LEGAL POSITIVISM'S ANSWERS TO THE NEOCONSTITUTIONALIST CHALLENGE

by Mauro Barberis

The rebirth of legal positivism we have seen over the last two decades in the theoretical debate among English-speaking scholars, or at least in the Oxbridge mainstream, can be considered an answer to the challenge that Dworkin aimed at Hartian positivism (Leiter 2003). In response to this challenge, the legal positivists have wound up multiplying their views, by refining and making more and more subtle their theses, and in any event putting out a growing amount of admittedly positivist literature, despite an increasing tendency to question whether the use of such traditional labels still makes sense. The common-law legal positivist replies to neoconstitutionalism have been of three sorts, namely, inclusive, exclusive, and normative legal positivism; and at least the first two bear comment, if only to clarify the way they have been received by Continental and Latin American legal positivism.[1]

The first of these replies is known as *soft* or *inclusive* legal positivism, but also as *incorporationism*.[2] On this view, the connections between law and morals invoked by Dworkin are certainly recognized but are held to be merely contingent, rather than necessary, and hence compatible with the Separability thesis (see Coleman 2001a, 2001b; Redondo 2003). Specifically, it is Hart 1994b, the posthumous reply to Dworkin's objections, that qualifies its own view as soft legal positivism—a move enabling Hart to consider Dworkin's theory as akin to his own view, on the one hand, and as incommensurable with it, on the other. Hart's soft positivism bears an affinity to Dworkin's stance by recognizing a contingent inclusion of morality in law by means of principles—a stance the later Dworkin considers as merging into his own (Dworkin 2006). But Hart's descriptive and general jurisprudence seems to Hart himself so different from Dworkin's normative and particular jurisprudence as to not even be susceptible of being contradicted by it (but see Raz 2007).

The second reply has been labelled *hard* or *exclusive* legal positivism, especially by supporters of the first one. Its main exponent, Joseph Raz, considers it

[1] Although Scarpelli 1965 can be considered an anticipation of normative positivism as paradigmatically set out in Campbell 1996 and Waldron 2001, this conception has not yet had any significant developments in continental Europe, except maybe for Hierro 2002, Pintore 2003, and Celano 2012.

[2] The qualifiers *inclusive* and *soft* are used in Waluchow 1994 and Hart 1994b, respectively. The label *inclusive (or soft) positivism* can in turn be considered synonymous with *incorporationism*—but see Kramer 2003 for a distinction.

to be no more than legal positivism as such, without any qualification (Escudero 2004, Jimenez Cano 2008). Indeed, the conception looks like a reply to Dworkin as well as a criticism of inclusive legal positivism, the two having been assimilated, for different reasons, by Raz as well as by Dworkin himself. Inclusive legal positivism is held to be incoherent: Either constitutional principles are considered legal rules, or law will end up being identified on the basis of morals alone. In fact, the criterion Raz adopts for identifying legal positivism is more demanding than the Separability thesis: i.e., the Social sources thesis, by which law could be identified only on the basis of social facts, not by any recourse to morality.

If we now turn our focus from the jurisprudence of the common-law tradition to the general theory of the civil-law countries, we will find that legal positivism comes under fire from Continental nonpositivism or neoconstitutionalism *a fortiori*, as it were. In fact, the main legal systems on the Continent can be much more readily traced to the model of the constitutional state—a system where a rigid constitution coupled with judicial review wind up constitutionalizing the entire positive law, i.e., irradiating it with constitutional principles. On the Continent, then, neoconstitutionalism can present itself as the legal theory of the constitutional state—thus reducing legal positivism to the legal theory of the legislative state.

Civil-law general theory of law is thus analogous to Anglo-American jurisprudence in one respect and different from it in another. First the similarity: Continental and Latin American authors often take up themes from Hartian scholastics, the discussion still primarily revolving around the relationship between law and morals, occasionally taking up distinctions such as that between inclusive and exclusive legal positivism. Then the difference: Continental and Latin American authors autonomously theorize constitutionalization, internationalization, and integration processes referring to their own legal systems—and what these legal theorists do here is to carry forward the Continental theories of norms, of the legal system, and of legal interpretation.

In what follows, we will only be able to look at one main issue and a handful of authors. As to the *issue*, it is the relationship between law and morals that will continue to enjoy pride of place—other matters, like the distinction between rules and principles, the defeasibility of legal norms, and legal interpretation, including constitutional interpretation, will mainly be touched on in connection with that first issue. For the same reason, preference will be given to those legal positivists who address head-on the challenge posed by neoconstitutionalism as a theory connecting law and morals *via* constitutional principles.[3]

[3] The term *constitutionalism* can mean the *theory* of constitutions or the constitutions themselves, and it is only in the first of these two acceptations that the term will be used in this chapter, in its variant *neoconstitutionalism*. For the post-World War II constitutions, instead, sometimes the term *new constitutionalism* comes up in the literature. On this subject, see Comanducci 2007 and Barberis 2012.

And so, as concerns the *authors* taken into consideration, emphasis will be laid on those from the Spanish and Argentinian areas, who indeed have greater visibility today in the international debate.

With these premises in place, and the usual disclaimer on the difficulty involved in outlining the contours of an ever-evolving debate, the discussion can be described as having so far progressed as follows. Even civil-law legal positivists authors initially tended to take an approach that held itself out as purely methodological, or nonideological (see Bobbio 1996), or descriptive (see Hart 1994b). It is the Separability thesis that was at first defended, but its simplicity—which Hart (1973, 55) still alluded to—turned out to be illusory, eventually finding itself replaced in the debate with the Social sources thesis.[4] Even the latter, however, has often been understood not in Raz's more demanding sense but in a generic sense as a conception of law as a human product—in truth a conception that could well be accepted not only by exclusive legal positivists but also by inclusive ones and by neoconstitutionalists, if not by many modern supporters of natural law (see, e.g., Finnis 1992).

It is with an eye to these developments and their representatives that the authors considered below have been selected. Thus, the later Bulygin will represent traditional legal positivism's standard reply to Alexy's and Nino's neoconstitutionalist challenges; José Juan Moreso will illustrate the effort to work the neoconstitutionalist objections into a legal positivism sufficiently inclusive to itself result in a form of neoconstitutionalism; Juan Carlos Bayón will exemplify legal positivism's openness to neoconstitutionalist themes like defeasibility of legal norms; and Jorge Rodríguez, for his part, will show the effort to *resist* this receptiveness, by going back to arguments that make explicit some of legal positivism's deepest presuppositions.

11.1. Bulygin's "Simple" Positivism

As we saw in Section 9.5, Bulygin is especially known for his work on norms and normative systems: a work providing the logical toolkit for much of legal theory in the Castilian-speaking world. In the last article Bulygin wrote with his friend Alchourrón, before the latter's untimely passing (Alchourrón and Bulygin 1996), an effort is made to resist the tendency, fostered by Nino but originated with Raz, to replace the concept of a norm with that of a reason for action; in the same work, however, the authors seem to subscribe to the view

[4] The same happened in the Anglo-American debate: See at least Fußer 1996, Gardner 2001, Green 2003, Morauta 2004. But Social sources thesis is no less beset with problems than Separability thesis as a criterion by which to classify legal theories. On the one hand, in Raz's specific version, it rules out inclusive legal positivism, including Hart and his followers; on the other hand, it makes it even more necessary to confront the methodology problem, i.e., the *vexata quaestio* of the relation between knowledge and evaluation (see Dickson 2001, Burge-Hendrix 2008).

of norms as defeasible conditionals, namely, as conditionals subject to implicit exceptions, i.e., exceptions not explicitly stated in their premises. Defeasibility would subsequently be the subject on which Bulygin's pupil, Rodriguez, would engage with Bayón in the discussion treated later on in Sections 11.3 and 11.4.

As we have also remarked, all of Bulygin's work proceeds from a set of unmistakably legal positivist premises. His theory of the legal system as a systematization process, to take only one example, presupposes that the axiomatic basis of systematization can exclusively consist of positive legal norms. For the influence exerted by the ongoing discussion in the Anglo-American and Spanish context, Bulygin increasingly made explicit this originary legal positivist stance. Specifically, he staked out a position on the relation between law and morals in a series of essays later collected in Bulygin 2006, where he criticizes the neoconstitutionalist theses advanced by Garzón, Nino, and Alexy, insisting in particular that law and morals are not bound by any necessary (analytic, conceptual) connection.

Contra Garzón Valdés 1990, to begin with, Bulygin makes explicit the latent ambiguity inherent in the assertion "Every legal order must necessarily conform to morality." Depending on whether this proposition is made subject to universal or to existential quantification, it can be taken to mean two markedly different things: Every legal system must conform either to *some* morality (a positive one) or to a *single* morality (a critical morality). In the former case, the proposition would amount to a truism: There is no doubt that any legal order hoping to be effective must accord with prevailing positive morality or moralities. In the latter case, by contrast, the thesis sounds unconvincing, precisely because it would postulate a single objective morality, one that all the officials in a given legal order either *can* share or even *do* share (Bulygin 1996).

Contra Nino, Bulygin challenges the thesis that in order to fully or ultimately justify a judge's decision, you have to resort to a moral norm. Taking up the arguments found in Moreso, Navarro, and Redondo 1992, Bulygin 1996 observes that if what is meant by *justify* is to "*logically* justify" (by deduction), then legal rules can very well justify legal decisions, thus figuring into the judge's ruling as operating reasons rather than as merely auxiliary ones. Nino, as Bulygin reads him, rests his thesis on a stipulated definition of *justification* as a sound or ultimate justification—but a stipulated definition, as the objection goes, does not make for a good argument in favour of a necessary connection between law and morals.

Contra Alexy, finally, Bulygin criticizes the Rightness (*Richtigkeit*) argument, finding it to be undermined by a notion of performative contradiction lacking logical stringency, and he criticizes the Connection thesis (*Verbindungsthese*) itself. On this latter subject, the objection made by Bulygin (2000, 136) is that while necessary connections do exist in a logical, analytic, or conceptual sense, none exist in a normative sense—and in fact Alexy concedes that "something being normatively necessary means no more than its being obligatory," and that "normative necessity is only a necessity in a broader sense"

(Alexy 1989b, 169 n. 4; cf. also Alexy 2000). For Bulygin, by the same token, it is simply by virtue of a moral, contingent norm that law must respect morality, and this moral norm cannot be made into an analytic sentence just by virtue of a stipulated definition of *law*.

Bulygin's legal positivism has been hypothesized to be of a "simple" variety, meaning it is logically independent of the dispute between inclusive and exclusive legal positivism—his later positions, therefore, could be ascribed to inclusive or to exclusive legal positivism alike (Redondo 2007). Certainly, one can speak of his legal positivism as simple in the sense of its being classical, pure, or unqualified—classical, i.e., akin to Kelsens's and Hart's theoretical tradition; pure, i.e., having only a logical or semantical dimension, as opposed to a practical or pragmatic one; and finally unqualified, i.e., viewing the tedious debate between inclusive and exclusive legal positivism as an unnecessary and self-feeding detour from the straight path of the logical analysis of law.

11.2. Moreso from Soft Positivism to Neoconstitutionalism

In the past, José Juan Moreso (1959–) has cowritten works with pupils of Bulygin and Caracciolo like Pablo Navarro and Cristina Redondo—thus witnessing the deep influence exerted by these Argentinian scholars on the new Spanish jurisprudence. Subsequently, however, he developed a form of inclusive legal positivism described in his own words as "latitudinarian" enough to embrace Dworkin's stance itself and to ultimately wind up in a sort of neoconstitutionalism. The theory of law set out in Moreso 1997a uses Alchourrón's and Bulygin's logical toolkit—especially in the first three chapters, devoted to the theory of norms, to propositions about norms, and to the legal system, respectively. The last two chapters are instead devoted to the primacy of the constitution and to constitutional interpretation, these being typically neoconstitutionalist issues, further developed through the essays collected in Moreso 2009, representing a further step in his way out of legal positivism.

Moreso has contributed to clarifying the Oxonian discussion on the relationship between law and morals, especially by distinguishing in a rigorous way the three more common varieties of legal positivism and arguing in favour of inclusive legal positivism (2004). These three common varieties correspond to as many interpretations of the Identification thesis, a corollary of the Social sources thesis whereby "the determination as to what is law does not depend on moral criteria or arguments" (ibid., 47; my translation).[5] Even Moreso, in other terms, tends to replace the Separability thesis with the Social sources thesis, and the latter with the Identification thesis, as criteria by which to dis-

[5] Moreso himself refers us to Dyzenhaus 2000 and Kramer 2001 for the Identification thesis and for its three interpretations, respectively. But this has now become a standard reformulation of the Separability thesis itself. See, e.g., Marmor 2001, chap. 4.

tinguish legal positivism—which criteria, however, continue to be about the relationship between law and morals.

The three varieties of legal positivism are identified by giving three different interpretations of the ambiguous phrase "does not depend" in the passage just quoted. *Exclusive* legal positivism takes this phrase to mean "*cannot* depend" (i.e., the identification of law necessarily does not depend on morals); *inclusive* legal positivism takes the phrase to mean "does not necessarily depend" (i.e., the identification of law, in fact, does not *need* to depend on morality); and *ethical* legal positivism takes the phrase to mean "*ought* not to depend" (i.e., the identification of law ought not to depend on morals). Whereas in Moreso 2001 the choice for inclusive legal positivism was justified by criticizing the main arguments in support of *exclusive* legal positivism, in Moreso 2004 the justification is provided by criticizing *ethical* legal positivism.

Ethical legal positivism does presuppose the truth of inclusive legal positivism, but it pretends to convert exclusive legal positivism from a conceptually false theory into a normatively valid one. The sense in which ethical legal positivism is found to presuppose inclusive legal positivism is that if it were in fact conceptually impossible to include morality in law, as exclusive legal positivism claims, then it wouldn't make sense to even discuss whether such an inclusion is normatively acceptable. Ethical legal positivists argue that such an inclusion, though implicitly considered by them to be logically possible, is normatively unacceptable, because that would make law too uncertain—a thesis that Moreso rebuts by arguing that morality can sometimes be objective, at least when it relies on thick concepts (rather than on thin ones), as constitutions often do.

Inclusive legal positivism thus remains the only position in the running—a stance that Moreso 2009 further works into a form of neoconstitutionalism. To be sure, neither in this work nor elsewhere does he label himself a neoconstitutionalist, arguing, on the contrary, that labels such as "legal positivism," "non-positivism," and the like are only labels loose enough to warrant our replacing them with the various theses so labelled (cf. Raz 2007). Yet he seems to accept the Separability thesis even in his latest book (Moreso 2009, 245), at least in the sense of denying, *contra* Alexy (and Raz too), that there can be any necessary connection between law and morals. Still, as much as these connections are reckoned to be contingent, their increasing number suggests to Moreso that therein lies the distinctive trait of the modern state: Of the legislative state at first, and *a fortiori* of the constitutional state.[6]

[6] "Constitutionalism is only a special case of the inclusion of morality into modern law" (Moreso 2009, 47, n. 47; my translation). The Spanish original: "El constitucionalísmo es unícamente un caso especial de la incorporación de la moralidad al derecho de la modernidad." Thus Moreso cannot be classified as an orthodox neoconstitutionalist, if such a stance exists: What sets the constitutional state apart from the legislative state is for him not a *qualitative* difference but a *quantitative* one.

The observation that the law of the constitutional state incorporates morals—an observation typical of theoretical neoconstitutionalism, but which could still be compatible with Hartian methodological legal positivism—gave start to the shift from theory to methodology found in other forms of neoconstitutionalism (see Chapter 10). The methodological status of legal theory changes in such a way that the theory was now thought to stand to legal dogmatics as normative ethics stands to applied ethics—a typical methodologically neoconstitutionalist view (see Moreso 2008). But a further shift took place, this time toward ideological neoconstitutionalism: Jurists and even legal theorists were to adhere to the constitutional state, even though an attitude of epistemic servility should still enable them to distinguish, within the constitution, the law as it is from the law as it ought to be (see Moreso 2009, 251–3).

11.3. Juan Carlos Bayón's Arguments for Defeasibility

Like Moreso, Juan Carlos Bayón (1957–) analyzes the relation between law and morals on both a theoretical and a metatheoretical level, extending such analysis to the question of the defeasibility of legal norms. He first concerned himself with the question of the normativity of law; then he systematically mapped out the meanings of the Separability thesis, which he, too, replaced with the Social sources thesis; next he criticized inclusive legal positivism by deploying a notion of deep conventionalism more apt to shed light on legal positivism's background assumptions (its metaphysics, in the well-known Peter Strawson's sense of the term); and, finally, he put forward a theory of the defeasibility of legal norms.

The first problem Bayón (1991) addressed is that of law's normativity (cf. Postema 1987, Delgado Pinto 1996). If we take up the standpoint of methodological legal positivism, we will come to know the law as a *fact*, at the risk of getting law to cast off all legal normativity. Bayon attempts to rectify this consequence by recourse to Raz's concept of reasons for action (Raz 1975, 1990), precisely as had earlier been attempted in Nino 1984—a move which consequently led to a stance similar to that of Nino's fundamental theorem. When it comes to *identifying* the law, in other words, Bayón adopts the Separability thesis such as it is understood by exclusive legal positivism; but when it comes to *justifying* the law, he instead espouses a version of the Connection thesis similar to that proposed by Nino and Alexy (and Raz too), arguing that law *claims* moral normativity without necessarily possessing it.

Just like Moreso, Bayón (2002a) subsequently laid out a map of the meanings assumed by the Separability thesis—a label that in the recent debate has come to cover nearly as wide a range of positions as those falling within the reach of the expression *legal positivism* analyzed by Hart and Bobbio in the 1950s. Of all these definitional, justificatory, and interpretive stances, there is at least one that Bayón singles out as peculiar: the Social sources thesis, more

broadly construed as conventionalism, which at once *entails* the Separability thesis and is *presupposed* by it. This point, where all the legal positivist theses intersect, is named by Bayón "the minimum content of legal positivism."

Conventionalism is taken up again in Bayón 2002b, where the term *law* is argued to designate a complex of social conventions, and *morality* the rational tribunal before which such conventions are judged. But what are *convention* and *conventionalism* supposed to mean? Like Dworkin,[7] and on the basis of M. Moore 1986–1987, Bayón distinguishes superficial conventionalism, typical of imperativist legal positivism, from deep conventionalism, this being the view that certain interpretive conventions exist which could regulate the identification and application of the law even by recourse to morality. Dworkin understands such conventionalism as no more than an underdeveloped form of his own interpretive theory—exactly the converse of what Bayón believes to be the case, for in his view it is instead Dworkin's interpretive theory that shows itself to be an underdeveloped form of conventionalism.

Finally, in a discussion with Rodríguez subsequently collected in Bayón and Rodríguez 2003, the same Bayón defended a theory of the defeasibility of legal norms, by attempting to drive into legal positivist territory a suggestion taken up from neoconstitutionalism. More to the point, he argued, at least at the outset, that in identifying the law, judges often recognize exceptions implicit, i.e., not explicitly stated in the premise of a norm. Now, in at least some of these situations, it would be useful to conceive of legal norms as defeasible conditionals, rather than as classic conditionals subject to the laws of *modus ponens* and reinforcement of the antecedent. Legal norms so conceived are defeasible conditionals, whose premises state necessary but not sufficient conditions for the consequences to be realized.

It has long been a contention among jurists that law is governed by a logic of its own. It is in particular in neoconstitutionalist theories of principles that such a nonclassic, defeasible, nonmonotonic logic is often invoked, arguing that principles cannot simply be applied deductively but only once they have been duly balanced against one another. Bayón holds that such defeasibility of norms is in some forms compatible with legal positivism, for it would bring about that partial, rather than total, legal indeterminacy that has always been acknowledged by legal positivists like Kelsen, Hart, and Raz. As we will see in the next section, however, Bayón wound up granting many of the objections raised by Rodríguez in the course of the debate between them, especially as

[7] Dworkin had distinguished two varieties of conventionalism, a strict one and a soft one, referring in the former case to overt *stated* conventions (such as they are understood in game theory, or otherwise in the form of commands à la Austin) and in the latter case to any *consequence* (including implicit ones) deriving from such explicit conventions. But he went on to conclude that soft conventionalism is only "a very abstract, underdeveloped form" of his own interpretive theory of law (Dworkin 1986, chap. 4).

concerns the central role played by classic, monotonic logic in a legal positivist theory of law and of the legal system.

11.4. Jorge Rodríguez's Arguments against Defeasibility

Jorge Rodríguez (1964–) was trained under Bulygin and expanded on his theory of the legal system by honing and defending its original deductivist and legal positivist premises. This happens formerly in Rodríguez 2002, which to this day stands as his major work, notwithstanding the more recent and updated Ferrer Beltrán and Rodríguez 2011. In the first part of the former book, Rodríguez sharpens and defends the nomostatic system worked out by the classical Alchourrón and Bulygin (1971), supplementing it with the nomodynamic theory the same two authors elaborated subsequently. In the second part of the same book, Rodríguez instead defends legal positivism from the related objections centred on principles and defeasibility, arguing in particular that the theory of the legal system has at its disposal all the tools it needs to rebut such criticisms, without needing to accept the Defeasibility thesis or abandon its legal positivist background assumptions.

Rodríguez occasionally claims that the theory of the legal system expounded in Alchourrón and Bulygin 1971 can incorporate and deal with such criticisms of legal positivism as Dworkin's principles-based objection. That is what would happen, to take just one example, if we further developed Alchourrón and Bulygin's distinction between prescriptive and descriptive relevance, or that between axiological and normative gaps (see Rodríguez 2002, 77–87; Atria et al. 2005). Rodríguez thus worked out in particular a notion of descriptive relevance that would make it possible to consider relevant for the legal system such properties as are not expressly stated in any norms but can only be identified by reference to the legal principles underlying those norms. This extension of Bulygin's theory, though accepted by him, is still open to debate (see Ratti 2009, chap. 4)—but in any event it certainly points out one direction in which the theory could be developed.

The greater part of Rodríguez's discussion, also in the essays collected in Bayón and Rodríguez 2003, is given over to showing how the positivist theory of legal system is immune from many familiar external and internal criticisms alike. We would count among the external criticisms Dworkin's principles argument, and among the internal ones that same argument if principles were understood to consist not of moral values at all but of the legal norms belonging to the system itself. And that happens as well with the theories of defeasibility that Rodríguez adversarially discusses with Bayón. To be sure, these theories—prefigured by the early Hart, fleshed out by the later Alchourrón, and then again defended by the same Bayón—are backed up by a respectable legal positivist pedigree, but they are nonetheless found by Rodríguez to be at odds with some core tenets of legal positivism.

In Bayón and Rodríguez 2003, chap. 3, as well as in Rodríguez 2002, chap. 4, Rodríguez distinguishes ten senses of *defeasibility*, thus breaking down the problem of defeasibility into a plurality of heterogeneous issues needing to be treated in different ways. But he makes the case that a good part of these issues—for example, those relative to the vagueness of legal language, to the applicability of norms, and to the changes they undergo by the hand of judges and lawmakers—can be solved by simply bringing to bear the distinctions adopted by Alchourrón and Bulygin. Three distinctions in particular would be worth mentioning: that among a norm, a normative proposition, and a norm's formulation; that between a norm's belonging to the legal system and its applicability; and that between legal system and legal order, the former static and the latter dynamic.

It is sometimes claimed that norms contain implicit exceptions, and are therefore defeasible, only when expressed in vague language, and in this case the problem can be solved ex post facto by *constructing* such language. Other times it is claimed instead that norms contain implicit exceptions, and are therefore defeasible, only *after* their language has been interpreted and it comes time for the courts to apply them, and in this case the problem can be solved ex post facto through the judge's discretion. Still other times it is claimed that norms contain implicit exceptions, and are therefore defeasible, only in the sense that their judicial interpretation and application changes over time, or in the sense that the language itself may change by legislative action—and in this case too the problem is solved through a dynamic theory of the legal order as a succession of momentary systems, in the Razian sense.

The only real problem for legal positivism, as the argument goes, comes when defeasibility is predicated of norms themselves, that is, when the claim is that you cannot apply basic deductive logic to them, or that the theory of the legal system cannot identify them without resorting to moral evaluation. In response to the first claim, Rodríguez invokes what Bayón (1991, 360ff.) has called the Trojan Horse defence, arguing that you cannot acknowledge the defeasibility of *some* norms without recognizing the same with respect to *all* norms. In response to the second claim, Rodríguez argues that the legal positivist theory must *by definition*, i.e., on pain of metamorphosizing into a *different* sort of theory, exclusively accept evaluations *internal* to the system, thus taking only legal principles into account, and not also moral values (cf. Nino 1985, 145–73). In such a theory, accordingly, we would only have room for a marginal defeasibility of beliefs about whether or not a norm belongs to the legal order.

In a nutshell, Rodríguez makes the point that if legal positivism is to fulfil its objective—which is to explain how law can guide human conduct through general norms, rather than just case by case—it must concede that though momentary legal systems are by definition always subject to change, they can at any time in principle identify nondefeasible legal norms: *nondefeasible*, on the

one hand, in the sense that they can be used to deduce the solution to specific cases, *legal*, on the other hand, in the sense of their being nonmoral, positive legal norms. Rodríguez thus makes explicit some of the conceptual assumptions on which legal positivism is built. And in doing so he shows how the theory could prove coherent, even if it would turn out to be less attractive than theories built on different kinds of assumptions, closer to the lawyers' common sense.[8]

11.5. Conclusion on Legal Positivism

As we have noticed, legal positivism has been on the defensive for the last few decades, albeit more so in the civil-law debate than in the common-law debate; and what accounts for this defensive stance is especially the criticism coming from the constellation of theoretical positions referred to in this chapter as neoconstitutionalism, but otherwise labelled constitutionalism, nonpositivism, antipositivism, and suchlike. There is also another name, however, a label that has begun to gain ground in the Anglo-Saxon world, too, and that captures an important aspect of neoconstitutionalism. Such a name is *postpositivism*,[9] and the important aspect it captures is that neoconstitutionalists say they in no way intend to go back to natural law: They rather seek to *supersede* legal positivism, absorbing and developing the theoretical ground it has gained.

Neoconstitutionalists, especially on the Continent, and postpositivists, in the Anglo-American world, often proceed from the claim that they are updating theoretical legal positivism to the developments of the constitutional state—a claim which *in se* would be perfectly in keeping with methodological legal positivism. Indeed, as has often been said, if *theoretical* neoconstitutionalism confined itself to that aim, it could not be regarded as anything more than the legal positivism of the 21st century. Yet, as we have seen, neoconstitutionalism does not stop here. Its pretence to update legal positivism triggers a long train of methodological and ideological shifts, which may or may not be justified in view of their premises, but which, regardless, produce a conflict between such a stance and methodological legal positivism, often also reintroducing forms of ideological legal positivism.

What comes out having to defend itself, oddly enough, is not so much the Social sources thesis—which neoconstitutionalists or postpositivist authors are usually happy to take on board, albeit in a much less demanding version than

[8] The same idea has been expressed by Jonathan Dancy in a remark that Bayón chose as an epigraph in Bayón and Rodríguez 2003, 154: "It is the job of a philosopher, so far as possible, to give an account of our practice rather than to tell us that we all ought to be doing something else. To the extent that this cannot be done, it is normally a fault in the philosophy rather than in the practice."

[9] The term was introduced by Villa (1997), and was then taken up by MacCormick (2007a, 278) to designate his own position.

in Raz's original statement of it. Indeed, this criterion by which to distinguish legal positivism from natural law is certainly at least as ambiguous as the old Hartian Separability thesis entailed by it. Yet, as often happens in the history of ideas, Separability thesis does not so much get refuted as it gets emptied and pushed aside: Neoconstitutionalist and postpositivist theorists simply find more interesting, here and now, the many connections between law and morals—the question of the necessity or contingency of such connections becoming less important or even irrelevant. At least from this point of view, neoconstitutionalism shows itself to be not a somewhat puzzling return to natural law but a form of postpositivism, superseding legal positivism by incorporating some of its premises.

Let us just take the three connection theses distinguished by Nino: the interpretive, the justificatory, and the identificatory one. The *interpretive* connection between law and morals is admittedly contingent—Nino and Moreso both argue it increasingly holds for *modern* law, a law distinguished from morality only in Western and modern culture, as opposed to non-Western and ancient and medieval cultures. At any rate, the process toward the moralization of law is a historical and a contingent one, as is the complementary process toward the legalization of morals (see Habermas 1992, chap. 3). The only way in which the interpretive connection thesis can appear necessary, i.e., true by definition, is if *interpretation* is defined in Dworkinian terms, with the ascription of meaning to legal texts collapsing into their moral justification—a very idiosyncratic definition of *interpretation* indeed.

The *justificatory* connection between law and morals, for its part, is something the legal positivists recognize: Law can make a *moral* claim such that citizens will obey it and judges will apply it only if it is morally just (cf. Raz 2004), or else if it is not intolerably unjust. Yet such a connection works itself out as an empty tautology (if something is morally binding, then it is morally binding), or as a mere truism (for who could deny that the law has to be morally just?), or still as a merely normative connection, necessary only in a broad, normative sense, as Alexy concedes to Bulygin (see Section 11.1 above). In fact, it is not only by virtue of a stipulated definition of *law* and *morality* that their justificatory connection can appear necessary, but also on the basis of the unity of practical reasoning, subordinating law to morals (cf. Raz 1990, 10–1; Marmor 2006)—the latter, however, proving to be only a naive form of value monism, a metaethical stance open to objections of value pluralism.[10]

[10] See Raz 1986, 395–7, and paradigmatically Berlin 1958. Oddly enough, the neoconstitutionalist theory seems to presuppose a form of value pluralism when it admits that constitutional values and principles are not arranged according to any stable hierarchy, a circumstance making necessary the constitutional argument called balancing or ponderation. Contrariwise, the neoconstitutionalist authors unproblematically adopt the Unity of practical reasoning, as most legal positivists do, too, except for Raz and, more recently, for Redondo (1996, 1998) and Barberis 2008b.

The *identificatory* connection between law and morals, finally, does not appear to be necessary, either, at least not in most of the senses in which the terms *law* and *morals* are commonly used in Western or developed societies today. Of course, and again, the two terms could by stipulation be defined in such a way as to render analytic the propositions entailed by such definitions—but a stipulated definition does not make for a solid basis on which to rest an argument aimed at demonstrating a necessary connection. And if, as is much more common today, we speak not of a definitional connection but of an identificatory one—a connection serving to identify the law in order to apply or study it—then this connection will appear *a fortiori* contingent: After all, the end of the constitutional state could well be that of extending the empire of law to a growing part of morals (Barberis 2012).

The foregoing connections may be contingent, to be sure, but that does not rule out for them a role important enough as to make it possible to build upon them an entire theory of law, be it neoconstitutionalist or postpositivist or even positivist. Especially in the civil-law tradition, constitutionalized law is often identified, justified, or interpreted by recourse to principles setting forth or deriving from moral values. But how to reconstruct these practices theoretically? How to define the relative concepts? What methodological rules to adopt? What ideological or moral assumptions to make, if any are to be made at all? Here the contemporary common-law discussion revolves around the so-called methodology problem, and in particular around the possibility of a morally neutral theory of law, but the broader discussion remains completely open-ended.[11]

The same facts—the multiple contingent connections between law and morals instituted by constitutional state—could be depicted in many ways, on the basis of different methodological and axiological premises. The legal positivist theorists, for example, could stay true to Weber's idea that a theory could remain *Wertfrei*, or value-*neutral*, even as it must inevitably be value-*oriented*, and depict these connections in terms of a *positivized morality* incorporated by constitutional principles. Conversely, the neoconstitutionalists theorists, having dismissed from the outset the idea that legal and moral theories can really be neutral and *Wertfrei*, could continue to consider such connections in terms of *moralized law*, in such a way as to make legal theory a province of the empire of morals. In these new, constitutional terms, perhaps, goes on the old, seemingly outdated, and in fact never-ending, debate between legal positivism and natural law: a debate where it would be time to get rid of its stereotypical positivist formulation, e.g., by rediscovering features of the natural law tradition misrepresented by Hart and his followers.

[11] To appreciate this fact, one need only think about the vaguely paradoxical solution offered in Raz 2004: The judges should always apply morals, and the alleged incorporations of morals into law—as through the constitution—would serve the peculiar function of modulating such application, expressly ruling out any and all possible exceptions.