

LEGAL POSITIVISM: 5½ MYTHS

JOHN GARDNER¹

I. ISOLATING LEGAL POSITIVISM

The label “legal positivism” is sometimes attached to a broad intellectual tradition, distinguished by an emphasis on certain aspects of legal thought and experience (namely the empirical aspects). This way of using the label is well-suited to work in the history of ideas, in which the object of the exercise is to trace the ways in which philosophical themes were reprised and reworked as they were handed down from one generation to the next. In such work there is no need to identify any distinctive proposition that was advanced or accepted by all those designated as “legal positivists,” for the label attaches by virtue of common themes rather than common theses. But things are different when the label “legal positivism” is used in philosophical argument. In philosophical debate our interest is in the truth of propositions, and we always need to know which proposition we are supposed to be debating. So there is nothing philosophical to say about “legal positivists” as a group unless there is some distinctive proposition or set of propositions that was advanced or assumed by all of them. In philosophical argument, to put it another way, “legal positivists” stand or fall together only if they are united by thesis rather than merely by theme. There is neither guilt by association nor redemption by association in philosophy.

In this paper, I intend to treat one and only one proposition as the distinctive proposition of “legal positivism,” and to designate as “legal positivists” all and only those who advance or endorse this proposition. The proposition is:

(LP) 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.

In philosophical argument it matters not which proposition is given which name; it matters only which is true. On the other hand, I obviously did not choose this proposition (LP) at random to carry the famous “legal positivism” branding. In the first place, I wanted to bring my use of the label into a tolerable extensional alignment with the use of the label familiar from the history of ideas. Those commonly said to constitute the dominant historical

1. This is a revised version of a lecture delivered at Notre Dame Law School on 10 April 2001.

figures of the “legal positivist tradition”—Thomas Hobbes, Jeremy Bentham, John Austin, Hans Kelsen, and Herbert Hart—do not converge on many propositions about law. But subject to some differences of interpretation, they do converge unanimously on proposition (LP). Secondly, proposition (LP) is the one that contemporary self-styled “legal positivists”—such as Joseph Raz and Jules Coleman—bill themselves as subscribing to *qua* legal positivists, and the correct interpretation of which they debate when they debate among themselves *qua* legal positivists. Finally, my use of the label makes literal sense of the label itself. What should a “legal positivist” believe if not that laws are *posited*? And this, roughly, is what (LP) says of laws. It says, to be more exact, that in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it. It is no objection to its counting as a law that it was an appalling norm that those agents should never have engaged with. Conversely, if it was never engaged with by any relevant agents, then it does not count as a law even though it may be an excellent norm that all the relevant agents should have engaged with unreservedly. As Austin famously (if perhaps too brashly) expressed the point, “the existence of law is one thing; its merit or demerit is another.”²

We see here how the contrast between “sources” and “merits” in (LP) is meant to be read. “Source” is to be read broadly such that any intelligible argument for the validity of a norm counts as source-based if it is not merits-based. The two categories, in other words, are jointly exhaustive of the possible conditions of validity for any norm. But are they also mutually exclusive? You may say that there is a problem of overlap which prevents us from classifying some arguments for the validity of a norm as either source-based or merits-based, for they mention conditions of both types. On the one hand (i) we have arguments that attempt to validate certain norms by relying on *merit-based tests of their sources*, e.g. by relying on the fact that they were announced or practiced by Rex, together with the fact that Rex is a noble king. On the other hand (ii) we have arguments that attempt to validate certain norms by relying on *source-based tests of their merits*, e.g. by relying on the fact that they are reasonable norms, together with the fact that some other norm (validated only by its source) instructs us to apply all and only reasonable norms.

The legal positivist tradition has been united in regarding arguments of type (i) as invoking merit conditions of a type which cannot possibly be among the

2. Austin, *The Province of Jurisprudence Determined* (1832; ed. W.E. Rumble, Cambridge: Cambridge University Press, 1995), 157.

conditions of a norm's legal validity. The question of whether Rex is a noble king (or whether the regime in Lilliput is a just one, etc.) obviously bears on the moral significance of his (its) pronouncements and practices, but the answer to such questions cannot, according to legal positivists, affect the legal status of those pronouncements and practices. This is not to deny, of course, that they can make a merely *causal* difference to legal status: maybe the fact that Rex is a noble King explains why his subjects, or his officials, have come to regard his word as law. But it is *his word* that they regard as law. For his word to be regarded as law it must be possible to regard his word as law without reopening the question, when his word is heard, of whether he is a noble king. Thus Rex's nobility, according to legal positivists, cannot make a *constitutive* difference to Rex's ability to affect legal validity. So our approximation (LP) should be reformulated more exactly to read:

(LP*) 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 its merits, in the relevant sense, include the merits of its sources).

As far as arguments of type (ii) are concerned, the tradition has been more divided. Those who have come to be known as "soft" or "inclusive" legal positivists allow that in some legal systems norms may be legally valid in virtue of their merits (e.g. their reasonableness), but only if other legally valid norms happen to pick out those merits as relevant to legal validity.³ Others, known correspondingly as "hard" or "exclusive" legal positivists, deny this. They hold that a law which declares that (say) all and only reasonable laws shall be valid does not legally validate any further norms, in spite of appearances. Rather, it delegates to some official (say, a judge) the task of validating further norms himself or herself by *declaring* them reasonable. On this "hard legal positivist" view, the validity of the further laws in question comes not of their reasonableness (their merit) but rather of the fact that some relevant agent declared them reasonable (their source).⁴

3. This possibility was clearly envisaged by Hart in *The Concept of Law* (Oxford: Clarendon Press, 1961), 204, and was relied upon in the postscript to the book's second edition (Oxford: Clarendon Press, 1994) at 250. (Subsequent references are to the first edition unless otherwise specified.) In the meantime "soft" legal positivism had been proposed by Philip Soper in "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute," *Michigan Law Review* 75 (1977) 473; David Lyons, "Principles, Positivism, and Legal Theory," *Yale Law Journal* 87 (1977) 415; and perhaps most influentially by Jules Coleman in "Negative and Positive Positivism," *Journal of Legal Studies* 11 (1982) 139.

4. This was clearly Kelsen's view: see *The General Theory of Law and State* (New York: Russell and Russell 1961), e.g. at 134-6. The most influential contemporary exponent of the "hard" legal positivist view is Joseph Raz: see his "Authority, Law and Morality," *The Monist*

In what follows, I will for the most part bracket the internecine debate between “hard” and “soft” legal positivists and leave (LP*) ambiguous in respect of it. Where necessary, I will default to the “hard” version, since that is the version I support myself. I will leave it to the reader to make the modifications needed to accommodate the soft version, where relevant. These modifications should not alter much what I have to say. That is because the problems I will be surveying—and it will largely be a secondhand survey—are apt to afflict hard and soft legal positivists alike. In general, they are not problems of legal positivism’s own making. They are problems of systematic misrepresentation by others. Have the members of any tradition of thought ever had their actual philosophical commitments so comprehensively mauled, twisted, second-guessed, crudely psychoanalyzed, and absurdly reinvented by ill-informed gossip and hearsay, as the legal positivists? Has any other thesis in the history of philosophy been so widely and so contemptuously misstated, misinterpreted, misapplied, and misappropriated as (LP*)? Well, actually, I can think of a few. Something like this is apt to happen whenever a label is used in both philosophy and, relatedly, in the history of ideas. “Natural lawyers” will feel some sympathy, as they often suffer similar indignities. Nevertheless, there are special and interesting lessons to be learnt from the catalog of myths about legal positivism that have gradually built up to give it a whipping-boy status in so much legally-related literature.⁵ Some of these lessons, not surprisingly, are lessons about law itself.

II. WHY SO MISUNDERSTOOD?

But before we come to the myths, let’s just stop to ask ourselves what it is about legal positivism that made it so ripe for misrepresentation. I think there are two principal factors.

First: Proposition (LP*), although a proposition about the conditions of validity of certain norms that may be used in practical reasoning, is itself normatively inert. It does not provide any guidance at all on what anyone should do about anything on any occasion. Sometimes, like any proposition, it does of course serve as the minor (or informational) premise in a practical syllogism. If someone happens to acquire a duty to determine what the law of Indiana says on some subject on some occasion, then the truth of (LP*) affects how she should proceed. According to (LP*), she should look for sources of Indiana law, not ask herself what it would be most meritorious for people in

68 (1985) 295, further defended in Scott Shapiro, “On Hart’s Way Out,” *Legal Theory* 4 (1998) 469.

5. See Fred Schauer, “Positivism as Pariah” in Robert P. George (ed.), *The Autonomy of Law* (Oxford: Clarendon Press, 1996).

Indiana to do. On the other hand, (LP*) is never a major (or operative) premise of any practical syllogism. That means that *by itself* it does not point in favor of or against doing anything at all. I don't just mean that it provides no moral guidance. It provides no legal guidance either. It merely states one feature that all legal guidance necessarily has, viz. that if valid *qua* legal it is valid in virtue of its sources, not its merits.⁶ Lawyers and law teachers find this comprehensive normative inertness in (LP*) hard to swallow. They think (rightly) that legal practice is a practical business, and they expect the philosophy of law to be the backroom activity of telling front-line practitioners how to do it well, with their heads held high. When a philosopher of law asserts a proposition that neither endorses nor criticizes what they do, but only identifies some necessary feature of what they do, lawyers and law teachers are often frustrated. They automatically start to search for hidden notes of endorsement or criticism, secret norms that they are being asked to follow. They refuse to believe that there are none.⁷ They cannot accept that legal philosophy is not wholly (or even mainly) the backroom activity of identifying what is good or bad about legal practice, and hence of laying on practical proposals for its improvement (or failing that, abandonment). In this fundamentally anti-philosophical climate, a thesis like (LP*), which is inertly informative, is bound to become egregiously distorted.

Second: To make (LP*) a revealing proposition about law one has to believe that there is some *alternative* to validating norms according to their sources. One has to believe that some norms are valid depending on their merits, or else one won't see the contrastive purchase of (LP*). Instead, (LP*) will just strike one as rehearsing a general truth about norms—that all norms are made valid by somebody's engagement with them—and hence as revealing nothing special about law. All the torchbearers for the legal positivist tradition that were mentioned above agreed that, by default, the validity of a norm depends on its merits: the fact that a norm would be a good one to follow is, by default, what makes it valid. All agreed, for instance, that this is true of

6. Dworkin's talk of "the grounds of law" in *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), at 4ff, intentionally elides the distinction I am drawing here. Both the claim that legal norms are valid on their sources and the claim that legislation constitutes a source of valid legal norms are treated by Dworkin as *legal* claims. But only the second is a legal claim. The first is a claim about what *makes* the second a legal claim. To be exact, "legislation is a source of valid legal norms" is a legal claim only if the norm it mentions (viz. the norm of legislation-following) is itself being held out as valid on the strength of its sources rather than its merits (e.g. on the strength of the fact that legislation is identified as a source of law in a constitutional document or judicial practice.)

7. For a particularly clear expression of this refusal, see Gerald J. Postema, "Jurisprudence as Practical Philosophy," *Legal Theory* 4 (1998) 329.

moral norms.⁸ Legal norms, they agreed, are special (although not unique) in defying this default logic of norm-validation. How on earth do they defy it? It is a matter of deep wonderment to many philosophers.⁹ Alas, many lawyers and law teachers and students do not share the wonderment. For many in these lines of work think—being especially affected by a feature they see every day and take for granted in legal norms—that whether *any* norm is valid can depend only on its sources. They assume that moral and aesthetic norms are the same: just like legal norms, they can only be validated by the beliefs or endorsements of their users, or by social conventions or practices, etc. When one proposes a moral or aesthetic norm, such people often react in classic positivist fashion by asking “Who says?” or “On whose authority?” (as if the validity of a moral or aesthetic norm would depend on somebody *saying* it or *authorizing* it) rather than by asking what is the merit of the norm. Such general normative positivists—and they have always dominated the Critical Legal Studies movement and similar pseudo-radical camps—naturally cannot see what (LP*) has to offer in illuminating the distinctive nature of law.¹⁰ So if legal positivism is to illuminate the distinctive nature of law, the thinking goes, (LP*) cannot be all there is to it. There must be more. And there begins the myth-spinning.

III. THE MYTHS

A. *The value of positivity*

My title says I will cover 5½ myths about legal positivism, and I will begin with the half-myth. At the inception of the legal positivist tradition—in the work of Hobbes and arguably that of Bentham—we find an (LP*)-inspired optimism about the value of law. Insofar as legal norms are valid on their

8. Kelsen is an apparent exception. He normally reserved the label “morality” for a specialized order of posited (conventionally- or ecclesiastically-validated) norms rivaling law. Nevertheless, his work always presupposed the possibility of genuine moral norms valid on their merits. I have defended this reading of Kelsen in “Law as a Leap of Faith,” in Peter Oliver, Sionaidh Douglas Scott and Victor Tadros (eds.), *Faith in Law* (Oxford: Hart Publishing, 2000).

9. As Hart expressed the wonderment: “How are the creation, imposition, modification and extinction of obligations and other operations on other legal entities such as rights possible? How can such things be done?” See Hart “Legal and Moral Obligation” in Melden (ed.), *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958), 82 at 86.

10. When legal positivists are labeled simply as “positivists,” or it is otherwise insinuated that they tend to share the broader philosophical positions of e.g. Comte or Ayer—beware! It is usually the pot calling the kettle black. And nowhere more spectacularly than in the work of Stanley Fish: e.g. “Wrong Again,” *Texas Law Review* 62 (1983) 299 at 309ff, especially note 31.

sources rather than their merits, this fact alone is held to endow legal norms with some redeeming merit even when they are (in every other respect) unmeritorious norms.¹¹ Their redeeming merit is their special ability to settle matters that cannot be settled one way or the other on their merits. Believers in this claim are sometimes known as “normative legal positivists” but here I will call them “positivity-welcomers.”¹² That is because they need not endorse (LP*) and hence need not be legal positivists in the sense I am exploring. As positivity-welcomers they merely endorse

(PW) To the extent that (LP*) is sound, it identifies something not only true about legal norms, but meritorious about legal norms as well.

Those who are both legal positivists and positivity-welcomers are less frustrating to lawyers and law-school-dwellers than other legal positivists. For such people give (LP*) some immediate and invariant practical significance of a kind that warms our legal hearts. They tell us that the positivity of law is not only something we have to live with, but also something we can be proud of. Thanks to the truth of (LP*) combined with the truth of (PW), they say, it is always in one respect meritorious—and hence *ceteris paribus* justifiable—to advance a legal solution (however otherwise unmeritorious) to a moral or economic problem that would be intractable on its merits alone.

This rather self-congratulatory conclusion has not been common ground among the leading figures of the legal positivist tradition, and in particular the philosophical maturing of the tradition in the twentieth century led to its abandonment by the tradition’s most important modern torchbearers, among them Kelsen, Hart, and Raz. Hart is an especially interesting case. Hart agreed with those who say that all laws have a redeeming merit which comes of their very nature as laws. However, he did not trace this redeeming merit of all laws to their positivity. He traced it instead to the fact that, in his view, laws are not merely norms but *rules*, i.e. norms capable of repeated application from case to case. This fact of their normative generality, he thought, means that

11. See e.g. Hobbes, “Questions Concerning Liberty, Necessity, and Chance” in W. Molesworth (ed.), *The English Works of Thomas Hobbes* (London: Bohn, 1839-1845), vol. v, at 194. For thorough documentation of Bentham’s complex views on the built-in merit of law, see Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986).

12. Prominent examples of positivity-welcomers today: Neil MacCormick, “A Moralistic Case for A-moralistic Law,” *Valparaiso Law Review* 20 (1985) 1; Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth, 1996); Jeremy Waldron, “Normative (or Ethical) Positivism” in Jules Coleman (ed.), *Hart’s Postscript* (Oxford: Oxford University Press, 2001), 410. I erred on the side of excess in the list of legal positivists I classified as positivity-welcomers in my review of Campbell’s book in *King’s College Law Journal* 9 (1998) 180.

wherever laws go a kind of justice (and hence a kind of merit) automatically follows, for the correct re-application of any law entails that like cases are treated alike.¹³ My own view, contrary to Hart's, is that there is no justice (and more generally no merit) to be found in the mere fact that like cases are treated alike.¹⁴ But be that as it may, Hart's belief that all laws have some redeeming merit has everything to do with the fact that in his view laws are general norms and nothing to do with the fact that in his view they are posited norms. These two qualities are unconnected.¹⁵ Notice that as it stands, (LP*) is not a proposition specifically about *laws*. It is a proposition about what makes norms valid as *legal norms*, and hence as part of the law. It includes within its scope nongeneral legal norms such as the ruling that Tice must pay \$50 to Summers in damages. This too is valid as a legal norm on its sources, according to (LP*), even though it is not a norm capable of repeated application and hence would not be a law, according to Hart—and hence would not share in the value that Hart ascribes to all laws.

Some legal positivists go further, as Raz does, and deny that there is any built-in merit in all laws, let alone in all legal norms.¹⁶ Observers of such debates often ask: If legal positivists disagree among themselves about whether the positivity of legal norms lends them any value, why is it that they all mysteriously agree in making such a *fuss* about the positivity of law? Doesn't it reveal that they all think it *important* that legal norms are posited norms? True enough. Philosophers who defend (LP*), like all other philosophers, are offering an interpretation of their subject matter that plays up the true and important and plays down the true but unimportant.¹⁷ But what is important about legal norms, even what is important for their evaluation, need not be something that lends value or merit to them. Notice that the positivity

13. See Hart's 1958 essay "Positivism and the Separation of Law and Morals" in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 49 at 81; also *The Concept of Law*, supra, note 3, chapter 8.

14. See my lecture "The Virtue of Justice and the Character of Law" in *Current Legal Problems* 53 (2000) 1.

15. Some of Bentham's remarks cited by Postema, note 11, supra, suggest that for him the only built-in merit of laws lies in their *combination* of generality and positivity, which is why I said that he was only *arguably* a supporter of (PW).

16. See Raz's assembled arguments in chapters 12 and 13 of *The Authority of Law* (Oxford: Clarendon Press, 1979). These add up to a rebuttal not only of law's built-in rational appeal but also (by the same token) of its built-in merit.

17. Which shows that it is a mistake to follow Ronald Dworkin in contrasting "interpretive" accounts of law's nature with "descriptive" ones, unless one happens to share Dworkin's idiosyncratic "constructive" view of interpretation. Cf. Dworkin, "Legal Theory and the Problem of Sense" in Ruth Gavison (ed.), *Issues in Contemporary Legal Philosophy* (Oxford: Clarendon Press, 1987), 9 at 13-14.

of law could also be evaluatively important as a ground of *abhorrence* for law, as something that automatically drains merit out of each legal norm rather than adding merit to it. Anarchists, for example, can turn their arguments against submission to authority into arguments against respect for law only by endorsing (LP*) as a stepping stone. Only if legal norms are posited by someone do they count as exercises of authority. Anarchists who do not endorse (LP*) therefore should not have a blanket opposition to respecting legal norms *qua* legal. That anarchists do typically have a blanket opposition to respecting legal norms *qua* legal shows that they are typically legal positivists. Would one suppose that this in turn showed a secret belief, on the part of all such anarchists, that all legal norms, or all laws, have a built-in redeeming merit?

If not, then one should not jump to that conclusion regarding non-anarchistic legal positivists either. It is open to them to hold, for example, that the truth of (LP*) is evaluatively important precisely because (LP*) brings out a single feature of legal norms that leads anarchists to find laws invariably (in one respect) repugnant and some of their opponents to find laws invariably (in one respect) attractive. Nor are these—invariable repugnance and invariable attraction—the only possible evaluative reactions to law’s positivity. Perhaps the positivity of law sometimes makes law more repugnant and sometimes makes it more attractive and sometimes makes no difference at all to law’s value, depending on what other conditions hold. Only if a law is meritorious in some other ways, say, does its positivity lend it additional merit. I am not advocating this position. I am only saying that the truth of (LP*) must be granted, at least *arguendo*, before the argument over this position can even begin. This shows why philosophers of law might regard the positivity of legal norms as evaluatively important without thereby being predisposed to the (LP*)-inspired but not (LP*)-entailed thesis (PW).

B. *The rule of law*

Legal positivists are sometimes identified as placing a particular emphasis on the ideal of the rule of law (or *Rechtstaat*) as opposed to other ideals of government. No doubt on some occasions this is just another way of saying that legal positivists are relative enthusiasts for law, in that they see some built-in redeeming merit in legal norms *qua* posited. This is the half-myth that we already considered under heading (A), involving the extra thesis (PW). But on at least some occasions the association of legal positivism with the rule of law is clearly supposed to suggest a different point not implicating (PW). It is supposed to suggest that legal positivists insist on the evaluation of laws according to their form (e.g. their clarity, certainty, prospectivity, generality,

and openness) as opposed to their content (e.g. what income tax rate they set, or what limits on freedom of speech they authorize). The label “rule of law” is used to designate the former clutch of “content-independent” evaluative criteria.¹⁸

It is hard to disentangle the various confusions that underlie this myth. The simplest and commonest confusion seems to be this one. Thanks to the sloppy multi-purpose way in which the word “formal” is bandied around by lawyers, the distinction just drawn between the form of a law and its content is often conflated with the distinction drawn in (LP*) between source-based criteria of normative validity and merits-based criteria. Thus, those who think that norms are legally valid according to their sources and not their merits are then herded together with those who think that norms are legally valid according to their form rather than their content.¹⁹ This herding-together is muddled. While the former position is the legal positivist one captured in (LP*), the latter is a classic *anti-legal-positivist* position often associated (fairly or unfairly) with Lon Fuller.²⁰ To hold a norm legally valid according to its formal merits rather than according to the merits of its content is still to hold it valid according to its merits, and this puts one on a collision course with (LP*).

This point is spelled out by Hart in a passage towards the end of *The Concept of Law*.²¹ Alas, Hart later went on to court confusion on the same point by suggesting that legal reasons (including legal norms) are distinctive in being reasons of a content-independent type.²² Unlike moral and economic norms, their validity cannot be affected by their content. In saying this, Hart cooked up a red herring the scent of which still lingers.²³ The validity of legal

18. See e.g. Hugh Collins, “Democracy and Adjudication” in Neil MacCormick and Peter Birks (eds.), *The Legal Mind* (Oxford: Clarendon Press, 1986), 67 at 68; Kenneth Winston, “Constructing Law’s Mandate” in David Dyzenhaus (ed.), *Recrafting the Rule of Law* (Oxford: Hart Publishing, 1999), 290ff.

19. See e.g. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 17: legal positivists’ criteria of legal validity have to do “not with [the] content [of norms] but with ... the manner in which they were adopted or developed.”

20. “Positivism and Fidelity to Law: A Reply to Professor Hart” *Harvard Law Review* 71 (1958) 630. I say “fairly or unfairly” because arguably Fuller is not talking about the conditions of legal validity at all, and so is not engaging with (LP*). Arguably he is talking about the conditions under which (admittedly valid) law deserves no respect among legal officials.

21. In *The Concept of Law*, supra, note 3, 202-7.

22. “Commands and Authoritative Legal Reasons” in his *Essays on Bentham* (Oxford: Clarendon Press, 1982), 243 at 254-5.

23. I am not doubting the value of the idea of content-independence in framing or solving other philosophical problems. For example, the notion does help to illuminate (as Hart observes) the difference between norms and other reasons. For more sweeping (although I think unsuccessful) objections to the philosophical value of the idea of content-independence, see P.

norms *can* depend on their content so long as it does not depend on the *merits* of their content. That a certain authority has legal jurisdiction only to change the criminal law means that, by virtue of their content, its measures purporting to create new causes of action in tort do not create valid legal reasons. Conversely, and by the same token, the validity of legal norms cannot depend on their merits even if their merit does not lie in their content but lies rather in their form, e.g. in the extent of their compliance with rule-of-law standards. Hart should have said, to get to the real point, that legal reasons (including legal norms) are reasons of a distinctively *merit*-independent type. They take their legal validity from their sources, not from their merits, and their merits for these purposes include not only the merits of their content but also the merits of their form (as well as the merits of the person or people who purported to make them or the merits of the system within which they were purportedly made etc.). Thus, as Hart had correctly explained in his earlier engagements with Fuller, a legal norm that is retroactive, radically uncertain, and devoid of all generality, and hence dramatically deficient relative to the ideal of the rule of law, is no less valid *qua* legal, than one that is prospective, admirably certain, and perfectly general.²⁴

The conflation of the form-content distinction with the source-merit distinction is compounded, in many discussions of the relationship between legal positivism and the rule of law, by numerous other confusions. In the background of such discussions seems often to lurk the further assumption that the apt ways of evaluating any norm are dictated by the conditions of its validity. Thus, if we suppose that all conditions of legal validity are source-based, we are limited to source-based criticisms of the law; if we endorse “formal” conditions of legal validity, we are limited to “formal” criticisms of the law, and so forth. Why should this be so? It implies that the only criticism one can properly make of a supposed legal norm is that it is legally invalid. But far from being the only proper criticism of a supposed legal norm, *this need not be any criticism at all*. Agreeing that a norm is legally valid is not

Markwick, “Law and Content-Independent Reasons,” *Oxford Journal of Legal Studies* 20 (2000) 579.

24. But isn't this insistence on the possibility of legal validity without conformity to the rule of law at odds with Hart's view, already mentioned at note 13, *supra*, that all laws (being not only norms but *rules*) have a built-in element of generality? No, it isn't. For the absence of this element of generality, as we saw, does not affect the legal validity of any norm, in Hart's view. It only affects whether it is a valid *law* as opposed to a legally valid norm of a nongeneral type (e.g. Tice must pay \$50 to Summers). Either way, its legal validity turns on its source not its generality. Apart from which, the minimal generality required to achieve “rulishness” clearly falls well short of the measure of generality expected by any credible version of the rule-of-law ideal. One cannot congratulate oneself on having conformed to the generality clause of the rule of law merely by virtue of the fact that the norm one made was a rule.

incompatible with holding that it is entirely worthless and should be universally attacked, shunned, ignored, or derided. There are substantive moral debates to be had—independently of the normative inert (LP*)—about the attitude one should have to legally valid norms. In these debates the whole gamut of possible attitudes is on the table. Remember the anarchists we encountered above, who went as far as to regard the fact that a norm is posited is actually part of the case for attacking it, shunning it, ignoring it, or deriding it? Even for positivity-welcoming legal positivists, who combine (LP*) and (PW) and conclude that legally valid norms necessarily have some redeeming merit, this is still only a *redeeming* merit. It does not affect the possibility of attacking, shunning, ignoring, or deriding the same legal norm on the ground of its many more striking and important *demerits*. Those demerits may obviously include the demerits of its content (e.g. what income tax rate it sets or what limits on freedom of speech it authorizes) as well as the demerits of its form (e.g. its unclarity, uncertainty, retroactivity, ungenerality, and obscurity).

And why, to bring out one final confusion under this heading, should these last two dimensions of criticism be regarded as rivals? That one believes that unclarity, uncertainty, retroactivity, ungenerality, obscurity and so forth are demerits of a legal norm does not entail that one denies that there are further demerits in the same norm's content (e.g. that it sets a too-low rate of income tax or a too-high protection for freedom of speech). Nor does it suggest that one regards the former demerits as more important than the latter. One may well think, to be sure, that the former demerits are in a sense *more peculiarly legal* demerits than the others. As a believer in (LP*), one is committed to agreeing with Hart that the law's living up to the rule-of-law values that Fuller called the "inner morality of law" cannot be among the conditions for the legal validity of any norm. But so long as they are not held to be among the conditions for the legal validity of any norm, one is not debarred from agreeing with Fuller that these values constitute law's special inner morality, endowing law with its own distinctive objectives and imperatives.²⁵ Legal positivism is not a whole theory of law's nature, after all. It is a thesis about legal validity, which is compatible with any number of further theses about law's nature, including the thesis that all valid law is by its nature subject to special moral objectives and imperatives of its own. It is a long way from this thesis, however, to the conclusion that valid law answers *only* to its own special objectives and imperatives, and not to the rest of morality. A more credible assumption is that law's inner morality, if it has one, adds *extra* moral objectives and imperatives for legal norms to live up to, *on top of* the regular

25. Hart, *The Concept of Law*, supra, note 3, 202.

moral objectives and imperatives (e.g. avoiding the infliction of pain, not deceiving its addressees) that every practice or activity should live up to as a matter of course. Naturally, this addition of extra moral objectives and imperatives can give rise to extra conflicts. Sometimes laws that have meritorious content can accordingly be made morally questionable by the fact that there is no way to make them sufficiently clear, certain, prospective, general, or open. Thus—true enough—the pursuit of some other sound governmental ideals may sometimes be slowed down by adherence to the ideal of the rule of law.

But this is no reason to imagine that those who subscribe to the ideal of the rule of law have no commitment to any potentially conflicting ideals of government, or that they automatically regard potentially conflicting ideals as subordinate, or that they do not regard the law as answering to any ideals apart from the specialized ideal of the rule of law.²⁶ In particular, none of the leading figures of the legal positivist tradition subscribed to any views resembling any of these. And even if they had, for the reasons I have given, this could have had no philosophical connection with their being legal positivists.

C. *Positivist adjudication*

In some quarters legal positivists are thought to be committed to a distinctive view about the proper way of adjudicating cases, according to which judges should not have regard to the merits of cases when deciding them. This conclusion generally comes of combining an endorsement of (LP*) with the widespread assumption that judges are under a professional (i.e. a role-based moral) obligation to decide cases only by applying valid legal norms to them.²⁷ But the latter assumption is not shared by legal positivists in general and is directly challenged by several of the tradition's leading figures. The simplest way to challenge it is to rely on its systematic and unavoidable collision with another pressing professional obligation of judges, namely their obligation not to refuse to decide any case that is brought before them and that lies within their jurisdiction. If judges are professionally bound to decide cases only by applying valid legal norms to them, the argument goes, then there are necessarily some cases that they should refuse to decide, for there are necessarily some cases not decidable only by applying valid legal norms. This

26. Friedrich Hayek did much to encourage the view that allegiance to the rule of law requires a suppression of all other ideals for government and law: cf. *The Road to Serfdom* (London: George Routledge, 1944), 54ff. However, Hayek's arguments to this effect were uniformly fallacious.

27. Cf. Dworkin, *Law's Empire*, supra, note 6, 6-8.

in turn is so precisely because of the positivity of legal norms. There are inherent limitations on the ability of agents to anticipate future cases in which the norms they create may be relied upon, and to shape the norms they create in such a way as to settle across the board which cases they apply to.²⁸ Insofar as legal norms are the creations of agents—i.e. insofar as they are the posited norms that (LP*) tells us they are—these inherent limitations inevitably give rise to some gaps in the law.

When I speak of “gaps” here, I do not mean that the law is silent regarding some cases. Closure rules (such as “everything not forbidden by law is permitted by law”) are perfectly capable of preventing legal silence.²⁹ Rather, the gaps I have in mind arise (i) in cases in which a given legal norm is neither applicable nor inapplicable, but rather indeterminate in its application, and (ii) in cases in which valid legal norms conflict so that two rivals (e.g. one forbidding a certain action and the other requiring the same action) are both applicable at once and there exists no third legal norm that resolves the conflict. No closure rule, however ingenious, can guarantee to eliminate these latter types of gaps.³⁰ They are endemic to law, in all legal systems, thanks to the positivity of law. This makes it inevitable that if judges are to decide all cases validly brought before them, they will sometimes have to go beyond the mere application of posited (including legal) norms. And once they have exhausted all the normative resources of posited norms, what else is there for them to rely on but the merits of the case and hence of the various norms that might *now* be posited in order to resolve it?

The picture presented here—which is mainly attributable to the work of Hart and Raz, but also owes something to Kelsen—makes legal positivists the natural enemies of the mythological “legal positivist” view that judges should not have regard to the merits of cases when deciding them. Except by withdrawing from judges the requirement to decide every case validly brought before them, legal positivists cannot but ascribe to judges the role of determining at least some cases at least partly on their merits, and hence cannot but expect of them that they will go beyond the task of merely applying valid law. This brings out the important fact that, in dealing with the full

28. As explained at length by Hart in *The Concept of Law*, supra, note 3, 121-132.

29. Cf. Kelsen’s denial of the possibility of legal gaps *in the sense of silences* in “On the Theory of Interpretation,” *Legal Studies* 10 (1990) 127 at 132. As Kelsen rightly observes, deontic logic supplies automatic closure rules for cases in which the law fails to do so. Since these defaults are not valid on their sources but are necessary truths they are not valid as legal norms according to (LP*). This reminds us that the view according to which judges should *only* apply legal norms is in one respect absurd. At the very least, they also need to apply the norms of logic, which are valid on their (intellectual) merits.

30. Joseph Raz, *The Authority of Law*, supra, note 16, 70ff.

gamut of human decision, source-based and merit-based norms are apt to call upon each other's services at frequent intervals. At least sometimes, relying on source-based norms is warranted because it provides one way of resolving cases that cannot be completely resolved on their merits. On any view, this provides at least part of the justification (such as it is) for having legal systems. It is this fact, you will recall, that positivity-welcomers inflate to yield their conclusion that all laws have some redeeming merit just in virtue of their positivity. What they less often notice, however, is that the reverse point also holds with similar force and on similar grounds. At least sometimes relying on some or all of the merits of a case is warranted because it provides a way of resolving cases that cannot be completely resolved according to the applicable source-based norms. This does not necessarily turn into a constant buck-passing exercise. The source-based norms may obviously narrow the issue such that it can now be resolved on the merits even though, without the intervention of source-based norms, it would not have been resolvable on the merits.

This proposal invites a modification of the myth under consideration. Are legal positivists at the very least committed to the view that judges should, *if possible*, decide cases by applying source-based norms? Should judges resort to deciding on the merits only as a fallback, when legal norms cannot settle the matter? This idea has some moral appeal. But it is still not one that has any natural affinity with legal positivism. As I explained, (LP*) is normatively inert. It only tells us that, insofar as judges should apply legal norms when they decide cases, the norms they should apply are source-based norms. But that leaves completely open the vexed questions of whether and when judges should only apply legal norms. Some legal positivists—one thinks particularly of Bentham—happen to be enthusiasts for limiting the role of judges in developing the law.³¹ It would be better, on this Benthamite view, if judges stuck to merely applying the law, so far as possible, and left law-making activities by and large to the legislature. Is (LP*) implicated in this view in any way? No. Bentham's preference for the legislature to make the law and judges to apply it is in fact totally independent of his legal positivism. One could equally be a legal positivist enthusiast for judges to be the main lawmakers. Moreover, endorsing (PW) changes nothing on this front. Unlike (LP*), (PW) is obviously not normatively inert. It does have some implications, even taken on its own, for what some people should sometimes do. But it still does not bring us any closer to the conclusion that legislatures should

31. See Postema, *supra*, note 11, at 197, citing Bentham's manuscript remark that "[no] degree of wisdom ... can render it expedient for a judge ... to depart from pre-established rules."

make the law and judges should so far as possible only apply it. For (PW), like (LP*), is completely indifferent as between legislative and judicial sources.³² It holds that the positivity of legal norms endows them with some redeeming merit, whatever their demerits. If it is truly the *positivity* of legal norms that supposedly endows them with this redeeming merit (and not some other feature), then the merit in question necessarily remains constant as between enacted and judge-made legal norms. For judge-made legal norms are no less posited than their enacted counterparts. This is acknowledged in the very idea that judge-made law is judge-made, i.e. is legally valid because some judge or judges at some relevant time and place announced it, practiced it, invoked it, enforced it, endorsed it, accepted it, or otherwise engaged with it.

D. Judicial legislation

Legal positivism militates against the assumption that judges should only and always apply valid legal norms. This is sometimes held to be a reason to abandon legal positivism. This suggestion lay at the heart of Ronald Dworkin's first critique of Hart's work. Dworkin agreed with Hart that judges cannot but decide some cases at least partly on their merits. However, he refused to concede that this could possibly involve judges in doing anything other than applying valid legal norms. If they did anything other than applying valid legal norms they would be part-time legislators, Dworkin said, and that would lay to waste the important doctrine of the separation of powers between the legislature and the judiciary. It would also condemn the law to violations of the rule-of-law ban on retroactive legislation, for the law made by judges would necessarily be applied by them retroactively to the cases before them. On these twin grounds Dworkin felt impelled to reject (LP*). He famously concluded that the validity of *some* legal norms depends on their merits rather than their sources. It depends, in his view, on their merits as moral justifications for other (source-based) legal norms.³³

32. This remains true when it is formulated as the thesis that "the law ought to be such that legal decisions can be made without the exercise of moral judgment": Jeremy Waldron, "The Irrelevance of Moral Objectivity" in Robert George (ed.), *Natural Law Theory* (Oxford: Clarendon Press, 1992). Judges can help to make the law like this no less than legislatures.

33. *Taking Rights Seriously*, *supra*, note 19, chapter 2. I omit the further and independent claim that source-based legal norms are "rules" and merit-based ones are "principles." Hart used the word "rule" in its ordinary sense simply to mean "general norm." Principles are general norms and hence count as rules in Hart's sense. Dworkin, on the other hand, gave "rules" a special technical meaning: they are general norms that cannot be either more or less weighty. His claim that all source-based norms must be rules in this special technical sense is mistaken. Source-based norms are more or less weighty in proportion to the importance of their source: one owed to the Supreme Court has greater weight than one owed to the Court of Appeals, etc.

Even if we grant the premises, we may marvel at the conclusion. Why should the fact that the law would inevitably fail to live up to certain ideals if (LP*) were true be a reason to deny (LP*), rather than a reason to admit that law inevitably fails to live up to certain ideals, or perhaps a reason to wonder whether one has exaggerated the ideals themselves?³⁴ But never mind that familiar challenge to Dworkin's conclusion. Instead, I want to focus on Dworkin's premise according to which (LP*), at least in Hart's hands, turns judges into part-time legislators. Here we see a fresh myth that is sometimes wheeled out, in combination with the myth just considered under heading (C), to effect a kind of pincer movement against legal positivists as a group. Either legal positivists agree that judges should not decide cases on their merits (absurd!), or they become committed to the view that judges are part-time legislators (intolerable!).

The latter myth—Dworkin's myth—has at its source the mistaken assumption that all law-making is necessarily *legislative* law-making. It is fair to point out that Hart accidentally encouraged this mistaken assumption. He said that, in cases in which a case cannot be decided by applying only valid legal norms, the judge has "discretion" to decide the case either way.³⁵ Technically this is correct. The case is *ex hypothesi* unregulated by law in respect of its result and that makes the result legally discretionary. But talk of "discretion" is also misleading here. It suggests a judge who is entitled, consistently with his or her professional obligations, to give up legal reasoning and instead simply to reason morally or economically or aesthetically, or maybe even not to reason at all any more but simply go with his or her gut instinct, the toss of a coin, etc. But giving up legal reasoning in this way, at least at this early stage in the game, would admittedly be a violation of a judge's professional obligations. For judges admittedly have a professional obligation to reach their decisions by legal reasoning. And even in a case which cannot be decided by applying only existing legal norms it is possible to use legal reasoning to arrive at a new norm that enables (or constitutes) a decision in the case, and this norm is validated as a new legal norm in the process.

Obviously, legal reasoning, in this sense, is not simply reasoning about what legal norms already apply to the case. It is reasoning that has already-

34. For (LP*)-independent reasons to think that law inevitably fails to live up to the ideal of the rule of law, properly understood, see my "Rationality and the Rule of Law in Offences Against the Person," *Cambridge Law Journal* 53 (1994) 502. For (LP*)-independent reasons to think that some people exaggerate the ideal of the rule of law, and so read conformity as violation, see Timothy Endicott, "The Impossibility of the Rule of Law," *Oxford Journal of Legal Studies* 19 (1999) 1.

35. *The Concept of Law*, *supra*, note 3, 128.

valid legal norms among its major or operative premises, but combines them nonredundantly in the same argument with moral or other merit-based premises. To forge a (legally simplified) example: (1) the Civil Rights Act of 1964 gives everyone the legal right not to be discriminated against in respect of employment on the ground of his or her sex (source-based legal norm); (2) denying a woman a job on the ground of her pregnancy is morally on a par with discriminating against her on the ground of her sex, even though there is no exact male comparator to a pregnant woman that would allow the denial to count as sex-discriminatory in the technical sense (merits-based moral claim); thus (3) women have a legal right not to be denied a job on the ground of their pregnancies (new legal norm); now (4) this woman P has been denied a job by D on the ground of her pregnancy (proven fact); thus (5) D owes P a job (a further new legal norm, but a nongeneral one).

This is a classic example of legal reasoning. Naturally, I have sidelined some possible complications. In particular I have ignored conflicting legal norms that may inhibit judicial delivery of new legal norms by this kind of reasoning. If a previous judicial decision establishes norms inconsistent with (3), then the rules of *stare decisis* applicable in the legal system in question may affect what a judge faced with the facts in (4) has the legal power to do. Perhaps she may overrule the earlier decision. Or perhaps she has scope to distinguish the earlier decision, i.e. to rely on and hence validate a norm narrower than (3) which is consistent with the earlier decision, but which still reflects the moral force of (2), and which still yields (5). Or perhaps not. These questions depend on the local legal norms establishing her powers as a judge. These norms set source-based constraints on the judge's use of merits-based legal reasoning. If the judge violates these constraints, different legal systems cope differently with the violation. Some may have a *per incuriam* doctrine similar to the common law one that eliminates the legal validity of norm (3) but leaves norm (5) legally valid until the case is appealed. Others may have different solutions. The possibilities are endless.

But none of this detracts from the main point. The main point is that the reasoning from (1) to (5) is an example of specifically legal reasoning—reasoning *according to law*—because the existing legal norm in premise (1) plays a nonredundant but also nondecisive role in the argument. Because the existing law is not decisive the judge necessarily ends up announcing, practicing, invoking, enforcing, or otherwise engaging with some new norm or norms (which may of course be modifications of existing legal norms), in this case the norms in (3) and (5). In virtue of (and subject to) the judge's legal powers to decide cases on this subject, these new norms become legally valid in the process, at least for the purposes of the present case. If the judge sits in a sufficiently elevated court, then, depending on the workings of the local

stare decisis doctrine, the new norms may also become legally valid for the purposes of future cases, subject always to future judicial powers of overruling and distinguishing. But that future validity does not turn these new norms into legislated norms even if they have exactly the same legal effects as legislated norms. In creating new legal norms by legal reasoning, or according to law, the judge plays a different role from that of a legislature. For a legislature is entitled to make new legal norms on entirely nonlegal grounds, i.e. without having any existing legal norms operative in its reasoning. A legislature is entitled to think about a problem purely on its merits. Thus, it can enact laws against pregnancy-related denials of employment without having to rely on the existing norms of the Civil Rights Act (or other specifically legal materials) to do so. But not so a judge. Barring special circumstances, a judge may only create this new legal norm on legal grounds, i.e. by relying on already valid legal norms in creating new ones.

This is not the only difference between legislative and judicial law-making, but for our purposes it is the most important.³⁶ Dworkin may object that it is a merely verbal quibble. His arguments were directed against judicial law-making, he may say, whether we bless it with the name of “legislation” or not. But that is not true. Dworkin’s arguments were based respectively on the moral importance of the separation of powers, and the rule of law’s ban on retroactivity. What is really morally important under the heading of the separation of powers is not the separation of law-making powers from law-applying powers, but rather the separation of *legislative* powers of law-making (i.e. powers to make legally unprecedented laws) from *judicial* powers of law-making (i.e. powers to develop the law gradually using existing legal resources). Similarly, the only morally credible rule-of-law ban on retroactive legislation is just that, namely a ban on retroactive *legislation*, not a ban on the retroactive change of legal norms even when that change is made in accordance with law. In short, the distinction I drew between legislation and judicial law-making, far from being a merely verbal one, is a distinction of great significance in many moral (and some legal) arguments—notably the classic moral arguments based on the separation of powers and the rule of law that Dworkin himself invokes.

It is also entirely consistent with (LP*). According to (LP*), norms are made legally valid by someone’s having engaged with them. A judge’s engagement with norms by mounting a defense of them partly in terms of other legal norms is one such type of engagement. It differs in deeply important ways from the legislative engagement that consists in the norm’s

36. It is explored most fully in Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), chapters 11 and 13 (chapters 12 and 14 in the paper edition).

straightforward (legally undefended) pronouncement. So it is a myth that legal positivists must become believers in judicial legislation as soon as they agree that legal norms do not settle every case.

E. Interpretation

It is sometimes hinted by critics, and widely believed by students, that legal positivists must favor particular methods of legal interpretation. They must be supporters of interpretation using only the resources of the legal text itself.³⁷ Or maybe believers in interpretation according to the original intention of the law-maker.³⁸ Why these particular methods of interpretation? Because presumably the act of positing that legally validates a norm under (LP*) must also identify the norm that it validates. And it may seem that there are only two aspects of the positing act that are suitable candidates for this identificatory role: the text in which the norm is posited and the intention of the agent who posits it. So presumably legal positivists have to choose between the rock of “textualism” and the hard place of “originalism.” Or so the popular mythology goes.

A preliminary but telling objection to confronting legal positivists with this Hobson’s choice is that it already assumes that the legally valid norms mentioned in (LP*) must be posited *articulately* (i.e. in words) and *intentionally* (i.e. with a view to positing a norm). But that is by no means the shared assumption of believers in (LP*). The “command” versions of (LP*) espoused by Bentham and Austin admittedly did embrace this assumption. But Hart went to great pains to distance himself from it. He argued (I think successfully) that in all legal systems at least some valid legal norms are posited and hence validated by being practiced or used rather than by being articulated, and that the relevant uses of these norms need not be regarded or intended as norm-positing acts by the relevant users.³⁹ Yet presumably these norms often need to be interpreted too. When that is so, what would it mean to interpret them “using only the resources of the text itself” or “according to original intention”? Neither proposal makes sense. So presumably there are other proposals for the interpretation of practice-validated norms that *do* make

37. See e.g. Fish, “Wrong Again,” *supra*, note 10, 309-10. Cf. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1986), who kindly observes at 37 that “not even” legal positivists sign up to this “textualist” view—even though they “seem the most likely” to do so!

38. See e.g. Michael Freeman, “Positivism and Statutory Construction: An Essay in the Retrieval of Democracy” in Stephen Guest (ed.), *Positivism Today* (Aldershot: Dartmouth, 1996), 11 at 21.

39. *The Concept of Law*, *supra*, note 3, e.g. 113, 149-150.

sense. Why not apply these other proposals, whatever they may be, to articulate and intentional acts of law-making, such as legislation, too? Why not, for example, interpret all these acts, in their norm-creating aspect, just as they were interpreted by others at the time when they were performed (which need neither be a textualist nor an originalist interpretation)? That meets the condition that the act of positing that legally validates a norm under (LP*) must also identify the norm that it validates. The norm is identified as the norm that certain others, observing the acts of positing in question, took those acts to be creating.

The reason why this won't do regarding legislation and other acts of intentional law-making, it may be said, is this. To have the power to make law intentionally—as it is sometimes put, to be an *authority*—one must surely have the power intentionally to determine what law one makes, at least up to a point.⁴⁰ And that surely requires interpreters to give credence to what one meant (originalism) or, alternatively, to limit attention to the words one chose to convey what one meant (textualism). It will not do to give the power to determine what norm one created entirely to others who observed one's norm-positing act, by making their interpretation authoritative rather than one's own. But *why* will this not do? So long as one can work out more or less how the relevant others will read what one says or does, one can also adapt what one says or does to anticipate their readings. If one can work out that the relevant others are perverse types who will always read "cat" to mean "dog," one can make the dog-regulating laws one means to make by passing a Cat Regulation Act. By this feedback route, one has the power intentionally to determine what law one makes even though the norm for interpreting that law does not refer to one's intentions (i.e. is not originalist), and gives one's text a quirky meaning (i.e. is not textualist). All of this depends, to be sure, on the assumption that one can work out more or less how the relevant others will read what one said or did. But in a legal system this condition can normally be met by having (source-based) legal rules of interpretation. These rules will be used by interpreters (e.g. by judges) and can therefore be relied upon in advance by legislators and other lawmakers to work out, backwards, how they should speak or behave in order to be held to have made the law that they are trying to make.

So the widely different norms of interpretation adopted and practiced in different legal systems need not differ in the measure of ability they give to lawmakers intentionally to shape the laws that they make. So long as the local norms of interpretation can be grasped by the lawmakers (or by those drafting

40. Raz, "Intention in Interpretation" in *The Autonomy of Law*, supra, note 5, 249 at 256-260.

statutes or judgments on their behalf), the laws can be intentionally shaped by anticipating how they will be interpreted by others and drafting them accordingly. It does not follow, of course, that we should be indifferent as between different possible norms of interpretation—that we should not care, for example, whether traditional British strict construction in reading statutes prevails over the more relaxed American approach. Possibly one of these approaches makes for all-round better judicial decisions than the other, or possibly neither is as good as some third approach, or possibly a mixture of approaches would be best of all, etc. My point is only that *this* desideratum—the achievement of all-round better judicial decision—is the proper basis for selecting (and legally validating) norms of interpretation. In selecting such norms one need not be inhibited by the need to build in a special respect for the law-maker’s words or the law-maker’s intentions because, thanks to the feedback loop I mentioned, that can largely look after itself whatever norm one adopts or practices.

I say “largely” because of course there is a proviso. Since legislators and other lawmakers are no more clairvoyant than the rest of us, they can only adapt their law-making to norms of interpretation already in use or proposed. So the considerations just mentioned do have a certain conservative leaning. Insofar as law-making agents are to be treated as *authorities* regarding the norms they made, there is a reason to apply to those norms the interpretative norms that were knowably applicable to them *at the time when they were made*.⁴¹ But how significant a constraint is this? One must remember that most legal norms, even when intentionally made, were not made by just one agent in one fell swoop. They were made by a succession of legal engagements. When people ask their lawyer or their law teacher “What does the First Amendment have to say about this problem?” they don’t normally mean to restrict attention to the norm created by the original agreement on the text back in 1789. They mean to ask about the *law* of the First Amendment, which includes the original 1789 sources *plus* the often conflicting pronouncements, arguments, and practices of countless judges in First Amendment cases over the intervening centuries. Since a great deal of this intervening law-making was itself intentional, the question is not only one of treating the Congress of 1789 as an authority, but also one of treating the Supreme Court of 1926 as an authority, and indeed as an authority regarding how to treat the Congress of 1789 as an authority, and then of treating the Supreme Court of 1968 as an authority regarding both the Congress of 1789 and the Supreme Court of 1926, and regarding the legally proper way to relate them, and so forth. It follows that the limited conservative implications of the principle of deference to

41. *Ibid.*, 271.

authority are so limited as to be rarely worthy of any real moral anxiety. They point to nothing like “originalism” or “textualism” conceived as interpretative doctrines that would freeze the First Amendment or the Civil Rights Act at the time of enactment, or limit the range of background context that could bear upon its meaning.

In all of this I have been granting another very common assumption that supporters of (LP*) need not, and often do not, share. I have been granting that the interpretation of legal norms belongs exclusively to the law-applying stage of legal reasoning, as opposed to the law-making stage. Recall that we started with the question of how (LP*) would have us *identify* the norms that are validated according to source-based criteria, and we took this to be where the question of interpretation fits in. But that is already a mistake. Interpretative activity straddles the distinction between the identification of existing legal norms and the further use of them to make new legal norms. To the extent that a judge can determine what the First Amendment means by relying exclusively on the relevant source-based norms (i.e. by relying on the text of the First Amendment together with judicial interpretations of it and judicial interpretations of those interpretations and applicable laws of precedent and interpretation), that judge is merely identifying the First Amendment in interpreting it. But to the extent that the judge is left with conflicts among or indeterminacies in the applicable source-based norms—including those of precedent and interpretation—the process of legal interpretation necessarily takes him beyond the law. The assembled ranks of source-based norms took the judge so far, but at a certain point they left the meaning of the First Amendment unclear, to be settled on the merits. At that point, settling the meaning of the First Amendment means *giving* it a meaning. It necessarily goes beyond norm-application to norm-alteration.

Remember our example of legal reasoning about sex discrimination under the Civil Rights Act? There our imaginary judge started with (1) an interpretation of the Act according to which it gives people a legal right not to be discriminated against on grounds of sex in employment. From that starting point, in combination with a moral premise, our imaginary judge ruled (and thereby made it the law) that (3) a woman has a legal right not to be denied a job because she is pregnant. Was this in turn an interpretation of (1)? Maybe. Maybe we forgot to mention that, according to our imaginary judge, (3A) a woman has a legal right *under the Civil Rights Act* not to be denied a job because she is pregnant. That judges talk like this has been understood by Dworkin and many others to suggest that all they are doing is applying the norms in the Civil Rights Act when they arrive at conclusion (3A).⁴² But it

42. See e.g. Dworkin, *Law's Empire*, supra, note 6, at 6.

does not suggest that at all. It suggests that they are *interpreting* the norms in the Civil Rights Act when they arrive at (3A), and that could mean *either* applying them *or* developing them. Some acts of interpretation are concerned with settling the law in the sense of identifying what it already says, but other acts of interpretation, like that captured in (3A), are concerned with settling the law in the sense of getting it to say something new.⁴³ According to (LP*), the difference between the two cases is the difference between wholly *source-based* modes of interpretation (looking to existing conventions of interpretation, or to some person's or constituency's actual understanding, etc.) and partly or wholly *merits-based* modes of interpretation (looking to what would make the norm morally defensible, or more fit for its intended purpose, etc.). Predictably—and much to the frustration of lawyers and law teachers all over the world—(LP*) has nothing at all to say on the subject of what the balance ought to be between these two families of interpretative considerations, for, here as elsewhere, (LP*) has nothing to say on the subject of where law-making should end and law-applying should begin. It merely says that whatever law is applied also has to be made, for unless it is made (either beforehand or in the process of application) there is nothing valid to apply. Interpreting it, however, can be making it and/or applying it.⁴⁴

F. The “no necessary connection” thesis

Finally, I come the jurisprudence student's favorite myth about legal positivism. Apparently legal positivists believe:

(NNC) there is no necessary connection between law and morality.

43. As Bentham explains robustly in *Of Laws in General*, H. L. A. Hart (ed.) (London: Athlone Press, 1970), 162ff.

44. Some student resistance to this picture seems to come of the following line of thought: (i) one must identify what norm one is interested in before one can ask about its validity according to (LP*), but (ii) one cannot identify what norm one is interested in without first eradicating the indeterminacies and other gaps in its application that (LP*) makes inevitable, and hence without completing its interpretation. But this argument works only if there can be no such thing as an identifiable norm with built-in indeterminacies. If one says, as all legal positivists who have thought about the matter must say, that one is interested in the validity of norms *complete with* their indeterminacies then one assumes the opposite. There is of course a genuine dispute to be had about just how indeterminate a norm can be before it stops being a norm at all. But clearly it does not stop being a norm merely because there are *some* actions, the normative status of which it leaves unclear. This is the respect in which it is misleading (although not false) to frame (LP*) as a thesis about the *identification* of legal norms, rather than their validity.

This thesis is absurd and no legal philosopher of note has ever endorsed it as it stands.⁴⁵ After all, there is a necessary connection between law and morality if law and morality are necessarily *alike* in any way. And of course they are. If nothing else, they are necessarily alike in both necessarily comprising some valid norms. But there are many other necessary connections between law and morality on top of this rather insubstantial one, and legal positivists have often taken great pains to assert them. Hobbes, Bentham, Austin, Kelsen, Hart, Raz, and Coleman all rely on at least some more substantial necessary connections between law and morality in explaining various aspects of the nature of law (although they do not all rely on the same ones).

So how arises the myth that, as the leading legal positivists, they must all deny all such connections? It seems to arise from Hart's early work. In a much-cited footnote, Hart mistook Bentham's and Austin's ringing endorsements of (LP*)—notably Austin's remark that “the existence of law is one thing; its merit or demerit is another”—for endorsements of (NNC). Then by hint and emphasis he seemed to endorse (NNC) himself.⁴⁶ But a few pages later he admitted that he did not really endorse it. For even in this early work he advanced the proposal (mentioned under heading (a) above) 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.⁴⁷ For Hart this built-in dash of moral merit in every law clearly forges a necessary connection between law and morality. So his apparent endorsements of (NNC) must be read as bungled preliminary attempts to formulate and defend (LP*), which, like Bentham and Austin, he really did endorse.

How does (NNC) differ from (LP*)? In two respects (LP*) is the broader of the two propositions and in two respects the narrower. Let me begin by explaining how it is narrower. First, (LP*) is narrower than (NNC) in that it is concerned only with the conditions of legal *validity*. Studying the nature of law involves—as my remarks over that last few pages have amply demonstrated—studying much more than the conditions of legal validity. That some people mistake an account of the conditions of legal validity for an account of the whole nature of law (and hence mistake legal positivism's distinctive *thesis about law* for a comprehensive *theory of law*) may come of the fact that one can question the validity of a certain putatively valid law by

45. Although it is helpfully billed as “the quintessence of legal positivism” in student textbook Howard Davies and David Holdcroft, *Jurisprudence: Texts and Commentary* (London: Butterworths, 1991), 3.

46. “Positivism and the Separation of Law and Morals,” *supra*, note 13, 57-8.

47. *Ibid.*, 81. See text at note 13, *supra*.

asking “Is this really a law?” and that question in turn is easily confused with the much more abstract (and pretentious) question “What is law?”⁴⁸ But, in fact, once one has tackled the question of whether a certain law is valid there remain many relatively independent questions to address concerning its meaning, its fidelity to law’s purposes, its role in sound legal reasoning, its legal effects, and its social functions, to name but a few. To study the nature of law one needs to turn one’s mind to the philosophical aspects of these further questions too. To these further questions there is no distinctively “legal positivist” answer, because legal positivism is a thesis only about the conditions of legal validity.

Proposition (LP*) narrows (NNC) further in that it restricts its attention to one specific connection that is sometimes thought to hold between a law’s validity and its moral merits, namely a relationship in which the former *depends* upon the latter. This is a one-way relationship. Legal positivists deny that laws are valid because of their moral merits. But they do not deny the converse proposition that laws might be morally meritorious because of their validity. As we saw, some legal positivists—Hobbes, Bentham, and Hart the most prominent among them—have regarded valid laws as necessarily endowed with some moral value just in virtue of being valid laws, never mind how morally odious in other respects. (NNC) rules this view out. On the other hand, (LP*) is compatible with it but does not require it.

At the same time, (LP*) is broader than (NNC) in that it is concerned not only with the connection between a law’s validity and its *moral* merits, but with the connection between a law’s validity and *any* of its merits. Legal positivists line up equally against views according to which the validity of a law depends upon, for example, its economic or aesthetic merits. Moreover—as we saw under heading (B) above—legal positivists must also reject views according to which the validity of a law depends upon its merits purely as a means, i.e. its fitness for its purpose (be that purpose meritorious or unmeritorious). Thus, as we saw, the thesis that insufficiently clear or insufficiently certain norms lack validity is a classic *anti*-positivist thesis.

Finally, unlike (NNC), (LP*) does not limit its embargo to supposedly *necessary* connections between a law’s validity and its merits, i.e. to those that are supposed to exist by law’s very nature. At any rate, it does not do so as I have expressed it. But here we have, you will recall, the most important point at which legal positivists differ in their interpretation of (LP*), so I had best say that in this respect (LP*) is only *arguably* broader than (NNC). According to the so-called “soft” legal positivists, there may be laws, the validity of

48. This confusion is another one that is courted in Dworkin’s opaque question “what are the grounds of law?”: *Law’s Empire*, supra, note 6, at 4.

which depends on their merits, but only if the “merits” test in question is set by some other law, the validity of which does *not* depend on its merits. Thus, according to soft legal positivists, there is no law that depends for its validity on its merits just in virtue of the nature of law, i.e. necessarily. However, there can be laws that depend for their validity on their merits in particular legal systems because other laws of those legal systems so dictate, i.e. contingently. Hart endorsed this view. But personally, as I mentioned near the beginning, I side with those “hard” legal positivists who reject it. In my view, no law depends for its validity on its merits *full stop*, whether owing to the very nature of law (necessarily) or merely owing to what other laws say (contingently). To capture the hard as well as the soft legal positivist position—quite apart from its other dimensions of over- and underinclusiveness—(NNC) should not discriminate between necessary and contingent connections.

IV. LEGAL POSITIVISM FOR NATURAL LAWYERS

The myths I have been concerned with here are myths often peddled about legal positivism as an intellectual tradition. My first aim has been to counteract the common but philosophically disreputable tendency to find leading writers in that tradition guilty by association. Since they are legal positivists, the thinking goes, they *must* espouse such-and-such a silly “legal positivist” thesis. But by and large, as we have seen, the leading figures found guilty by this method do not espouse the silly theses with which they are thus associated. What they do espouse in common is thesis (LP*), which is often misrepresented by critics as some quite different and much sillier thesis, or at least held out as having some much sillier theses among its implications. That is why my second aim here, and perhaps the philosophically more important of the two, has been to identify what is and what is not an implication of (LP*). The main tendency we encountered—running through several of our myths—was a tendency to assume that (LP*) must have implications of its own for what at least some people (e.g. judges, governments) should do. In fact, it has no such implications. It tells us how the legal validity of any norm in any legal system falls to be determined—namely, by its sources—but leaves open whether and when and why any of us should ever bother to have or to follow any valid legal norms. To show that valid legal norms are ever worth having or following, and in what way, always requires a separate argument, regarding which (LP*) is in itself entirely agnostic.

Our friends in the natural law tradition tend to balk at the idea that we can study the validity of legal norms in the agnostic way envisaged by (LP*), i.e. without deciding in advance whether (at least some) valid legal norms are

going to be worth having or following. It is not that natural lawyers cannot see the possibility of, or interest in, studying the validity-conditions of certain norms in the practically noncommittal sense of “validity.” Sure, the rules of a game can be valid *qua* rules of the game without having any significance for what anyone should do except to the extent that they fancy playing the game. But law is not a game. It purports to bind us morally, i.e. in a way that binds even those of us who do not fancy playing. So why not go straight to the question of whether it succeeds in doing so? Why begin by asking about its legal validity in the thin, practically noncommittal sense found in (LP*), and only then go on to ask whether it is valid law in the thicker sense of being morally binding on at least some people? According to this critique, the problem with legal positivism is not that it has silly answers of the kind peddled in its name by the myth-spinners. The problem, rather, is that it has a distracting and prevaricating *question*, which is the question of what determines legal validity in the thin, practically noncommittal sense of “legal validity.”

There are indeed two inflexions of “legally valid,” and they correspond to two senses of “legal.” In most European languages other than English there are two words for law corresponding conveniently to these two senses of “legal”: *lex* and *ius*, *Gesetz* and *Recht*, *loi* and *droit*, and so on. Legal positivists need not deny that there is a moralized notion of law captured in the second term in each of these pairs.⁴⁹ They need not deny that in some contexts “legality” accordingly names a moral value, such that in the second moralized sense of “valid law,” laws may be more or less valid depending on the extent to which they exhibit legality, and hence depending on their merits. Nor need they deny that one must capture this moral value of legality, whatever it is, in order to tell the whole story of law’s nature. As in any other field of human endeavor, understanding the nature of the endeavor in full admittedly means having an ability to tell success in the endeavor from failure. Perhaps law does have a special way of succeeding, as these European languages seem to suggest. Maybe the ideal of the rule of law, for example, does represent a moral ideal distinctively for law, such that one does not fully understand the nature of law until one understands that at least part of its success, if it were ever successful, would lie in conformity to this ideal. Or maybe the relevant ideal of legality is something quite different. But picking out the relevant ideal(s) is irrelevant to the truth or the importance of (LP*). For (LP*) tries to answer a logically prior question. What is this field of human endeavor, to which the natural lawyer’s proposed criteria of success and failure apply? What makes something a candidate for being accounted a

49. Hart explicitly pointed it out in *The Concept of Law*, *supra*, note 3, at 203-7.

success or failure in these terms? What is this *lex*, such that it ought to be *ius*? Legal positivism naturally supplies only part of the answer. To be exact, legal positivism explains what it takes for a law to be legally valid in the thin *lex* sense, such that the question arises of whether it is also legally valid in the thicker *ius* sense, i.e. morally binding *qua* law. In doing so legal positivism admittedly does not distinguish law from a game, which is also made up of posited norms. To distinguish law from a game one must add, among other things, that law, unlike a game, purports to bind us morally. That has implications, no doubt, for what counts as successful law, and hence for what one might think of as law's central case.⁵⁰ But this does not detract from the truth or the importance of (LP*), which is not a thesis about law's central case but about the validity-conditions for all legal norms, be they central (morally successful) or peripheral (morally failed) examples.

50. The most important study of which—taking (LP*) for granted although remaining studiously unexcited by it—is John Finnis's *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1981).