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The Genealogy of Legal Positivism

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Abstract—This article argues that legal positivism is best understood as a political tradition which rejects the Separation Thesis—the thesis that there is no necessary connection between law and morality. That tradition was committed for some time to eliminating the conceptual space in which the common law tradition and its style of reasoning operate. A genealogical reconstruction of the tradition shows that when positivist judges are forced to operate in that space, they have to adapt their own style of reasoning to some of the constraints of that space. That most contemporary positivists will attempt to disown such judges is symptomatic of deep problems in contemporary positivism, problems which stem from the attempt to detach positivism from its political tradition. So a recent neo-Benthamite revival in legal theory is welcome. Not only does it reunite positivism with its political tradition, but it also opens the way for a productive debate between positivism and its critics. 'As for the philosophical approach, once so lively and dominant, it seems at times today rather tired, and exhibits its unease by seeking revitalization in flirtations with the absurd. But the problems of legal theory remain as fascinating as they ever were, and, if there is any grand message in these essays, it is that the historical study of legal institutions may have more to offer to their solution than has yet been appreciated'.[1]

1. *Introduction*

Legal positivism is today so broad a church that criticism of the whole attracts charges of 'sloppiness', 'confusion' and 'misrepresentation'. In addition, nearly all positivists disown a position which many critics think shows positivism at its most vulnerable. This position is judicial positivism, a stance about the rule of law which is informed by a political doctrine of the separation of powers, and which has a direct impact on the practice of law, in particular on the way in which judges interpret the law.[2]

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[1] A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (London: The Hambledon Press, 1987), Introduction.

[2] But see further, T. Honoré, 'The Necessary Connection between Law and Morality' (2002) 22 *Oxford Journal of Legal Studies* 489 and J. Eekelaar, 'Judges and Citizens: Two Conceptions of Law', ibid at 497.

I will argue that once we understand positivists as part of a political tradition, we see both that there are enough links between particular positivists to produce a position against which one can argue generally and that that position should not disown judicial positivism. This argument, however, has to be made in the face of the self-understanding of most contemporary positivists. They do not regard positivism as part of a political tradition, but as the product of philosophical inquiry into the nature of law, where philosophy seems defined as an a-historical, a-traditional, a-political mode of inquiry, and further as a mode of inquiry which seems a priori in nature, answering to the concepts of the theorist and not to legal practice.[3]

2. *The Positivist Tradition*

When H.L.A. Hart set out his 1958 manifesto for positivism, 'Positivism and the Separation of Law and Morals', he said that he would present the 'subject as part of the history of an idea'.[4] He took his main predecessors to be Jeremy Bentham and John Austin and made it clear that what united the tradition was its insistence on a Separation Thesis—the thesis that, in Austin's words, 'the existence of law is one thing; its merit or demerit another'.[5] Though the law of a particular legal order will have been influenced by people's ideas about morality, and may in fact be moral, nothing about its existence as law makes it moral. Whether the law is morally good or bad depends on the content the law happens to have.

The two main respects in which Hart departed from his predecessors were that he detached positivism from their utilitarian political morality and argued that they were profoundly mistaken to claim that the sovereign legal authority of any legal order is legally unlimited—an 'uncommanded commander'. But, Hart

[3] Thus I will argue that Ronald Dworkin is right that all legal theories, best understood, are political. But I will also show that the way in which they are best understood as political remedies a problem in Dworkin's critique of legal positivism. It allows one to make explicit the links between the several targets of his critique: Benthamite legal positivism, H.L.A. Hart's descriptive positivism, and positivist judges. It thus removes the appearance of randomness from Dworkin's critique. For a notable example, see how Dworkin's argument shifts from one target to the other in Dworkin, 'Law's Ambitions for Itself', 71 *Virginia Law Review* 173 (1985). In more recent work, Dworkin deals more explicitly with the problem, which he had of course addressed to some extent in his discussion of the 'semantic sting' in *Law's Empire* (London: Fontana Press, 1986), ch 2. See 'Thirty Years On', 115 *Harvard Law Review* 1655 (2002), reviewing Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) (hereafter referred to as 'Thirty Years On'). My remedy will I hope respond to Liam Murphy's criticism of me, and by implication of Dworkin, when he says that arguments that aim to establish a connection between a positivistic theory of the grounds of law and a judge's theory of adjudication are 'rather bizarre'; 'The Political Question of the Concept of Law' in Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) 371, n 91 at 395. For the relationship between political and legal philosophy, especially the philosophy of positivism, see Jeremy Waldron, 'Legal and Political Philosophy' in J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford: Oxford University Press, 2002) at 352. At 377–81, Waldron directs some caustic remarks at positivists' neglect of their history.

[4] H.L.A. Hart, 'Positivism and the Separation of Law and Morals' reprinted in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49 at 50 (hereafter referred to as Positivism and the Seperation of Law and Morals).

[5] Quoted ibid at 52.

said, this mistake could be remedied without in any way endangering the Separation Thesis.[6]

John Gardner, Hart's first positivist successor in the Oxford Chair of Jurisprudence, has set out a new manifesto in which he claims that the Separation Thesis is 'absurd', and that Hart only 'seemed to endorse it' by 'hint and emphasis'.[7] Gardner maintains that Hart's 'apparent' endorsement must 'be read as a bungled preliminary attempt to formulate and defend [a different thesis], which, like Bentham and Austin, he really did endorse':[8]

> In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where merits, in the relevant sense, include the merits of its sources.)[9]

But the thought that validity depends on sources, not merits does not, according to Gardner, entail that validity is morally unmeritorious. Hobbes, Bentham and Hart, he claims, 'regarded valid laws as necessarily endowed with some moral value just in virtue of being valid laws'.[10]

However, while Gardner is right about Hobbes, Bentham and Austin, he seems wrong about Hart. Gardner supposes that Hart rejected the Separation Thesis in the 1958 article by Hart's claim (in Gardner's words) that 'every law necessarily exhibits a redeeming moral merit, a dash of justice that comes of the mere fact that a law is a general norm that would have like cases treated alike'. However, what Hart said was that the legal requirement that like cases should be treated alike is '*one* essential element of justice' and he was clear that this is 'justice in the administration of the law, not justice of the law'. While this fact prevents one, he said, from treating law 'as if morally it is utterly neutral', nevertheless, he emphasized, a legal system which satisfied this requirement might 'apply, with the most pedantic impartiality as between the persons affected laws which were hideously oppressive'.[11]

In other words, while the 'treat like cases alike' requirement is a necessary element of justice, it is not sufficient, and so it does not establish a necessary connection between law and morality. Everything depends on the content of the law and the requirement might make things morally worse.[12] Indeed, in 1958 and in the later chapters of *The Concept of Law*,[13] Hart advances the moral benefits of adopting the Separation Thesis, the benefits of seeing that law has no

[6] Ibid at 56–62.

[7] J. Gardner 'Legal Positivism: 5 1/2 Myths', 46 *American Journal of Jurisprudence* 199 (2001) at 222 (hereafter referred to as 'Legal Positivism: 5 1/2 Myths').

[8] Ibid at 223.

[9] Ibid at 201.

[10] Ibid at 224.

[11] 'Positivism and the Separation of Law and Morals' at 8, his emphasis.

[12] Hart reinforces this point in what he takes to be a knockdown objection to Dworkin, in H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) at 152–3.

[13] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). All references in the notes will be to this edition, save when I refer to Hart's 'Postscript', posthumously published in the second edition of *The Concept of Law* (Oxford, Clarendon Press, 1994) at 238.

inherent or intrinsic moral value qua law, as an important part of the set of reasons to adopt the positivist concept of law. While moral benefits accrue to the citizen or judge who accepts positivism's understanding of law, they accrue through recognition of the fact that law is not necessarily endowed with any moral value. All of this leads, Hart thinks, to the conclusion that the 'truly liberal answer' of one who is confronted by a morally bad law is to let individual conscience decide, unhampered by any thought that there is a necessary connection between law and morality.[14]

Hart sought to enlist Bentham in exactly this version of the Separation Thesis, noting that Bentham thought that certain laws might be too evil to be obeyed. However, Gardner is right that Bentham should not be so enlisted. What Hart in 1958 called Bentham's 'general recipe for life under the government of laws'—'*To obey punctually; to censure freely*',[15] suggests a general moral duty to obey the law. Indeed, Bentham and Hobbes before him argued for a different connection between law and morality—one between legal order and political morality—from any that Hart envisaged. For them the authority of law resides in the determinate content of particular laws, but for the reasons that make a properly functioning, well designed legal order deserving of the obedience of those subject to it. Authority stems from the fact that legal order as a whole has been constructed along the lines suggested by their political theories, Bentham's utilitarianism or Hobbes's contractarianism. These theories require that there be but one source of law—sovereign will—and that that source manifest its judgments in the form best suited to transmitting determinate judgments about the public good from ruler to subject—statutes.

The real import of the passages from which Hart takes Bentham's 'recipe' is that one is under a moral obligation generally to obey the law even when one disapproves of it, but also under an obligation freely to criticize the law and the institutions that produce it, all in the cause of effective law reform.[16] Moreover, in the passages where Bentham wrestles with the problem of obedience to particular evil laws, he comes to the following conclusion: while in principle the correct individual calculation of utility might issue in the duty to disobey the law, the risks attendant in any individual getting this calculation wrong are such that generally no one should try it. For Bentham, then, there is a general moral duty to obey the law even when there is no freedom, and this duty must become even stronger under conditions of freedom, that is, of democratic government. For all those subject to the law of any established legal order, whether unfree or democratic, this duty is located in the impossibility of getting right the 'moral arithmetic'[17] of resistance. And, in a democratic legal order, there is the additional

[14] Positivism and the Separation of Law and Morals at 75.

[15] Ibid at 54. J. Bentham, *A Fragment on Government*; J.H. Burns and H.L.A. Hart (eds) in J.H. Burns, *The Collected Works of Jeremy Bentham: Principles of Legislation* (London: Athlone Press, 1977) 393 at 399, Bentham's emphasis.

[16] Bentham, *A Fragment on Government* at 397–403.

[17] The phrase is taken from Bentham, *Principles of Legislation*, 1.

institutional fact of the moral quality of the law, located not in the content of particular laws, but in the democratic provenance of the law. As Bentham said of his injunction, obey punctually but criticize freely, it is 'the motto of the good citizen'.[18]

This position on the right of resistance hardly differs from that of Hobbes,[19] though Hart did not even mention Hobbes in the 1958 manifesto, presumably because his idea of the positivist tradition, as united around the Separation Thesis, so obviously excludes Hobbes's argument that the good of obedience to law always outweighs the calculable benefits of disobedience. Moreover, because for Hobbes and Bentham the connection is between well designed legal order and political morality, there arises an even more significant overlap between their theories of law than their exclusion of the right to resistance.

Hobbes and Bentham want the sovereign law-maker to have a monopoly on law-making power and his judgments about the law to be as determinate as possible in order to diminish speculation about what he in fact intended to communicate. They are well aware that their own legal orders are not so designed, in large part because of the legal authority that the common law judges claim through their own monopoly—a monopoly on interpretation of the law. They recognize that, as Hobbes put it, 'All Laws, written, and unwritten, have need of Interpretation' and that a staff of officials or judges must be put in place to interpret the law.[20] But they think that the way to deal with this phenomenon is, first, to have the sovereign make law in such a way as to minimize the occasions which require interpretation and, second, to deny legal force to judicial interpretations of the law beyond the scope of the particular case. The judge's decision is final for the parties because he has the authority to decide, but the decision has no precedential force. They also adopt a remarkably similar device for cases in which judges detect that the determinate judgment of the statute will cause an injustice in the particular case: the judge should inform the sovereign so that the sovereign can consider amending the law and might also consider suspending the application of the law to the particular case.[21]

[18] Bentham, *A Fragment on Government* at 399.

[19] See T. Hobbes, C.B. Macpherson (ed), *Leviathan* (London: Penguin Books, 1986) at ch 15, the famous passage on the Foole, [72–73], 203–205. Moreover, Hobbes has exactly the same aims for his political and legal theory which Hart attributes to Bentham of avoiding the dangers of anarchy and conservatism since Hobbes says his aim is to pass 'unwounded' between 'those that contend, on one side, for too great Liberty, and on the other side for too much Authority'; ibid, his Dedication at 75.

[20] Ibid at ch 26, [143] 322.

[21] Ibid at ch 26, [143] 323, the paragraph beginning 'The Interpretation of the Law of Nature'. And for Bentham, see G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) at ch 12. Note that this introduces a kind of feed back mechanism into the legal order, an early version of Niklas Luhmann's and Guenther Teubner's 'autopoiesis'—a theory about the self-referential characteristics of legal systems. For the reinvention of the idea of autopoiesis to understand Hobbes's contemporary relevance, see J. Hampton, 'Democracy and the Rule of Law' in I Shapiro (ed.), *Nomos XXXVI: The Rule of Law* (New York: New York University Press, 1994) at 13. And see Carl Schmitt, commenting on Kelsen's place in the positivist tradition—'And now the machine runs itself' ['Die Machine läuft jetzt sich von selbst']; Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränanität* (Berlin: Duncker & Humblot, 5th edn, 1990) 62, discussed in D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997) chs 2 and 3.

Neither Hobbes nor Bentham is then in the business of supplying what we think of today as a theory of adjudication, a theory about how judges should decide hard cases; those cases where lawyers reasonably disagree about what the law requires. Their theories of law confine most of the job description of judges to application of the law, where application means using superior technical knowledge to work out what, as a matter of fact, the sovereign intended.[22] On those occasions where the sovereign has failed, for whatever reason, to express a determinate judgment, the judge will have to come up with his own judgment as a kind of mini-sovereign.

Naturally, both Hobbes and Bentham enjoin the judge to decide as best he can. But what matters most is that the issue is resolved, not how it is resolved. There is no internally generated need for the judge to give reasons for his decision. In this regard, Gerald Postema has suggested that Bentham's requirement of publicity for judges' reasons for decision will focus the attention of those subject to the law as well as of other judges on the reasons. Once public reasons for decisions are focused upon, and not the fact that the issue has been resolved, those subject to the law will come to expect that the reasons articulated for a decision on one problem of interpretation will influence judges who decide similar cases. Judges will then have to take into account the utility served by not disappointing expectations about how cases will be decided. Hence, an informal doctrine of precedent will arise, even if, as Bentham wanted, judgments are deprived by the constitution of precedential force.[23] So it would seem that the integrity of Hobbes' and Bentham's vision of legal order is best maintained by imposing on judges a duty not to give reasons of any sort.

Once Hobbes's and Bentham's legal theories are seen in this light, one can also see how, in today's parlance, they look rather more like exclusive legal positivists than like inclusive legal positivists. The former, represented most prominently by Joseph Raz and Scott Shapiro, hold that when moral considerations and arguments figure in legal reasoning, the conclusion is necessarily not about what the law is, but what it ought to be.[24] That is, the answer is not fully determined by law. Conversely, the latter, represented by Jules Coleman and Will Waluchow, hold that when moral considerations are incorporated into a legal order's criteria for legal validity, and when argument on the basis of such criteria yields a correct answer, there is no reason to deny that the answer is fully determined by law. Hart, it should be noted, joined the inclusive camp in the posthumously published Postscript to the second edition of *The Concept of Law*.

[22] Here I put to one side Hobbes's claim that a judge would insult the sovereign if he gave the law an interpretation which displayed the law as inequitable; see Hobbes, *Leviathan*, ch 26, [145] 326 and my discussion in 'Hobbes and the Legitimacy of Law' (2001) 20 *Law and Philosophy* 461.

[23] Postema, *Bentham and the Common Law Traditio* at 453–59. Postema's prediction is supported by the experience of administrative tribunals in Canada: their decisions are formally deprived of precedential force but have increasingly come to be recognized as constraining the future.

[24] See, for example, Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) at 194 and S.J. Shapiro, 'On Hart's Way Out' in Coleman, *Hart's Postscript* at 149. Gardner indicates in 'Legal Positivism: 51/2 Myths' at 202, that he supports this camp.

I will return to this division in contemporary positivism below. For the moment I want to emphasize that Hobbes and Bentham are exclusive positivists because of their political visions about the best way to construct legal order. Those visions require that judicial interpretation is excluded for political reasons from taking more than a marginal role in legal order. Hobbes and Bentham also make a second exclusionary move. It follows through on the first by requiring that judicial interpretation should not be given legal force beyond the dispute between the particular individuals, because to grant more force is to give to judges a legislative authority which should be reserved to the sovereign law-maker. This second move is necessary in order to accomplish the political task of maintaining the integrity of positivistically conceived legal order.

It follows that while Hobbes and Bentham reject the Separation Thesis, they do hold to a different thesis about the relationship of law and morality. I will call it the 'Identification Thesis', because it is a thesis about the importance of law having a determinate content—one which can be identified in a particular fashion. This thesis states that the best way to understand law is as positive law with a determinate content.[25]

Positive law, properly so called, is not merely law whose existence is determinable by factual tests but law whose content is determinable by the same sort of tests, here tests which appeal only to facts about legislative intention. Legal reasons are thus confined to the set of reasons about such facts and to say that there is a determinate legal answer to a question is to say that the answer is fully determined by this set of reasons. The very values that underpin the design of legal order which Hobbes and Bentham favour are supposed to issue in non-evaluative legal reasoning by judges, reasoning which does not involve moral deliberation. That judges will have to engage in at least some measure of moral deliberation is not denied, but as soon as they do they are, from the positivist perspective, no longer engaged in legal reasoning. As I will now argue, the stance that I call judicial positivism comes about because there are judges who accept some version of Hobbes's or Bentham's political theories, but find themselves working in a legal order which is not designed along the right lines.

3. *Styles of Reasoning*

My argument is genealogical, a kind of historical explanation of how different kinds of conceptual space come into being—the space of the common law tradition and the space of positivism—and of how in each space a different style of

[25] As I will point out below, the Identification Thesis is very similar to Raz's 'Sources Thesis', a 'law is source based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument'; Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) at 195. But the Identification Thesis is not a descriptive claim about the way law is, given the very idea of authority, as in Raz's essay, but a claim about the best way to conceive law, given the politically most productive way to understand authority.

legal reasoning is at home.[26] It seeks to explain the position of positivist judges in common law legal orders by reference to the way in which they find themselves having to adapt their preferred style of reasoning, one which would have been politically at home in a legal order which was never properly instituted, to a space antithetical to that style.

The common law style of reasoning is exemplified in the reasoning of judges within the conceptual space of the common law tradition. Such judges suppose—and thus aim to show in their judgments—that the law (which includes both statutes and their judgments)—is a repository of inexhaustible legal reasons. As long as they go about reasoning in the right way—searching for the reason of the law—they will be able to solve any problem of interpretation by working out what the best understanding of relevant legal material requires. That solution is both fully determined by the law and the result of reason.

Reason here is 'artificial' in that it is not unconstrained 'natural' reason but constrained legal reason—reason immanent in already existing legal material. But it is reason nonetheless, which is to say moral, practical reason, reason which sustains conclusions about what the law both morally and legally requires. But the morality does not come from a source extrinsic to law. It does not have to be injected into the law by some authority. Rather, morality emerges through judges engaging in the common law style, through their bringing to the surface the fundamental principles already immanent in the law.

A range of metaphors and vocabulary describes this style, most famously, the idea of 'the law working itself pure' and various takes on the idea of immanent reason, or 'integrity' in the most famous formulation of the 20th century deployed by both Lon L. Fuller and Ronald Dworkin. Moreover, in the common law style, the problem for judges to solve is conceived in such a way as to be capable of a solution. Judges regard problems of legal interpretation, whether posed by statute or by the common law or by some combination, as theirs to solve because they regard legal order as a whole as striving to reach ideals of justice, both explicit and immanent in the law. With such problems, the authority of law is demonstrated by showing how propositions about what the law is are justified by the artificial reason of the law. In addition, the common law style of reasoning has a view of the relationship between legislative and judicial authority in which both are participating in a common project of realizing the reason of the law. As J.G.A. Pocock described the common law view prevalent in Hobbes's time, it was of the 'consubstantiality' of legislature and judiciary.[27] There is no rivalry, no competition for sovereignty, since the task of exercising sovereignty presupposes

[26] Here I rely on I. Hacking, 'Language, Truth and Reason' in M. Hollis and S. Lukes (eds), *Rationality and Relativism* (Cambridge, Mass.: MIT Press, 1982). See further A. Davidson's illuminating discussion, 'Styles of Reasoning' in P. Galison and D.J. Stump (eds), *The Disunity of Science* (Stanford: Stanford University Press, 1996) at 75, and, in the same volume, Hacking, 'The Disunity of the Sciences' 37 at 64–74. For a quite similar use of style in the legal context, see M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at 58–59.

[27] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Reissue with a Prospect* (Cambridge: Cambridge University Press, 1987) at 271–72.

that both institutions are engaged in—and necessary to—working towards a common goal.

Hobbes and Bentham were aware that the only way to confront what they regarded as an elaborate smokescreen for judicial usurpation of a power that is properly the monopoly of some other institution is to design legal order in such a way as to exclude the space in which the common law style is at home. The only style of legal reasoning for which they make space is reasoning about what the sovereign as a matter of fact intended. There is of course also the sovereign's legislative reasoning about what content he ought to give to the law. But that is not legal reasoning. For Bentham, it is moral arithmetic or utilitarian calculation, while for Hobbes it is the sovereign's sense of what the laws of nature require and what makes for a comfortable life for his subjects.

Austin differs from his positivist predecessors both because he does not seem to understand the methodology of legal theory as political and because he does not share their faith in the educability of the masses. In respect of methodology, Austin seems to suggest a view of the pursuit of knowledge which supposes that the primary work is to be done by a kind of value-free conceptual analysis.[28] In addition, he thinks that the design of Bentham's theory has been instituted, to the extent that a sovereign parliament has triumphed over the common lawyers, so that the only task left for jurisprudence is to unpack further the conceptual structure of law, positivistically conceived. However, Austin also argues against Bentham that the design has been too successful. The triumph of the sovereign legislature is not an occasion for celebration, since Bentham's faith in the multitude to decide matters private and public for themselves has turned out to be misplaced. Even Hobbes, Austin says, was too optimistic about the capacity of the masses to be instructed in political science. So Austin asserts that it is time for the judicial elite to start to legislate when the occasion presents itself, for such legislation will introduce enlightenment into the law.[29]

This combination of methodology and elitism risks subverting the positivist project, since it maintains for judges a basis to elevate themselves into the role of rival to the legislature. All that is preserved from the positivist tradition is the idea that when judges move away from application of the determinate content of the law to doing something else, the way to understand what they are doing is through the idea of legislation. Austin makes neither of the two exclusionary moves sketched in the last section. He neither seeks to marginalize judicial interpretation, nor does he deny precedential legal force to judge's interpretations. All he denies is that judicial decisions which go beyond simply applying the factually determinate content of the law are themselves determined by law; they are legislative in nature though not in scope.

[28] See W.E. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform and the British Constitution* (London: The Athlone Press, 1985), especially ch 3, 'Divine law, utilitarian ethics, and positivist jurisprudence'.

[29] Austin, *Lectures on Jurisprudence*: on Hobbes, vol 1 at 133 and 282–83; on Bentham, vol 1 at 218, vol 2 at 532–33, 641–47.

As Wilfrid Rumble has shown, Austin's legal theory confronted a serious tension qua positivist account of law at this point. Austin's definition of positive law was one which seemed to exclude the possibility of judgments being considered a source of law. But he wanted to make space for this possibility without adopting the extreme position, later associated with American Legal Realism, of declaring judges to be the de facto sovereign. So he modified his definition of positive law to allow for law properly so-called to include judge-made law, when there had, as he conceived it, been either an express delegation by the sovereign to judges or a tacit delegation, which could be inferred from the sovereign's silence in the wake of a judicial decision.[30] Further, he was anxious to stress that we should demand more candour from judges by not allowing them to get away with disguising their law-making activity under the various devices that together support the 'childish fiction' of the common law tradition that judges do not make law.[31] Judges should be clear that they are legislating and so avoid the fictions and metaphors of the common law style.

In sum, Austin at this point seems to depart from his own value-neutral methodology by arguing on political grounds for the legitimate place of judicial legislation. He also departs from his predecessors in that he gives to judges a role which his predecessors thought it imperative to exclude. Thus Austin concedes to judges the space in which the common law style is at home. This has the effect that the risks which we saw Postema detect for the positivist project when judges give reasoned decisions become a reality in Austin.

Evidence of this is to be found in Albert Venn Dicey's account of the English constitution. Austin is the major theoretical inspiration for Dicey. But Dicey weaves Austinian legal theory almost seamlessly into an account of constitutionalism, where the legislature has a monopoly on making law and judges on interpreting the law.[32] He simply adds to Austin's concession to judges of one of the most important components of the common law tradition—the precedential force of their judgments—the other main component—the claim that all judges' decisions are considered to be fully determined by the artificial reason of the law. The common law and its principles loom large both in Dicey's understanding of what law is and in his justification for the role he gives to judges.

Dicey's intention is to reconcile the fact of supreme legislative power, positivistically conceived, with the common law tradition. His hope for this reconciliation is, like Austin's, to justify a space in legal order for a judicial elite which can act as a check on a legislature which might be captured by an ignorant multitude. But the check is far more effective if one reinstates, as he does, the fiction that judges never make law. A positivist vocabulary of gaps in the law, indeterminacy, vagueness, penumbras of doubt in contrast with a core of certainty, and the thought that morality has to be legislated or incorporated into the law from the

[30] Rumble, *The Thought of John Austin* at ch 4, 'Judicial legislation and legal positivism' at 110–11.

[31] See ibid at 112–23, and Austin, *Lectures on Jurisprudence*, vol 2 at 539, 634, 665.

[32] See P.P. Craig, *Administrative Law* (London: Sweet & Maxwell, 4th edn, 1999) at 4–7 and A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: MacMillan, 10th edn, 1985).

outside, is alien to the common law style. For that vocabulary presupposes the positivist image of successful law, where law is a 'one-way projection of authority',[33] contained in rules with determinate content: a content which is determinable only by positivistic tests. From the perspective of the common law tradition, the fiction is not a smoke screen for judicial legislation but a regulative assumption of sound judicial practice. Judges who adopt it must show that all the reasons which figure in their argument about what the law requires are legal reasons and that the argument is the most compelling one available on the basis of those reasons.

With that fiction in place, Dicey opens up the potential for judges to force statutes into a mould of common law principles unless a statute very explicitly commands them to do otherwise. Indeed, with that fiction in place, judges might even have the basis for a claim to an authority in the name of the law to override an altogether explicit legislative command. As long as judges' decisions have precedential force, they can claim that they are merely enforcing the intention of the legislature—the source of all law—even as they use the common law to mould or even distort or evade that intention. The claim that the legislature is all powerful can be used against an all powerful legislature.

So Dicey exploits Austin to reinstate within legal theory the conceptual space of the common law style of reasoning. But his reliance on a gift given by a legal positivist in this endeavour is not without consequence. The legislature is still understood positivistically, as the supreme legal authority with a monopoly on law making power. And this understanding creates the potential for another kind of judge to emerge within the conceptual space of the common law style, the judge who works within that space but whose fidelity to law is positivistic.

This work by positivist judges is anathema for Hobbes and Bentham. In their view, when judges have to go beyond identifying the factually determinate content of the law, they do not engage in legal reasoning. But judges who adopt quasi-legislative styles of reasoning appear eccentric within the conceptual space of the common law style, where judgments have precedential force. Statements about what the law requires within the conceptual space of the common law are candidates for truth or falsehood only if substantiated by a judge willing to work to some large extent with the common law style, in particular, within the parameters set by the principles that all the reasons relied on by the judge should be legal reasons and that the judge must mould those reasons into an argument about how the reasons determine a conclusion. In sum, the judge must show that the conclusion is fully determined by law.

Hence, there is an almost inevitable pull towards the common law style exerted on judges who work within its space. Judges who work in a different conceptual space, for example, the one which Hobbes and Bentham hoped to create, would not feel that pull, though it might take, as Postema's argument suggests, a ban on reasons to immunize them fully. At the least, the judges

[33] Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, revised 2nd edn, 1969) at 207.

would have to make a serious effort to keep away from the kinds of legal reasons on which common law judges rely.

But my contention is not that all judges who work within the conceptual space of the common law style of reasoning will be committed to all of the elements of that style. There are positivist judges who work within that space. These judges, like their common law counterparts, accept the constraints of the space to the following extent. They attempt to substantiate their conclusions about the law exclusively by reference to legal reasons. Their positivism manifests itself in that when they are confronted by an issue of statutory interpretation, they confine themselves, in so far as this is possible, to a set of reasons which can be represented as facts about legislative intention, that is, to tests which do not require moral evaluation. This search for facts about legislative intention, or proxies for such facts, framed by a presumption that statutes are the primary source of legal meaning, is what characterizes the kind of reasoning which positivist judges adopt in order to retain an ideal of fidelity to law as positive law, all the while working within the conceptual space of the common law. In other words, they are positivists in that for political reasons they adopt what I called earlier an Identification Thesis, the thesis which states that the best way to understand law is as positive law. Law is law whose content can be determined by public tests which are factual in the sense of appealing to facts about legislative intention, and which thus avoid reliance on the judge's interpretation of moral values.

Such judges have an understanding of the separation of powers which is formal because it insists on very sharp lines of separation between the legislature, with its monopoly on making law, the executive, with its monopoly on the administration of the law, and judges with their monopoly on interpretation of the law. This formal understanding is the one bequeathed to common law jurisdictions in the 20th century by Austin through Dicey, with the only difference between them Dicey's common law twist on the role of judges. But it not Hobbes's or Bentham's understanding, since, as we have seen, those two positivists wanted to confine judges as much as possible to the executive role of law application. They granted judges a legally very confined authority to close what they conceived of as gaps in the law only because of necessity and they mitigated the grant by making the exclusionary moves sketched above.

It is important to keep in mind here that the formal understanding of the separation of powers is formal only in that it establishes formal lines of separation between the powers. It is far from formal in another sense, since those formal lines are required for deeply substantive political reasons, either a Hobbesian social contract argument in combination with the utilitarian argument for preferring established order to the chaos of the state of nature or Bentham's democratic utilitarianism.

Positivist judges who work within the conceptual space of the common law will accept one or other (or some combination) of these political arguments for the legitimacy of the constitutional arrangement whereby parliament has a

monopoly on law-making power.[34] But they also find themselves confronted with the fact—a fact about the conceptual space of the common law—that they have their own monopoly on interpretation. So they try to exercise that authority in a way that best conforms to their understanding of law's authority by using tests that focus on facts or alleged facts about legislative intention. Only when such facts run out, or are simply not relevant because the area of law is predominantly common law, or when the judges are explicitly directed by the legislature or by a written constitution to legislatively or constitutionally incorporated moral values, will they resort to value-based adjudication.

When lawyers criticize judges for their positivism or their formalism, often both together, it is just this sort of judge they have in mind. Such judges are distinctively both positivist and formalist. They are positivist because they adopt a view of law as positive law for political reasons and formalist because, for the same reasons, they adopt a very formal view of the separation of powers as well as a mode of reasoning that strives to preserve the legislative monopoly of the sovereign. They depart from the positivist tradition in that they try their best to deploy their view of law as an account of adjudication within the conceptual space in which the common law style of reasoning is most at home. But if they are to be faithful to their ideal of law, they have no choice but to adjudicate as they do.

I have already noted that contemporary positivists do not regard such judges as bearers of the positivist tradition and I will now argue that this attempt to disown the judges is symptomatic of deep problems in that theory, problems which stem from the attempt to detach positivism from its political tradition.

4. *Mind the Gap: Positivism and Theories of Adjudication*

Recall that most contemporary positivists do more than disown positivist judges, they also assert that positivism is not a political or prescriptive theory. Recall also that in his 1958 manifesto, Hart wished to disengage positivism from the utilitarian political tradition. This disengagement prepared the ground for Hart's claim that positivism is committed to providing a general theory of law, one which will seek to describe law as it is.

[34] They might even adopt this positivistic understanding of law simply because of the dominance of legal positivism in legal education; but I prefer to pay them the compliment of having some sense of the legitimacy of what they are doing. Dworkin, in his response to Jules Coleman's criticisms, says that he himself has never argued that judges must believe in the legitimacy of what they do; see 'Thirty Years On' at 1685–86. I think he is wrong on this score. See, for example, his description of Judge Hercules in 'Hard Cases' in *Taking Rights Seriously* (London: Duckworth, 1977) 81 at 128. Nor am I convinced by Dworkin's assertion that there are South African judges who genuinely thought that what they were doing under apartheid was illegitimate. My sense of such claims by South African 'old order' judges is that these are understandable after the fact rationalizations for the fact that they took office under apartheid, rationalizations in which they claim that they took office knowing that what they would be doing would be illegitimate but calculating that they could do more good than harm. For discussion see Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing), ch 4, especially 163.

'Descriptive positivists' want to stay on value neutral, descriptive ground, although they have recently refined the claim that what they are doing is entirely value neutral. They recognize that the very selection of the phenomena that are worthy of investigation as well as any ranking of the phenomena selected as more or less central cannot be done without engaging in evaluation. But they think that one can still remain morally and politically agnostic and it in this sense that we should understand their project as descriptive.[35]

When a legal order is a common law legal order, descriptive positivists will not polemicize against the common law, as did Hobbes and Bentham, but seek to show how positivism can explain the common law or any other institution of legal order. However, their understanding of law as positive law committed them for almost thirty years to trying to describe the common law through the lens of a thesis almost identical to the Identification Thesis—the Sources Thesis that law properly so called is law whose content can be determined by positivistic tests.

They hold that in most hard cases, cases in which there is reasonable disagreement about what the law requires, there will be no answer picked out by the Sources Thesis. Here variously described, there is a 'gap' in the law, or the judge is in the 'penumbra' of 'unsettled' law in contrast to the 'core' of 'settled' law. That gap is closed by the judge exercising 'discretion', a quasi-legislative judgment about what is best all things considered in order to turn penumbral doubt into core certainty. In addition, there is range of questions which will fall into the penumbra where judges seem to have an authority to depart from settled or core understandings of the law, whether of the common law or of statute. Finally, in an age of constitutional human rights documents, descriptive positivists must also cope with the kind of judicial power writ large by the judges' legislatures to overturn or bring into question statutory provisions that, in the judges' view, conflict with broadly framed constitutional values.

So the gappiness of legal order, on the positivist view of law as positive law, is even more pervasive in common law legal orders than in others, and of course, again more pervasive when judges are given authority to declare statutory provisions unconstitutional. In contrast to the founders of their tradition, Hobbes and Bentham, these positivists merely note this gappiness, since to advocate against it would be against the grain of their descriptive methodology.[36] But their allegiance to positivism still entices them to describe the conceptual space and the style of reasoning of the common law in the legislative language developed by Hobbes and Bentham in a bid to rid legal order of that space.

There is a precedent for their description of judicial interpretation as legislation in Austin's argument that Bentham had underestimated the utility of judge-made

[35] The impetus in this regard came from the leading natural law legal theorist, John Finnis, who in *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) ch 1, pointed out that Max Weber, the arch exponent of value neutrality, recognized that evaluation could not be avoided but still wanted to hold on to moral or political agnosticism.

[36] Indeed, they even point out reasons why such gappiness might be thought not only inevitable but desirable.

law. As we saw, Austin developed an account of how judges should occupy the space of the common law—an account of judicial legislation. But, as we have also seen, Austin's description, despite his own apparent allegiance to a descriptive methodology, seems explicitly put on prescriptive grounds. Utility is best served only if judges avoid the language of the common law style and use positivist, legislative-sounding language which makes it clear that they are avoiding the childish fiction that they are not making law.

Hart's 1958 manifesto, and to some lesser extent *The Concept of Law*, share much with Austin. While Hart wanted to rip positivism from its utilitarian political roots, he argued for the utility of conceiving the problem of the penumbra in Austinian terms, as solved by judicial legislation or discretion, rather than as disguised by the childish fiction that judges never make law. However, he also showed a keen awareness of the fact that if one were to approach this same problem from the perspective of the judge, it might well seem more natural to adopt language that suggests that the judge is merely engaged in drawing out an answer already immanent in the law. Moreover, he was concerned by the fact that at the times he advocated legislative language, the more it seemed that the space in which discretion is exercised is a kind of legal vacuum. So he was careful to stress at other times that the problem of the penumbra is too much rather than too little law. In other words, he recognized the common law's claim about the inexhaustibility of legal reasons while denying its capability of determining what law is.[37]

As a result, Hart found himself caught in a dilemma between his tradition and its politically motivated opposition to the common law style theory and an a-political description of that style which concedes too much, perhaps almost everything to it. The first horn of this dilemma consists of the attempt to describe the conceptual space of the common law by using positivist, legislative language. Such language implies that the space in which the judge operates is unconstrained by law and offers political reasons for adopting this implication—the avoidance of the childish fiction. Since that implication seems false and since Hart wishes to avoid putting legal theory on a political, prescriptive foundation, he moves at other times in the direction of the other horn. On this second horn, not only is the space very much filled by law, but the more natural description—from the inside—is the common law one in which judges are drawing out the best solution from the inexhaustible stock of legal reasons. But to adopt the second horn is also to go some considerable distance to adopt the common law style of reasoning.[38]

Consider, for example, a legal order where judges divide into those who use the common law style and those who adopt the judicial positivist style of reasoning which seeks to adapt positivism to the constraints of the space of the common

[37] See the subtle shift between the legislative perspective (62–72) and the judicial perspective (87) in Hart, 'Positivism and the Separation of Law and Morals'. Gardner adopts the more judicial perspective—'Legal Positivism: 51/2 Myths' at 216–18. Raz, like Hart, shuttles between both—see chs 13 and 16 in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press: Oxford, 1994).

[38] See for example Hart's description in his Postscript at 274–75.

law. Someone who wanted to give a value neutral description would be confined to reporting the facts of the situation, including the fact that both sets of judges claimed that their conclusions, even in the hardest of cases, were fully determined by law, even while they disagreed about those conclusions, as well as about some of the assumptions about the nature of law that inclined them to different conclusions.

A theorist who wants to go beyond this report because he has a positivist account of law encounters the following two problems. He has to supply, first, a reason for discounting both sets of judges' claims that their conclusions are fully determined by law. Second, he has to explain why the positivistic features of one set's style of reasoning fail to establish a prima facie case that there is a natural bridge from a positivist theory of law to a positivist theory of adjudication, when positivist judges are compelled to work within the space of the common law.

If the theorist moves to political ground, he has to do without the thought that his theoretical enterprise is descriptive. Moreover, history should lead him to a rather sceptical view of Austin's attempt to inject positivism into the conceptual space of the common law, and so to revert to the more wholesale reformism of Hobbes and Bentham. Hence, the task of overcoming the onus likely leads to recommendations about marginalizing the conceptual space of the common law style, rather than about how to reform it from within.

I will show in the next section that there has been such a move in recent years with the revival of an explicitly political form of positivism.[39] But not only do descriptive positivists refuse the engagement, but any attempt to grapple with their position makes confronting the Hydra seem easy. While the Hydra grew heads to replace those that were lopped off, descriptive positivism has at least two, each of which when addressed tells the critic that he is speaking to the wrong head. If the critic points out that there is a bridge from positivist theory to the stance of judges who adapt positivism to the constraints of the space of the common law, he is told to speak to the head which says that judges are by definition legislating in this space. If he points out that the space is full of legal principles, so that the metaphor of judicial legislation looks implausible, he is told to speak to the head which more or less adopts the common law's description of what happens in that space. Moreover, the same reasons that led to the growth of this second head have spawned a third, the inclusive legal positivist head, which not only recognizes that the space of the common law is full of legal and moral principles, but is prepared to concede that the conclusions of reasoning on the basis of those principles are fully determined by law.[40]

[39] For example, although in quite different ways, Jim Allan, Tom Campbell, Jeffrey Goldsworthy, Neil MacCormick, Liam Murphy, Gerald Postema, Fred Schauer, Jeremy Waldron.

[40] Which is why Dworkin has characterized them at different times as stipulative, semantic, or Ptolemaic. See Dworkin, *Law's Empire* and 'Thirty Years On'. Not only Dworkin has expressed frustration with this debate. John Finnis describes it as a 'squabble'; Finnis 'On the Incoherence of Legal Positivism', 75 *Notre Dame Law Review* 1597 at 1603 (1999-2000), and Waldron, 'Legal and Political Philosophy' at 381 is even more dismissive.

The step from recognition to concession is exactly the one Dicey took when he folded Austin's legal theory into his own. It departs from the positivist tradition so dramatically that inclusive legal positivists seem wholesale enthusiasts for the common law style of reasoning. They neither wish to exclude judicial interpretation from a central role in legal order, nor do they deny authority to judicial decisions. Most dramatically, they adopt fully the common law style's understanding of interpretation, even when judges have to reason on the basis of contested moral values. As long, it seems, as there is a right answer, however determined, to the question of law, they hold that there is no reason to deny that the answer is fully determined by law.[41] All that binds them to the positivist tradition is a preamble to their theory that all legal values have their source in social practices and that social practices can give rise to morally repugnant values, so that the presence of morality is a matter of historical and political contingency.

That preamble is vacuous because no-one could deny it. The only way to save it from vacuity is through any argument that there is something distinctive about *legal*, social practices; for example, Jules Coleman's recent argument that legal practices, properly so called, are conventional.[42] Coleman's position seems a kind of gloss on Postema's critique of Bentham's willingness to require publicity for judicial reasons for decision, since he seeks to build a theory of adjudication on the basis of the way in which judges will become focused on each other's reasons. But this is an odd gloss, as we saw that Postema's argument is that such a focus is subversive of the positivist project.[43]

In addition, not only do many positivists regard conventionality as incapable of generating obligations, but there is no general agreement within judicial practice on conventionality. As a result, Coleman's argument pushes inclusive positivism into the terrain of its exclusive counterpart, who insists that there is some essence to law that transcends legal practice. But such insistence requires an explanation, which is not forthcoming from such legal positivists because its only source is the kind of genealogical argument which they need to resist.

Joseph Raz, for example, argues that the positivist method amounts to unpacking the concepts presupposed by participants in legal practice.[44] But as

[41] As Hart pointed out in his Postscript at 253, if inclusive legal positivists were to deny that such conclusions were fully determined by law the reason for the denial would have to do with a claim about the truth of non-cognitivism in ethics. Hart himself does not embrace cognitivism but thinks that it would be odd to make claims about the nature of law turn on claims about meta-ethics. For an earlier argument to the same effect, see Hart, 'Positivism and the Separation of Law and Morals' at 82–87.

[42] Coleman, *The Practice of Principle*, Part Two.

[43] Notice that inclusive legal positivists cannot avoid what Philip Soper calls 'weird' legal positivism, where the issue is not the role of sound morality in judicial reasoning, but an immoral morality; see Soper 'Two Puzzles from the Postscript' (1998) 4 *Legal Theory* 359, 368. Take for example the South African legal order under apartheid, where the practice of by far the majority of judges was to resolve hard cases about the interpretation of apartheid law by reference to their understandings of legislative intention, that is, their understanding of what would maximize the impact of the statute. If the basis of judicial obligation is conventional, South African judges were under an obligation to extend the spirit of apartheid law. Note that this understanding of judicial obligation was thought by positivists to be Dworkin's, and hence a knockdown critique of his position. But, as I have argued in *Hard Cases in Wicked Legal Systems*, Dworkin was not committed to this understanding. Ironically, it seems more like one of the mutations of legal positivism—a positivist attempt to work within the space of the common law.

[44] J. Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in Coleman, *Hart's Postscript*, 1.

the leading exclusive legal positivist—one who insists on the Sources Thesis—he denies that judges who operate within the conceptual space of the common law style have a correct understanding of their practice. That denial seems premised on an argument about the very nature of authority: it is in the very nature of authority that the content of an authoritative directive can be determined in accordance with the Sources Thesis. But that argument looks suspiciously circular, especially given the political origins of the Identification Thesis from which the Sources Thesis descends, and the fact that the account of authority in which the argument is nested is one of the bones of contention within both legal theory and legal practice.

One should wonder then at Raz's claim that the criteria for the concept of authority do ultimately depend 'on what people think they are'.[45] Despite his readiness to talk about 'our concept of authority' and the way in which the 'claims and conceptions' of legal institutions and officials 'contribute to that concept', he rules out a priori any concept which is at odds with his, most notably, the concept presupposed by common law judges.[46]

Nor is one's confusion helped when John Gardner, whose position in legal theory takes much from Raz, says that any attempt to argue that philosophy of law should be answerable to judgments about what constitutes good or bad legal practice is evidence of a 'fundamentally anti-philosophical climate', thus banishing from philosophy not only one of the most significant philosophies of the last century—American pragmatism—but also the utilitarian tradition in which positivism is rooted, together with the wider empiricist tradition in which utilitarianism is itself located.[47]

My point here is not that the concept of authority or of law can simply be read off best practice. Rather, it is that judgments about what constitutes good or bad practice presuppose politically partisan accounts of the authority of law whose contours have to be reconstructed genealogically. Ultimately, we have to choose between such accounts on the basis of which works best for us, given both our ideals and the resources that are in fact available. And that historically informed choice is obviously more complex than one which simply discounts a practice because it is deemed inferior. However, Gardner considers it a mere coincidence that Bentham and other legal positivists were 'enthusiasts for limiting the role of judges in developing the law' and so, unlike Hart, or at least the 'early' Hart, he is happy to attempt a complete rupture not only

[45] Ibid at 16. At 36, Raz says that the concept of law has evolved historically and that its evolution has been partly influenced by the legal theories of the day. But he does not explain how this point can be reconciled with his claim that only his positivist theory successfully explains our current concept.

[46] See Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) at 201 and for the a priori nature of his argument, see his remarks at 209–10 about why Dworkin's theory fails. See Dworkin's response in 'Thirty Years On' at 1665–76.

[47] 'Legal Positivism: 51/2 Myths' at 203.

between positivism and legal practice, but also between positivism and its history.[48]

That attempt has to fail. Its conception of philosophy as a kind of pure conceptual analysis is more in the spirit of Hans Kelsen's Pure Theory of Law than of British empiricism.[49] Still its explanations are as shaped by history as any, with the difference that its suppression of history results in the application of the analytical tools of Hobbes and Bentham's conception of law to the problems of the conceptual space of the common law, where the tools are inappropriate because they were designed to dismantle that space, not to work within it.

I am very much aware that Hart thought that he had developed a new analytical tool for positivism in the rule of recognition, the fundamental rule of legal order that constitutes ultimate legal authority by requiring that all laws conform to its criteria of validity. Only this rule, Hart argued, can solve certain problems which Bentham and Austin (and Hobbes) were allegedly unable to solve, including the normativity of law, because of their insistence that the ultimate legal authority is ultimate because unconstrained by law.[50]

However, in Hobbes and Bentham it is the legitimating theory of legal order that transmits, through properly designed institutions, normative force to the determinate content of positive law. Those subject to the law should obey it because they understand and accept the theory. If they do not, and the law in question is a prohibition with sanctions for those who fail to comply, it is up to the sovereign to attach sufficient sanctions to make the 'Fooles', those who do not accept the theory, fall into line. In short, legal order, properly constructed, is fully normative

[48] Ibid at 213. He refers in n 31 to Postema, *Bentham and the Common Law Tradition*. Postema's path-breaking book gets surprising little mention from positivists in this group, I suspect because his treatment, while deeply sympathetic to positivism, sets out so clearly the basis for the kind of genealogical work done here. So it no surprise to find that when it is mentioned, the mention is preliminary to a marginalizing even disparaging remark: Gardner's point about anti-philosophy is directed at Postema, citing his 'Jurisprudence as Practical Philosophy' (1998) 4 *Legal Theory* 329; see Gardner at 203, n 7. Even more neglected is B. Simpson's classic essay, 'The Common Law and Theory' in Simpson, *Legal Theory and Legal History: Essays on the Common Law* at 359. There Simpson, in a wonderful display of the power of what I call genealogical explanation, shows both the inability of positivism to explain the common law style and how Bentham desired to eradicate it, not to explain it. See further his companion essay, 'The Survival of the Common Law System', ibid at 383 and G.J. Postema, 'Philosophy of the Common Law' in *Oxford Handbook of Jurisprudence* at 588.

[49] 'Legal Positivism: 5 1/2 Myths' at 203. And see Gardner's declaration of allegiance to Kelsen in 'Law as a Leap of Faith' in P. Oliver, S. Douglas Scott and V. Tadros (eds), *Faith in Law: Essays in Legal Theory* (Oxford: Hart Publishing, 2000) at 19. Any resort to Kelsen as a potentially interesting source of an alternative philosophical methodology should not ignore Kelsen's own formative political engagements in the debates about the nature of legality and constitutionalism in pre-war Austria and German. See Dyzenhaus, *Legality and Legitimacy* and Dyzenhaus, 'The Gorgon Head of Power: Heller and Kelsen on the Rule of Law' in P.C. Caldwell and W.E. Scheuerman (eds), *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic* (Boston: Humanities Press, 2000) at 20. In particular, it should not ignore the way in which what Kelsen calls the principle of legality has a central place in both his legal theory and his theory of democracy, nor that Kelsen himself conceived his quest for a Pure Theory of Law as an attempt to find a way of transcending the ideological conflicts of his day. (In this respect, his Pure Theory of Law shares much with John Rawls's political liberalism.) Finally, one should note Kelsen had pursued exactly the same strategy in great detail as Gardner does in 'Faith in Law' of comparing faith in God to faith in law. But Kelsen pursues the strategy as a kind of genealogical account of the evolution of the concept of God and the concept of law, and he comes to a radically different conclusion about the status of morality from the one Gardner attributes to him. See Kelsen, *Der Soziologische und der juistische Staatsbegriff (*Aalen: Scientia Verlag, 2nd edn, first pub. 1928, 1981) at ch 11, discussed in *Legality and Legitimacy*, 132–49. (Schmitt's comment in n 21 is directed against Kelsen's argument.)

[50] Hart, *The Concept of Law*, chs 3 and 4.

when viewed from the perspective of a subject who understands why he is under an obligation to obey the law of his sovereign.[51]

Moreover, Hart's account of the rule of recognition proved incapable of generating normative force—of explaining why it created obligations for the legal officials charged with its application.[52] He argued that the rule owes its existence to two factors. First, as a matter of fact, officials have in the past deployed that rule to determine the validity of other rules. Second, the officials have an 'internal point of view' in that they 'accept' that they should continue to follow the rule.[53] Hart was later to insist, against the grain of some of his remarks in *The Concept of Law*, that acceptance had nothing to do with officials' accepting or appearing to accept the legitimacy of the rule. Acceptance is simply a matter of following a convention.[54] But Dworkin successfully argued that conventions by themselves create no obligations.[55] And, as mentioned above, Hart and other positivists seemed to recognize this as a serious problem for his theory, although Hart also wanted at all costs to avoid any alternative to conventions which might prove the basis for a Hobbesian prior moral obligation to obey the law.[56]

So Hart's own solution turned out unsuccessful. Moreover, at least in respect of Hobbes it is would be wrong to conclude that his political vision excludes legal limits on ultimate authority, and so cannot explain how legal authority is always legally constituted.[57] While for Hobbes the sovereign commander is not subject to commands, he might well be subject to other sorts of constraints, including legal ones. It is of the essence of sovereignty for Hobbes that the sovereign be able to make public his judgments and to have them recognized as law. And so when Hobbes said that sovereignty is legally unconstrained, he could not have meant to exclude rule of recognition type constraints, rules which an authority has to follow in order to make it possible to determine both what

[51] Raz's theory of authority is different in that normativity, which is to say genuine normativity, always comes from an external source. His analysis of de facto authority leads him to the conclusion that every authority must claim to be legitimate, to be serving the interests of those subject to it. The test of that claim is for him whether the directives of that authority meets legitimacy conditions set by his version of liberalism. But before one moves into the contested terrain of normative political theory, one should put the point about the claim to legitimacy as a claim to meet whatever legitimacy conditions are set by the best theory of legitimacy. So whether or not the obligations generated by an alleged authority are genuinely obliging will always depend for Raz on an external source. Compare Raz 'Authority, Law, and Morality', 'The Obligation to Obey: Revision and Tradition' and 'Government by Consent' in *Ethics in the Public Domain.*

[52] For a clear summary of the debate, see L. Green 'The Concept of Law' (1996) 94 *Michigan Law Review* 1687, 1692-97. See further Finnis, 'On the Incoherence of Legal Positivism'.

[53] Hart, *The Concept of Law*, chs 5 and 6.

[54] See Hart, *Essays on Bentham*, ch 10.

[55] Dworkin, 'Model or Rules II' in *Taking Rights Seriously* at 46. See also Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990), ch 2.

[56] Hart, *Essays on Bentham*, ch 10.

[57] D. Dyzenhaus, 'Hobbes and the Legitimacy of Law' and Hampton, 'Democracy and the Rule of Law'. Hobbes did recognize that he had some difficulties; see *Leviathan*, ch 19, [100–101], 248–51. Bentham is no different, although Hart prepares the way for Raz's account of legitimacy by insisting (wrongly, in my view) that for Bentham the issue is the legitimacy of particular laws—whether they live up to the conditions set by a liberal theory of legitimacy—rather than the legitimacy of legal order.

counts as a valid exercise of authority and what the content of that exercise is.[58] Further, in his account of the rule of law, these constraints at their most minimal are much thicker than the constraints of manner and form which Hart seemed to have in mind.

Hobbes, in contrast to most contemporary positivists, supposes that there is one substantive constraint on the sovereign. By definition, civil or positive law is law which the subject has a prior obligation to obey, and so, if the basis for that obligation is missing, then the sovereign's commands are suspect. There are two interpretations of how to cash out this constraint. The first is that the constraint is illusory, since whatever the sovereign commands must be taken as conforming to the basis for obedience. The second is that the constraint does have cash value. On some interpretations of Hobbes, the cash value of the constraint is the subject's right to resist the sovereign in particular circumstances, while in contemporary debates it is more or less assumed that if there are to be constraints on sovereign authority, it must be judges who will be the guardians. However, these interpretations are mistaken in their supposition that a substantive constraint in order to be a genuine constraint has to cash out in something substantive. In other words, a constraint that starts in something substantive might turn out to be formal in nature, but still genuinely constraining.

Suppose, for example, that the sovereign is an individual in a simple society, where his subjects find out what the law is by looking to what he commands in writing on a notice board in the town square. There is a rule of recognition in this society and the sovereign cannot make law unless he follows that rule. Hobbes has absolutely no problem in accepting this kind of constraint on sovereign authority; as suggested, it is essential to the successful realization of his theory. All that his theory requires as a matter of internal, normative logic is that the rule of recognition sets out criteria which are purely manner and form and that any interpretative dispute about whether a rule conforms to the criteria is settled not by judges, but by the sovereign issuing a judgment in the form of a law that conforms to those criteria.[59] As long as one can elaborate the idea of a rule of recognition

[58] Howard Warrender explained just why Hobbes must allow for rule of recognition type constraints before Hart had articulated the idea for which his legal theory is famous—Warrender, *The Political Theory of Hobbes: His Theory of Obligation* (Oxford: Clarendon Press,1957) 258–63. For discussion of Hobbes and the rule of recognition, see R. Ladenson, 'In Defense of a Hobbesian Conception of the Rule of Law' (1990) *Philosophy and Public Affairs* 134, J. Hampton, 'Democracy and the Rule of Law' and Waldron, 'Legal and Political Philosophy' at 366–68. Indeed, it is clear that Hobbes has in mind not only that freedom from legal constraint is freedom from the constraint of particular positive laws, but freedom in the sense that particular positive laws are always subject to repeal; and the person or body who has power to initiate repeal of a law is only bound by that law in that he or it chooses not to repeal it.: *Leviathan*, ch 26 [137–38], 313. Compare the passage which contains the 'regress' argument: *Leviathan*, ch 29 [169], 367. (See J. Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1988) at ch 4.) Note that Hobbes does permit the subject to challenge the sovereign in court for violating the law—*Leviathan* at ch 21, [113], 271–72.

[59] The second requirement is to deal with the 'regress' problem. As I show in the last section, this Hobbesian solution is replicated in Jeffrey Goldsworthy's recent attempt to find an accommodation between legal positivism and rights-based constitutional review.

in a way that avoids adding sources of law, and thus undermining the sovereign's monopoly on law-making, that idea poses no threat to Hobbes's model.

So here we have an example of formal constraint, which must remain formal for substantive reasons—the argument for the sovereign's monopoly on law-making. But while formal, it is genuinely constraining in that the sovereign has to follow clear, public requirements if he wishes to exercise legal authority. The rule of recognition, understood in this way, helps to explain both how law is constitutive of legal authority and why law is normative. But it can do these closely related tasks only because the explanations take place within the conceptual space of a highly political theory. Moreover, because for Hobbes the rule of recognition gets its character from his overarching political theory, the rule is confined to accounting for a very limited style of judicial reasoning—reasoning about the determinate content of positive law. The kinds of problems which Dworkin detected for descriptive positivism in his first two major articles—the inability of a positivistic, rule-focused model of legal order to deal with legal reasoning about principles—are not problems for Hobbes because the conceptual space of his positivism is designed to prevent such problems from arising.[60]

I claimed earlier that positivism is best understood as politically prescriptive. The argument for that claim has been mostly made—that any of the marks of positivism as a distinct theory about the nature of law are marks inherited from a political tradition and which can be detached from that tradition only on pain of vacuity.

Vacuity takes two forms, one more characteristic of inclusive positivism, the other of its exclusive counterpart. The inclusive positivists try, as I noted, to maintain their ties to the positivist tradition by dint of a preambular proclamation of allegiance that does no work. But that very proclamation moves them onto the terrain of their exclusive counterpart, who insists that there is some essence to law that transcends practice. Not only does that feature transcend practice, but it entails that law is best understood as positive law—law with a factually determinate content. That claim is of little assistance to judges in a common law legal order, and even less in a common law legal order which has adopted a constitutional bill of rights and made judges their guardian.

All the exclusive legal positivist can say to such judges is that they have discretion and that they should describe most of what they do in Austinian, quasi-legislative language. Here the kind of vacuity in issue is the virtual irrele-

[60] 'Model of Rules I' and 'Model of Rules II', both in Dworkin, *Taking Rights Seriously*. At least they are not problems unless there is inevitable pressure on judges to deal with the moral remainder, cases which require moral deliberation, by giving public reasons which draw judges (as we have seen Postema suggest) to the common law style.

vance of theory to practice.[61] But even the exclusive legal positivists find that the more they try to capture what is going on in the common law style, the more inappropriate legislative language seems, especially since they deny themselves a political basis for making their recommendations. So both kinds of descriptive positivists find themselves retreating to some high ground about the very nature of law, unanswerable to experience and practice because of their political purity.[62]

These positivists also claim that the high ground is important for any one who wishes to construct a general theory of law, a theory which would explain what is in common in all those places where law is to be found, no matter the institutional differences in legal order—for example, constitutional judicial review or parliamentary supremacy, no matter the differences in the substantive content of the particular laws—bad or good. However, no argument has been made to my knowledge about why such a general theory would have to be descriptive rather than political.[63]

Fortunately, as I will now show, positivism has been undergoing a kind of neo-Benthamite revival which holds out the hope of a constructive, political engagement between positivism and its critics. Moreover, that constructive engagement demonstrates the virtues of what might be a necessary element of the participating legal theories—that each is in an important respect parochial or rooted in the contingencies of a particular time and context.

[61] This is nowhere better illustrated than by Raz's well known essay 'The Rule of Law and its Virtue' in Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1983) at 210. Raz there seeks to answer Lon L. Fuller's claim that there is an internal morality of law (*The Morality of Law*) by showing how the principles Fuller claims to be part of the morality turn out to be mere principles of efficacy, assisting law to be a better instrument for the powerful. This requires Raz, for example, to claim that the virtue of judicial independence lies solely in its service to application of the determinate content of positive law, thus seeming to make such independence irrelevant to adjudication where moral judgment is in play. Even the administrative law principles of natural justice are pressed by Raz into such service (the principles of fairness and impartiality), despite the fact that such principles are thought valuable by administrative lawyers for reasons which have little to do with the promotion of certainty. The centripetal force of certainty in Raz's legal theory cannot be explained, as Julie Dickson seems to want, as an example of 'indirect evaluation'—see Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), ch 3. For Raz is not here merely selecting as important some aspects of legal order as centrally important for explanation and then seeking to unpack the normative characteristics of these. Rather, he is attributing a contested normative character to these aspects of legal order. This is what I take to be the thrust of Stephen Perry's argument about positivism's normative foundation—see Perry, 'Hart's Methodologicial Positivism' in Coleman, *Hart's Postcript* at 311. My argument differs from Perry's in that I take seriously Gardner's claim that his and Raz's legal positivism is normatively inert, but show that inertness is really vacuity; hence, the propulsion of legal positivism to the other horn of the dilemma.

[62] I am of course aware that there are many more questions for philosophy of law to answer than the question of how best to understand adjudication. See Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) and 'Legal Positivism 5 1/2 Myths'.

[63] It is relevant that historians and anthropologists do not seem to think that the high ground is available. See Simpson's essays cited in n 48 above and H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983) at 556. See S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (Harmondsworth: Penguin, 1979) 24–25, also Simpson's remarks in 'RS Rattray and Ashanti Law' in *Legal Theory and Legal History*, 403, 426. See further Ronald Dworkin's point about Jules Coleman's unsubstantiated claim about legal positivism and social science: 'Thirty Years On' at 1680–81, referring to *The Practice of Principle* at 201.

5. *Constructive Engagement*

The neo-Benthamite revival is part of an attempt in legal and constitutional theory to focus attention on legislatures rather than courts. It seeks to reverse a trend from an era in which judges are thought to be more trustworthy than politicians and in which there is a world-wide experiment taking place as both old and new democracies give ever more authority to judges by constitutionalizing human rights. The revival claims that parliaments in vigorous democracies protect human rights better than courts and that trust in judges to resolve our political disputes results in the capture of our political processes by elites and thus in 'democratic debilitation'.[64]

The revival is neo-Benthamite in that it argues on democratic grounds for a legal order in which Parliament has a virtual monopoly on law-making. It resists constraints on ultimate legal authority that go beyond the constraints of manner and form required to make it possible to identify both Parliament's laws and their content. Correspondingly, it seeks to marginalize the role of judges. So, for example, Jeremy Waldron argues that the decisions of appellate courts are best understood as a matter of the outcomes of majoritarian voting, with the inevitable conclusion that if outcomes are going to be so determined, it is better to have them determined by elected representatives than by a judicial elite[65]—'judge & co', to use Bentham's phrase. Since the outcome is all that matters, it follows that there is no requirement to attempt to justify the conclusions by reasons. Indeed, since all that matters is the decision and the ideology that won, Waldron does not even require that judges are impartial and he seems to regards reasons for decision as interesting only in so far they reveal the political ideology of the judges.[66]

This revival does not react descriptively to the trend which constitutionalizes moral values. Rather, it argues that the trend is a moral and a legal mistake, the mistake of the common law legal order writ large in the language of constitutional human rights. Such a mistake is an institutional one, a mistake of design. And so one has to eschew reform from within. The institution itself must go.

This reaction is very different from that of descriptive positivists. As we have seen, inclusive positivists embrace the trend by suggesting that in the legal orders in which it is manifested, there the common law style of reasoning correctly describes legal order. Exclusive positivists, in contrast, must regard the trend as widening the space of judicial discretion and thus diminishing the reach of the

[64] This kind of neo-Benthamism is hardly new. Before common law jurisdictions began their experiments with constitutionalism, leftwing administrative lawyers in the United Kingdom, Canada and elsewhere in the common law world, criticized on the same grounds the way in which judges used the common law to expand alleged rule of law controls on the administrative state, thus (in the view of the critics) substituting the judges' judgment for that of the expert administrators to whom Parliament had delegated authority. For the term 'democratic debilitation', see M. Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-Majoritarian Difficulty' (1995) 94 *Michigan Law Review* 245.

[65] See J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999).

[66] Ibid at 296–98.

authority of positive law. But whichever tack is adopted, neither engages with the trend from a perspective which one could usefully think of as positivist.

The neo-Benthamite revival does more than engage with the trend—it also engages with those legal theories which have promoted the trend, most notably Ronald Dworkin's.[67] It contests Dworkin's theory at several levels—at the level of claims about what kind of legal order best serves our interests, at the level of how best to design institutions for that order, including the relationship of legislature and judiciary, and on how best to understand law and reasoning about law.

It might seem that the only real engagement is at the most abstract level of political argument about the nature of law. It would follow that disagreements at more concrete levels, for example, disagreement about how judges should decide a hard case, are simply transmitted from the most abstract level to the more concrete ones. However, the terrain of argument is more complex than that, as I will illustrate by returning to Austin and Dicey.

Recall that Austin wanted to reconcile positivism with a large role for judges because he regarded the legal creativity of a judicial elite as contributing to the overall utility provided by legal order. That reconciliation proved problematic, as Dicey showed in the way he folded Austin's legal theory into a common law account of the judicial monopoly on interpretation. But Dicey's own theory is also tension ridden since he acknowledged the supremacy of Parliament, a supremacy limited only by criteria of manner and form. So he seemed, even more than Austin, to put in place two rivals for sovereignty—parliament with its monopoly on making law and the judges with their monopoly on interpretation. The tension in Dicey arises from the attempt to include in the same constitutional theory a positivist account of legislative supremacy and a common law account of the judicial role.[68]

Neither Austin nor Dicey might appear reformers in the spirit of Hobbes and Bentham, so the tension-ridden nature of their legal theories might seem explicable by the fact that they were both trying to give an interpretation of the world, more than to change it. But as we have seen, Austin's theory of adjudication is

[67] Brian Leiter has argued that Dworkin's theory has had no impact in the USA. His evidence is lack of citation by courts in that jurisdiction. See Leiter 'Classical Realism' (2001) 11 *Philosophical Issues* 244, 258. This argument is supposed to show more generally that normative legal and political theories have no impact. Leiter's argument fails because he does not take sufficiently into account that—as the charge of parochialism is meant to show—Dworkin's theory was not so novel in a jurisdiction like the USA with a long history of constitutional judicial review. It was much more novel in jurisdictions like the United Kingdom and South Africa, where the prevailing legal ethos was positivistic. And it was in those countries, in the face of that ethos, that Dworkin had immense influence, not only on judges but in the debates about appropriate constitutional drafting.

[68] Note that Dicey's most distinguished disciple in the 20th century, the administrative lawyer H.W.R. Wade, 'discovered' the rule of recognition at more or less the same time as Hart and moreover the discovery was made in the course of correspondence with Hart on the topic. See Wade 'The Basis of Legal Sovereignty' [1955] *Cambridge Law Journal* 172 and for a sketch of the correspondence, see J. Allison, 'Parliamentary Sovereignty, Europe and the Economy of the Common Law' in M. Anderson (ed.), *Liber Amicorum for Lord Slynn: Court Review in International Perspective* (The Hague: Kluwer, 2000) 177 at 188. Wade wanted to resolve the tension in Dicey set out in the text. He thus suggested that the ultimate rule of the legal order is in the 'keeping' of judges but that the content of the rule is that Parliament is limited only by criteria of manner and form. This suggestion spawned a set of problems for public lawyers in the United Kingdom and in related jurisdictions which track the tensions in descriptive legal positivism, most notably in the debate about whether the *ultra vires* doctrine is the basis for judicial review. See the essays in C. Forsyth (ed.), *Judicial Review & the Constitution* (Oxford: Hart Publishing, 2000).

a reaction to what he regards as his positivist predecessors' misplaced faith in the educability of the masses, while it is well known that Dicey conceived his legal theory as a kind of bulwark against the creation of the administrative state which would be beyond the rule of law; a state beyond the control of judges.

Moreover, even the wholesale reformers like Hobbes and Bentham found themselves unable to redesign legal order totally. Recall here Postema's point that the fact that Bentham still valued public reason-giving by judges would have the likely effect that judges' decisions would became an informal source of law, despite any constitutional prohibition. And, as I have argued elsewhere, Hobbes, despite his disdain for the common law tradition and his desire to confine the role of judges, seems to permit most of the values of that tradition to creep into legal order via his account of the relationship between the laws of nature and positive law.[69] In sum, disagreements at all levels are mediated by what seem to be something like the limits of what is achievable through legal order, even as disagreement latches onto the very question of the politically best way to conceive legal order.

In addition, and somewhat counter to intuition, it will be the case that disagreements seem more radical at the more concrete levels than at the most abstract. For example, the vocabulary of the common law style seems radically discontinuous with the positivist description of adjudication as quasi-legislation. But, at the most abstract level, Dworkin and Waldron will agree that the point of legal order is to serve democracy and that the institutions of legal order should be designed to serve that end. Of course, a great deal will then turn on the more concrete account of democracy. But if part of that account is that one has democracy when the people's elected representatives have the last word in politics, then, as another distinguished neo-Benthamite, Jeffrey Goldsworthy has pointed out, it is not so clear that the neo-Benthamites should oppose the constitutionalization of human rights, as long as Parliament has the clear authority to override the judges.[70]

In his argument, Goldsworthy expresses regret that the device on which he focuses that permits such override—section 33 of the Canadian Charter of Rights and Freedoms—suggests that when Parliament chooses to override, what it is overriding is the Constitution rather than 'disputed judicial interpretations of the Charter'.[71] He regrets this aspect of section 33 just because it raises the political stakes too high for a parliament unwilling to unnerve an electorate which sets great store in their constitution. Far better, in his view, is a text that encourages the public perception that the judicial understanding of the constitution is entitled to no more deference than the legislature's, indeed to less deference

[69] Dyzenhaus, 'Hobbes and the Legitimacy of Law'.

[70] J. Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' in T. Campbell, J. Goldsworthy and A. Stone (eds.), *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, forthcoming).

[71] Section 33 provides that both the federal Parliament and the provincial legislatures 'may expressly declare in an Act of Parliament or of the legislature . . . that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7–15 of this Charter'. The override is valid for five years only and has to be renewed to be effective past that date.

since the legislature is composed of elected representatives of the people. Both interpretations, as Waldron would say, are conclusions reached by voting, and thus we should prefer the conclusion reached by legislators.

This move by Goldsworthy introduces the same kind of tension we saw manifested in Austin. Goldsworthy wants the political benefits of a common law style of judicial reasoning, and moreover wants them writ large to include constitutional judicial review. But he also wants to avoid certain aspects of the style that are integral to the way in which it substantiates as true or false propositions about what the law requires. A positivist who wishes to find some kind of legal accommodation with rights-based constitutionalism, where judges are the guardians of the rights, will have to find some better way of coping with the constraints of the conceptual space of the common law. The claim that all the judges are doing is voting shifts our focus from the way in which the reasons for decision substantiate the decision entirely to the decision itself. And in this shift the rationale for constitutional review begins to disintegrate. The gift to judges independent of the political branch of an authority to test the decisions of that branch for compliance with constitutional values presupposes that the judges will exercise judgment exclusively on the basis of legal reasons.[72]

Section 33 also confronts Ronald Dworkin's legal theory with a problem. Dworkin, like Dicey, argues for a judicial monopoly on interpretation of the law. His account of adjudication, like any other based in the common law tradition, requires that law is capable of being interpreted by judges in such a way that it does not violate the fundamental values of their tradition. But section 33 faces such judges with the choice between recognizing as law a statute which explicitly overrides a constitutional value or ignoring a provision of the constitution. However, this mechanism for dealing with disputes between legislature and judiciary over constitutional values is hardly innovative. It writes into constitutional law a device that was always available to 'supreme' legislatures when they wanted to override common law judges—very explicit statutory language. Positivist critics of Dworkin have thus suggested that his claims for such judicial supremacy could only be made by someone whose perspective on law was formed in the more absolutist constitutional tradition of the United States of America. And this suggestion has led to the charge of parochialism—that Dworkin's legal theory is not a theory of law in general, but merely an abstract account of the practice of judges in one jurisdiction, where the values of the constitution are the values of a liberal democracy.

There is something to this charge. It explains why Dworkin has spoken out against constitutional devices less radical than section 33, for example, devices such as section 1 of the Canadian Charter, which requires judges to uphold legislative

[72] The effects of this shift in focus go even further, for reasons explored earlier. The attempt to understand the common law as a set of decisions, each of which stands for a determinate proposition, is driven by positivistic assumptions about the nature law should have, and so departs from the self-understanding of the common law tradition. Bentham gave up on reform of the common law, because he realized more clearly than his followers that the conceptual space of the common law is intrinsically resistant to such an attempt.

limits on constitutional rights as long as the government can justify those limits as 'reasonable limits ... as can be demonstrably justified in a free and democratic society'.[73] But for Dworkin to oppose such devices is to oppose a trend in constitutional design which gives a more explicit role to legislatures in the formation of a constitutional tradition.[74] The theories of constitutional dialogue between courts and legislatures that are quite popular now echo the quite ancient idea of the common law tradition in which legislature and judiciary are engaged in a common project.[75]

Notice that the neo-Benthamites are no less parochial. They speak from the context of Westminster-style parliamentary democracy and from a rather partisan perspective on the constitutional history of England.[76] But parochialism here is a virtue. It is only the fact that the legal theories of Dworkin and the neo-Benthamites are anchored not only in particular legal traditions, but in politically partisan accounts of those traditions, that permits them to provide insights both about the low ground of participant engagement with legal practice and about the high ground of abstract theory, as well as about the levels in between. For example, the common law idea of the consubstantiality of the different powers of legal order mentioned above, the idea that the legislature and the judiciary are involved in a common project to realize the values of the rule of law, is not an idea about the conceptual primacy of legislature and judiciary. It is an idea, which as Dworkin argues, must be defended by political arguments which have significant implications for questions about how best to understand law and its rule, for questions about how best to design institutions like those which control administrative discretion, and for questions about how participants should decide what the law is.

Once we see that parochialism is a necessary component of productive engagement between rival legal theories, we can also see how that engagement is never quite on the theorist's terms, if only because engagement is with practices for which the theorist has to account, even if part of his account is that the practices embed institutional mistakes. So, for example, any legal theorist writing today should take into account that the moral commitment to human rights is manifested domestically in human rights statutes and commissions, tribunals and courts with the authority to enforce the rights, and internationally in treaties

[73] See K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 232–38. For Dworkin's argument against such devices, see *A Bill of Rights for Britain* (London: Chatto, 1990).

[74] See S. Gardbaum 'The New Commonwealth Model of Constitutionalism', 49 *American Journal of Comparative Law* 707 (2001).

[75] In this light, Dworkin might look less like an exponent of the classical common law tradition (See Postema, 'Philosophy of the Common Law', suggesting that Fuller is the modern torch bearer of the common law tradition.) Rather, he has developed a theory to justify a claim of judicial monopoly over interpretation of the law, one which makes the judges exclusive guardians of fundamental values. I will not pursue here the interesting thought that the common law tradition does not require a judicial monopoly on interpretation.

[76] See D.E. Edlin 'Rule Britannia', 52 *University of Toronto Law Journal* 313 (2002), reviewing J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999) and M. Walters 'Common Law, Reason and Sovereign Will', 53 *University of Toronto Law Journal* 65 (2003), reviewing T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

and in committees of the United Nations, as well, more recently, in international tribunals, both ad hoc and permanent.

My point is only that this reality is one with which legal theory has to deal if it does not want to declare itself irrelevant to the practice of law. Parochialism, then, does more than make productive engagement possible. The movement it promotes between the more particular and the more general continually throws into question one's deepest assumptions.[77] And it is in that movement, I suggest, that evaluation can begin of the claims of rival legal theories and of the styles of reasoning each advocates.

[77] Thus I dispute Murphy's claim that there is sharp distinction between the 'legal regime' and the 'legal order'; Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) at 375. It is the thought that there is such a distinction which lies behind his further claim (n 91 at 395)—against the argument of *Hard Cases in Wicked Legal Systems*—that no legal theory can do best overall in accounting for different combinations of the moral character of legislators and judges: good judges, bad legislators, etc. I accept that no legal theory can do best overall, but for a different reason: a legal theory will not do a good job of describing a legal order whose design goes against the normative grain of the theory.