Hard Cases in Wicked Legal Systems

Pathologies of Legality

Second Edition

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Judicial Obligation and the Rule of Law

Legal positivism is the leading doctrine about the nature of law. Its proponents insist that a realistic understanding of law must respect a distinction between law as it in fact is and law as we would like it to be. Like Dr Jekyll and Mr Hyde legal positivism seems to lead two distinct lives, one virtuous and one wicked. As Jekyll, and as its proponents claim, legal positivism is a doctrine about the nature of law that, correctly understood, can only help to inculcate morally desirable attitudes towards the law in both judges and citizens.

As Hyde, and as its critics claim, positivism's slogan 'Law is law' is the legal ideology of authoritarianism, of governments which use the law as an instrument of oppression, of politically conservative judges who adopt a mechanical approach to the interpretation of law, applying it without thought of its moral implications, and of citizens who unquestioningly conclude from the mere fact that L is the law that L is worthy of their respect. These critics have tried to show what it is about theoretical Dr Jekyll that might make him haunt the practice of law as Mr Hyde. But positivism's place as the leading doctrine about the nature of law is testament to the difficulty of that task.

In 1967 Ronald Dworkin published the essay 'The Model of Rules',[1] in which he criticized the account of judicial obligation given by legal positivists, principally that of H L A Hart, and offered an alternative. Until the turn of the century, the debate between positivists and their critics focused on the issues introduced by Dworkin, in particular the issue of the judicial obligation in 'hard cases'—cases whose decision turns on contested points of law.[2] In this century, the attention of legal philosophy has changed somewhat, from the question of judicial interpretation of particular laws to the question of the nature of legality or the rule of law. But since, as we will see, the two questions are intimately linked, it

[1] Reprinted under the title 'The Model of Rules I' in R M Dworkin, *Taking Rights Seriously* (London, 1978).

[2] It is, of course, a difficult matter to say when a case becomes 'hard'. We will see that to say that a case is hard when there is no answer at law begs the question in favour of positivism and against Dworkin. For my purposes, a case on a point of law is hard when lawyers disagree about what the judge should decide, when 'informed lawyers disagree about the proper result'; K Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) 75(1) *Columbia Law Review* 385–6.

would be fair to say that legal philosophy is still working out the implications of Dworkin's intervention in 1967.[3]

The debate about judicial obligation in hard cases can usefully be seen as one about a general problem which occupies anyone who offers an account of judicial obligation. In common law jurisdictions, those in which some judicial decisions are precedents or legally binding on judges who decide like cases, over time the law of the jurisdiction will change at the hands of its judges and yet the judges see themselves as bound by law. The problem is to reconcile this apparent tension between judicial constraint and creativity.

The positivists and Dworkin each claim that their particular reconciliation not only correctly describes law but leads in practice to morally superior judicial decisions. The positivists argue that the moral superiority of their solution is due to their distinction between law and morality. Briefly, the positivists accept, while Dworkin rejects, a conception of law which asserts that true propositions of law—correct claims about the legal rights and duties of legal subjects—are determined by factual considerations in the sense that when judges enforce the law they do not, in deciding what the law is on a matter, rely on moral considerations and arguments. Rather, they determine what law is by tests that rely on matters of social fact.

This disagreement about the correct conception of law is also a disagreement about the correct conception of the rule of law, about what is involved in judges enforcing the rule of law. For Dworkin and other critics of positivism, judges who enforce the correct, because morally charged, conception of the rule of law will make of government through the medium of law a more justifiable or legitimate enterprise. For positivists, law has no inherent moral worth and so the legitimacy of government through the medium of law depends entirely on the character of the particular government. The legitimacy of law is always a matter contingent on the kind of law a particular government has as a matter of fact enacted.

In making these claims about law and the rule of law, legal positivists[4] stand with Hart in a certain tradition, which Joseph Raz, himself such a positivist, describes in the following way.[5] Hart is the 'heir and torchbearer' of the legal theory founded by Jeremy Bentham, a 'great tradition in the philosophy of law

[3] As I pointed out in the Preface to this edition, some legal positivists will dispute this claim. On the strongest version of this view, Dworkin's theory has been refuted and legal philosophy has moved on from its distraction of some 40 years with him to a focus on properly philosophical questions about the nature of law. This is a highly stipulative and idiosyncratic move, as it equates doing legal philosophy properly with the methodology and questions of a small though influential group of thinkers. Moreover, since among their questions is the question of the nature of legality, their attempts to sideline Dworkin and other critics of legal positivism look rather odd.

[4] Legal positivism is also associated with philosophers who make rather different claims, for example, Hans Kelsen did not offer an account of legal practice so much as an account of legal order, that is, a theory of the state and its relationship to law. See L Vinx, *Legality and Legitimacy: Hans Kelsen's Pure Theory of Law* (Oxford, 2007) 169.

[5] J Raz, 'Authority, Law and Morality' in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, 1994) 194.

which is both realist and unromantic in outlook'. For Hart shares the 'Benthamite sense' of the 'deleterious moral consequences' of an 'excessive veneration in which the law is held in Common Law countries'. Raz says that 'evident' in Hart's recent work is his 'fear' that legal theory has 'lurched back' in the direction of excessive veneration instead of continuing Hart's project—the laying of the 'foundation for a cool and potentially critical assessment of the law'.

Raz is alluding to the fact that Bentham founded positivism in the last years of the eighteenth century in reaction to what he regarded as the moral dangers of the common law theory dominant at that time, the most famous exposition of which is Sir William Blackstone's *Commentaries on the Laws of England* (1765–9). Whatever the changes in positivism during Bentham's lifetime and after, the sense of these dangers has remained, as Raz suggests, a constant with contemporary positivists. They see Dworkin's critique of positivism as the 'lurch' which attempts to revive common law theory in a modern guise.

This chapter sketches the history of the debate between positivists and their critics from the time of Bentham's attack on common law theory until the present. The debate is sketched as one about the implications of different conceptions of law for the view one takes of the moral worth, if any, of the judicial enforcement of the rule of law. I must note at the outset that there are other ways of understanding the debate.[6] In addition, my concern at this stage is not to suggest new insights into the debate, but only to represent it as it is generally understood. This sketch will serve as the basis for the case-study which follows. It is only after that study has been completed that I will take up the issue of whether it provides us with new insights, which might lead us to understand the debate differently. However, it is worth keeping in mind the following thought as I will argue that it is supported by the case-study.

Notice that Raz talks about an 'excessive veneration' of the law which positivism might have the potential to keep in check. There is of course a gap between excessive veneration and other positive attitudes. If a government that observed the rule of law had by that fact to observe certain moral constraints that improved the lives of those subject to the law then law would deserve our respect because of its moral qualities, even if we recognized that particular bad laws might have in the end no moral claim on us because their immoral content so clearly outweighs the moral quality they necessarily have as law. Of course, if there is reason to accord law moral weight just because it is law, that reason complicates our moral deliberations more than if law had no such weight. But if there is such reason the conclusion that the law is too evil to be obeyed is still perfectly open to us, as long as the reason does not lead to excessive veneration. Indeed, we might even think there is such reason in the face of the fact that governments have used, and will no doubt in the future use, law as an instrument of quite systematic immoral policy. This fact would make us not want to venerate, let alone

[6] See eg J Finnis, *Natural Law and Natural Rights* (Oxford, 1980) 21.

excessively venerate, law. But still we might think that when we condemn such immorality we do so because the overwhelming badness involved in a systematic use of law as an instrument of immorality easily outweighs the moral good that government under law must nevertheless do. We might even say that what has gone wrong is not only the institutionalization of evil but the fact that law has been made the instrument of evil. Notice in this regard that we usually think it appropriate to speak of government *ab*using the form of law to promote immoral policies, and not of a simple use, which implies that the form is generally better suited to promoting something worthy of our respect.

So my thought is that we should be alert to the possibility of a more moderate position on the relationship between law and morality than one that would cause us to 'lurch' to a stance of excessive veneration of the law. As I will argue, just this more moderate position is to be found in the account of legality offered by another and earlier critic of legal positivism, Lon L Fuller. Moreover, as we will see, Fuller appears to adopt a rather different methodology when it comes to legal philosophy from that offered by both the positivists and Dworkin. The positivists and Dworkin seem to proceed by giving an answer to the question 'What is law?' and then reading off their account of the rule of law from that answer. Fuller, in contrast, proceeds by asking what is legality or the rule of law, because for him the question of what counts as a particular law can only be answered if one understands first what is involved in the qualities we attribute to legality.

Fuller, we might say, supposes that law is answerable to legality, by which I mean two related points. First, the question of what is 'law' is one that is best answered by reference to an understanding of what it takes to rule through law, ie what a commitment to legality entails. Second, questions about what 'the law' requires must be answered in such a way that the answers are consistent with the commitment, and, hence, the content of the law is conditioned or determined in part by the principles of legality.

1.1 The Positivist Distinction

Gerald Postema has pointed out that the organizing idea of common law theory is that law is neither something made by a king, a parliament, or judges, nor a set of universal rational principles.[7] Rather law is the expression of standards of reason embedded in historically evidenced national custom. Common law theory can be seen as a response to political absolutism—as an attempt to justify a measure of control over centralized power. It holds that judges exercise this control by interpreting statutes as if they were enacted in order to comply with

[7] G J Postema, *Bentham and the Common Law Tradition* (Oxford, 1986). See also A W B Simpson, 'The Common Law and Legal Theory' in Simpson (ed), *Oxford Essays in Jurisprudence* (Oxford, 1973).

standards of reason embodied in the common law. Among the most important of the standards are those protective of the liberty of the individual.[8]

According to common law theory, while the reason of the common law is embedded in historically evidenced national custom, it is not arbitrary. Standards of reason are embedded in the law because they have stood the tests of time, popular experience, and judicial wisdom. The standards are the coherent product of a process of reasoning by lawyers and judges over time, and they express certain commonly shared values and conceptions of reasonableness and common good. As such, the standards provide a measure for the reasonableness or unreasonableness of actions. It follows for common law theorists that a correct solution to a legal question is not rational, just, and fair merely because it is in accordance with the law. It is rational, just, and fair because it is in accordance with legal standards that embody rationality, justice, and fairness.[9]

In his *Comment on the Commentaries* (1774–6) and *A Fragment on Government* (1776), Bentham argues that two great moral dangers inhere in the morally charged view of law put forward by common law theorists. First, he argues that their view that what is in accordance with law is also in accordance with morality will encourage people to conclude from the mere fact that L is the law that L should be obeyed. Here the danger is that people might be seduced into an 'obsequious quietism'.[10] They will unthinkingly obey bad laws instead of doing what Bentham thinks to be morally required—criticizing the law with a view to its reform.

The second danger arises from two further claims made by the common law theorists. They argue that judges in deciding hard cases do not make new law, because their decisions, if correct, are correct by virtue of the reason already embedded in the law. They also argue that because standards of reason provide the criteria for correctness, judges are not obliged to follow judicial decisions that are, in Blackstone's words, 'flatly absurd or unjust'. As he puts it, such decisions are 'most evidently contrary to reason' or, even worse, to 'the divine law'.[11]

Bentham maintains that these claims license an official élite taking power over morality as well as law. Judges can claim that their own views as to what the law should be are in accordance both with law and with morality.[12] Common law theory seems to give judges a licence to declare the law invalid because it does not accord with right reason. But 'right reason', according to Bentham, means 'What I like'.[13] So the second danger is the opposite of obsequious quietism. It is the danger of anarchy.

[8] See Sir William Blackstone, *Commentaries on the Laws of England* (Chicago, 1977) i, 130–2.
[9] Simpson, 'The Common Law and Legal Theory', 79.
[10] Bentham, *A Fragment on Government*, ed J H Burns and H L A Hart (London, 1977) 498.
[11] Blackstone, *Commentaries on the Laws of England*, i, 69–70.
[12] Bentham, *A Comment on the Commentaries*, ed J H Burns and H L A Hart (London, 1977) 194–5.
[13] Ibid 197–8.

Bentham thinks that the danger of anarchy is compounded by the explanation offered by Blackstone of how the law can exercise a control over an executive eager to be free from all constraint. Blackstone argues that the separation of powers between Parliament, with its supreme power of legislation, and the executive provides a check on a government eager to be free of the constraints of the common law. He says that if ever the distinction between the executive and Parliament is lost, or if one becomes subservient to the other, the constitution will be damaged with serious consequences for liberty.[14]

Bentham scoffs at such faith in the separation of powers. Both he and John Austin, his distinguished disciple, point out that Parliament is for the most part under the effective control of the government.[15] But Bentham also sees implicit in Blackstone an argument which we should note is explicitly put forward by other common law theorists.[16]

The implicit argument focuses on the separation of powers between the courts, the executive, and Parliament; and the courts, rather than Parliament, are seen as the guardian of liberty against the executive. The argument says that judges who interpret statutes in accordance with the moral standards embedded in the common law will see to it that statutes, and therefore executive action under statutory powers, measure up to what they take the moral standards of the common law to require. As Sir Edward Coke put it, 'The surest construction of a statute is by the rule and reason of the common law.'[17]

This focus on the courts as the guardians of liberty was taken up by A V Dicey in his famous lectures on the British constitution published in 1885.[18] Dicey suggested that two features characterize the political institutions of England. First is the 'omnipotence or undisputed supremacy throughout the whole country of the central government'. Dicey points out that during the earlier periods of 'our history' the king was the 'source of law and the maintainer of order' and that this 'royal supremacy' has now passed into the sovereignty of Parliament.[19]

Dicey says that the second feature, 'which is closely connected with the first, is the rule of supremacy of law'.[20] This second feature is the one which for Dicey operates to safeguard the liberty and rights of individuals. It is clear from his discussion of this second feature that to a large extent the safeguard is provided by the 'ordinary tribunals' of the land adjudicating disputes in accordance with the rights of individuals at common law.[21]

[14] Blackstone, *Commentaries on the Laws of England*, i, 48–52.
[15] See Bentham, *A Fragment on Government*, 462–4, esp at 464; J Austin, *Lectures on Jurisprudence* (London, 5th edn 1885) i, 248–51.
[16] Most notably, Sir Mathew Hale. For an account of his views, see Postema, *Bentham and the Common Law Tradition*, 19–27.
[17] Quoted in C K Allen, *Law in the Making* (Oxford, 1978) 456.
[18] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (London, 1987).
[19] Ibid 183. [20] Ibid 184. [21] Ibid 187–96.

Both Bentham and Austin would have thought, with Dicey's twentieth-century critics, that Dicey is caught in an 'irreducible contradiction'[22] between a claim, on the one hand, that the courts can be effective guardians of liberty and an acknowledgement, on the other, that parliaments have supreme power and are under the effective control of governments. But Bentham sees in the faith placed in the courts an invitation to judges to disregard or misinterpret the law. In his view, this faith encourages judges to become part of a 'power-stealing system', to use a device or 'fiction' to conceal what amounts to

> a wilful falsehood, having for its object the stealing legislative power, by and for hands, which could not, or durst not, openly claim it,—and, but for the delusion thus produced, could not exercise it.[23]

It is not that Bentham finds it impossible to conceive that a 'portion of supreme power' can be transferred to the courts. However, in accordance with his democratic convictions about the way in which political power is best distributed, he puts forward a political doctrine of judicial responsibility which rules out giving legislative power to unelected officials. He argues that it is politically inappropriate for judges to have power over laws passed by an assembly in which the popular will has at least some influence. In addition, he points out that judges are appointed by the same body, the executive, whose 'partial and occasional influence' the common law theorists seek to curtail.[24]

Bentham also argues that it is more realistic and morally better to acknowledge that the only real safeguard of liberty lies in having a political system in which the government is subject to the check of free and frequent elections.[25] He and Austin both assert that the only real checks on legislative power are and should be moral and external to the legal system.[26] Indeed, Dicey, while he had some doubts about Austin's theory of sovereignty, agreed with Bentham and Austin that the only effective checks on abuses of government power are external to law—the check of civil disobedience and the check of the character of legislators.[27]

The alternative 'Command' theory of law which Bentham and Austin developed observes a rigid distinction between what law is and what morality requires. It reduces the idea of law to social facts about human behaviour. It holds, firstly, that law exists when the population of a country habitually obeys the commands, backed by sanctions, of the sovereign. The sovereign is the particular person or body who does not obey the commands of any other—he is legally unlimited. Secondly, the Command theory holds that the content of the law, of

Command theory

[22] W Burnett Harvey, 'The Rule of Law in Historical Perspective' (1960–1) 59(1) *Michigan Law Review* 493.
[23] Bentham, *A Fragment on Government*, 509–10.
[24] Ibid 474–92, at 487–8. [25] Ibid 485.
[26] Austin, *Lectures on Jurisprudence*, i, 276–8.
[27] Dicey, *An Introduction to the Study of the Law of the Constitution*, 71–81.

the sovereign's commands, is that which can be identified by tests which rely on factual considerations alone.

Notice two apparent advantages of the Command theory. Firstly, if the law of a legal system is composed of laws publicly knowable because their content can be ascertained by tests that rely on factual considerations alone, it might seem that the moral dangers of common law theory are avoided. Citizens will not be tempted into obsequious quietism because they will know that L is the law merely because L complies with certain factual considerations and not because it is in accordance with morality. And if the law is publicly knowable by factual tests, the law will not be determined by whatever judges happen to like.

Secondly, the theory is elegantly simple. It avoids the muddle of moral, political, and legal claims that common law theorists put forward on behalf of their conception of law. However, a difficulty for the Command theory is that the common law does not fit neatly into the mould of a command with a factual content just because the common law is composed of both the judicial decisions on the facts between the parties to a matter and the reasoned justifications for the decisions.

Bentham and Austin argue that the common law has to be seen as composed of the rules or commands for which judicial decisions stand. In their view, the rules have the status of law, not because they are in accordance with right reason, but because they have not been repealed by the legislature. Their legal status is by virtue of what Bentham calls a tacit or quasi-command.[28]

It is important to note that Bentham was always rather doubtful about whether the common law could be fitted into the mould of factually ascertainable, and therefore publicly knowable, commands. He says of the common law that it is 'but an assemblage of fictitious regulations feigned after the images of these real ones that compose the Statute Law'.[29] Because, in addition, he is averse to the idea of judges having law-making power, he eventually suggested that the common law should be eradicated as a form of law. His view came to be that judges should be stripped of their power to make law so that judicial decisions would not have any force except as between the parties to the case.[30] He dealt with the apparent tension between judicial constraint and creativity by getting rid of the judicial role in shaping the law.

Austin thought that Bentham was wrong on this point and he gives an extended treatment of common law adjudication.[31] In addition, he does not follow Bentham in putting forward a doctrine of judicial responsibility rooted in a democratic theory. His arguments seem designed to show that law is in its nature factually knowable rather than that the law should be made to be factually knowable.

[28] Bentham, *A Fragment on Government*, 429–30; Austin, *Lectures on Jurisprudence*, ii, 642.
[29] Bentham, *A Comment on the Commentaries*, 120.
[30] Bentham, *Constitutional Code*, ed F Rosen and J H Burns, *The Collected Works of Jeremy Bentham* (Oxford, 1983); Postema, *Bentham and the Common Law Tradition*, chs 12 and 13.
[31] Austin, *Lectures on Jurisprudence*, ii.

It is also important to see that Austin did not think that a legal system composed of factually knowable commands and quasi-commands would resolve all legal questions. Judges would still be required to settle contested points of law on which the legislature and the common law had not definitively pronounced.

His reconciliation of judicial constraint and creativity rejects what he calls the 'childish fiction'[32] of the common law theorists that judges merely enforce and declare the law that already exists on a matter. He argues that in many of the cases which come up for adjudication, judges have to decide the matter as between the parties by exercising a law-making power in a manner not dictated by law. The checks or constraints on this power are in fact, as in the case of supreme legislative power, moral and external to the legal system—the opinion of the judge's colleagues, public opinion, and the likely reaction of legislators.[33] The appropriate constraints, in Austin's view, are the dictates of the utilitarian moral theory he espouses.

In a famous essay in the 1958 *Harvard Law Review*, Hart set out a new manifesto for legal positivism by proposing a theory of law for legal positivism that differed significantly from that of his predecessors.[34] However, while I will now show just how his theory differed, I want also to preserve here and throughout the elements that bind Hart and those who follow him to the tradition established by Bentham and continued by Austin.

In the 1958 essay Hart firmly disengaged positivism from utilitarian moral theory and from the Command theory of law. He rejects the Command theory, firstly, because he thinks it evident that there is more to legal order than the compulsion of a command backed by a threatened sanction. Law, he says, is surely not a 'gunman situation writ large'.[35] Secondly, he points out that the Command theory of law seems to put the sovereign outside the law, which does not account for the fact that 'nothing which legislators do makes law unless they comply with fundamentally accepted rules specifying the essential law-making procedures'.[36]

His own claim is that the key to understanding a legal system lies not in the notion of a command backed by a sanction, but in the notion of certain fundamental rules accepted by legal officials as specifying law-making procedures. In 1961 in *The Concept of Law* Hart develops the idea of fundamental acceptance into an account of the 'rule of recognition'.[37] The rule is the most fundamental constitutional rule of a legal system, accepted by at least the officials who administer the law of the system as specifying the criteria of validity which certify whether or not a suggested rule is a rule of the legal system. In terms of this account, legislatures are not legally unlimited even in jurisdictions where there is a strict doctrine of legislative supremacy. For there the courts will recognize as

[32] Ibid 634.
[33] Ibid, esp Lectures XXXVII and XXXVIII.
[34] H L A Hart, 'Positivism and the Separation of Law and Morals', reprinted in Hart, *Essays in Jurisprudence and Philosophy* (Oxford, 1983).
[35] Ibid 59.
[36] Ibid 59.
[37] Hart, *The Concept of Law* (Oxford, 1961) 89–96 and ch 6.

valid only those legislative acts which conform to the criteria of validity in fact embedded in their practice.

In Hart's view, there are two aspects to official acceptance. Firstly, there is the normative aspect—the officials adopt an 'internal point of view'; they accept that they are under an obligation to follow the rule and they manifest this acceptance both by following the rule and by criticizing deviations from it. Secondly, there is the factual aspect—the content of the rule is what was in fact accepted in the past by officials as constituting its content.

It might seem that an account which relies on a notion of official acceptance must involve some moral component. But, through his emphasis on the factual aspect of the rule of recognition, Hart resists introducing a moral component into the account. He follows Austin in taking over a framework for understanding law which relies on claims about what law in its nature is and not on any political doctrine of judicial responsibility. He remains adamant that positivism should retain what he takes to be the central idea in the positivist reaction to common law theory: an insistence on 'the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be'.[38] Hart also thinks that Bentham's and Austin's reason for making the distinction holds good. It will 'enable men to see steadily the precise issues posed by the existence of morally bad laws, and to understand the specific character of the authority of a legal order'.[39]

In sum, Hart's insistence on retaining the positivist distinction between law as it is and law as it ought to be is what binds him to the positivist tradition. The insistence manifests itself, firstly, in the claim that the content of law is knowable by purely factual tests. It manifests itself, secondly, in Hart's account of how a notion of factual official acceptance can reconcile judicial constraint and creativity. Finally, it manifests itself in Hart's claims about the way in which a positivist theory of law, because it denies any necessary connection between law and morality, conduces to morally superior results over rivals which blur the distinction.[40]

1.2 Hart on Judicial Obligation

In his 1958 essay, Hart points out that Bentham and Austin, in insisting on the distinction between law and morality, had in mind the best way to deal with laws the meaning of which is settled. He sees the need for positivism to consider the additional problem of the characterization of legal duty in cases where the law is unsettled. For positivism must, he thinks, respond to a claim that 'an essential

[38] Hart, 'Positivism and the Separation of Law and Morals', 50.
[39] Ibid 53.
[40] Hart, as we will see later, was to change his mind somewhat about the first point, but held steadfastly to the second. In regard to the third, he sometimes expressed himself somewhat ambiguously on the issue of necessary connection but held to the claim about positivism's moral superiority.

Hart on hard cases.

connection between law and morals emerges if we examine how laws, the meanings of which are in dispute, are interpreted and applied in particular cases'.[41]

The threat Hart perceives to the positivist distinction is as follows. Judges are the officials charged with deciding disputes over legal meaning. In doing so, they have to take moral considerations, for example, arguments about social policy, into account. Because their decisions turn on moral considerations, it might seem to follow that the distinction between law and morality is blurred.

Hart, in countering this threat, sets out the positivist view on why disputes over legal meaning arise and on what the judicial obligation is in settling the disputes. He dismisses critics of positivism who claim that it advocates a mechanical and formal kind of decision procedure for settling disputes about legal meaning. He says that the positivists, because they are aware of a certain feature of language, are also aware that judges have to make intelligent judgments about social policy in order to reach their decisions in hard cases.[42]

Communication, Hart suggests, is possible because words have a 'core of settled meaning', of 'standard instances', where there is no doubt about the meaning of the communication. But there is also always a 'penumbra'—an area of 'open texture'[43]—where what a communication means is 'debatable'. If rules are seen as communications across time, as legislation for the future, they too will have a core of settled meaning and a penumbra of indeterminacy or uncertainty.

Hart points out that the aims with which rules are enacted are both general and indeterminate and that human invention and natural processes throw up facts not foreseen by the draftsmen of statutes. He argues, therefore, that the penumbra of uncertainty would exist even in a world where rules were drafted perfectly. So his claim is that uncertainty necessarily arises in legislation because it is inherent in the language in which rules are expressed and it is ineliminable because of problems inherent in legislating for the future.[44]

Since positivism recognizes that adjudication to a large extent involves deciding problems in the legal penumbra where the law is unsettled, it follows that in these penumbral or hard cases the decision is always the result of an intelligent, that is, not a mechanical, judgment. This leaves two questions. Why does the charge of mechanism or formalism arise? How is one to characterize the intelligent judgment which decides a hard case?

In answer to this first question, Hart says that formalism is more a vice of theory than of judges; and then it is more appropriately laid at the door of theorists such as Blackstone, whom, following Austin, Hart accuses of being preoccupied with the separation of powers and of adopting the 'childish fiction' that judges do not make but merely enforce the law that already exists.[45] Hart thinks that when the charge of formalism is made against judges this is really a way of stigmatizing

[41] Ibid 56–7. [42] Ibid 63–70.
[43] Hart introduces the notion of 'open texture' in *The Concept of Law*, 124–5.
[44] Hart, 'Positivism and the Separation of Law and Morals', 63–4, and *The Concept of Law*, ch 7.
[45] Ibid 66.

the policy which the judgment in fact advances; for example, when the judge takes the policy-based decision of adopting the meaning which 'would jump to the mind of the ordinary man' or when he decides according to a conservative social policy.[46]

As a prelude to answering the second question, Hart rejects an argument that the distinction between what law is and what law ought to be is blurred because a judge, in deciding a hard case by an exercise of intelligent judgment, draws on social policies and aims already existing in the law. He says that the contrast between an automatic and an intelligent decision can be 'reproduced inside a system dedicated to the pursuit of the most evil aims'. A decision, for example, can be intelligent if it is guided 'exclusively by consideration of what was needed to maintain the state's tyranny effectively'.[47]

Hart's point here foreshadows the positivist reliance on hard cases in wicked legal systems as an alleged counterexample to Dworkin's theory of adjudication. It is that in such systems the intelligent judgment might advance some morally repugnant policy, and so such systems serve to show that an intelligent judicial decision as to what law ought to be need not be in accordance with what morality requires.

This point is clearly ancillary to Hart's main argument, which is that the correct characterization of judicial obligation in hard cases is one that respects the positivist distinction. Like Austin, he holds that judges often or even usually do not decide hard cases in accordance with what law is. Rather they make a ruling that is not dictated by law.

Hart acknowledges that he cannot 'refute' an argument that the aims and policies of the penumbra are as much law as the 'core of legal rules whose meaning is settled', since in effect the argument is an '*invitation* to revise our conception of what a legal rule is'. But he says that he wants to 'refuse' the invitation.[48] In his opinion, a vocabulary which blurs the distinction between what law is and what law ought to be is mysterious and there is an unmysterious one available. The unmysterious vocabulary is one that observes the distinction by adopting the language of judicial discretion—'the language of choice between alternatives'.[49]

In addition, he charges the mysterious vocabulary with asserting that 'all legal questions are fundamentally like those of the penumbra', thus neglecting the fact that the 'hard core of settled meaning of a law is law in some centrally important sense and that even if there are border lines, there must first be lines'. The mysterious vocabulary, he claims, abandons the notion that rules have authority and that there is any 'force or even meaning to an argument that a case falls clearly within a rule and the scope of a precedent'. His point is that positivism, in avoiding formalism, does not succumb to a scepticism which holds that all

[46] Ibid 67–8. [47] Ibid 69–70.
[48] Ibid 71 (his emphasis). [49] Ibid 71–2, 87.

legal questions lack determinate answers. Rather positivism shows where the authority of law lies.[50]

Notice the direction of Hart's argument. His premiss is the positivist one that law is settled law and his conclusion is that judges have a discretionary power in the decision of hard cases. If we amplify the premiss in line with Hart's account of the rule of recognition, we can see how Hart and other positivists think that a theory of adjudication based on the notion of (factual) official acceptance reconciles judicial constraint and creativity. We can see why Hart thinks that the distinction between law and morality explains both the authority of law over judges and the fact that the judicial decision of hard cases is not determined by law.

Positivists hold that in order to determine the law of a legal system we find out first what legal officials in fact recognize as the sources of law of that system. We then determine the laws which stem from those sources by using the very tests the same legal officials would be required to use; those which legal officials have made a practice of using in the past. Hence the legal constraints on judges are constraints of established practice. Judges regard the fact that certain tests have been used in the past as legally compelling or conclusive, what Hart later called 'peremptory', reasons to use them.[51]

But there is more to these reasons than their peremptory quality. They are, as Hart terms it, 'content-independent'. Such a reason requires the person to whom it is addressed to act as the reason requires independently of the nature and/or character of the actions it requires.[52] For positivists, the primary judicial obligation is to apply the law as it is determined to exist in this content-independent way. It follows that where judges base their decisions on reasons which are not content-independent, the judges are no longer engaged in legal reasoning. Rather, just as Austin argued, the judges are exercising a law-making discretionary power, the checks on which are moral and external to the legal system.[53]

Judges will be required to exercise such a power, firstly, as a result of the uncertainty inherent in legislating for the future. The tests which the judge is required to use might show that there is in fact no law on the matter. Secondly, discretion might arise because judicial practice is itself indeterminate. For example, in determining the meaning of a statute, a judge might find that two different presumptions of statutory interpretation are arguably appropriate and that they lead to different results. Notice that if judges make a practice of applying one presumption rather than the other, at some point they will be required to apply

[50] Ibid 71–2. For a detailed account of the pitfalls of 'rule scepticism' and Hart's argument that positivism avoids them, see Hart, *The Concept of Law*, ch 7.
[51] Hart, *Essays on Bentham* (Oxford, 1982) 252–4.
[52] Ibid 254–5. Joseph Raz has the most developed account of such reasons, which he calls exclusionary reasons because they exclude certain considerations as a basis for action; see, especially, Raz, *Practical Reasons and Norms* (London, 1975).
[53] See eg Raz, 'Legal Principles and the Limits of Law' in M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Totowa, New Jersey, 1984) 77.

that one because practice is no longer indeterminate. As Hart puts it, in the case of indeterminacy within the rule of recognition, 'all that succeeds is success'.[54]

If there is a doctrine of precedent in the jurisdiction, the judge's decision as to what a statute should be taken to mean may do more than settle the matter between the parties.[55] It may be taken by future judges to have authoritatively settled the issue of what the statute means. The same applies to the law whose source is other judicial decisions—the judge-made or common law.

For positivists a body of common law will exist when some judicial decisions are viewed by judges as validly laying down rules for the future: the rules constrain judges because the judges take them to stand for rules or propositions of law. As the positivists see it, a doctrine of precedent will generally both bind judges and give them power to change the law. A judge may narrow down the rule for which the previous decision stands by distinguishing the matter before him from the previous one, as long as the rule for which he takes the previous decision to stand still justifies that decision. Or judges may discard a restriction in the previous decision and extend the rule to cover new matters as long as the extended rule still justifies the previous decision. In both these situations judges alter the rule, but it continues to exercise a constraint on them because the changed rule still has to be a justification for the past decision. Finally, judges sometimes have the power to overrule past decisions, on the positivist view, by discarding the rule for which a past decision stands. Here the only constraint on judges is again the moral and external one which is the ultimate consideration on which any exercise of discretion is based.

This solution to reconciling judicial constraint and creativity also indicates the positivist view of the status of judicial mistakes about what practice requires or about what law is. Judicial mistakes as to what practice requires may create controversy about what it requires and this will unsettle previously settled law.[56] Here the judges exercise a discretion which they do not in fact have, and I will refer to this legally unpermitted exercise of discretion as the 'arrogation of a discretion'. Such a mistake, as well as mistakes as to what settled law is, may in fact become the law, depending on the status of the court that makes the mistake and the attitude of future courts.[57]

[54] Hart, *The Concept of Law*, 149.

[55] Hart, *The Concept of Law*, ch 7, esp 121–3, 130–2. The description of the positivist attitude to precedent offered here relies also on Sir Rupert Cross, *Precedent in English Law* (Oxford, 1979) ch 7, and Raz, *The Authority of Law* (Oxford, 1983) ch 10.

[56] Raz says that it is only in the case of controversy between legal officials about what the rule of recognition requires that controversy is proof that the law is unsettled; that is, because there is then no fact of the matter about what practice requires; *The Authority of Law*, n 16 at 69.

[57] Raz argues that the fact of controversy about what the correct answer to a legal question is is not proof that there is no settled law. All that this goes to show is that experts can be wrong about matters of fact: 'Authority, Law and Morality', 218–19. See W J Waluchow, 'Herculean Positivism' (1985) 5 *Oxford Journal of Legal Studies* 203–4, for a discussion of the distinction between a judge having a discretion and exercising a discretion which he does not have.

Hart's account of the common law thus differs from that of Bentham and Austin in the following way. He holds that judges are under an obligation to regard precedent as binding, not because the legislature has failed to repeal the rules for which the precedent stands, but because the judges are required by their own established practice to regard the precedent as binding.

Hence, the contemporary positivist reconciliation of constraint and creativity involves a claim about constraint: judicial obligation coincides with the judge's duty to apply the tests which judicial practice recognizes as appropriate and the law which the tests pick out in a content-independent way. It also involves a claim that judges have to exercise a law-making discretion when there is no settled law on a matter either because judicial practice is equivocal on what tests a judge should use to determine what law is, or because of the uncertainty inherent in legislating for the future. Finally, it involves a claim that in systems where there is a doctrine of precedent, judges may have a discretionary power in certain circumstances (perhaps in almost every case that comes before them for adjudication on a point of law[58]) to change, extend, or overrule judge-made law.

I showed above that this reconciliation arises from the premiss that the law of a legal system is confined to its settled law. I also pointed out that Hart thinks that one would go astray in looking for the nature of law in the penumbra where law is unsettled, not least because one would not then be able to explain the authority of law. In the context of the positivist account of adjudication, the premiss manifests itself in the claim that judges have to exercise a law-making discretionary power in deciding hard cases, the control on which is ultimately external to the legal system.

In addition, the premiss tells us that contemporary positivism is not a theory of adjudication but a theory of law; for positivism does not put forward a political doctrine of judicial responsibility which tells judges how they ought to go about the morally charged business of deciding hard cases. Positivism merely tells us that a sound theory of adjudication would be one which addresses itself to such questions as how discretion should be exercised and how much discretionary power judges should have. Put another way, positivists do not provide a solution to the problem of reconciling constraint and creativity for particular jurisdictions, but only the structure within which particular solutions should work. To fill in the structure would require, amongst other things, a doctrine of judicial responsibility which would tell judges what they ought, morally speaking, to do.

I do not at this point go into the various and complex arguments which different positivists think justify the premiss that law is settled law.[59] My sole concern is

[58] See Raz, 'Facing Up: A Reply' (1989) 62 *Southern California Law Review* 1204.

[59] Hart, *The Concept of Law*, 204–7, suggests that the premiss should be adopted because it is theoretically more fruitful and will lead to good moral consequences. However, in 'Comment on Dworkin' (R Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart* (Oxford, 1987)), he suggests that positivism adopts the premiss for the sake of theoretical fruitfulness alone. N MacCormick believes that Hart's view of law is justified by moral

with what, as contemporary positivists see it, follows from that premiss. As I have indicated, in 1958 Hart claimed that the merits of positivism are that it avoids the mysteries of positions which blur the distinction between law and morality. But he was, at that time, also concerned to rebut a charge that it is positivism that promotes obsequious quietism because it is 'not only intellectually misleading but corrupting in practice, at its worst apt to weaken resistance to state tyranny or absolutism, and at its best apt to bring the law into disrespect'.[60]

1.3 The Truly Liberal Answer

This charge was born of the horrors of the Second World War. It was put forward by German lawyers, most notably Gustav Radbruch, who had rejected positivism's slogan 'Law is law' because they thought that their experience showed that it had contributed to the subservience of the German legal profession to Nazism. On the basis of that experience, Radbruch came up with what came to be known as the Radbruch Formula—'Extreme injustice is no law!'

As Hart understands it, Radbruch's argument is that the positivist distinction between law and morality corrupts practice precisely because it insists on a distinction between what law is and what law ought to be. Positivism is alleged to encourage citizens to believe that the certification of a law as valid is not affected by the fact that it grossly offends moral standards, and this will in turn encourage citizens to obey bad laws.[61] Hart portrays Radbruch's argument as follows. There are fundamental principles of humanitarian morality which are part of the very concept of *Recht* or Legality. Laws which transgress these principles for that reason lack legal character and should be denounced as such by judges and lawyers. Moreover, the laws should not count in 'working out the legal position of any given individual in particular circumstances'.[62]

Hart, despite his sympathy for the motives of these German lawyers, accuses them of 'extraordinary naïvety' for thinking that the view that laws are laws whatever their moral character had contributed to subservience to state power

reasons: *H. L. A. Hart* (London, 1981) ch 12. He also argues that this is the only way to go about justifying the premiss; MacCormick, 'A Moralistic Case for A-Moralistic Law', (1985) 20 *Valparaiso University Law Review* 10–11. Raz seems to think that the positivist view of law is correct because it is in fact the view adopted by participants in a legal practice, but his argument is not one which depends on appeals to actual practice. It hinges on the claim that only his positivist view of authority can explain how it is that authority is 'serviceable'; see esp Raz, 'Authority, Law and Morality'. But compare Raz, 'Authority and Justification', (1985) 14 *Philosophy and Public Affairs* 27, where he calls his account of authority 'partisan', though without elucidating his reasons for choosing it above others.

[60] Hart, 'Positivism and the Separation of Law and Morals', 50.

[61] Hart relied on translations prepared by L L Fuller of certain of Radbruch's post-war essays: Hart, 'Positivism and the Separation of Law and Morals', ibid n 42 at 74.

[62] Ibid 72–8, at 74.

in Nazi Germany. Rather, Hart says, this 'terrible history' prompts enquiry into why emphasis on the slogan 'Law is law' and the distinction between law and morality acquired a sinister character in Germany, but elsewhere are associated with the most enlightened liberalism. In his view, the 'truly liberal answer' to any sinister use of the slogan 'law is law' is: 'Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality.'[63]

Hart goes on to argue that the road to the truly liberal answer lies in acknowledging that laws may be too evil to be obeyed. He uses the example of a decision whether to punish a person now for doing something grossly immoral but legal at an earlier time. In his view, Radbruch is committed to dealing with the situation by stripping the old law of its legality and then punishing the person for having transgressed whatever law made the immoral offence illegal. But, Hart argues, this solution hides the fact that the situation is a moral quandary—one has to choose between the evil of retrospectivity and the evil of leaving unpunished the person who had obeyed a law too evil to be obeyed. The vice in Radbruch's solution is that it would

> serve to cloak the true nature of the problems with which we are faced and encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.[64]

In the last section, I showed how Hart deals with the question of how to characterize legal duty when the law is unsettled. Here the problem is how to characterize moral duty when the law is settled but evil. But notice that Hart's answer here is similar to his answer to the first problem. He thinks that the vocabulary positivism adopts can get the situation right while the alternative vocabulary distorts the situation by blurring the distinction between the law as it is and the law as it ought to be.

It is instructive to note, as Hart acknowledged later, that his example, which he had thought to be that of an actual case decided in Germany in 1949, was inaccurate.[65] The statute in question made it an offence, punishable by death, to insult Hitler. A German woman had rid herself of her husband by denouncing him to the authorities for having made insulting remarks about Hitler. The 1949 court had held, not that the statute lacked the character of legality, but that it did not impose a duty on the wife to do what she did, and that, therefore, she had illegally deprived her husband of his liberty.

But despite this acknowledgement, Hart nowhere adverts to the possibility that the German court in 1949 had, in order to get to what it considered the just result in the case, based its reasoning on a view of law imbued with ideals that

[63] Ibid 74–5. [64] Ibid 77.

[65] Ibid n 43 at 75. That Hart and others had got the facts of the case wrong was pointed out by H G Pappe, 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 *Modern Law Review* 260, 274.

blur the distinction between what law is and what law ought to be.[66] Nor does Hart take up the point that, on his own portrayal of Radbruch's position, it seems that Radbruch was not much concerned with the naïve claim that the German people had been misled by legal positivism. Rather he seems concerned with the more interesting claim that German lawyers and judges had been misled by legal positivism in determining what their legal duty involved, including the judicial obligation in the decision of hard cases.

Indeed, this was Radbruch's concern. He says that the positivist belief that 'a law is a law' had made 'the German legal profession defenceless against statutes that are arbitrary and criminal'.[67] He does advert to the possibility that a 'conflict between statute and justice reaches such an intolerable degree that the statute as, "false law", must yield to justice'. However, his main argument is not that a morally charged view of law requires one to decide that laws are too unjust to be worthy of the status of law. Rather he argues that, at a certain stage of injustice, laws will lose all the attributes, including the formal or positive ones, which we associate with the very idea of law:

> It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'false law', it lacks completely the very nature of law. For law, including positive law, cannot otherwise be defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist Law never attained the dignity of valid law.[68]

I suggest that it is likely that Hart did not take up this point because he thought that the notion of a morality inherent in the very idea of law is empty. For he goes on to dismiss the claim that all legal systems have to comply with certain principles of legality which have the effect of imbuing the legal systems with a minimum moral content; for example, the principle of fairness observed in treating like cases alike.[69]

In Hart's view, wicked legal systems are a sufficient counterexample to such a claim. For 'a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between the persons affected, laws

[66] Pappe, ibid, describes the reasoning in this way. See further my translation of the case, an appendix to my treatment of it in 'The Grudge Informer Case Revisited' (2009) 83 *New York University Law Review* 1000–34.

[67] G Radbruch, *Rechtsphilosophie* (Stuttgart, 1973) 344–6. I rely here on the translation by B Litchewski Paulson and S L Paulson, 'Statutory Lawlessness and Supra-Statutory Law' (2006) 26 *Oxford Journal of Legal Studies* 1, 6.

[68] Ibid 6–7.

[69] He also considered another argument—that there are certain facts about human nature with which any system of rules regulating human behaviour has to deal, and that this requirement ensures a certain moral content to legal systems. For a developed exposition of his counter-argument, see *The Concept of Law*, ch 9.

which were hideously oppressive . . .'.[70] Thus he says that even if there are principles which amount to minimum requirements for legality, they would not imbue a legal system with a minimum content of morality and hence their existence would not threaten the distinction between law and morality. Indeed, Hart's conviction that the notion of a morality inherent in the very idea of law is empty drives the contemporary positivist response to both of the two leading critics of contemporary positivism—Lon L Fuller and Ronald Dworkin.

1.4 Fuller on the Rule of Law

Fuller's arguments in reply to Hart, and in much of his subsequent work, are best seen as an attempt to show why law necessarily has a moral quality to it because law to be such must be answerable to principles of legality. Fuller thought that in his 1958 manifesto Hart had gone some way to acknowledging this point because Hart had seen that one of the chief issues in the debate between positivists and others was how best to 'define and serve the ideal of fidelity to law'.[71] However, Fuller accuses Hart of not accepting the implications of this acknowledgement. His fault, Fuller thinks, stems from a positivist reluctance to infuse morality into the law, a reluctance based in the fear that bad moral values might in fact be infused. In his view, this fear betrays an assumption that 'evil aims may have as much coherence and inner logic as good ones'.[72] By contrast, his own starting-point is a faith in the moral resources of law and in particular that when people are compelled to explain and justify their decisions, the effect will generally be to pull those decisions towards goodness, by whatever standards of ultimate goodness there are'.[73]

Fuller's main argument is that there are eight principles of legality which are inherent in the idea of law: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time, and, the one which he took to be the most complex, congruence between official action and declared rule.[74] A system which fails completely to meet one of these requirements, or fails substantially to meet several, would not, in his view, be a legal system. It would not qualify as government under law—as government subject to the rule of law.

Fuller's claim is that compliance with the eight principles imbues law with a moral content, an 'inner morality'. He thus claims that compliance with the eight principles would make a positive moral difference to all legal systems, even wicked ones. Even a tyrant who wanted to govern through the medium of law

[70] Hart, 'Positivism and the Separation of Law and Morals', 81.

[71] L L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 632.

[72] Ibid 636. [73] Ibid.

[74] These are set out in detail in Fuller, *The Morality of Law* (New Haven, Conn, 1969).

would have to comply with the eight principles, and this would preclude rule by arbitrary decree and secret terror, which, Fuller says, is the most effective medium for tyranny.[75] Hence his argument, like Blackstone's, is one which emphasizes legislative limits on government power.

However, Fuller's argument has seemed to fare no better than Blackstone's. By way of response, Hart pointed out a distinction between the notion of purposive activity and morality. Poisoning, he said, is a purposive activity and there are no doubt principles that guide an effective act of poisoning.

> But to call these principles of the poisoner's art 'the morality of poisoning' would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is informed.[76]

Hart thus reiterated that 'principles of legality' are 'neutral between good and evil substantive aims'. All Fuller could show, in his opinion, is that the principles were 'incompatible with the pursuit of vaguely defined substantive aims, whether they are morally good or evil'.[77]

Indeed, the positivists have not responded to Fuller by denying that law to be such must to some extent comply with principles of legality very much like those on Fuller's list. Rather, in line with their view of law as settled law, they respond by taking the function of law to be the authoritative provision of standards to guide behaviour. As Raz argues, it follows (for positivists) that the principles of legality which make up the idea of the rule of law, of government within a fixed framework of rules, enhance the ability of law to guide behaviour.[78]

Thus while Raz concedes that law which lives up to this virtue may serve morally valuable ends, he also stresses that whether morally valuable ends are served depends on the factual content of the rules in the fixed framework. Judges, in seeing that official action is congruent with declared rules, do no more than apply the law with the content it in fact has. For Raz the principles of legality are mere principles of efficacy which make the law into a better or worse instrument for achieving the ends of the powerful. While the rule of law might be the virtue or 'specific excellence' of law, it is the virtue of law in the sense that sharpness is the virtue of knives.[79]

In the face of such critiques, Fuller was driven to admitting that there was no 'logical contradiction in the notion of achieving evil, at least some kinds of evil, through means that respect all the demands of legality'.[80] So he is generally thought to have had the worst of the debate about the rule of law. But he does

[75] Ibid, esp ch 2.
[76] Hart, *Essays in Jurisprudence and Philosophy*, 350.
[77] Ibid 351–2. It is worth noting that South Africa is the example of the wicked legal system in this exchange between Hart and Fuller.
[78] Raz, *The Authority of Law*, ch 11.
[79] Ibid 225–6.
[80] Fuller, 'A Reply to Professors Cohen and Dworkin' (1965) 10 *Villanova Law Review* 664.

make some interesting suggestions about how the debate could productively be continued.

Firstly, he claims that the key to understanding the rule of law is the eighth principle—congruence between official action and declared rule.[81] Secondly, he suggests that the workings of the principles of legality, especially the eighth, will be revealed if one pays attention to their operation in answering practical questions of legal interpretation.[82] Thirdly, he rejects as unhelpful both the positivist vocabulary of judicial legislation and the distinction between law and morality it observes. A judge, in his opinion, can only resolve hard cases if 'he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it ought to be'.[83]

Finally, Fuller criticizes positivists for not seeing that interpretation in law is purposive. He argues that fidelity to law is served when judges interpret particular laws in accordance with the principles of legality so that these principles inform the judicial understanding and interpretation of the law.[84] And he makes clear in his last major work his view that in common law jurisdictions, the principles of the common law provide the resource on which judges draw in enforcing the eighth requirement.[85] As he sees it, the common law provides this resource, not because it consists, as the positivists maintain, in discrete rules of law. Rather the common law provides a context of legal and moral standards in which the legal data, including statutes, are to be interpreted and thus which give some sense to the notion that law can 'preexist its declaration'.[86] So Fuller was moving from a Blackstone-like emphasis on legislative constraints on executive power to the Dicey-like argument which Bentham and Austin thought lurked in Blackstone. For he was beginning to suggest that judges can exercise a constraint on the executive by interpreting statutes in accordance with the 'rule and reason of the common law'.

But it is not clear how Fuller thought that these suggestions could meet the positivist claim that the inner morality of law consists merely of techniques of efficacy. In addition, it is not easy to see what 'ideal of fidelity to law' he can pin on contemporary positivists, given that they expressly refrain from putting forward a doctrine of judicial responsibility.

In later work, he contrasts his view of the authority of law—the 'product of an interplay of purposive orientations between citizens and government'—with that of the positivists, which he takes to be a 'one-way projection of authority, originating with government and imposing itself upon the citizen'.[87] But, as we have seen, while the positivists think that the primary duty of a judge is to apply settled law, they also think that the authority of law runs out in hard cases. In such cases a judge has to exercise his discretion and make an intelligent judgment

[81] Fuller, *The Morality of Law*, 209.
[82] Ibid 91, 232.
[83] Fuller, 'Positivism and Fidelity to Law', 647.
[84] Ibid 661–9.
[85] Fuller, *Anatomy of Law* (New York, 1968) 84–112.
[86] Ibid 96–8.
[87] Fuller, *The Morality of Law*, 204.

about social policy. His decision, as Hart suggests, might be conservative. But then we should criticize the judge on these grounds and not attribute the practical effects of his political convictions to positivism. As a result, the positivists think that moral arguments about the rule of law, for example, arguments about whether it serves democratic ideals for judges to have a supervisory power over legislation, are not appropriately put forward as arguments about the rule of law. For on the positivist account of the rule of law, it has to do with considerations about the effectiveness of law. And moral arguments like those about what serves democratic ideals best are more appropriately addressed to such issues as how much discretion judges should have and how they should exercise it.[88]

The supposed failure of Fuller's enterprise might seem even more evident when we see that Hart's, and in general the positivist, response to him echoes a criticism of Fuller first put by Dworkin, who a few years later took over from Fuller the role of leading critic of Hart's positivism. Dworkin said that if tyrants preferred not to rule through law this would be because they feared publicity and not because there was any constraining inner morality of law.[89] Thus he rejected Fuller's claim that laws enacted to achieve evil ends are necessarily vague and therefore lacking in the quality of legality, saying that a 'perfectly evil statute can be drafted with exquisite precision'. The only substance in Fuller's position, Dworkin thought, was that if we have to interpret a law whose fundamental purpose is obnoxious to our sense of morality, we might have difficulty in understanding the law because we would 'gain no help from our sense of fairness in making discriminations under it'.[90] And Dworkin suggested that positivism was best attacked by exposing its 'unacceptable account of the logic of legal standards'.[91] But we will see that positivists think that Dworkin's critique, which is the one indicated by Fuller's move to the Dicey-like emphasis on judicial constraints on executive action, founders like Fuller's on the example of the wicked legal system.

1.5 Dworkin's Logic of Legal Standards

Dworkin's main challenge is to the positivist claim that the law of a legal system is confined to its settled law—the rules whose content can be determined by purely factual tests. He attacks the idea that the law of a legal system is exhausted by the content-independent rules determined by one master rule—the rule of recognition.[92]

[88] See Raz, *The Authority of Law*, 216.

[89] Dworkin, 'Philosophy, Morality, and Law: Observations Prompted by Professor Fuller's Novel Claim' (1965) 113 *University of Pennsylvania Law Review* 672.

[90] Ibid. [91] Ibid 687.

[92] See especially Dworkin, *Taking Rights Seriously*, ch 2, but I will also describe the argument as it came to be clarified in later work, most notably, *A Matter of Principle* (Cambridge, Mass, 1985) and *Law's Empire* (London, 1986).

Dworkin argues that if we look to the way judges decide hard cases, we can see that they do not appeal only to rules. They also appeal to other sorts of standards which Dworkin calls principles. The difference between the two sorts of standards is that rules decide issues in an all-or-nothing fashion while principles support a decision. Principles figure in the rationales or reasoned justifications for rules and, in Dworkin's view, hard cases arise when two principles dictate different results. For example, the judge might have to decide between two different principles of tort law or whether the principle of fairness, which requires him to follow precedent, is outweighed by the fact that the rationale for the precedent decision is a bad one.

Such determinations of weight will often, Dworkin says, be controversial and will require a judge to exercise his moral judgment. In addition, Dworkin suggests that the very determination of what the different principles at stake are might require an exercise of moral judgment. So it is no part of his argument that the principles must have been recognized as legal standards in the past. Indeed, his account requires judges to distinguish between 'principles' which are 'requirements of justice, fairness or some other dimension of morality' and 'policies' which set out 'some goal to be reached, generally an improvement in some economic, political or social feature of the community . . .'.[93] Only principles can, in Dworkin's view, form a basis for the judgment that a decision is in fact justified in law.

Dworkin also claims that his account of the role of principles fits legal practice. He points out that judges usually justify their decisions by an argument which appeals to both rules and principles and that they seem to suppose that their argument justifies one unique answer which it is their legal duty to give. In addition, the parties to a case suppose that one of them has a right to the decision which the judge is legally required to give. Thus Dworkin claims that positivism's view of law is counter-intuitive because it entails the conclusion that judges in deciding hard cases retrospectively decide the rights of parties in an exercise of discretion not determined by law.

Thus on Dworkin's account of the logic of legal standards, judges do not have a discretionary power in the decision of hard cases. For his account suggests both that the reach of law is much more extensive than the positivist view of law as settled law supposes and that the law provides resources supporting one party's claim to have a legal right to a particular decision. Of course, the decision of such cases will be as controversial as the moral and political considerations which determine weight. But Dworkin says that to deny that hard cases have one unique answer because the answer is a matter of moral controversy is to deny that controversial moral questions have right answers. And he supposes that the positivists do not rest their case for their view of law on that sort of scepticism.

In response, Hart admits that his early work did not sufficiently bring out the importance attached by courts

[93] *Taking Rights Seriously*, 22.

when deciding cases left unregulated by the existing law, to proceeding by analogy so as to ensure that the new law they make is in accordance with principles or underpinning reasons which can be recognized as already having a footing in existing law.[94]

And Raz emphasizes that as far back as Austin, positivists have recognized that rules of law can expressly or by implication incorporate moral principles, so that it is the judicial obligation in hard cases to which such principles are relevant to decide the cases in accordance with the principles.[95]

Hart and Raz thus remain undaunted by Dworkin's account of the logic of legal standards. For them, because law is determined by factual considerations alone, it follows that the evidence for discretion is stronger the more principles are shown to intrude on the decision of hard cases. As Hart puts it:

> For though the search for and use of principles underlying the law defers the moment, it cannot eliminate the need for judicial law-making, since in any hard case different principles supporting competing analogies may present themselves and the judge will have to choose between them, relying like a conscientious legislator on his sense of what is best and not on any already established order of priorities among principles already prescribed for him by the law.[96]

Some followers of Hart offer a different response. They hold that if a moral principle is legally relevant to the decision of a legal question, and answers the question in the morally best way, then that answer is also correct in law.[97] Thus they hold that moral claims can count among the truth conditions of propositions of law. But they argue that it is a contingent matter whether such moral principles are incorporated into the law of any particular legal system.

On their view, if moral principles are in fact incorporated, then adjudication might be much as Dworkin describes it. But if such principles are not incorporated, then adjudication will be different. They think that a caveat as to the contingency of the presence of morality in a legal system binds them to the positivist tradition in which Hart stands and avoids the dangers that usually attend blurring the distinction between law as it is and law as it ought to be. I will refer to those positivists who continue to regard law as determined by factual considerations alone as 'exclusive legal positivists' and to those who think that, contingently, law may be determined by incorporated moral standards as 'inclusive legal positivists'.[98]

[94] Hart, *Essays in Jurisprudence and Philosophy*, 7.

[95] Raz, 'Legal Principles and the Limits of Law', 74–5.

[96] Hart, *Essays in Jurisprudence and Philosophy*, 7, and Raz, 'Legal Principles and the Limits of Law', 75–6.

[97] eg P Soper, 'Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute' (1977) 75 *Michigan Law Review* 511–19; D Lyons, 'Principles, Positivism and Legal Theory' (1977) 87 *Yale Law Journal* 415–35; J Coleman, 'Negative and Positive Positivism' in M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (London, 1984); Waluchow, 'Herculean Positivism'.

[98] I prefer 'inclusive' to 'incorporationist' as all positivists recognize that a particular rule of recognition might require judges to take moral standards. Note that Hart in the Postscript to the second edition of *The Concept of Law* expressed his agreement with inclusive legal positivism—see Hart, 'Postscript' in P A Bulloch and J Raz, *The Concept of Law* (Oxford, 1994) 238–76, at 250–4.

In a large extent, the debate between Dworkin and positivists has been stalemated on the issue of who has the logic of legal standards right. It is already clear that their different solutions to the problem of reconciling judicial constraint and creativity both rest on accepting that judges' moral convictions play an essential role in the adjudication of hard cases. But it is important to see that a reason why Dworkin has not been able to persuade positivists that his logic should be preferred to theirs is that they reject a substantive claim implicit in his distinction between principle and policy.

The substantive claim is that there is no sharp distinction between legal duty and moral duty, something exposed by the fact that judges, in deciding hard cases, have to show how the legal principles which justify those decisions in law also provide a moral justification for the decisions. In section 1.6, I will set out the substantive claim and, in section 1.7, I will show why positivists think that wicked legal systems are a counterexample to it.

1.6 The Soundest Theory of the Law

A legal theorist's conception of law tells us, among other things, what it is that makes a standard or principle a legal one. For example, positivism distinguishes the legal from the moral because it holds that moral claims do not, or at least do not necessarily, count among the truth conditions of propositions of law. I showed in the last section that Dworkin argues for a logic of legal standards in which legal considerations that are also moral determine the answers to the questions posed by hard cases. Hence his own theory of law and of adjudication must be one which does not establish the sharp distinction between law and morality upon which the positivists insist. As a result, he has to answer the question, 'What distinguishes the legal from the moral?'

Dworkin's answer is that a moral principle, in addition to being a moral principle, is also a principle of law if it figures in a particular way in a judgment in a hard case.[99] He recognizes that in any hard case there will be a mass of legal materials—explicit law—which affects the answer to the legal question in the case in the following way. A judge who had to decide the question would be under a legal duty to base his decision on the materials. So Dworkin claims, firstly, that the decision must be the conclusion of an argument which makes sense of or explains the explicit law. It must, as he puts it, pass a 'threshold test' of 'fit'.

Secondly, the judge's argument must show why the decision should be preferred to any other which passes or is argued to pass the threshold. Dworkin says that the judge should prefer the argument which provides the best moral justification of the relevant legal materials, even if this justification does not fit the relevant material as well as another. This is the test of 'soundness'. The correct decision in

[99] See eg Dworkin, *Taking Rights Seriously*, ch 4.

a hard case is, then, one which is correct across two dimensions—the explanatory dimension of fit and the moral dimension of soundness. And it is clear that soundness is the conclusive consideration, something emphasized in Dworkin's recent work where he argues that decisions about fit and soundness occur within an overarching context of soundness or justification.[100]

He calls the set of principles which explain and justify the correct propositions of law of a legal system 'the soundest theory of the law'. For him 'a principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question'.[101] As he sees it, then, the principles of morality are not coextensive with legal principles: only the moral principles which figure in the soundest theory of the law of a particular jurisdiction are also legal principles.

For Dworkin, the judicial obligation in a hard case is to apply this soundest theory of law. He captures this duty in the slogan which makes his label 'constructivism' apt—judges are required to make the laws of their jurisdiction 'the best they can be'. Because he supposes that there will in nearly all hard cases be a soundest theory which determines only one answer, he denies that judges generally have discretion.

It also follows that, in his view, legal meaning is put in dispute not because there is no settled law on the question, nor because judges have the power to change settled law. Rather legal meaning is put in dispute when people disagree about the moral and political justification for the decisions of the past—about the soundest theory of the law. For him, uncertainty in law is the 'result' rather than the 'occasion' of interpretation.[102] What the positivists call settled law is merely the set of rules that are justified by almost all the different political and moral theories which are at play in legal practice. There is no distinction in principle between hard and easy cases—the correct decision of hard cases is that which accords with the theory which best justifies the decision of easy cases.

Dworkin focuses on judges and adjudication because he claims that we can see best in judicial decisions how legal argument relies on and brings to the surface the soundest theory of the law and because, as he puts it, judicial reasoning has an influence over other forms of legal discourse that is not 'fully reciprocal'.[103] Jurisprudence, for him, is the 'general part of adjudication, silent prologue to any decision at law'.[104]

His reconciliation of judicial constraint and creativity in a sense denies that there is a problem to be resolved. He claims that when the law changes at the hands of judges this is not because judges are legislating. Rather they are 'working the law pure'—bringing it into line with the requirements of the soundest

[100] Dworkin, *Law's Empire* (London, 1986).
[101] Dworkin, *Taking Rights Seriously*, 66.
[102] Dworkin, *Law's Empire*, 352.
[103] Ibid 14–15.
[104] Ibid 90.

theory of the law, which might have changed with the passage of time or have been wrongly perceived in the past.[105]

The upshot for his theory of statutory interpretation and precedent is that these activities have to be seen within a context of judges attempting to ascertain and enforce the soundest theory of the law. Thus, for Dworkin, in a jurisdiction where judges follow a strict doctrine of legislative supremacy, judges should regard statutes as having this standing because they think it fair that they should be bound in the interpretation of statutes. But the conviction about fairness should itself be part of a system of ideas that also includes the assumption that legislatures should strive for justice. In his view, courts, even in a jurisdiction where there is a strict doctrine of legislative supremacy, pay only a 'qualified deference to the acts of the legislature'.[106]

In short, the principles which justify the standing that statutes have for judges will figure importantly in interpreting their meaning. The limits of such interpretation will be set by what is reasonably consistent with the words of the statute in question, a requirement which is based on the value of fairness. Judges should regard statutes as historical events intended to make the legal system into the best it can be, and to make sense of statutes as such events is to make sense of the words used in the text.

This theory of statutory interpretation allows one to take seriously judges' claims in all cases on statutory interpretation to be interpreting in accordance with a legislative intention, even in those cases where positivists would argue that an appeal to a notion of an intention is a fiction to conceal the judge's discretionary activity. For, on Dworkin's approach, the intention is not to be attributed to any actual person or set of persons. It does not matter in a sense that the intention was never actually held by any legislator, nor that some or even all of the legislators had different or contrary intentions. All that really matters is that the intention attributed to the legislature shows that the statute is a datum that coheres with the principled basis underpinning other relevant explicit law.

When a statute is a datum that cannot without difficulty be accounted for in this principled fashion, it is, Dworkin says, a 'mistake'. A mistaken statute will be confined to its 'specific authority' which has the effect that it will be confined to as narrow a class of situations as possible. Further, it will not figure in a decision about the soundest theory of law in cases not directly affected by the statute because it lacks the principled basis required to figure in such a decision. The statute has no 'gravitational force'.[107]

Similarly, Dworkin sees the doctrine of precedent not as a set of rules, but rather as a set of principles which judges must somehow weigh in the general

[105] Ibid ch 11.
[106] Dworkin, *Taking Rights Seriously*, 37.
[107] Ibid 121.

balance of principles when deciding hard cases.[108] Judges adopt the doctrine because they think that it is fair that the decisions of the past should count in deciding what the soundest theory of law is. But since the duty of the judge is to decide the case in accordance with the soundest theory of the law, he cannot be under a duty to decide the case in accordance with reasoning that is fundamentally mistaken about the soundest theory of law.

The judge deciding the case may, depending on his own status in the hierarchy, be able to overrule the past judge. If he cannot, he can still deny the past decision gravitational force by confining it to its 'specific authority'. The judge denies that the decision exposes a theory of law capable of forming the principled basis for future decisions. Such a decision is an 'embedded mistake', but because it is a mistake it is taken to affect the narrowest possible class of situations, which, because of the wider reach of a statute, will be narrower than the class to which a mistaken statute can be confined.[109] – TRS ch.4.

For Dworkin, then, the question of what law is should always be answered by resort to the principled basis of the law. Indeed, it may be rather misleading to say that for him law is both explicit legal materials and the principled basis of the materials. Rather the explicit legal materials are the legal data which have to be accounted for in deciding what law is. His claim is both that moral principles such as justice and fairness are embedded in the explicit legal materials and that what law is is determined by an argument about what impact these principles have in particular cases. His theory of adjudication is one firmly within the common law tradition.

Dworkin argues that because law embodies moral principles in this way it also embodies an ideal of justice which he says constitutes the rule of law.

> It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law... is the ideal of rule by an accurate public conception of individual rights.[110]

He claims that if judges adopt his view of law, then morally superior legal practice will emerge. Law will in fact approximate more to the substantive standards of morality already embodied in the law. In particular, law, in approximating to these standards, approximates to the democratic ideal that minorities have political rights against the majority. Judges will see to it that the decisions of majoritarian legislatures are subject to moral constraints which protect these rights. Thus, like Dicey, he focuses on the judicial control of executive power.

[108] See S Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 *Oxford Journal of Legal Studies* 215–56.
[109] Dworkin, *Taking Rights Seriously*, 110–23. – ch.4.
[110] Dworkin, *A Matter of Principle*, 11–12 (his emphasis).

Finally, in line with his argument that disputes about legal meaning are disputes about the soundest theory of law, Dworkin argues that disputes about the correct view of law are interpretative disputes about what political ideal of justice should inform that view. In his opinion, the positivist view that law is settled law serves the following (conservative) ideal. Judges should, as far as possible, apply rules whose content is settled by factual and public tests because this protects the legitimate expectations that surround those rules. Judges should thus strive to decide hard cases by answering the question posed by the case in accordance with the way in which legislators actually intended it to be answered. And if there is in fact no answer to that question, then the judges must do the best they can by legislating for the future.[111]

1.7 A Historical Enquiry

Positivists see in Dworkin's account of adjudication the two dangers which Bentham and Austin thought inhere in common law theory. One is the danger of obsequious quietism, of deference to bad laws because of the mistaken belief that laws always possess moral weight. This danger will of course be most vicious in a wicked legal system. In such a system, it will seem that the theory which best explains the law will be the official wicked policy in whose service legislation is enacted. It will thus seem that a Dworkinian judge must believe that he is legally and morally required to apply the repugnant moral ideas underpinning the wicked laws. Thus Raz suggests that Dworkin's theory would 'require a South African judge to use his power to extend Apartheid'.[112]

Because positivists think that Dworkin is forced to the conclusion that a judge's legal and moral duty in a wicked legal system is to extend the official wicked ideology, they argue that his claims about the role of morality in deciding questions of law are mysterious. They find significant Dworkin's suggestion that a judge in a wicked legal system could, 'in spite of the influence that morality must have on the right answer in a hard case', decide that his moral duty lay in not deciding a hard case in accordance with the soundest theory. Dworkin suggests that such a judge might decide to resolve the issue either by resigning or by taking 'the difficult moral decision' to lie about what the law is.[113]

However, as Hart argues, to suppose that the decision to lie is difficult is to presuppose a basis for moral obligation in wicked law. But if, in a wicked legal system, the soundest theory of the law is composed of repugnant moral principles, then explanation and justification should part company. Thus Hart thinks

[111] For the general point about legal theories being political, see Dworkin, *Law's Empire*. For the argument about positivism or 'strict conventionalism', see ibid ch 4. See also Dworkin, *A Matter of Principle*, ch 1.
[112] Raz, 'Authority, Law and Morality', 208.
[113] Dworkin, *Taking Rights Seriously*, 326–7.

that wicked legal systems raise 'insuperable difficulties' for Dworkin's claim that a judge always has a moral reason to apply the soundest theory of law.[114]

Dworkin has suggested in reply that it is a mistake to take wicked legal systems as a crucial test for his theory. They are like hard cases in that how we should approach them turns on 'which conception of law is best rather than easy cases whose proper resolution we know and can therefore use to test any particular conception for adequacy'.[115] In addition, they are 'not very important hard cases, from the practical point of view, because the judgments we make about foreign wicked legal systems are rarely hinged to decisions we have to take'.[116] Finally, he has suggested, as we saw Fuller and Radbruch did, that there might be a pitch of wickedness such that a legal system ceases to be capable of being a source of legal rights and duties just because it cannot be treated as a source of moral rights and duties.[117]

But his main argument on this score appears to be twofold. Firstly, he says that he needs to distinguish more sharply than he had in his earlier work between 'explanation' and 'justification'.[118] In his view, an explanation does not 'provide a justification of a series of political decisions if it presents, as justificatory principles, propositions that offend our ideas of what even a bad moral principle must be like'.[119] He also says that he has more confidence than he had in earlier work in what he calls the 'screening power of the concept of a moral principle'. He claims that the requirement which his theory imposes on judges—that they provide an argument which shows the legal record in its best moral light—will tend to screen out or exclude morally unacceptable principles.[120]

Secondly, Dworkin takes the positivists to suppose that it is the principles that figure in the soundest theory itself which transmit moral weight to the judge's legal duty to apply the soundest theory of law. But, Dworkin claims, there is another source of moral weight. This is the 'general political situation'

> that the central power of the community has been administered through an articulate constitutional structure the citizens have been encouraged to obey and treat as a source of rights and duties, and that the citizens have in fact done so.[121]

But, he emphasizes, the reasons for treating this political situation as generating at least some weak case in favour of according moral weight are distinct from the process of interpreting any particular law and hence from the morally laden process of interpretation that we have seen Dworkin advocates.[122]

Positivists have not found these responses convincing. They continue to treat the idea that repugnant moral principles will not figure in a soundest theory of

[114] Hart, *Essays in Jurisprudence and Philosophy*, 9. For his extended argument on this point, see Hart, *Essays on Bentham*, 150–3.
[115] M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (London, 1984) 260.
[116] Ibid. [117] Ibid.
[118] Ibid n 4 at 299. See also *Taking Rights Seriously*, 340–1.
[119] Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence*, n 4 at 299.
[120] Ibid. [121] Ibid 258. [122] Ibid.

law as the expression of an unsupported and romantic ideal. And they can point out that the claim that the source of moral weight lies in a 'general political situation' is a claim about why judges might have a prima-facie moral obligation to enforce the law of even a wicked legal system. But even if that claim is warranted it is about the weight one should give to factors that, apparently, have nothing to do with the substantive content of the law. The claim does not start to show why one should take seriously Dworkin's claim that there is a soundest theory which justifies as well as explains the law.[123]

Hence positivists can argue that judges in a wicked legal system like South Africa would be better advised to see law in accordance with the view which positivism takes. The judges would then see that in hard cases on the interpretation of apartheid laws there is a range of legal solutions, none of which is required by law. They would then be able, in an exercise of law-making discretionary power, to choose the solution which best resists apartheid ideology, so taking a reformist role. As Raz has put it, positivism, in providing such a vocabulary, 'makes room for a theory of adjudication calling on the courts to counter rather than to propagate the ideology which underlies unsatisfactory source-based law'.[124]

Moreover, positivists think that Dworkin's denial of discretion invites the other danger inherent in common law theory—the danger of anarchy. Dworkin's theory is, they think, an invitation to judges to be power-stealers. It invites judges to conceal the fact that they are exercising a discretionary law-making power in the decision of hard cases. Thus Hart suggests that Dworkin's theory provides a fiction which would enable a judge 'in the misleading guise of finding what the law behind the positive law really is, to invest his own personal, moral or political views with a spurious objectivity as already law'.[125]

So positivists claim that the description of a hard case as one requiring the exercise of discretion will elicit the right moral response. Alternative descriptions, which blur the distinction between what law is and what law ought to be, seek to achieve what is better achieved by directing one's arguments to the issue of how much discretionary power judges should have and how they should exercise it. And this point, they would think, applies with equal force to Dworkin's claim about a democratic ideal in the rule of law. That claim, they would say, is a mere revival of Blackstone's preoccupation with the separation of powers.

Finally, the positivists would argue that Dworkin's charge that the positivist view of law involves a conservative conception of the rule of law is a mere revival of the charge of formalism which Hart rebutted in 1958. They would say that the conservative judges whom Dworkin takes to be influenced by positivism are merely judges who exercised their discretion in accordance with conservative values.

[123] See Hart, 'Comment on Dworkin'; Soper, 'Legal Theory and the Obligation of a Judge'.
[124] Raz, 'Dworkin: A New Link in the Chain' (1986) 74 *California Law Review* 1111.
[125] Hart, 'Positivism and the Separation of Law and Morals', 57. Raz makes the same criticism about Dworkin's theory of statutory interpretation and precedent: 'Legal Principles and the Limits of Law', 78.

My aim in this work is to see what light an enquiry into the decision of hard cases in the South African legal system during apartheid can shed on these issues. It is important before beginning this case-study to keep in mind a methodological peculiarity inherent in the enterprise, one to which I will often return.

Recall that positivists hold that judges in deciding hard cases have to exercise their moral judgment. So positivists concede that the moral attitudes judges happen to hold will of necessity have an impact on their decisions. But the positivist theory of law does not include a political doctrine of judicial responsibility—one which tells judges how they ought to go about the morally charged business of deciding hard cases. It follows that the most a positivist would expect from a case-study is that it will reveal how judicial attitudes made their impact on the decision of the cases.

However, if we take seriously the arguments put forward by critics of positivism, Radbruch, Fuller, and Dworkin, we cannot ignore the possibility that judges will differ in the adjudication of hard cases in accordance with their different conceptions of law and the rule of law. This difference would hinge on whether the judge adopts a doctrine of judicial responsibility premissed on the positivist conception of law, one which asserts the distinction between law and morality, or a doctrine premissed on a morally charged conception of law such as the one sketched by Dworkin. To use Fuller's term, the difference would hinge on a political disagreement about the appropriate 'ideal of fidelity to law'.

The methodological peculiarity arises because positivists are theoretically committed to disowning any doctrine of judicial responsibility. Moreover, their account of the structure of adjudication permits them to redescribe any description of adjudication that attempts to link such a doctrine with their conception of law as an exercise of judicial discretion in accordance with a particular attitude towards morality. The peculiarity is an important instance of a problem that pervades the contemporary debate between positivists and their critics. The debate might seem to take place on altogether different planes with the result that its participants are doomed to the endless frustration of firing shots at targets which cannot be reached.

On the one hand, there are the legal positivists, who from a descriptive or social scientific perspective, conclude that all a theory of law can say about such adjudication is that it involves an exercise of judicial discretion based on factors which it is not the task of philosophy of law to speak to. On the other hand, there are the two most prominent critics of legal positivism of the last 50 years, Fuller and Dworkin, who, whatever their differences on other matters, would unite in thinking that at stake in adjudication are political conceptions of law so that legal philosophy should concern itself with answering questions about the most appropriate theory of adjudication.

I hope to show that the situation is not so dire. I will argue that my case-study of adjudication takes the debate in legal philosophy further in a way that, ultimately, does deal with the methodological peculiarity. Indeed, we will see that

two developments in legal positivism assist in forcing a joinder of debate. One is the increasing intervention in debates about adjudication of legal positivists who do not start from a descriptive or social scientific stance. Rather, they are 'political positivists', legal theorists who regard legal positivism as describing an ideal of fidelity to law which should influence the way we design legal orders and the practice of legal officials, including judges.

Secondly, Dworkin's theory of adjudication is required to make sense of the cases and, in particular, of the fact that contrary to Hart's and Raz's intuitions, a study of adjudication in apartheid South Africa supports rather than refutes Dworkin's theory. But in order to see why this is so, we have to understand that more basic to philosophy of law than a theory of adjudication is a theory of legality, the kind of theory that Fuller articulated in his sketch of the internal morality of law. Put differently, the terrain on which engagement in legal philosophy should take place is not primarily one occupied by theories of adjudication but by theories of legality. And this conclusion of the case-study is significant because it is increasingly the case that Dworkin and legal positivists alike see the importance of engagement with the idea of legality, precisely the engagement which Fuller from 1958 on argued was the issue for legal philosophy just because an ideal of fidelity to law is an ideal of a conception of legality.