which judges are said to be "bound" to apply the law.

Let me add that even though I cannot share Dworkin's mistaken criticism of Hart's position on the issue concerning the judges' duty to apply the law, his mistakes, if not justified, are no doubt excusable as well as illuminating.

⁷⁷ H.L.A. HART, *supra* note 6, at 111.

⁷⁸ *Id.* at 113.

⁷⁹ *Id.* at 110.

⁸⁰ *Id.* at 112.

⁸¹ *Id.* at 142.

CONCLUSION

After this long discussion, full of details and quotations and perhaps signifying too little, something in the nature of a general appraisal is called for. I shall try to state briefly those aspects of Dworkin's view on legal positivism that conceivably may seem more striking to a jurist brought up in the continental legal tradition. To that purpose I shall make three different types of remarks.

First: In criticizing legal positivism, Dworkin has *created* or *invented* his target. The brand of legal positivism he argues against does not exist. It results from the insertion into the general scheme of *The Concept of Law* some formalist views alien to the spirit in which the book was conceived and written. They make up the so-called "model of rules," that is, law seen as a set of specific rules applicable in an all-or-nothing fashion and identifiable, in the same fashion, by means of formal ultimate criteria which only take into account the rules' pedigree and never their content.

Formalism has been an endemic disease affecting legal theory. It is the distinguishing feature of one of the most sophisticated products of continental legal thinking: the so-called *Rechtswissenschaft* (science of law or legal dogmatics), born in Germany in the second half of the last century, and spread elsewhere rapidly.

Before coming to settle in America, H. Kelsen was already famous in Continental Europe and in Latin America as the legal philosopher who had asked and answered the Kantian-sounding question "How is *Rechtswissenschaft* (the science of law) possible"? In asking and answering this question Kelsen had in mind, of course, the kind of legal theory German scholars had elaborated. His answer is found in the terse pages of the first edition of the *Reine Rechtslehre* (*The Pure Theory of Law*),⁸² dating back to the early thirties, and is foreshadowed in his *Hauptprobleme*,⁸³ dating back to 1911, as well as in many of his intermediate writings. In the first edition of *The Pure Theory of Law*, one finds carefully displayed and thoroughly articulated the conditions of possibility (in the Kantian sense of the expression) of a value-free as well as fact-free theoretical approach to law. Such an approach, and Kelsen's rigorous description of its underlying assumptions, have been repeatedly criticized as espousing the most barren formalist attempt to deal with legal problems.

For a jurist brought up in the continental legal tradition, Hart's brand of legal positivism represents chiefly an original and fertile

⁸² H. KELSEN, *REINE RECHTSLEHRE* (1934).

⁸³ H. KELSEN, *HAUPTPROBLEME DER STAATSRICHTS LEHRE* (1911).

way of combining the main doctrine of legal positivism—the separation, or rather, the separability of law and morals—and the substitution of a flexible and realistic view of law and legal problems for the rigid and, to a large extent, useless theses of the formalists. The formalists' theses are characteristic of what I have called above "legal positivism as a theory." Hart's fruitful combination was possible as a consequence of his methods of analysis which are closely related to his views on general philosophy.

Many of Dworkin's criticisms appear to be directed to formalistic features allegedly embedded in Hart's brand of legal positivism, as if the differences between Hart's and Kelsen's interests, methods and final theoretical products were negligible. As we have seen, this assumption is untenable. This is the main reason why *those* objections of Dworkin to legal positivism, as expounded in *Taking Rights Seriously*, do not make much sense to a jurist brought up in the continental legal tradition.

Second: Again, from the viewpoint of a jurist brought up in the continental legal tradition, Dworkin's objections to what he calls the positivists' theory of judicial discretion in the strong sense of this term, call for a different appraisal. The same holds true for the related issue of the sense in which it can be asserted that judges are "bound" to apply the law. These objections deserve a close examination because they help us to see two things. On one side, even though Dworkin is wrong in attributing to Hart a theory of adjudication which does not do justice to the few passages Hart has written on the subject in the last twenty years, Dworkin's objections have shown that, so far, Hart has produced only hints of his views about the characteristic features of judicial reasoning within the context of a typical legal system. We shall not be able to determine, therefore, whether those views are open to criticisms which make them indefensible or, on the contrary, can be regarded as acceptable until we know much more about them.

On the other related issue we must say, I think, that even though Dworkin's criticisms of Hart's approach to the problem of the normative status of judges within the legal system and particularly with judges' duty to apply the law, are based mainly on a misinterpretation of Hart's position, they have permitted us to realize that Hart's analysis of the concept of legal duty as developed in *The Concept of Law* is incomplete. The analysis is incomplete because it does not allow us clearly to see the meaning of the proposition, which we are intuitively willing and ready to accept as true, that judges have a legal duty to apply the law. If we accept what Hart says about the normative predicament of judges, a new sense of

“legal duty”—whose analysis has *not* been developed in Hart’s contributions—seems to be required to account for the typical normative status of judges within a typical municipal legal system.

Third: To conclude, I shall mention a final fundamental question which a jurist brought up in the continental legal tradition, and perhaps any jurist, will find hard to grasp. It is related to the changing, or rather shifting, viewpoints from which Dworkin, in *Taking Rights Seriously*, has addressed his attacks against legal positivism. Are those viewpoints to be construed as expressing some new type of natural law doctrine? Or, are we to take, as I have done in this article, Dworkin’s unequivocal assertions contained in *Seven Critics* at face value, that is, as an explicit adherence to legal positivism as an approach? In the latter case, should we say that Dworkin’s criticisms are based on a sort of Poundian sociological approach, enriched by refined philosophical grounds and overtones, but not to be confused with any natural law doctrine, old or new? These perplexing questions are worth a clear and precise answer which, of course, would require an inquiry beyond the scope of the present endeavor.