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A DEFENSE OF SOFT POSITIVISM: JUSTICE AND PRINCIPLE PROCESSES

by

Keith W. Diener

Under the Direction of Dr. Andrew Altman

ABSTRACT

This thesis addresses the historic debate between natural law theorists and positivists. After providing a foundation for the debate by discussing the thirteenth century natural law theory of St. Thomas Aquinas and the criticisms of it by positivist philosopher John Austin, this thesis turns to the theory of H.L.A. Hart. My primary aim is to outline a defense of the soft positivism of H.L.A. Hart in face of the criticisms of Ronald Dworkin by appealing to two nonexclusive roots of moral principles in the law: justice and criminal law.

INDEX WORDS: Positivism, Soft Positivism, H.L.A. Hart, Ronald Dworkin, Natural Law Theory, St. Thomas Aquinas, John Austin, Justice, Criminal Law

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Keith W. Diener

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Master of Arts

In the College of Arts and Sciences

Georgia State University

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For My Family
&
In Memory of William H. Diener

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Introduction:
A Defense of Soft Positivism: Justice and Principle Processes
Keith W. Diener

The controversy between natural law theorists and positivists is one of the most recognized ongoing debates in contemporary jurisprudence. Natural law theories can be traced to the writings of St. Thomas Aquinas in the thirteenth century who claimed there is a necessary connection between law and morality. His theory came under attack in the nineteenth century by positivist philosopher, John Austin who claimed there is no necessary connection between law and morality. Chapter I lays out the important aspects of Aquinas's natural law theory, Austin's criticisms of natural law and his positivism (i.e., command theory), as well as H.L.A. Hart's criticisms of Austin's command theory.

Hart renames command theory as the coercive orders theory and proceeds to develop his own theory of positivism based on rules rather than commands. His theory has come to be known as soft positivism because, though denying a necessary connection between law and morality, he asserts that there sometimes are connections between morality and the law. Hart's theory is outlined in Chapter II.

Chapter III covers the attack on Hart's positivism as rendered by his former student, Ronald Dworkin. Dworkin reasserts that there is a necessary connection between law and morality by the exemplification of moral principles in Anglo-American case law. After arguing that positivism cannot remain coherent given these principles, chapter three also covers Dworkin's moral theory of law, or, law as integrity.

Chapter IV deals with Hart's posthumously published response to Dworkin's allegations that positivism cannot remain coherent given the existence of moral principles

in the law, as found in his *Postscript*.¹ Hart agrees that there are moral principles in the law though they are not conceptually necessary elements of a system of law. Hart further asserts that positivism can remain coherent while accepting their presence in the law.

The final chapter, Chapter V, shows how two nonexclusive historical roots of moral principles can explain Dworkin's sample cases in terms of the theory of Hart. It asserts that Hart's theory remains coherent in face of Dworkin's criticisms by tracing the many processes undergone by these moral principles and evaluating the Constitutional principle of justice in light of David Schmidtz's theory of justice. After addressing a number of objections to this defense of positivism, I conclude that soft positivism remains coherent despite the existence of moral principles in the law.²

Chapter I: The Turn from Natural Law to Positivism

Keith W. Diener

I. Aquinas's Natural Law:

Natural Law theory is largely rooted in the thirteenth century writings of Saint Thomas Aquinas. The central tenet of natural law theory is that there is a necessary connection between law and morality. Law, for Aquinas is a “certain rational plan and rule of operation,” and is a measure of human activity as “law is something pertaining to reason.”³ Aquinas’s view is considered the traditional version of natural law theory wherein legal rules that conflict with natural law are considered invalid. Such rules are considered to impose no legal obligation on anyone because natural law principles, in effect, trump immoral positive law rendering it void. Natural law is still a widely considered view today, though none have developed as systematic and precise a vision as Aquinas. Aquinas’s theory rests on four tiers of law: the highest being eternal law, followed by natural law, with divine law in between natural and eternal law, and finally human law: each of these tiers is under the supreme judge, God.

Eternal law is composed of principles of both action and motion that allow each thing to function in accord with their role in the universe, as designed by God. The good and the bad are then relative to the proper function of each thing: if something enables the thing to perform its function then it is good and if it does not, then it is bad. The “blessed and the damned are under eternal law,”⁴ the highest law- Aquinas asserted that everything, “whether contingent or necessary, is subject to the eternal law.”⁵ It is God’s law and everyone, whether intelligent or dumb, whether righteous or wicked, is subject to eternal law.

Natural law is composed of the eternal law principles that are particular to human beings. The rational creature, “has a share of the eternal reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law.”⁶ Natural law principles are known through human reason which acts as a compass, guiding us to what is good. The good is harmony and peace among humans so natural law principles prohibit activities that would degenerate peace, such as murder and theft. Through obedience to this natural law humans can attain what is good (their function), so generally there is an obligation to act in accord with natural law.

By following natural law, humans will be able to achieve the good that is attainable in this world, though to attain eternal salvation, the good in the world to come, humans must also follow divine law. “The end of the divine law is to bring man to that end which is everlasting happiness”; the divine law is the law that will lead to eternal salvation in the life to come.⁷ The divine laws, for Aquinas, are primarily enunciated in the scripture, a combination of the New and Old Testaments of the Bible.

Human law is the law posited by some lawmaker of a human community. It is aimed at the common good of the members of the community and as such is derived from natural law. Aquinas notes their relation, claiming that “every human law has just so much of the nature of law as it is derived from the law of nature.”⁸ The general principles of natural law are specified according to the conditions of mankind via human law. For instance, actions that prevent peace would be punishable under human law (once they are accepted as actions that prevent peace or harm mankind).

If a human law comes into conflict with natural law, then the human law would be considered unjust and thus not a law at all. Human reason allows one to know if the laws are just or not: “in so far as it [a law] deviates from reason, it is called an unjust law, and has the nature, not of law but of violence.”⁹ These unjust laws create no obligation to obey and no legal authority. Unjust laws are not to be obeyed absent exigent circumstances, such as when the common good is temporarily dependent upon obeying an unjust law.¹⁰

II. Critique of Aquinas’s Natural Law Theory:

Aquinas’s natural law theory has fallen into disrepute for a number of reasons including the arguments provided against it by John Austin in the nineteenth century. The obvious criticism of Aquinas’s theory is that it assumes there is a God, moreover, that this God and his will can be known by humans. There has been a modern trend to secularize legal theories because of the uncertainties and disagreements over the existence of god and his will; few will make an exception for natural law. Austin, however, opposed natural law theory for more practical reasons.

Austin believes the claim that unjust laws are not laws, or laws that come in conflict with natural law are not laws, is a mistaken assessment. Laws, no matter whether they are just or not, are often enforced by the legal officials and remain valid and enforceable laws with requisite legal authority. Further, if a person attempts to claim that she need not obey a human law because it is in conflict with natural law, then she will be sanctioned nonetheless.

Additionally, Austin criticizes Aquinas’s claim that unjust laws are void because they do not leave enough room for the lawmakers to use their reason in promulgating

wise and intelligent rules for the changing circumstances of a community. Lawmakers would be quite limited in their rule if they had to abide by the restrictions of natural law and to think otherwise would be confusing legal and moral obligations. In other words, though legal and moral obligations will sometimes coincide, the necessary connection advocated by natural law theorists is mistaken.¹¹

III. Austin's Positivism:

John Austin was one of the first methodological proponents of positivism. His theory resolves the problems he articulated about natural law theories by appealing to rules as a species of command. "Laws proper, or properly so called, are commands; laws which are not commands, are laws improper or improperly so called."¹² Commands can be general or specific, requiring or prohibiting specific actions under specific circumstances or general actions under general circumstances. Law can be seen as a kind of general command which imposes on those under its jurisdiction general obligations to act or refrain from acting as the law commands. That is, "By every command, the party to whom it is directed is obliged to do or to forbear."¹³ Moreover, duties and commands for Austin are correlative terms, "the meaning denoted by each being implied or supposed by the other."¹⁴ That is, for Austin's purposes a duty implies a command and a command implies a duty: given their function in his theory, both are inseparably connected to a sanction.

Austin, unlike Aquinas, distinguished between moral and legal obligation asserting that moral obligation is rooted in the commands of God and legal obligation is rooted in commands of a sovereign. Similarly, if one breaches a moral rule then one is subject to punishment by God whereas if one breaks a legal rule then one is subject to

political sanction (punishment by a ruler). Further, Austin asserts that legal obligation and not moral obligation is the subject of jurisprudence and cites positive law as “the appropriate matter of jurisprudence,”¹⁵ rather than moral law.

Law is positive if it is a command of the sovereign: “Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is sovereign or supreme.”¹⁶ A sovereign, under Austin, is the political ruler of a specific community whose rules are generally obeyed and who does not generally obey anyone else (absent, perhaps, God). This sovereign needs no moral justification for his rule but is in power over the community at issue; his power is illimitable because, “Supreme power limited by positive law is a contradiction in terms.”¹⁷ A sovereign rules independently of notions of morality and need not necessarily be just in his rule. That is, there need not be the necessary connection between law and morality as proposed by natural law theorists.

Another facet of his theory is the important distinction also advocated by Jeremy Bentham between *law as it is* and *law as it ought to be*. The former means there may be unjust laws in force, though this is a separate question from the latter which prescribes whether or not laws should be unjust or just (or, for that matter, if they should be any other way).¹⁸

IV. Hart's Critique of Austin's Positivism:

H.L.A. Hart criticized Austin's command theory for a number of reasons. Austin's model claims that laymen habitually obey the commands of the sovereign, who habitually obeys no one. Hart realizes that the term *command* has numerous connotations

and is used in many contexts. For this reason, Hart suggests that *command theory* be re-titled *coercive orders theory*. The simple model of coercive orders considers law as “general orders backed by threats given by one generally obeyed.”¹⁹ This model, supposedly in its strongest form, was challenged by Hart on at least four grounds: (1) The content of laws, (2) The range of application, (3) The modes of origin, and (4) The doctrine of sovereignty.

The *content of laws objection* simply claims that the model of coercive orders does not fit a significant portion of laws. He provides the examples of laws pertaining to the capacity of humans to perform certain actions, such as the signing of a contract or the witnessing of the signing of a will, both of which must be done by a competent adult. For instance, laws like ‘in order for a contract to be valid, both parties must be eighteen years of age,’ or ‘one must be a competent adult to witness the signing of a will,’ contain no threats of sanctions (no orders-backed-by-threats). Laws such as these do not fit the coercive orders model.

Two counterarguments are considered by Hart to the content of laws objection: the legal nullity argument and fragments of laws argument. The former claims that nullity is a sanction itself, that is, failure to enforce is a punishment itself. The sanction element, being a necessary component of the orders backed by threats model, is then fulfilled by the nullity or invalidity of the legal contract or will, etc. Hart disagrees with this defense because sometimes legal nullity can benefit the person in question, such as an insane person who is not tried for the death penalty.

The fragments of laws counterargument to the content of laws objection also fails, according to Hart. This defense claims that under the coercive orders theory a law in its

complete form always has some sort of sanction attached, otherwise (such as the examples above), they are just fragments of laws. The moderate version of this counterargument²⁰ claims that the orders are directed at the citizens and some laws need to be construed in conditional form, though the criminal law is already in the form of an order backed by threat. The recasting is limited to rules that confer powers without associated sanctions. For instance, the law, ‘one must be a competent adult to witness the signing of a will,’ should be recast as ‘if the will signing is witnessed by a competent adult...then the executor will give effect to the will.’ The executor, in this instance, is to apply the sanction of invalidity if the will signing is not witnessed by a competent adult. Hart rejects this counterargument because it is “distorting the different social functions which different types of legal rule perform.”²¹ This recasting of laws not only obscures laws into an unintended form, but also fails because it is conceivable to have laws without a sanction attached to them, according to Hart.

Hart’s second objection to the coercive orders model considers that *the range of the application* of the law is too broad: legislatures, or those who enact the law, will often fall under the purview of the laws they enact. “The order backed by threats is essentially the expression of a wish that *others* should do or abstain from doing certain things,”²² and there are only few scenarios that could conceivably fit this model, such as the case of monarchs or dictators that have absolute rule. Even then, Hart notes, the range of the application of the law is a matter of interpretation: monarchs and dictators may indeed be found to fall within its ambit.

The *modes of origin objection* considers that the coercive orders model does not take into account customary law that is not enacted formally. “The enactment of a law,

like the giving of an order, *is* a deliberate datable act,”²³ and such customary law conflicts with the claim that law resembles orders backed by threats.

Hart addresses two counterarguments to the modes of origin objection. The first claims that these customary rules are not necessarily law until they are used in litigation. Hart claims that this objection is dogmatic and does not distinguish between what is contingent in some cases and necessary in others. That is, it implies that nothing is necessarily law unless someone has ordered it to be so but, in fact, custom is often contingently law even before it is ordered in a court.

The second counterargument claims that when custom is law, there is a tacit (unspoken) order from the sovereign, and thus it fits the orders backed by threat model. Hart brushes off the idea of a tacit order rather quickly: “in any modern state, it is rarely possible to ascribe such knowledge, consideration and decision not to interfere to the ‘sovereign,’ whether we identify the sovereign with the supreme legislature or the electorate.”²⁴ In other words, Hart does not find any merit in the tacit order argument.

As the foundation of the legal system of coercive order theories, *the doctrine of sovereignty* is in some way, shape, or form accepted. There, at the head of society, lay a sovereign: “a person or body of persons whose orders the great majority of the society habitually obey and who does not habitually obey any other person or persons.”²⁵ Hart criticizes this doctrine on two grounds: first, its inability to account for the continuity and persistence of the law, and second, because sovereigns are not illimitable.

Hart claims, through his vivid example of Rex (a sovereign who is recently deceased), and his successor, Rex II, that there is no way of validating the laws of the new sovereign. At the death of Rex no one is in the habit of obeying Rex II so he is not

truly creating laws. To explain how Rex II's laws can be validated, Hart suggests that we must look to rules of continuity and succession provided somewhere in the law. Habits of obedience would not give Rex II the right to rule nor provide validity to his laws, they are not normative, they would provide no rights, and cannot convey the habit of obedience from one ruler to another.

Hart also criticizes the doctrine of sovereignty on the grounds that there are almost no societies under which the sovereign would be considered legally illimitable. The coercive orders theory entails that the sovereign cannot be limited by its (his/her) own laws or, at least, does not have to habitually obey its (his/her) own laws. Many modern legal systems have legislatures that enact or promulgate laws which they have to habitually obey. Similarly, there are often limits on the legislative power set out in the constitution or by other governmental bodies. Hart considers that one may reply to this criticism by claiming that he has misidentified the legislature as the sovereign. If the true sovereign were identified, then it would turn out that it was the habitually obeyed entity that never habitually obeys anyone else. This reply, however, does not satisfy Hart because the legislature, electorate, or who/whatever is identified as the sovereign can be limited by the constitution or other similar rule-imposing documents. The doctrine of sovereignty, according to Hart, cannot provide the necessary illimitable sovereign needed to fit the coercive orders model. Additionally, it has drastic problems with continuity and succession; these criticisms lead Hart to reject the doctrine as applied to coercive orders theory and, along with the aforementioned objections, he rejects Austin's coercive orders theory itself.

Chapter II: Hart's Positivism

Keith W. Diener

I. Hart's Positivism:

Hart begins his analysis with the traditional Socratic-style question of “What is law?” –he was not satisfied with the paradoxical definitions provided by judges, lawyers, and jurists of the time. Law conceived as ‘What officials do about disputes,’²⁶ or, ‘prophecies of what the courts will do,’²⁷ does not satisfy his longing for an adequate definition of law. These responses do not adequately answer the question of “What is law?” These answers, according to Hart, merely offer suggestions about different aspects of the law. Unsatisfied also with a representation of the salient-skeleton features of law as a definition,²⁸ a compilation of a number of features that pervade legal systems, Hart identifies three recurrent issues. The answer to these three issues, Hart believes, provides an answer to the question of law: “How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?”²⁹ These recurrent issues are pursued within *The Concept of Law*, and in their answer Hart has concurrently developed his theory of positivism.

As Hart mentioned in his analysis of coercive orders theory, the concept of a rule is key to resolving the problems entailed in Austin's model. Rather than attempting to tweak the pre-existing model that is fraught with contradictions, Hart opted to develop his own rule-based model. Hart distinguishes between two types of rules, claiming that their union is “the key to the science of jurisprudence,”³⁰ denying Austin's claim that the coercive orders model fills this role. Primary rules are the basic type of rule that guide human action through either telling one what to do or what not to do. They are duty

imposing and concern actions of humans or changes. Secondary rules clarify, expound, and are parasitic on primary rules, “for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operation.”³¹ They are power conferring and provide the procedure for creating and varying obligations and duties.³²

Individuals in a society, social group, or similar entity that accept certain rules and use them to guide their conduct take an internal perspective on those rules. An observer who is not within the group at issue and merely looks upon the rules from outside the society has an external perspective on those rules. An external observer is one who is not engrained in the shared feelings, customs, and morality of a community. An external observer who remains outside the society without adapting to it cannot account for how individuals of the rule accepting group identify their own behavior, i.e. the outsider cannot define their actions in terms of obligations and duties. He will attempt to define their behavior in terms of generalities and predictions of their conduct; deviations resulting in a hostile social reaction or punishment. “What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which rules function as rules in the lives of those who normally are the majority of society.”³³ A benefit of Hart’s theory is his account of this distinction whereas the predictive theory of obligation fails to account for the internal aspect of rules imposing obligations.

According to Hart, both primary and secondary rules have historical roots; what Hart calls primitive societies realized the former but not the latter. He analyzes a number

of defects involved in such societies that do not impose secondary rules, for instance: solely primary rule societies could only work in small communities that have no procedure for identifying valid rules, i.e. such a society leads to uncertainty; change would take place through a very slow and lengthy process, that is, the rules are static; and the social pressure underlying the rules would be inefficient because the means of determining when a rule has been violated are unclear and indecisive. Hart suggests that the remedy for all three defects is to supplement the primary rules with secondary rules, the latter of which are “about such [primary] rules”.³⁴

To remedy the uncertainty of primitive societies, Hart believes the ‘rule of recognition’ unifies the system of primary and secondary rules into a system of law, i.e., a legal system. This rule will usually reference a writing of some kind as the authoritative and proper source of identifying valid rules. In the United States, Hart believes that the Constitution is the ultimate rule of recognition.³⁵ The second defect, the static quality of primitive societies, can be cured by the introduction of ‘rules of change’. This type of rule will identify how to change or eliminate existing primary rules and add new ones, among other things. The third defect is cured through ‘rules of adjudication’ – these are rules that empower individuals to decide when a primary rule has been breached, when one has not, and what procedures should be followed in making these determinations. The combination of these types of rules are what Hart calls the ‘elements of law’,³⁶ and the ‘heart of a legal system’.³⁷

A legal system must satisfy at least two necessary and sufficient conditions:³⁸ the rules which are validated by the rule of recognition must be generally obeyed, and the rules of recognition that specify the other types of rules (those of change and

adjudication) and provide a method for determining rule validity “must be effectively accepted as common public standards of official behaviour by its officials,” in order for a system to be considered a legal system.³⁹ The first condition needs to be satisfied by private citizens by obedience no matter their motive: whether it is rooted in obligation or fear, it matters not. The second condition requires that the officials obey the rules and criticize or perhaps even punish the lapses of other officials from the rules.

After providing the basics of his rule-based theory, Hart analyzes both the open texture of legal propositions (law) and rule skepticism. Hart first distinguishes between precedent and legislation as two devices for communicating the law. The former is usually through some sort of judicial (or in some cases administrative) decision making. The latter is largely a product of the legislature and the statutes and rules they promulgate. No matter which device (i.e., precedent or legislation) is employed in the communication of the laws, there are multiple common threads running between them including the indeterminacy involved in their interpretation. This indeterminacy, Hart refers to as the open texture of language and laws. Whether in law or not, “as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of the classifying terms in any form of communication concerning matters of fact.”⁴⁰ Indeterminacy and open texture are directly related to the two handicaps of humans whenever we attempt to use a general standard without the direction of an official: “our relative ignorance of fact...[and] our relative indeterminacy of aim,”⁴¹ are involved in deciphering the indeterminacy of language. Given these handicaps, humans must deal with the open texture of laws for certain instances on a case-by-case basis, striking a balance between the relative weights of the circumstances. Furthermore, open-texture

allows judges a limited amount of the use of their discretion in the interpretation and application of laws in a similar manner to the way that ordinary citizens have to interpret language generally.

II. Hart Fielding the Objections to his Positivism:

A. Rule Skepticism:

Rule skepticism comes in many forms, though the focus of Hart is on the moderate version.⁴² Moderate rule skepticism claims that there are some rules that constitute the courts, but still claims that law is a prediction of what courts will do. Moderate Rule skepticism can be resolved with an appeal to the open texture of laws and language generally as well as to the internal point of view. Moderate rule skeptics could claim either that law is not truly law until it has been applied by the courts or that statutes are the source of law: sometimes both. Rules are important because they provide a means of predicting what the courts will do, but the law is interpreted by the judge no matter what, so there is not law until this interpretation occurs. This argument, Hart claims, “ignore[s] what rules actually are in any sphere of real life.”⁴³ If a moderate rule skeptic were correct, citizens would not be adopting an internal point of view of obligation imposing rules, nor would they be using them as guides for behavior. In other words, the moderate rule skeptic’s argument is rebutted by realizing that laws have an open texture that can be interpreted from an internal point of view and these aspects cannot be accounted for by the moderate rule skeptic.

B. Moral Objections and Connections:

Hart goes on to develop his ideas through consideration of the questions of justice and morality and their relationship to the law. Justice, Hart believes, has something more entailed in it than merely treating like cases alike and different cases differently. There is

this element of proportion involved but Hart clarifies that it is primarily concerned with how classes of individuals are treated, rather than an independent individual's conduct. However, justice is only one aspect of morality, and is not nearly as broad as morality itself. Morality has areas of vagueness and open texture, and its status produces much disagreement concerning where it fits into the human universe of experience and knowledge.

Hart considers the argument that morality is connected to internality and laws are connected with externality as 'confused,'⁴⁴ nonetheless, he uses it as a basis for developing four criteria by which Hart distinguishes morality from other social rules and standards (including legal rules). These four criteria are: "importance, immunity from deliberate change, the voluntary character of moral offences, and the special form of moral pressure."⁴⁵ First, in contrast to moral rules, other social rules are considered relatively unimportant. Second, moral rules (or principles) cannot be brought into being through direct enactment by legislatures, or any sort of direct enactment. Nor can they be repealed in a like fashion (whereas legal rules can be enacted and repealed through deliberation). Third, while sometimes legal responsibility will not be exculpated even when an individual could not help doing what he was doing, in the moral realm this will almost always act as an excuse. To commit a moral offense one must do it voluntarily, and the excuse of not being able to help what one is doing will act as a moral excuse, though not a justification. In the legal realm, however, an individual is often held legally responsible even if he could not help having broken the law. Finally, there is a difference in social pressure between legal and moral rules: the former threatens punishment but the latter appeals to the demands of morality (the moral character of the action). These four

criteria are used to distinguish a legal rule from a moral principle and likewise, a legal from a moral obligation.⁴⁶

Chapter III: The Return to Natural Law

Keith W. Diener

I. Dworkin's Assertion: Moral Principles are in Law:

Ronald Dworkin begins his analysis by outlining three 'key tenets' of Hart's positivism (that may also apply to other positivist theories). Dworkin takes Hart's theory to be, currently, the strongest form of positivism, even stronger than his predecessor, John Austin's theory, and thus targets Hart's version of positivism. The first tenet of positivism asserts that there are criteria by which a positivist can determine if a legal rule is valid or not, that is, there are tests of the *pedigree* of the rule to distinguish between valid and spurious legal rules. The second tenet claims that if there is not a pedigreed rule for a certain case, then the judge must use his discretion to determine the law, "which means reaching beyond the law for some other legal standard to guide him in manufacturing a fresh legal rule or supplementing an old one."⁴⁷ The third tenet asserts that legal obligation is rooted in valid legal rules, and likewise with legal duties and legal rights, so the 'rules' of the second tenet -decisions made via judicial discretion- are "not enforcing a legal right as to that issue."⁴⁸ Dworkin proceeds to add aspects of Hart's theory to this skeleton of positivism, particularly Hart's distinction between primary and secondary rules and the difference between rules and orders, in the Austinian sense of the word. Rules are normative whereas orders are not; orders are binding because they are the will of the sovereign but rules are binding either because the relevant group accepts it as binding through their practice or because it has been created and deemed valid in accordance with the rule of recognition or what Dworkin calls the master rule.

Dworkin introduced his conception of legal principles as another means by which judges decide cases, other than rules. Dworkin believes that recognizing legal principles

as part of a legal system will lead the positivist to give up at least one of their three key tenets. If the positivist were to attempt to include principles in their system, then they would have to adjust their first tenet. Positivists would have to find some way of tweaking the test of pedigree to account for the existence of principles. In so doing this, however, Dworkin believes that the positivist would be forced to give up the second and third tenets. In other words, if the test of pedigree is changed to include principles, the positivist mission would be undermined.

His principles are more flexible and broader than rules, unlike rules, they can be chosen to be invoked or not by the residing judge. His quintessential examples of principles are: “no man shall profit from his own wrong” and, “men are free to contract as they wish”; both of which are sometimes referred to by courts and, or so he claims, are an alternative basis for judicial decision.⁴⁹ Dworkin further claims that the notions of open texture and indeterminacy that Hart claims are involved in rules do not explain the weight given to principles. Rules are all-or-nothing whereas principles are weighed and if they are not of equal weight then a judge must decide based on which is ‘heavier’, and these principles (unlike rules), “survive intact even when they do not prevail.”⁵⁰ The difference that principles are weighted and rules are not reveals that they are logically distinct from rules, the latter of which are either valid or invalid under the master rule (the rule of recognition). Given his distinction between rules and principles, Dworkin attempts to use their existence to show a contradiction between the positivist tenets by a sampling of cases.

In *Riggs v. Palmer*⁵¹ (Elmer’s case), a New York court had to determine if a man who murdered his grandfather would be able to receive his inheritance as promised in his

grandfather's will. The court found that he could not collect his inheritance based, at least in part, on the aforementioned principle that 'no man shall profit from his own wrong.' Dworkin gives the examples of converse instances where men can profit from their own wrong showing that the weighted principle still remains intact even when it is not enforced. For instance, the man who breaks his contract with one employer to take a higher paying job with another employer is entitled to keep his new salary despite his breach of contract. Similarly, if a man, in violation of his bail, crosses the state border and makes a profitable investment in another state, he is not denied the fruits of his gain.

*Henningsen v. Bloomfield Motors Inc.*⁵² is another case Dworkin samples as containing a number of references to principles including references to the principles of justice, equitability, and freedom of contract. In this case, a man bought a car from the dealer with a warranty that limited damages to repair or replacement of the broken part. The man, shortly thereafter, was injured in a terrible car accident due to defective parts. The court found based on principles of inequality of bargaining power that it would be unjust not to allow the man to be compensated for all of his damages.

Plessy v. Ferguson,⁵³ was decided in 1896 by the Supreme Court of the U.S. The majority stated that the segregated bus and school scheme of the time did not automatically violate the Equal Protection Clause. The court justified this holding by stating that the blacks were provided 'separate but equal facilities' and segregation as such was not unconstitutional. Almost sixty years later in 1954, the Supreme Court heard the question again when a group of black school children challenged the segregation policies of Kansas schools in *Brown v. The Board of Education*.⁵⁴ The court did not expressly overrule the 'separate but equal facilities' provision of *Plessy*, but rather

deferred to sociological evidence to show that segregated schools could not be equal under the Equal Protection Clause. “They pointed out that the phrase “equal protection” does not in itself decide whether segregation is forbidden or not, that the particular congressmen and state officials who drafted, enacted, and ratified the Fourteenth Amendment were well aware of segregated education and apparently thought their amendment left it perfectly legal...”⁵⁵ This interpretation, however, led to great controversy between government officials and laymen alike. The Equal Protection Clause, Dworkin believes, is a constitutional principle of equality.⁵⁶

Dworkin says that a positivist may claim either, that principles (such as the ones portrayed by the preceding cases) are binding in law just like rules, or that principles are extra-legal standards. By claiming the former the positivist is left with the task of fitting the latter two tenets with the changed first tenet, a task that Dworkin thinks is impossible. By accepting the latter, the positivist is left to justify how in cases like *Henningsen* and *Riggs*, a judge can use his discretion to punish individuals when there was no contemporaneous legal obligation; they would be punished *ex post facto*. To determine whether the positivist’s second tenet, the tenet of judicial discretion, can account for this dilemma, Dworkin further claims that the second tenet is ambiguous because the positivists pulled the term discretion from ordinary language and he thinks it should be put back in the context of law, back in its habitat. To do this and to clarify the ambiguity, he categorizes three senses of discretion.

Discretion in the first weak sense asserts that the standards an official uses demand judgment, and cannot be applied mechanically: “We use this weak sense when the context does not already make that clear, when the background our audience assumes

does not contain...[a] piece of information.”⁵⁷ In the second weak sense, an official has final authority to make a decision and this decision cannot be reversed by another official. “We speak this way when the official is part of a hierarchy of officials structured so that some have higher authority but in which the patterns of authority are different for different classes of decision.”⁵⁸ In the third sense, the strong sense of discretion, the official is not bound by the standards of the authority (but the authority is still in existence), “on some issue he [the official] is simply not bound by standards set by the authority in question.”⁵⁹ This sense of discretion deals with the range of decisions a standard purports to control: in the strong sense of discretion there is no standard by which the official is controlled in the situation at hand. Dworkin then concludes that at least on some occasions positivists take the term discretion in its strong sense,⁶⁰ in the sense that does account for principles, and then examines three routes that a positivist might take to show that principles do not control the decisions of judges in cases such as *Riggs* and *Henningsen*.

The first alternative a positivist could take is to claim that principles do not give rise to obligations- that they cannot be binding as rules are. To say that rules are binding is to say that if a particular rule is applicable in a particular case, it must be followed and if a judge does not follow it then the judge made a mistake. Principles, though at least in some cases, do give rise to obligations in some sense of the word, “there is nothing in the logical character of a principle that renders it incapable of binding him [the judge].”⁶¹ Since principles sometimes do give rise to obligations, the positivist could not take the first alternative.

Dworkin proposes a second alternative: “A positivist might argue that even though some principles are binding, in the sense that the judge must take them into account, they cannot determine a particular result.”⁶² Principles, or sets of principles, Dworkin assures us, can determine a result though it is decided in a different manner than rules. Rules are all-or-nothing whereas principles are weighed and if they are not of equal weight then a judge must decide based on which is ‘heavier,’ and these principles (unlike rules) “survive intact even when they do not prevail.”⁶³ And, just as a judge may be wrong in determining the valid rule, he may be wrong in the weighing of the principles. Since principles can determine the result of a case at least sometimes, Dworkin also rejects the second alternative.

The final alternative Dworkin suggests a positivist could take is to claim, “that principles cannot count as law because their authority, and even more so their weight, are congenitally *controversial*.”⁶⁴ Although the demonstration of the weight and authority of a principle is controversial, Dworkin appeals to history, practice, legislative history, and judicial history to show that principles are part of the law despite the fact that they may be controversial. The controversial nature of principles will later be found to have an impact on their recognition within the positivist’s master rule.

Having examined three routes a positivist may take to accommodate the strong sense of discretion with the claim that principles are extra-legal, Dworkin then considers if the positivist wants to claim that principles are in fact binding in law. If this is so, then there would be a direct conflict with the ultimate master rule, viz., Hart’s rule of recognition, because the rule does not account for binding principles, only rules. If the rule of recognition cannot account for principles being binding then they must be extra-

legal and yet Dworkin has already shown (or thinks he has shown) that principles are part of the law and in some instances give rise to obligation (and thus are sometimes binding). In order to claim that principles are binding as rules, a positivist would have to drop the second tenet altogether, and will have to devise some test to identify the valid and binding legal principles such as those in *Riggs* and *Henningsen*, and isolate them from the non-binding principles.

Dworkin says that Hart claims most rules are valid because an institution such as the legislature enacted them or judges formulated them to decide a case in precedent, and others, via custom. The former test will not work for principles like the ones found in the preceding cases because their origin is in some sense of appropriateness developed over time in the field and through the public. “Their continued power depends upon this sense of appropriateness being sustained,” and if these principles are not accepted as such they will slowly shift out of the legal system without ever being decisively overruled or repealed.⁶⁵ Dworkin concedes that immense institutional support would add to the weight of the principles but there is no exact means by which to gauge these principles: they cannot be placed into one single master rule for recognition given their differences in nature when compared to rules. Despite this concession, Dworkin believes that the relationship between principles and institutions is much too indirect for principles to be recognized under the master rule via their relationship to institutions.

Hart’s alternative means of validation under the master rules claims that “The master rule...might stipulate that some custom counts as law even before the courts recognize it...[but] he does not attempt to set out the criteria a master rule might use for this purpose.”⁶⁶ If, as the criteria of validity, the master rule were to state that they

should accept moral rules that the community thinks are morally binding, then the line between what is customarily a legal rule and what is customarily a moral rule would be smudged. To say this would be absurd because not all customary moral rules and obligations are enforced within the law. If the positivist tried to claim that the criteria should be what the community thinks is legally binding, then the whole purpose of the master rule would be undermined, “The master rule becomes (for these cases) a non-rule of recognition; we might as well say that every primitive society has a secondary rule of recognition, namely the rule that whatever is binding is binding.”⁶⁷ So, the gateway of custom is also an infeasible method of accounting for moral principles in the law for the positivist.

Given that principles cannot fit into law through either of Hart’s gateways, Dworkin suggests and rejects the idea that the rule of recognition be reformulated as a principle. He rejects this idea because if the rule of recognition is reformulated as ‘the complete set of principles in force,’ it results in the tautology, law is law.⁶⁸ And creating a list of all of the principles in the jurisdiction would be impossible because they are numberless and shift so quickly that we could never compose a complete and accurate list. Thus, Dworkin concludes that if principles are accepted into the positivist’s framework then their first tenet must be rejected, that of the master rule, which would also lead to the undermining of the second tenet- judicial discretion. Further, the acceptance of principles would also undercut the positivist’s third tenet, that obligation is rooted in rules because principles would (in some sense) also give rise to obligations.

II. Dworkin's Moral Theory: Law as Integrity:

A. The Legislative Principle:

Dworkin claims that there are two intertwined, basic principles of the moral reading, (that is, of law as integrity): the legislative and adjudicative principles. The legislative principle “asks lawmakers to try to make the total set of laws morally coherent, and the adjudicative principle...instructs that the law be seen as coherent in that way.”⁶⁹ Dworkin believes that the legislative principle of integrity is so entailed in the modern practice of courts and politics that it cannot be ignored by any interpretive theory of law. He runs his methodology to determine whether the legislative principle of integrity fits the modern political system and whether it justifies coercion, or as he has put it, ‘honors our politics.’⁷⁰ He concludes that the moral reading both fits the modern practice of courts and adequately justifies coercion.

In order to fit integrity into the modern political system it must first be seen as an ideal independent of justice, fairness, and procedural due process because integrity will often come into conflict with these other principles. For instance, in the sample case *McLoughlin*, within which the woman was suing for emotional damages where none had ever been awarded before, justice could come in conflict with integrity. In this case a woman came across her dead daughter and severely injured husband soon after a terrible car accident and wanted to sue for emotional damages caused by seeing them in such a horrific state. Dworkin believes that in this case a judge could consider it unjust to award such damages, but pursuant to integrity, the judge will be able to award compensation. Similarly, except in the strictest type identification of justice and fairness (i.e., claiming that they are one in the same), conflicts will arise between these ideals as well. It would be unfair not to compensate her whereas it may be unjust to award such damages.

Moreover, procedural due process may, in some instances, not be fair or even just. But for reasons greater than this, Dworkin claims that integrity is an ideal independent of these others.

He considers this ideal in context of his background assumption that we accept political fairness, the idea that everyone in (at least a democratic) society should have their share. Given that every human has at least slightly different moral ideas, legislation should be seen more as a series of compromises intended to represent all of the opinions to their respective degrees on the variant issues rather than merely the opinions of the majority. This legislation in accord with the different moral views produces a hodgepodge of different laws, or what Dworkin has called a 'checkerboard solution'.⁷¹ This is the very vision of political fairness, according to Dworkin: so, he enquires why is this 'Solomonic model' not generally embraced? It could not be rejected under the principle of justice because it actually prevents injustices, according to Dworkin's conception of justice. That is, it allows everyone their fair share in an opinion on the issue. The answer lies in the legislative principle of integrity: "The most natural explanation of why we oppose checkerboard statutes appeals to that ideal...it is inconsistency in principle among the acts of the state personified that integrity condemns."⁷² So the principle of integrity is the reason why people reject the checkerboard solution, or so Dworkin says; it is because lawmakers want to make the laws as morally coherent as possible.

Similarly, as a matter of Constitutional interpretation new decisions must be made such that they are consistent with other matters of Constitutional law. Dworkin examines whether abortion should be handed from the federal jurisdiction down to the states for

them to individually invoke their abortion laws in either their state constitutions or through statutes. This issue of federalism, Dworkin claims, must be decided by looking at the U.S. Constitutional scheme in its entirety to determine if it coheres. Dworkin claims that this is the methodology already used within the realm of Constitutional law. He believes he has shown that legislative integrity fits our system of laws; moreover, he finds it an appealing principle that “fuses citizens’ moral and political lives”.⁷³ Given this assessment, Dworkin surmises that political obligation does not flow from rules *per se*, rather from “fidelity to a scheme of principles each citizen has a responsibility to identify, ultimately for himself, as his community’s scheme.”⁷⁴

Having shown that law as integrity meets the first, ‘fit’, requirement of his methodology, Dworkin goes on to conclude that it also gives an adequate account of the justification of coercion, that is, one that holds absent extraneous and rarely, powerful circumstances. He goes about the task of showing that integrity justifies coercion by an analysis of legitimacy, obligation, justice, and community. Legitimacy and obligation go hand in hand, i.e., “A state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them.”⁷⁵ He believes that states that adopt the principle of integrity have a greater claim to legitimacy than states that do not.⁷⁶

Dworkin’s theory of political obligation is also called associative (or, communal) obligation, which “mean[s] the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors.”⁷⁷ There are two reasons, Dworkin believes, that philosophers have ignored this possibility: the first is that there is some presupposition of fiduciaries

involved that cannot be found in larger communities, and second, because such a vision of obligation often entails nationalism or even racism. So, in order to accept the communal obligation at all, one will almost surely accept some notion of reciprocity and more importantly, what I shall call the 'Four Dworkinian Musts': these four combined are the root of his system of obligation and thus legitimacy, which will simultaneously provide an adequate justification of coercion.

The four musts are to be resolved in favor of justice over nationalism; and will be found to play an integral role in Dworkin's three models of community which are explicated in the following. First, the individuals of the specific community *must* hold each other as fiduciaries, maintaining the obligation to the other members of the group as inclusively special, excluding those outside the group. Second, each individual *must* believe that these responsibilities are between each member of the group in a personal manner, rather than merely to the group collectively. Third, all of the members of this group *must* "see these responsibilities as flowing from a more general responsibility each has of *concern* for the well-being of others in the group."⁷⁸ Finally, individuals of the group *must* have an equal concern, not only a concern, for all of the members of the group. These four conditions, when they are met, constitute what Dworkin has called a 'true community,' which is distinguished from a 'bare community,' a community that is geographically or socially a community without fulfilling these four musts. A true community, in order to prevent defects of injustice, must be interpreted such that priority is given to justice over nationalism. This scheme resolves the foregoing reasons that philosophers have been hesitant to embrace an associative obligation as the family to which political obligation belongs: it puts justice over nationalism and it relies on a

conception of community which involves fiduciaries but with a contemporaneous equal concern for its members.

Dworkin believes that community generally takes priority over fairness or even justice in that principles of justice and fairness are decided within the context of the community or group at issue. He believes this is rooted in the idea of a true community and the task, then, becomes to interpret “what character of mutual concern and responsibility our political practices must express in order to justify the assumption of true community we seem to make.”⁷⁹ Dworkin then discusses three models of community entailing distinct modes of political association with respective views of the members towards each other and the community.

Dworkin discerns these three models rejecting the *de facto* and *rulebook* models because they do not abide by the four musts, in favor of the principle model which meets all four conditions. The first model, the *de facto* model, treats the community as merely a *de facto* historical or geographical accident rather than an associative community.

Dworkin easily disregards this model because it does not fulfill any of the four musts.

The *rulebook* model, the second model he rejects, “supposes that members of a political community accept a general commitment to obey rules established in a certain way that is special to that community.”⁸⁰ Alas, this model does not fulfill the latter two musts: it shows neither concern for the individuals of the community nor equal concern.

Dworkin is a proponent of the third model, the model of principle. The individuals of the community of this model understand and accept that common principles govern them including the principles of fairness, justice, and integrity, despite their differences with other communities. Although the model of principle may be open

to the same problems of injustice that any true community would, it fulfills the four musts better than any of the alternatives. As such, Dworkin has shown how a community of principle can defend political legitimacy better than the alternative community models by placing political obligation within the family of associative obligations. Dworkin notes that, “This defense is possible in such a community because a general commitment to integrity expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations according to standards for communal obligations we elsewhere accept.”⁸¹ Thus, Dworkin has shown not only that the legislative principle of law as integrity fits modern practice but also that it sufficiently justifies legal coercion via a true community of principle.⁸²

B. The Adjudicative Principle:

Dworkin accepts two principles of integrity, the last subsection covered primarily the legislative principle that asserts that law should be made in a coherent way by the lawmakers and this subsection expounds upon the adjudicative principle. The adjudicative principle asserts that law should be seen as if it was created in a coherent manner, as if the entire set of laws were created by the same author (of the community personified). In so doing, judges should identify the legal rights and duties in a like fashion. Law as integrity recognizes the grounds of law such that “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”⁸³ Dworkin has often phrased this by stating law should be interpreted to be seen ‘in its best light.’⁸⁴

The adjudicative principle should be applied regardless of the root of the law: it is applicable to all types of law including common law, statutes, and the Constitution. For

example, in *McLoughlin*, the case where the woman saw her dead child and injured husband shortly after a terrible accident, the judge should determine how legal practice would be seen in its best light by determining if the principle allowing emotional damages would, if accepted by the community, show law in its best (or, at least, a better) light. This interpretive task is to be seen not as a vertical consistency in principle, but rather a horizontal consistency of principles that spans the range of presently enforced community legal standards. This horizontal consistency does not include the entire history of laws of a country- it does not involve already abandoned laws- it is only concerned with the laws that are contemporaneously in force in the community. Dworkin provides an elaborate metaphor comparing judges to a series of novelists who each have to add a chapter to a novel, each novelist having to interpret the preceding chapters in order to create the best possible novel. In the process, however, many different interpretations may arise leading to different authors believing that the book would be seen best in different lights.

Considering Charles Dickens's *A Christmas Carol*, Dworkin provides the examples of two different explanations for Scrooge being so evil: one is that the evil is by nature and the other is by nurture. If an author were given only the first few chapters of this book which did not include Scrooge's redemption at the end, they could interpret Scrooge as being naturally evil as easily as they could take it to be due to nurture. If more of the book were revealed, the interpreter may change his mind and interpret Scrooge's evil as caused by nurture by looking more closely at the development of the literary characters and the nuances of the story. Just as a novelist would look to the various artistic attitudes in the story, a judge must see the complex structure of the legal

system. Moreover, there could be any number of interpretations for each controversy that arises. Dworkin, when speaking of the *McLoughlin* case (the case where the woman saw her dead child and injured husband shortly after a terrible accident) provides six nonexclusive, possible interpretations the judge could adopt.⁸⁵ The different interpretations spawn various results as to whether compensation should be awarded for emotional injury. He concludes that which interpretation the judge chooses depends on which principles of justice and fairness he adopts according to “a community whose members have the moral convictions his fellow citizens have,”⁸⁶ showing the judge’s commitment to integrity. As such, he will determine which constructive interpretation best fits and justifies the morality of the community in the unique circumstances of the case. The fit requirement, Dworkin assures us, is the threshold based primarily in the judge’s vision of justice; only after considering fit will the judge turn to justification.

C. Dworkin Resolving Objections to Law as Integrity:

The ideal judge who follows Dworkin’s method of constructive interpretation is called ‘Hercules’ and, having laid out the basis of his theory, Dworkin goes on to fend off objections to the method of Hercules. Dworkin rebuts a number of objections to his theory, including: the Hercules is playing politics objection, the Hercules is a fraud objection, the Hercules is arrogant and anyways a myth objections, and the internal skeptic objection.⁸⁷

There are two ways of understanding the ‘Hercules is Playing Politics’⁸⁸ objection, the objection that claims that by choosing one of the various interpretations Hercules has ignored precedent and the actual law in order to replace them with his own

interpretation. The first understanding of this argument claims that his interpretation does not fit with the principles of justice and fairness. This understanding of the argument, Dworkin believes, is only relevant as to single instances, where there is a misinterpretation of principles by Hercules or he fails to apply his own method properly. This is not a counterargument to the principle of adjudication as it is only applicable to the one instance of possible misinterpretation (according to Dworkin); however, the second interpretation is more plausibly a counterargument to the principle.

The critic of the second interpretation claims that a judge should not rely solely on his opinion of what would be just or fair, but rather should take on more fundamental notions of justice and fairness. This critic is claiming that his own notions of justice and fairness are somehow more appropriate than the judge's notions, and this would be hypocritical. Who is this critic to say that his notions of justice and fairness are better than Hercules's notions which are based on the community of principle? This entire understanding of the argument is "an album of confusions,"⁸⁹ because it attempts to replace an interpretation of integrity with another interpretation of the criticizing individual.

The 'Hercules is a Fraud'⁹⁰ objection can be rephrased as moral skepticism which will be dealt with below, or in a weaker version, as we will presently take it. Dworkin considers that integrity is in play only through Hercules's laying out the possible interpretations and then is no longer in force when he picks a particular interpretation. In other words, when considering the various interpretations involved, Hercules is abiding by law as integrity but when he picks an interpretation Hercules is no longer abiding by integrity. Dworkin thinks this implausible because it would corrupt the claim that

integrity is not involved when justice, fairness, and determining law in its best light are at issue. This would be impossible if Hercules is truly following the adjudicative principle.

Dworkin combines his next two objections by observing the critics that would claim ‘Hercules is Arrogant and Anyway a Myth.’⁹¹ This critic asserts that Hercules has no way of proving that his decision is right and it is not fair to accept his decision over so many other possibilities. Anyways, another critic may state, there is no real-life Hercules with powers such as this ideal judge. Dworkin responds to the former with the query: how could this judge following his senses of fairness and justice in accord with coherence in principle be any less fair than the opinions of another judge without integrity? This said, he responds to the latter claiming that Hercules is just that, an ideal for other judges to strive for and is instrumental in our understanding and analysis of the legal structure.

To return to the skeptical arguments, Dworkin may be subject to the internal skeptic; there are many forms of internal skepticism, two of which Dworkin addresses. The first is the claim that when faced with two (or more) different interpretations there is no better way of telling one as more politically moral than the other because both are incorrect. If this were accepted, Dworkin seems to say, the very idea of a certain kind of liability would have to be rejected, in which case an interpretation would still have to be adopted. In other words, one would merely be substituting one interpretation for another.

The second claim of the internal skeptic is not so easily gotten rid of, for it “attacks the feasibility of integrity at its root.”⁹² The second argument claims that the system of laws in practice yields contradictions, so attaining coherence in principle is impossible. Dworkin resolves this problem by reminding the reader that principles are weighted and can, in a sense, be seen as competitive rather than contradictory. As such,

different principles 'win' at times and others do not and at these times they are given priority but there is no contradiction *per se*.

Chapter IV: Soft Positivism

Keith W. Diener

I. Hart's Response to Dworkin:

A. Rules and Principles:

Although Dworkin has criticized Hart for not including moral principles in his positivism, Hart reflects on his mention of 'variable legal standards'⁹³ to be an infelicitously-titled term that considers the same standards Dworkin has titled 'legal principles.' That is, Hart and Dworkin have a terminological difference that Dworkin did not recognize: what Dworkin calls 'moral principles,' Hart has already considered under the title of 'variable legal standards' (although Hart concedes that his theory may have downplayed the importance of these standards). The difference between rules and principles include what Hart has termed the non-conclusiveness of principles as opposed to the near-conclusiveness of rules (there is not an irresolvable logical distinction between rules and principles as Dworkin would claim). Dworkin was mistaken in claiming that rules are 'all or nothing': that when one rule comes into conflict with another at least one is bound to win and the other to lose. Hart states that sometimes rules will come into conflict and when they do the less important rule may still survive and be found to be more important when applied to another set of facts in another case. Rules are not 'all or nothing' nor are they entirely distinct from principles as Dworkin claims.

Dworkin's position is seen as incoherent by Hart who cites *Riggs* as an example of when a rule and a principle have come into conflict and the rule remained intact. In *Riggs*, a grandson killed his grandfather and wanted to inherit what was bequeathed to him in his now-deceased grandfather's will. The rule in this case was found in the statute which read something like 'a validly created will that bequeaths inheritance to someone

will be enforced' and was outweighed, in *Riggs*, by a principle. The subject of the will (the inheritee) killed the testator and the principle 'no man shall profit from his own wrong,' outweighed the rule but the rule still remained in force. If a rule has an all-or-nothing character (as Dworkin claims), then it could not have come into conflict with a principle and remained intact as it did in this case. That is, if rules are all-or-nothing as Dworkin claims, then it would be impossible for a valid rule to be outweighed by a principle and still remain in force and yet this is exactly what happened in *Riggs*. This incoherence within Dworkin's view can be cured by admitting that the distinction between rules and principles is merely a matter of degree and not a logical distinction as Dworkin claims. Accepting the difference between rules and principles as a matter of degree also shows that principles can be coherently accounted for within Hart's theory. This inclusion of legal principles, Hart notes, is a very important aspect of legal reasoning and law, and he thinks should have stressed more their 'non-conclusive force.'⁹⁴

B. Principles and the Rule of Recognition:

Dworkin's interpretive approach to a legal system claims that principles are identified both by whether or not they fit the history of the past law of the institutions of the legal system and by whether they best justify the history of the past law of the institutions of the legal system (i.e., justify coercion). Dworkin realizes that there is no judge in history that has yet adopted such an approach, but he thinks that judges are attempting to look at things in this fashion and should be interpreted as doing so. This holistic criterion would, in effect, show law in its best light. Hart believes that Dworkin's obsession with defending his view has led him to overlook the fact that some principles owe their status to their pedigree: to the fact that they have been validated by a rule of recognition or recognized and adopted by a legal authority.

Dworkin's beliefs that principles cannot be recognized by their pedigree and that a rule of recognition is the only carrier of pedigree criteria are vastly mistaken, according to Hart. As to pedigree, Hart notes that "there is nothing in the non-conclusive character of principles nor in their other features to preclude their identification by pedigree criteria."⁹⁵ Provisions of the ultimate rule of recognition may incorporate such flexible and weighable standards, or at the very least, could be read to contain such principles. The First Amendment to the U.S. Constitution that provides freedom of speech is such an example. Moreover, basic common law principles such as 'no man shall profit from his own wrong' can meet the pedigree criteria of being invoked in a number of different cases by the courts. Not only are principles consistent with the rule of recognition, Hart goes so far as to claim that principles as recognized under Dworkin's interpretive methodology requires acceptance by the rule of recognition.

Having shown that the rule of recognition is consistent with the existence of principles in law, Hart further shows that Dworkin's own interpretive enterprise would be undercut without the acceptance of the master rule in a legal system. The use of Dworkin's interpretive criteria presumes the existence of settled law, for otherwise there would be no law by which to judge which principles best fit and justify the law. As such, despite their differences in terminology, Hart believes that he and Dworkin agree as to how judges identify the sources of law: through a "conventional form of judicial consensus."⁹⁶ Although there is still some disagreement based on their foundational beliefs about a legal system, at certain points their theories can cohere.

Hart believes that Dworkin is mistaken in thinking that legal rights and duties can only make sense in the context of law if they are morally justified or grounded. This is

because they serve the noble function of both providing freedoms and liberties to individuals while concurrently restraining them. Having asserted that there is a contingent, though not necessary connection, between law and morality, Hart claims that the critical difference between the two theories involves the identification of the law. Under Hart's positivism, law can be identified by reference to such social sources as judicial precedent, legislation, and some social customs. Hart's positivism does not reference morality nor consider it a necessary aspect of the law: it is only relevant when the law encompasses moral criteria for identification. For Dworkin, by contrast, morality plays a role both in identifying and justifying the law. In Hart's theory, certain jurisdictions may avail themselves of moral principles in their rule of recognition which would allow for a connection between law and morality. Given this, Dworkin's belief that law must be justified by morality is not necessary as they are already justified by the rule of recognition.⁹⁷

II. Soft Positivism:

In the *Postscript*, Hart asserts that his legal positivism is "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.*"⁹⁸ This statement, in conjunction with the conventional acceptance of a rule of recognition, will act as the basic definition of soft positivism.⁹⁹ By accepting that there are moral principles within the law, the soft positivist will be forced to deal with a number of counterarguments and criticisms (unfortunately, space disallows any such analysis of these arguments here). The primary question is whether allowing interpretive moral principles into the positivist theory will undermine the positivist tenets as Dworkin suggests or if soft positivism remains

coherent? The Dworkinian argument that the following chapter aims to counter is the assertion that moral principles cannot be validated through Hart's gateways of either recognition or precedent. Dworkin's assertion that principles are innumerable and shift so quickly that we could never compose a complete and accurate list of them will also be shown to be mistaken.

I suggest that there are at least two historical roots of moral principles in the law: criminal law and justice. Further, I claim that other moral principles existing in modern American law are often the product of *transfer*, *division*, or other *processes*. I will show that given these two nonexclusive roots, accepting moral principles in the law is coherent with soft positivism and moral principles are already recognized as valid by either the rule of recognition or through precedent. This is done without betraying the basic definition of soft positivism as provided by Hart.

Chapter V: Two Historical Roots

Keith W. Diener

I. Under Hart's Wing: A Place for Moral Principles:

A. Introduction:

Moral principles permeate modern American law as Dworkin was kind enough to point out in his arguments against Hart. Hart explicitly accepts their presence in the law of the United States and notes that other jurisdictions may have similar moral clauses in their rules of recognition.¹⁰⁰ Hart, however, did not explicate his answer to the question of where these principles come from and why they permeate modern American laws. Dworkin would seem to return to a natural law theory claiming that these principles have always been there and are justified by their appeal to morality. This route, however, would lead to a circle, spiraling back into natural law theories.¹⁰¹ Rather than accepting this route, the remainder of this essay will offer evidence as to the two nonexclusive historical roots of moral principles: justice and the criminal law. If either of these roots is accepted we will find that Dworkin is mistaken in the need for a moral justificatory method and that moral principles are already validated (justified) by the methods outlined by Hart (viz., by the rule of recognition, precedent, or even custom).

B. Two Historical Roots of Principles in the Law:

(1) Justice in the Rule of Recognition:

H.L.A. Hart notes that Justice and substantive moral values are specifically recognized in the U.S. Constitution; in its Preamble, in fact, the founding fathers stated one of the primary purposes of the document was to 'establish Justice.'¹⁰² Justice acts, then, as a validator of moral principles that are governed by justice within the United States given its explicit reference in the jurisdiction's rule of recognition.¹⁰³ A noble concept, this Justice, whose meaning is not precise or entirely understood: to better

understand the concept many philosophers have turned to deconstructing the concept with a number of other concepts and these latter concepts have themselves been further distinguished. A number of contemporary philosophers accept that justice has a number of elements and sub-elements. David Schmitz,¹⁰⁴ for example, believes that in order to determine what is just, one must look to the principles of desert, reciprocity, equality, and need, and that only then will one be capable of determining what one is due (what is just).¹⁰⁵

(2) Criminal Law Principles in Precedent:

There are a number of cases where moral principles are a basis of judicial decision and either, such as in England, there is no Constitutional principle of justice or there is no explaining these principles in terms of the elements of justice. In these cases we must turn to the second of our historical roots of moral principles in the law: criminal law.¹⁰⁶ The existence of moral principles in other fields absent an appeal to justice is often a matter of three historical occurrences: the first is through a process I shall call *transfer*. This is roughly the product of a judge using his discretion, which, in effect, transfers the existing moral principle from its root of criminal law into another branch of criminal law or field of law. Similar processes of the transfer of principles also occur between fields and branches through legislation. The second is what I have termed the process of *division*, that is, the splitting of one field of law into two fields. Through division, tort law of the United States has made an historical split from criminal law and, by so doing, has carried with it moral principles into civil law. Similarly, these tort principles can transfer into other fields and branches just as the principles of criminal law

have and continue to do.¹⁰⁷ Additionally, there are other *processes* that these moral principles undergo in time.

*II. Four Elements of Justice:*¹⁰⁸

David Schmitz believes that the elements of justice can be seen as forming a metaphorical map which is understood differently by various readers. The elements of justice can be seen to form a neighborhood rather than a building, that is, they all are common in many instances but they are not built in as unified a manner as a building is. As Schmitz says, “Someone may some day devise a grand unified theory of justice that answers all possible questions about justice. I do not have such a theory....I argued that justice is more than one thing, and that the elements composing it are in turn more than one thing.”¹⁰⁹ He believes that there are four elements of justice whose consideration and weighing can lead to just decisions and actions: desert, reciprocity, equality, and need, and each of these four elements has correlative subelements. I suggest that their analogue in the judicial realm would similarly lead to just judicial decisions and laws.

The various elements of justice are to be weighed so that each reader of the metaphorical map can determine the most just route to take. This weighing will lead to different results by different readers, which in the realm of law often happens as different judges come to contradictory decisions and cases are often overruled. Moreover, Schmitz’s theory is used instrumentally in the following in order to make the presence and effect of justice in U.S. judicial decisions easier to understand. This is done by drawing correlations between the principles exemplified in case law and the elements and subelements of justice as outlined by Schmitz. These elements and principles are generally accepted as core elements of justice and can likewise be considered (at the very

least for instrumental purposes) to be the elements of justice as they pertain to the laws of the United States.

Desert: The principle of desert is merely that “People ought to get what they deserve,” and can be seen from a number of angles.¹¹⁰ Desert can be seen as a compensatory notion or as a promissory notion. As a compensatory notion, an individual (X) gives something which shifts the moral scale and then when X is later given something the scale is rebalanced. Under this vision, X deserves something if it restores the moral balance or qua reward. As a promissory notion, when X receives something it shifts the moral scale out of balance. Subsequently, when X proves that he was worthy of receiving it, the moral balance is returned to equilibrium. For instance, X is given a job that he did not have the credentials for but after a year he grosses more income for the company than any other employee. After that year, X would have been deemed to have deserved the opportunity for the job. These two types of desert are necessary to the understanding of desert and hence justice.

Reciprocity: Under the heading of reciprocity, there are a number of important distinctions, though only two will be discussed in the following. First, Schmidtz distinguishes between symmetrical and transitive reciprocity. Symmetrical reciprocity is the returning of favors to our original benefactors. This is the ‘canonical form’ that most laymen would use as a definition. The latter form, transitive reciprocity, is the passing on of benefits to others based on what one has been given. The philanthropist, for example, gives to others not because they have given to him but because he has been given so much. Similarly, if a young college graduate is given a job, he cannot reciprocate by then giving his hirer a job right out of college (his hirer has been out of college for years), but

years later the hired is able to give another young college graduate a job. This is transitive reciprocity: it is honoring a favor rather than returning it.

The second major reciprocity-related distinction Schmidtz draws is between reciprocity qua restraint and reciprocity qua value. He argues that reciprocity qua value is the means within a social structure that we distribute to produce citizens willing and able to reciprocate- “to participate in the patterns of mutual recognition.”¹¹¹ Reciprocity qua restraint, on the other hand, as applied to a social structure would distribute benefits according to (or proportionate to) those who contribute to the social structure.

Equality: Schmidtz makes the point that there are a number of different types of equality: equality of opportunity, economic equality, equal pay for equal work, equal shares of distribution, etc. All of these different types of equality are necessary to the consideration of what is both equal and just, though no type seems to reign supreme in the world of justice.

Need: There is a hierarchy of needs, according to Schmidtz, under which some needs become more important with their urgency. He mentions the work of Abraham Maslow, who says “there is a hierarchy of needs, with physiological needs forming the base of a pyramid and spiritual transcendence forming the apex, with safety, belonging, esteem, and self actualization forming some of the intermediate levels....Part of Maslow’s point is that context determines which needs are most urgent.”¹¹² Schmidtz seems to agree with this idea but goes further in claiming that the most important needs can be fulfilled by being good neighbors, developing a strong economy, taking responsibility for our own actions, and to realize and embrace our human fallibility.¹¹³

Need, equality, reciprocity, and desert are the four major elements under which Schmitz has built his conception of justice and they should be invoked and weighed when considering what one is due. These four elements comprise the first historical root by which principles are found in American law, viz., justice.

III. Division of Criminal and Tort Law:

In the words of Justice Oliver Wendell Holmes, “they [criminal law and torts] have started from a moral basis, from the thought that some one was to blame.”¹¹⁴ Centuries before the U.S. was established, in Medieval England, there was no distinction between tort theory and the criminal law; it has only been in relatively recent times that they have formed into different fields with both different substance and different procedures. In Medieval England there was a criminal remedy known as the ‘appeal of felony’ that resolved what would in modern terminology be considered a ‘tort,’ which literally translated from the French is a ‘wrong’: both words are the same as the Latin *delictum*, which was the word used to signify these wrongs in ancient times.¹¹⁵ These wrongs of the ‘appeal of felony’ included ‘physical assaults and other invasions of personal interests.’¹¹⁶ A tort theorist, Thomas A. Street states, “During the whole of the past history of English common law there has, of course, been an abundance of legal rules concerning those wrongs which are now treated under the head of torts...”¹¹⁷ Street, who was writing on the topic in the early twentieth century, believed that tort principles were aimed at balancing in favor of justice.¹¹⁸ Moreover, he believed in an evolution of tort principles over time. Over the centuries that followed the common law remedies, civil tort remedies developed from criminal law and eventually it morphed into its ever-changing modern system of tort law. This historic split of criminal law and torts

into two separate fields and correlative procedures is what I have termed division.¹¹⁹

Division has similarly taken place as tort law has rapidly expanded in the contemporary technological age. For instance, many fields of law such as Family law and Workers Compensation law were originally a part of tort theory and as the laws for these areas expanded they eventually broke off into separate fields of law from their tort origins. Though their tort roots are prevalent in almost every statute or precedent based decision, the laws of these fields have expanded until a point of break with the traditional tort law.

Some characteristics of these fields remain obvious even today, for example, the fields of criminal and tort law both refer often to the question of reasonableness as determined by either the judge or a jury; it must be considered along with the capacity of the alleged criminal to commit such actions.¹²⁰ Tort theory contains flexible standards: *would a reasonable person in the position of X have done Y?* Similarly, in negligence theories a duty of some kind must be breached in order for a defendant to be found liable (along with a breach of this duty, causation, and damages) and at times, this duty can be of both moral and/or legal nature. Moreover, tort theory has questions such as: *was X wrong for doing Y?* Within tort theory, moral principles are found both as a standard of determining liability and as an instrument for deciding adequacy of the actions of an individual.

Analogously, in criminal law the Fourth Amendment to the Constitution asserts that searches and seizures must be deemed reasonable. It guarantees that: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...”¹²¹ These searches and seizures can be deemed unreasonable on many grounds, such as the failure to attain a warrant when

needed (the violation of the Constitutional guarantee) or if the officers conducting the search violate other constitutional or procedural guarantees. At times, the search could be found unreasonable in a similar manner to the actions of the reasonable person exemplified in tort theory above. For instance, if the officers conducting the search tore down an unlocked door or smashed a number of glass windows, the decision-makers would look to standards of both morality and reasonableness to determine if the actions of the officers were reasonable or not in lieu of deeming the action unreasonable due to a breach of a different procedural or constitutional safeguard. In other words, both torts and criminal law contain similar standards and involve both the looking to moral principles and an appeal to them in existing law which both direct subjects to look to moral principles and to provide answers to otherwise unknown questions.

Further, tort law and family law often contain similar standards and ideals (or, elements). For instance, in tort law there is fault and no-fault liability: the former involves the aforementioned duty, breach, etc. whereas the latter has no such elements (defendants are held strictly liable). The analogue in family law is the distinction between fault and no-fault divorce: the former requires breaches of duties and the latter does not. Moreover, other similar standards permeate both fields though these standards have morphed over time in different directions due to their prior division. The preceding are just a few examples of the process of division as it has occurred in American law.

IV. Transference of Tort and Criminal Law Principles:

Transfer explains how moral principles can seep into fields of law that are traditionally non-moral. There are two methods of transfer of moral principles: the first method is that legislators take it upon themselves to transfer moral principles from criminal law, its branches, or the fields that are the product of its division in order to

make new laws. For instance, a moral principle that was once accepted only in tort theory can become part of contract law via new legislation. The second method is through adjudication: this method shows that transfer plays a role in judicial discretion. The judges use their discretion, in order to make a just judicial decision, and take tort principles, principles of criminal law, or their product and transfer them into another field or branch.

Aside from transfer and division there are certainly a number of other *processes* that moral principles undergo within the law although they are not discussed here. For now, I will leave this category open under the heading of ‘other processes.’ These processes of moral principles that include transfer and division can also be applied to rules, though likely to a lesser extent (i.e., when a field divides both principles and rules divide with it and often rules are transferred from one field to another via legislation and, less often, through discretion). Since rules, to a lesser extent, also undergo these processes, the difference between rules and principles is not one of logical distinction, rather merely of degree (that is, perhaps principles undergo these processes to a greater extent than rules).

V. Dworkin's Sample Cases:

Dworkin's sample cases exemplifying principles in the law can be explained in terms of justice and criminal law principles. As such, they are explained in terms of validation under the rule of recognition and through precedent. In showing this, Hart's theory is shown to have adequately and coherently accounted for moral principles in American law.¹²²

In Dworkin's first sample case, *Riggs v. Palmer*¹²³ (Elmer's case), a New York court had to determine if a man who murdered his grandfather would be able to receive his inheritance as promised in his grandfather's will. The court found that he could not collect his inheritance based, at least in part, on the principle that 'no man shall profit from his own wrong.' Dworkin claims that this is a clear case of when a court has rendered a decision based on a weighted principle. This principle, however, is rooted in compensatory desert: if the man was allowed to profit from his own wrong then it would shift the moral scales out of balance and justice would not be served. Such compensatory desert is an element of justice and as such the judge in *Riggs* was ensuring that the constitutional moral principle of justice would be ensured.

Riggs could also be explained in terms of criminal law principles. The principle 'no man shall profit from his own wrong' is not a principle that was pulled out of thin air, but rather has been preserved in precedent over the centuries and was transferred into the laws of wills in this instance to prevent a man from inheriting when he had killed the testator of the will.

*Henningsen v. Bloomfield Motors Inc.*¹²⁴ is another of Dworkin's sample cases; he notes it contains a number of references to principles including references to the principles of justice, equitability, and freedom of contract. In this case a man bought a defective automobile which had a limited warranty, and soon thereafter got into a horrible car accident because the automobile was defective. The court agreed that the plaintiff should not be limited to recovering the damages of the warranty because of unequal bargaining power, that is, the dealer took advantage of the man in having him sign such a slanted contract. Dworkin claims that involved in this case are several moral principles

and he is correct, although, once again principles such as ‘freedom of contract’ and ‘inequality of bargaining power’ are principles rooted in justice. Freedom of contract spawns from the equality element of justice, specifically, equality of opportunity. Moreover, the ‘inequality of bargaining power’ could fall under either the equality element (ensuring economic equality), the reciprocity element (ensuring reciprocity qua value), or even under the need element (ensuring people get what they need while not being taken advantage of). The opinion of *Henningsen* specifically noted that this case was, at least in part, based on concerns of justice: “[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?”¹²⁵ This assessment of the opinion furthers the evidence that the decision of this case was partially based on the Constitutional principle of justice.

Moreover, *Henningsen* could also be explained in terms of the division and transfer of criminal law principles as well as justice. Although the principle of freedom of contract is based in justice, there are tort laws (which have divided from criminal laws) preventing corporations from selling faulty merchandise. Product liability is sometimes a strict liability offense, meaning that the dealer is held fully responsible for all costs incurred or damages rendered by the buyer of the goods based on the defective parts without a showing of fault. Similarly, the buyer in this case was allowed to recover even though there was no express law stating it *per se*. In this case, the tort principle allowing the buyer to recover damages was transferred into the contract law of automobile sales. The ruling of this case was then justified under the precedent of tort law and the justice of the rule of recognition.

Dworkin's next sample case is rooted in justice. *Plessy v. Ferguson*,¹²⁶ was decided in 1896 by the Supreme Court of the U.S. The majority stated that the segregated bus and school scheme of the time did not automatically violate the Equal Protection Clause. The court justified this holding by stating that the blacks were provided 'separate but equal facilities' and segregation at that time was not unconstitutional. Almost sixty years later in 1954, the Supreme Court heard the question again when a group of black school children challenged the segregation policies of Kansas schools in *Brown v. The Board of Education*.¹²⁷ The court did not expressly overrule the 'separate but equal facilities' provision of *Plessy*, but rather deferred to sociological evidence to show that segregated schools could not be equal under the Equal Protection Clause. "They pointed out that the phrase "equal protection" does not in itself decide whether segregation is forbidden or not, that the particular congressmen and state officials who drafted, enacted, and ratified the Fourteenth Amendment were well aware of segregated education and apparently thought their amendment left it perfectly legal..."¹²⁸ Whereas Dworkin believes the judges are changing their minds over a general principle of equality, they are really discussing the element of justice, equality.¹²⁹

All of the preceding cases have been explained in terms of the Constitutional principle of justice and/or the principles of criminal law. Justice is in the rule of recognition which is one of Hart's means of validation of law and the criminal law principles are preserved in precedent, another of Hart's means of validation of law. Having shown how Dworkin's sample cases can be explained in terms of justice and criminal law principles, we have also shown how Dworkin's sample cases can be explained in terms of the theory of Hart without any inconsistency.

VI. Objections to the Two Historical Roots:

A. Flexibility of Justice Unfathomable:

There are two forms of this objection: the first claims that the Schmidtzian conception of justice is by no means what the framers of the Constitution of the United States had in mind when they stated in the Preamble that they were attempting to establish justice. Such a deconstruction of justice is a product of modern thought and was not the intent of the framers. The second objection claims that the principles are overly flexible and could be used to explain almost anything.

The first objection has merit, however, I have argued elsewhere¹³⁰ that there are many benefits to reading the original meaning of the Constitution. A more intratextual look at the Constitution reveals that, though it may not have been phrased in this manner, a similar conception of justice to the one provided by Schmidtz is what the framers meant when they stated ‘Justice.’ The complete Preamble is as follows: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”¹³¹ All of the elements of justice are required to fulfill the noble mission stated by the framers in the Preamble of the U.S. Constitution. Ensuring the general welfare, liberty, and posterity also includes establishing justice: ensuring that people get what they need, what they deserve, reciprocating with them, and ensuring as much equality as possible. Moreover, if one does not agree that these elements are necessary aspects of Justice, then I suggest one merely use them instrumentally to better understand and explain what might be meant by justice.

The second objection is barely even worth mentioning. The flexibility of justice is exactly the point: the principle of justice is broad and contains many elements and subelements which explains the confusion between natural law theorists and positivists. Natural law theorists think that many aspects of morality are entailed in the law when many of these aspects are just elements of justice.

B. Begging the Question as to Roots:

Well, a critic may say, you are just begging the question. When asking where these principles come from you are saying they come from the criminal law but there is nothing to lead me to believe that they are not coming from some natural law source. You are, in fact, begging the question as to their roots.

There is a difference that this critic does not realize between evidencing the fact that these principles have existed in the many fields of law and have undergone many processes for centuries on end and begging the question of where they come from. These moral principles are present in American law either because they are rooted in Justice or because they have undergone processes rooted in a criminal law that came from the laws of countries that were in existence long before the United States (or because of some other unexamined historical root). Moreover, since we are primarily concerned with American law which is largely rooted in English Common law, one can truly say that in America these criminal law principles are rooted in a law that was in force before the founding of the United States. The principles came from English common law and have been preserved in precedent ever since this time: where they came from before that is a question I will not attempt to answer here.

C. Begging the Question as to Validity:

This natural law critic claims that the source of legal validity is not necessarily drawn from the fact that there are moral clauses in the U.S. Constitution (i.e., Justice). The natural law critic asserts that the question as to the validity of these moral principles is being begged, they need not be in the rule of recognition in order to be considered valid. Such a critic would claim that there are general moral principles whose validity is due to their universal nature (or some sort of communal acceptance as Dworkin would advocate). This alternative explanation provided by the natural law critic is, itself, begging a number of questions as to both validity and roots. Furthermore, the criteria provided by the rule of recognition perfectly well explains the validity of these principles without an appeal to these abstract principles which are largely a relic of a past, though not forgotten, age.

D. Controversial Nature of Moral Principles:

Some may claim that allowing these principles into the theory of positivism will lead to the downfall of the positivist theory. Moral principles are by nature controversial and since the master rule has to be accepted by convention, they are not accepted by convention (which entails consensus). This critic's argument leads to a very important point: the controversial nature of moral principles does not prevent their recognition by the population of the jurisdiction. Whether or not they agree as to the meaning of a moral principle in their rule of recognition, the important thing is that they agree that this moral principle is in force because it is in the rule of recognition or precedent.¹³²

E. Positivism is a Misnomer:

Others may claim that moral principles and positivism do not mix: to call a legal theory positivist is to imply that there is no necessary connection between law and morality. In reply one will recall our basic definition of soft positivism, it is "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*,¹³³ along with the conventional acceptance of a rule of recognition. The italicized phrase solves the apparent confusion of this critic: although there is no necessary connection between law and morality, there is a connection in some jurisdictions. There may be a necessary connection between the law of some jurisdictions and morality, though law itself is only contingently connected to morality (i.e., all of the jurisdictions who recognize moral criteria or principles could fall leaving only jurisdictions that do not recognize moral criteria).¹³⁴ This is still a positivist theory though the theorists are analyzing the U.S., a jurisdiction where the law as it is today sometimes does satisfy the demands of morality (but other jurisdictions do not). And if the critic is not happy with this response, then he can freely call it something else, perhaps, the theory of H.L.A. Hart.

VII. Conclusion:

Dworkin is mistaken in asserting there is a contradiction within positivism if positivists allow moral principles into their theory of law. These principles are already recognized either in the rule of recognition via justice or through precedent via the historic principles of the criminal law having undergone division, transfer, and other processes as well as through their product. These principles are a part of the law and are not dependant on moral justifications, rather on their validation under one of Hart's gateways. Additionally, these principles are not necessarily numberless and can be traced historically to their roots as has been evidenced here.¹³⁵ Hart's theory, with a little elaboration, can fully and completely account for the existence of moral principles in the law without betraying any of its other tenets.

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- ¹ Hart, H.L.A., *Postscript to The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 24.
- ² This view has been defended by various philosophers though by different methods, although these arguments will not be addressed here: see, e.g. Shapiro, Scott, "On Hart's Way Out", in Coleman, Jules, *Hart's Postscript: Essays on the Postscript to The Concept of Law*, Oxford University Press, 2001. Additionally, exclusive (hard) legal positivists have argued that Hart's positivism is not coherent for different reasons although there is not space to address these criticisms here. See, e.g., Raz, Joseph, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford University Press, 2001.
- ³ Aquinas, Thomas St., *Summa Contra Gentiles*, trans. Vernon J. Bourke, vol. 4, Notre Dame Press, 1975_bk III, pt. II, ch. 114, 1.
- ⁴ Aquinas, Thomas St., "Summa Theologica," In *Basic Writings of Saint Thomas Aquinas*, ed. Anton C. Pegis, vol. 2, N.Y., Random House, 1945_I-II, Q. 93, a. 6, ad. 2.
- ⁵ *Id.*_I-II, Q. 93, a. 4, c.
- ⁶ *Id.*_I-II, Q. 91, a. 2, c.
- ⁷ *Id.*_I-II, Q. 98, a. 1, c.
- ⁸ *Id.*_I-II Q. 91, a. 2, ad 2, c.
- ⁹ *Id.*_I-II, Q. 93, a. 3, ad 2.
- ¹⁰ Altman, Andrew, *Arguing About Law: An Introduction to Legal Philosophy*, 2nd Ed., Chapter 2: "Law and Morality," pgs. 40-78, Wadsworth Publishing Company, 2001.
- ¹¹ *Id.*
- ¹² Austin, John, "The Province of Jurisprudence Determined", In *Lectures on Jurisprudence or the Philosophy of Positive Law*, Ed. Robert Campbell, 4th Ed., Vol. 1, Spottiswoode and Co., London, 1879_pg. 81.
- ¹³ *Id.*_pg. 95.
- ¹⁴ *Id.*_pg. 91.
- ¹⁵ *Id.*_pg. 180.
- ¹⁶ *Id.*_pg. 270.
- ¹⁷ *Id.*_pg. 264.
- ¹⁸ Altman, Andrew, *Arguing about Law*.
- ¹⁹ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 24.
- ²⁰ This is opposed to the extreme version of the counterargument: the extreme form claiming that almost all laws, when considered alone, are merely fragments of laws. They should be construed in conditional form "If anything of a kind X is done or omitted or happens, then apply sanction of kind Y" (Hart 36). After this construal the orders will be seen as given to the officials to apply certain sanctions at certain times in a more uniform system of laws unified by the conditional statements of sanction.
- ²¹ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 38.
- ²² Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 42.
- ²³ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 44.
- ²⁴ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 47-8.
- ²⁵ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 50.
- ²⁶ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 1: Hart is quoting Llewellyn, *The Bramble Bush*.
- ²⁷ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 1: Hart is quoting O.W. Holmes, 'The Path of the Law' in *Collected Papers*.
- ²⁸ Hart identifies 5 salient features of law in: Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 3: "(i) rules forbidding or enjoining certain types of behavior under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones."
- ²⁹ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 13.
- ³⁰ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 81.
- ³¹ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 81.

³² This idea of obligation, as it is distinguished from being obliged, is an important point of Hart's theory. He analyzes this distinction, once again, by first criticizing Austin's definition of obligation and he uses this distinction to further distinguish between the internal and external perspectives. To be obliged, according to Hart, is to believe that some harm or punishment of sorts will come upon oneself if one does not obey. This is a largely psychological state of mind that refers to the motives and beliefs by which one does something or refrains from doing something. Hart's definition of being obliged is similar to the Austinian definition of an obligation (obedience brought about by orders backed by threats), though the latter is seen in more of a predictive context focusing on the chance or likelihood that someone will suffer the punishment of others if they do not fulfill this obligation.

Hart criticizes the Austinian notion of obligation, obligation as derived from the command of the sovereign, on two grounds: the first is that this definition obscures the rationale that the breaking or deviating from the rules is a justification for the punishment rendered. That is, to have an obligation is more than just a prediction of punishment rendered by others in the deviation from the rule. It is also a justification for the punishment in the event of a breach of the rule imposing the obligation. Secondly, Hart criticizes Austin's predictive interpretation because: "If it were true that the statement that a person had an obligation meant that he was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g. to report for military service but that, owing to the fact that he had escaped the jurisdiction, or had successfully bribed the police or court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood" (Hart 84).

Hart goes on to explain that to have a legal obligation implies the existence of a rule but every rule does not necessarily impose an obligation. Rules are spoken and conceived of as obligation imposing when one is brought to conform to these rules via a social pressure demanding conformity (i.e., rules are linguistic). If one fails to conform, a negative social reaction is presented towards the deviator. The more serious this social pressure and consequent reaction, the more likely the rule is to give rise to an obligation. Hart then considers a possible reply from proponents of the predictive theory; one such individual would claim that the predictive theory gives within the definition of obligation a central role for hostile social reactions and punishment. So the added requirement of a rule imposing obligations is really just a superfluous addition to the predictive theory. Hart rejects this reply by contrasting between the internal and external perspectives (aspects) of rules.

³³ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 90.

³⁴ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 94.

³⁵ The rule of recognition plays an integral role in any system of law by performing the function of validation (or at least, recognition) of the rules within the jurisdiction. There are many different means and multiple criteria by which a rule of recognition can validate a rule. Although many jurisdictions have multiple rules of recognition, there is one supreme or ultimate criteria present within each jurisdiction. For example, in the United States, the Constitution of the United States as framed in 1787 would almost surely be considered the ultimate criterion, i.e. the rule of recognition. Moreover, the individual state constitutions as enacted by each state would act as rules of recognition for that area, though they are validated by the supreme criterion. Certain statutes could even be considered rules of recognition, though not ultimate, such as the Administrative Procedure Act (APA) that provides the procedure by which agencies should promulgate rules. The ultimate rule of recognition determines the validity of legal rules, but its validity cannot be questioned from an external or an internal perspective. According to Hart, "it can neither be valid nor invalid but is simply accepted as appropriate for use in this way" (Hart 109). That is because the word validity is commonly used to determine what is valid within a legal system, under the rule of recognition whose existence, it seems, is just 'a matter of fact' (Hart 110).

³⁶ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 91.

³⁷ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 98.

³⁸ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 116.

³⁹ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 116. Although in unusual circumstances, these conditions could be seen as jointly sufficient and individually necessary. Hart notes, "In an extreme case the internal point of view with its characteristic normative use of legal language ("This is a valid rule") might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably

sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system” (Hart 117).

⁴⁰ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 128.

⁴¹ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 128.

⁴² Hart also considers unqualified rule skepticism. He considers the incoherence of the unqualified version because it both denies that it is possible to establish what courts will do while simultaneously claiming that law is a prediction of what courts will do (the assessment of most unqualified rule skeptics). This incoherence arises because, whether unqualified rule skeptics like it or not, there are decisions of courts which implies that there are at least some secondary rules that confer authority to officials as well as jurisdiction to courts. It is not possible for a theory to both deny the possibility of determining what courts will do while claiming that law is a prediction of what courts will do, according to Hart, this is incoherent.

⁴³ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 139.

⁴⁴ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 173.

⁴⁵ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 180.

⁴⁶ A possible counterargument to the four criteria would be to challenge them on the grounds of formality: they reference neither the content of moral rules, nor their purpose in society. Moreover, many would claim that there are additional criteria which should be added to this fourfold distinction. In response to the latter, Hart concedes that there is much more involved in morality than mere obligation, but further claims that to add either the content or the purpose would narrow the inquiry. It would “force us to divide in a very unrealistic manner elements in a social structure which function in an identical way in the lives of those who live by it” (Hart 182), and such a dissection would be impracticable as Hart would like to keep the inquiry broader.

In response to the formality charge, Hart conceded that there is a minimum necessary content to law that derives from naturally necessary truths about humans. This is opposed to a conceptually necessary content which he does not advocate. He does this through an analysis of natural law theory which claims, “that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid” (Hart 186). As such, survival is often the aim and if laws and morals do not have any content then this minimum purpose of survival will not be forwarded. “In the absence of this content men, as they are, would have no reason for obeying voluntarily any rules...” (Hart 193) Hart sees a minimum content of the teleology of natural law, that all men usually want to survive, is composed of five truisms: human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding & strength of will. The first truism, human vulnerability, realizes that humans are vulnerable to attack, death, injuries, etc. The second truism, approximate equality, explains that, despite our slight differences in intelligence and physical qualities, all humans are roughly equal. Limited altruism, the third truism, explains that men are neither devils nor angels and are prone to care more about themselves and their family than others- although sometimes they do care about others. The fourth truism accepts that the world has a limited amount of food, land, and other resources. Finally, the fifth truism explains that men are not perfect in their use of intellect and will but sometimes make mistakes. These truisms combine to provide a minimum content to rules, such as the “minimum forms of protection for persons, property, and promises” (Hart 199), according to natural law theorists.

Hart concedes that some of the beliefs of natural law claiming that this minimum content is a matter of “natural necessity” (Hart 199), are correct because laws often do portray morals. However, as a product of conceptual analysis, morality is not conceptually necessary to law.

⁴⁷ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 17.

⁴⁸ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 17.

⁴⁹ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 23.

⁵⁰ *Id.*

⁵¹ 115 N.Y. 506, 22 N.E. 188 (1889).

⁵² 32 N.J. 358, 161 A.2d 69 (1960).

⁵³ 163 U.S. 537 (1896).

⁵⁴ 347 U.S. 486 (1954) and 349 U.S. 294 (1955).

⁵⁵ Dworkin, Ronald, *Law’s Empire*, Harvard University Press, 1986_pg. 30.

⁵⁶ This case is taken from *Law’s Empire*, but can be seen in a similar light. Dworkin gives this example both as a case that has a moral principle in it and as an instance of theoretical agreement.

⁵⁷ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 31-32.

⁵⁸ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 32.

⁵⁹ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 32.

⁶⁰ The positivists claim that a judge does not have any discretion when there are clear, valid rules established, that could be applied to the case at hand. Nominalists would claim discretion is always used by judges even when a clear, valid rule could be applied to the case, they would thus advocate discretion in the second weak sense. They are proponents of the view that judges are the final arbiters of the court, and no one would have any authority to overturn a decision of the highest court. The second weak sense, however, could not be what the positivists have in mind because there is no need for discretion in cases where the rule is well established and available, thus the rule would be the final authority rather than the judge. A positivist could not claim that they mean to use discretion in the first weaker sense either. Although this may be an appealing option given that Hart, for example, notes the open texture of some legal rules, and that judges will sometimes disagree over these indeterminate rules, Dworkin shows that if discretion is used in the first weak sense, it would lead to a tautology. “The proposition that when no clear rule is available discretion in the sense of judgment [the first weak sense] must be used is a tautology” (Dworkin 32). Moreover, this tautology is not an insight and cannot account for legal principles except if they designate them as extra-legal, according to Dworkin. If this is so, then the positivist would still be left with determining the justification of punishment *ex post facto*.

⁶¹ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 35.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 35.

⁶⁵ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 40.

⁶⁶ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 42.

⁶⁷ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 42.

⁶⁸ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, 1978_ pg. 44.

⁶⁹ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 176.

⁷⁰ *Id.*

⁷¹ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 183.

⁷² Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 183.

⁷³ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 189.

⁷⁴ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 190.

⁷⁵ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 191.

⁷⁶ As usual, Dworkin first takes on the competitors' conceptions of legitimacy, rejecting the Rawlsian approach because it lacks genuine consent and does not allow the individuals to be free from the sovereign. However, even if Rawls's overall conception of legitimacy is rejected, one may still claim that his duty to be just holds strong. Dworkin points out that it does not, “tie political obligation sufficiently tightly to the particular community to which those who have the obligation belong” (Dworkin 193). In other words, Rawls's duty to be just does not show how a particular member of a community (or state) has a duty to support the institutions of that community (or state). Rawls's conception does not show that citizenship is the root of this legitimacy.

Dworkin's second competitor for providing an account of legitimacy consists of the 'fair play' arguments, which he rejects as quickly as the Rawlsian approach. This line of argumentation comes in many forms including: if someone has been subject to the protection, support, and other benefits of the state then they are also to accept the burdens whether these burdens are taxes, laws, or anything else. Often in judicial argumentation, particularly concerning matters of personal jurisdiction, a defendant will claim that he was not subject to the court's jurisdiction when he was served process in the jurisdiction. Such 'tagging' is justified by a fair play argument which claims that while within the borders of the state, whether a resident of that state or not, because the individual is incurring the benefits of the state they must also be subject to the court's jurisdiction (which would, to many defendants, seem like a burden given rise from political obligation) (I thank Dean Roy Sobelson for pointing out to me the prevalent use of the fair play justifications in the modern judiciary in cases such as 'tagging' in his Civil Procedure course.)

Despite its prevalent use in the modern judiciary, Dworkin finds the fair play argument to be rebutted by two counterarguments. Primarily, it is rejected because not everyone would agree to the

exchange: it assumes that obligations can be incurred by those who would not desire what they have been given. Secondly, and perhaps more importantly, the fair play argument is ambiguous in its use of the term 'benefit'. It is impossible to consider if the person would be better off in many senses of the word 'better', if the political institutions were not present. It would be a very weak principle indeed if it was only examined under the state of nature par of Hobbes, that is, better than a war of all against all. And if it were interpreted otherwise, a similar impasse of ambiguity would result: there is no telling if a citizen would truly be better off or not without the benefits of the state.

It is only after rejecting the fair play and Rawlsian conceptions of political obligation, Dworkin goes on to develop his own theory of political obligation as a form of associative (communal) obligation.

⁷⁷ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 196.

⁷⁸ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 200.

⁷⁹ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 209.

⁸⁰ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 210.

⁸¹ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 216.

⁸² Having done this he notes the addendums to clarify that integrity is not always achieved perfectly, particularly under the adjudicative principle there are many inconsistencies and the entire body of law cannot magically be converted into one coherent vision. Moreover, Dworkin explains that integrity is not synonymous with consistency because, in order to make the principles cohere, the institutions will depart from the doctrine of *stare decisis* in order to maintain fidelity to the principles (i.e., coherence in principle trumps consistency in judicial decision).

⁸³ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 225.

⁸⁴ See almost any chapter of *Law's Empire*.

⁸⁵ See: Dworkin, Ronald, *Law's Empire*, pgs. 240-44.

⁸⁶ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 249.

⁸⁷ Please see the individual objections for cites to the page numbers of these objections, immediately following this introductory paragraph.

⁸⁸ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 258.

⁸⁹ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 260.

⁹⁰ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 260.

⁹¹ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 263.

⁹² Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 268.

⁹³ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 130-1, 263.

⁹⁴ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 263.

⁹⁵ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 264.

⁹⁶ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_pg. 267.

⁹⁷ Jules Coleman also defends soft positivism against Dworkin's arguments, see:

Coleman, Jules, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*, Oxford University Press, 2003. Jules Coleman, when considering Dworkin's argument that moral principles lead to a contradiction between the positivist's tenets, stated that "no one nowadays considers this argument convincing," (Coleman, 105) though its importance to modern jurisprudence is unquestionable. Dworkin's argument spawned a dichotomy of positivist views: the exclusive (hard) legal positivists deny that moral principles can be validated by their mention in the rule of recognition whereas inclusive (soft) positivists allow for such a validation. Hart, like Coleman, is an inclusive positivist as he explicitly allows for the existence and recognition of moral principles in the rule of recognition of certain jurisdictions.

The inclusive (soft) positivist, according to Coleman, draws the distinction between the content and the grounds of the criteria of validity. The grounds must be a convention by officials but the content need not state specifically social facts or sources: inclusive positivists allow for morality to be a condition of legality, although it need not be a condition, it can be. And, whether or not morality plays a role in validation depends on the structure and content of the rule of recognition per each jurisdiction. The U.S., for example, explicitly recognizes moral principles in their Constitution, whereas other countries may not. Moreover, some countries may only recognize the validity of moral principles based on their social sources, and some based on both their rule of recognition and their social source.

⁹⁸ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_ pg. 185-6.

⁹⁹ I thank Professor Stephen Guest at UCL for providing this as the basic definition of Hart's positivism_ personal email correspondence.

¹⁰⁰ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_ pg. 247.

¹⁰¹ Although Dworkin is not a traditional natural law theorist as Aquinas, Altman has called him an interpretive natural law theorist. See: Altman, Andrew, *Arguing About Law*, pgs 49-70.

¹⁰² U.S. Constitution Available at: <http://www.usconstitution.net/const.html>

¹⁰³ The fact that justice is specifically referenced in Constitution (the rule of recognition), gives it the function attributed to it by the writers of the rule. This function of Justice as referenced in the rule of recognition is clear, the Constitution was written (in part) to 'establish justice'. Justice could then easily be seen as a kind of 'catch all' in the United States' Constitution that all the laws enacted under the Constitution and its laws must likewise 'establish Justice'.

¹⁰⁴ Schmitz, David, *Elements of Justice*, Cambridge University Press, 2006. See also, David Miller who has a similar conception of justice which accepts need, desert, and equality, but not reciprocity as the elements of justice: Miller, David, *Principles of Social Justice*, Harvard University Press, London, England, 1999.

¹⁰⁵ Schmitz's elements can be used here instrumentally in order to explain cases in terms of justice which could not as easily have been explained in the absence of such a deconstruction. It is used here to make justice's role in legal dispute more easily understood. The assumption that his theory is infallible should not be adopted but it is nonetheless vitally important to realize and accept its instrumentality.

¹⁰⁶ These criminal principles sometimes overlap with the principles of justice, but I believe that they are broader than the principles of justice as they often refer to aspects of morality that may exceed justice. Moreover, these principles of the criminal law (and punishment) are often justified under retributivism which would fit nicely into Schmitz's theory of justice (i.e. the element of justice, desert). However, sometimes they are justified under a utilitarian view, which would at times exceed the boundaries of justice and creep into the realm of other aspects of morality (besides justice).

¹⁰⁷ This distinction between a *branch* of a field and a *field* is vitally important. Fields of law are separate species of law though they may carry similar elements, they are distinct with different subject matter and, sometimes, different procedures. Fields include the commonly accepted categorizations of law (i.e., Criminal Law, Torts, Contract Law, Property Law, etc.). A branch, in the sense in which it will be used here, is a sub-field or a field within a field. Branches can also be seen as entities that have yet to complete the process of division, but perhaps they never will and they will remain a branch of the field forever. Although this distinction is somewhat fuzzy at times, only a moderate understanding is necessary to understand the roles of branches and fields of law in transfer, division, and other processes.

¹⁰⁸ This is an incomplete account of Schmitz's theory outlined for instrumental purposes. Please see endnote #105.

¹⁰⁹ Schmitz, David, *Elements of Justice*, Cambridge University Press, 2006_pg. 180.

¹¹⁰ Schmitz, David, *Elements of Justice*, Cambridge University Press, 2006_pg. 31.

¹¹¹ Schmitz, David, *Elements of Justice*, Cambridge University Press, 2006_pg. 96.

¹¹² Schmitz, David, *Elements of Justice*, Cambridge University Press, 2006_pg. 164.

¹¹³ Schmitz, David, *Elements of Justice*, Cambridge University Press, 2006_pgs 177-80.

¹¹⁴ Holmes, Oliver Wendell, *The Common Law*, Harvard University Press, 1963_ pg. 33.

¹¹⁵ Street, Thomas Atkins, *The Theory and Principles of Tort Law*, Beard Books, Washington D.C. 1996_pg. xxii.

¹¹⁶ Glannon, Joseph W, *The Law of Torts*, 2nd Ed. , Aspen Publishers, 2000_ pg. 3.

¹¹⁷ Street, Thomas Atkins, *The Theory and Principles of Tort Law*, Beard Books, Washington D.C. 1996_pg. xxi..

¹¹⁸ Street, Thomas Atkins, *The Theory and Principles of Tort Law*, Beard Books, Washington D.C. 1996_pg. 497.

¹¹⁹ Please note that entirely distinct substances and procedures is not necessary for division to take place.

¹²⁰ Hart, H.L.A. 'Criminal Responsibility', in *Punishment and Responsibility*, Oxford, 1968_pg. 155.

¹²¹ U.S. Constitution available at: <http://www.usconstitution.net/const.html>

¹²² Dworkin gave a limited response to Hart in: Dworkin, Ronald, *Book Review: Thirty Years On: The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory. By Jules Coleman*, Harvard Law Review, April 2002. Historically, according to Dworkin, positivism has been a political tool used primarily to undermine the natural rights assertions of ancient courts. Dworkin sees positivism's usefulness

as having diminished with the severe technological and sociological changes that have taken place over the course of the last century or so. It was used by such Judges as Oliver Wendell Holmes and Learned Hand to justify highly controversial decisions with appeal to the authority of law (Dworkin, 1677) Nonetheless, Dworkin portrays modern positivism as a guild whose members are deferring to once great philosophical ideas that have no place within the larger social and political realm. There are few, if any, ties between the narrow field of conceptual positivism and the broader spectrum of political philosophy. Positivism, as Dworkin states, is a relic of a past age whose modern academic contenders have shifted the meanings of positivism's terminology to such an extent that the few theses that were traditionally held of the greatest import have been betrayed by their own theorists.

¹²³ 115 N.Y. 506, 22 N.E. 188 (1889).

¹²⁴ 32 N.J. 358, 161 A.2d 69 (1960).

¹²⁵ Id. at 389, 161 A.2d at 86 (quoting Justice Frankfurter). See also, Dworkin's *Law's Empire*, pg. 24.

¹²⁶ 163 U.S. 537 (1896).

¹²⁷ 347 U.S. 486 (1954) and 349 U.S. 294 (1955).

¹²⁸ Dworkin, Ronald, *Law's Empire*, Harvard University Press, 1986_pg. 30.

¹²⁹ Equality could be considered as a third historical root in itself as it is in the Constitution, but it could also be considered as an element of justice.

¹³⁰ Diener, Keith, *Constitutional Interpretations and the Benefits of Meaning Originalism*, "Dialogue", Volume 48, #2-3, April 2006.

¹³¹ U.S. Constitution available at: <http://www.usconstitution.net/const.html>

¹³² Or, perhaps, custom.

¹³³ Hart, H.L.A., *The Concept of Law*, 2nd Ed., Oxford University Press, 1997_ pg. 185-6.

¹³⁴ I realize that this is highly unlikely, but it is possibility. Alternatively, the U.S. could rewrite its Constitution without any reference to morality and begin its entire legal process over without any reference to morals. If this happened then it would be apparent that law (as a concept) has no necessary connection to morality although the law of the U.S. as it is today is connected to morality.

¹³⁵ Custom is another means of validation under Hart but there is no space to address this topic here.

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