

A Critical Adjudication of the Hart-Dworkin Debate

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I. Synopsis

The debate waged between Ronald Dworkin and H.L.A. Hart over the concept of law looms large over the literature on legal theory. A Google Scholar search for the terms “Hart-Dworkin” returns some 1,560 scholarly articles either devoted to, or referencing, this powerful intellectual exchange.¹ The purpose of this “critical adjudication” is to provide a brief chronological analysis of the Hart-Dworkin debate, beginning with Dworkin’s critique of Hart’s *The Concept of Law*² in his magisterial *Taking Rights Seriously*³ and moving to Hart’s posthumously-published retort contained within his postscript to *The Concept of Law*. As I turn to Hart’s response, I transition from analytic description to critical adjudication. In so doing, I conclude that Dworkin’s challenge to the internal validity of Hart’s theory is largely ill-founded, and that from the standpoint of descriptive legal theory Hart’s framework is ultimately more compelling than Dworkin’s alternative.

II. Dworkin’s Critique of Hart’s Legal Positivism

Dworkin’s purpose in Chapters 2 and 3 of *Taking Rights Seriously* is clear enough: “I want to make a general attack on positivism, and I shall use H.L.A. Hart’s version as a target, when a particular target is needed.”⁴ His strategy is also manifest: “My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases [...] they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules [...] which] forces us to miss the important roles of these standards that are not rules.”⁵ To understand Dworkin’s

¹ See: http://scholar.google.com/scholar?hl=en&q=%22hart-dworkin%22&btnG=&as_sdt=1%2C22&as_sdtp=

² Hart, H.L.A. 2012 [1961]. *The Concept of Law*, 3rd ed. New York, NY: Oxford University Press.

³ Dworkin, Ronald. 1978 [1977]. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.

⁴ Dworkin, *Taking Rights Seriously*, pg. 22.

⁵ *Ibid*, pg. 23.

critique then, we must first consider how he differentiates rules from standards, and particularly from principles.

Dworkin posits that “[r]ules are applicable in an all-or-nothing fashion,” in the sense that when two rules conflict, “one of them cannot be a valid rule.”⁶ Thus when a valid rule states that the speed limit is 60 miles per hour, another rule cannot simultaneously stipulate that the speed limit is 35 miles per hour. Principles, on the other hand, “have a dimension that rules do not – the dimension of weight or importance. When principles intersect [...] one who must resolve the conflict has to take into account the relative weight of each.”⁷ Rules determine; principles tip the scales. Hence when a principle applicable to a fact-situation stipulates that “a person should not profit from his own wrong,” this does not preclude a countervailing principle from being simultaneously applicable to the case at hand. In other words, when rules conflict, they prevail and invalidate one another, such that casualties are inescapable; conversely, when principles conflict, they balance against one another and predispose the resolution of the case in a direction proportionate to their relative weights, and both sets of principles may “survive intact when they do not prevail.”⁸

If, as Dworkin perceives, Hart and the legal positivists conceive of the “law” as a model of rules, it suggests a very particular framework for analyzing adjudication. When a rule governs a fact situation, it deterministically binds the judge. But “when a judge runs out of rules he has discretion, in the sense that he is not bound by any standards from the authority of law [...] rules are not binding on [him].”⁹ In such situations, judges inhabit the equivalent of “the hole in a doughnut,”¹⁰ free to move within it as they please. The question, then, is whether principles comprise the doughnut itself or the doughnut hole – do they, in other words, bind the judge? For Dworkin, the positivists would answer in the negative: since within “each legal system there is an ultimate test for binding law like Professor Hart’s rule of recognition – it follows that principles are not binding law.”¹¹ This is because principles, unlike rules, emerge from “a sense of appropriateness developed in the profession and public over time” – they are not, in other words, the products of design. As a result, principles cannot “have a

⁶ Ibid, pg. 24; 27.

⁷ Ibid, pg. 26.

⁸ Ibid, pg. 35.

⁹ Ibid, pg. 34.

¹⁰ Ibid, pg. 31.

¹¹ Ibid, pg. 36.

simple or direct connection” with “official acts of legal institutions” or some “ultimate master rule of recognition.”¹² Their “pedigree,” namely their proximity in content and form to a legislative act, will never be sufficient for them to be recognizable by a rule of recognition.¹³ Hence positivists relegate principles to the dishonorable status of “extra-legal standards which each judge selects according to his own lights in the exercise of his discretion.”¹⁴

Dworkin concludes that since “we treat principles as law,” we “must reject the positivists’ first tenant, that the law of a community is distinguished from other social standards by some test in the form of a master rule.”¹⁵ He underscores that Hart’s sociological approach to rules fails to capture the moral principles that underlie most rules. Hart falters by focusing exclusively on *conventional morality* or a morality of agreement, treating “agreement as an essential part of [individuals’] grounds for asserting [a] rule.”¹⁶ Hart is indeed explicit that a rule of recognition – the precondition for a transition from a pre-legal to a legal society – “is constituted by the conforming behavior of the bulk of a population.”¹⁷ Yet Dworkin posits that a second, and perhaps more pervasive, type of morality explicates individuals’ affective attachment to, and obeisance of, a rule. This is a *concurrent morality*, which is emerges within a community “when its members are agreed in asserting the same, or much the same, normative rule, but they do not count the fact of that agreement as an essential part of their grounds for asserting that rule”.¹⁸ This dualist conception of the moral foundation of rules is crucial: since judges often disagree regarding the content of the rules they reference, these rules cannot “apply to judicial duties” if we treat them as rules founded upon a conventional morality.¹⁹ In other words, if we accept the positivist conception of a deterministic rule identifiable via a rule of recognition whose content is settled by social consensus, judges are routinely awash in an ocean of discretion, and much of what they treat as law could not possibly count as law.

But there is more. For Dworkin, positivists not only misconceive rules, but they get principles wrong as well. When “people who live outside philosophy texts” appeal to “moral standards” in

¹² Ibid, pgs. 40-41.

¹³ Ibid, pg. 43.

¹⁴ Ibid, pg. 39.

¹⁵ Ibid, pg. 44.

¹⁶ Ibid, pg. 53.

¹⁷ Ibid, pg. 54.

¹⁸ Ibid, pg. 53.

¹⁹ Ibid, pg. 55.

controversial cases, they do not argue that they “ought to have the duties and responsibilities that the standard prescribed, but that they do have them.”²⁰ In other words, when the principle that “no person should benefit from their own wrong” is invoked in a courtroom, it is perceived to be a pre-existing entity by the parties to a dispute. What is more, judges also treat these principles as pre-existing entities. Thus in *Henningsen v. Bloomfield* a New Jersey court legitimated the plaintiff’s argument that a car manufacturer should be held liable for medical expenses incurred from an automobile malfunction despite a lack of statutory support. Instead, the court relied on pre-existing and binding principles: “Is there any principle,” the judges matter-of-factly proclaimed, “more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?”²¹ Absent a rule of recognition, Dworkin concludes, such truisms could not possibly bind a judge. The fact that principles are routinely treated as law highlights that they do not comprise social rules embedded in a conventional morality, but normative principles embedded in a concurrent morality. Hence even when the “rules run out” and judges find themselves in a “doughnut hole,” they remain custodians of the enduring moral principles that serve as the foundation of a society’s legal system, and are hence only able to exercise a weak form of discretion, “which is the sense that counts.”²²

II. A Defense of Hart’s “Soft Positivism”

I should like to state my purpose in this section as clearly as Dworkin stated his in Chapter 2 of *Taking Rights Seriously*: I want to make a general attack on Dworkin’s critique, and I shall use H.L.A. Hart’s postscript in *The Concept of Law* for support, when an evidentiary weapon is needed. As I see it, Dworkin is mistaken regarding Hart’s concept of rules, and he consequently errs in his portrayal of Hart’s concept of judicial discretion and his treatment of principles. I conclude by citing a passage in *Taking Rights Seriously* where I believe Dworkin clearly concedes victory to Hart’s theory of “soft” positivism.

Let us begin by assessing Dworkin’s interpretation of Hart’s concept of rules. Recall that for Dworkin positivists treat rules as “applicable in an all-or-nothing fashion,” and when they conflict

²⁰ Ibid, pg. 55.

²¹ Ibid, pg. 24.

²² Ibid, pg. 71.

“one of them cannot be a valid rule.”²³ Yet Hart’s concept of rules is far more nuanced, stressing the “open texture” of law as an inescapable and constitutive quality, for language does not admit of universal semiotic agreement. Indeed, Hart writes that “the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition. This is made plain, or so I had hoped, both by my explicit statement in this book that the rule of recognition itself as well as particular rules of law identified by reference to it may have a debatable ‘penumbra’ of uncertainty.”²⁴ Hence while it is true, as Hart concedes, that his account “cannot [...] explain the normative character possessed by even the simplest conventional rule,”²⁵ this weakness is not fatal to Hart’s treatment of rules, precisely because their open-texture permits ambiguity-generated debate in a way that Dworkin’s “all-or-nothing” rules disallow.

As an illustrative example, consider two *prima facie* crisp rules governing public conduct in a city park: (1) No food allowed on park premises; (2) Dog owners must dispose of all pet waste and food in the appropriately marked receptacles. Here, one rule seems premised on “food” being brought onto park premises, whereas the other appears to prohibit the practice. By Dworkin’s logic, if these two rules do indeed conflict, then one must be invalid, and if we wish to proclaim the validity of both, then the rules cannot possibly conflict, or they must constitute principles instead of rules. We are thus asked to decide whether the scenario occupies the domain of crisp, “all-or-nothing” law or the space where “rules run out.” It seems rather more appropriate to treat this case as an example of two open-textured rules generating a relational “penumbra of uncertainty.” In fact, in such situations judges have developed legal principles to handle such ambiguous *tensions* (where ‘tension’ lies somewhere between ‘conflict’ and ‘congruence’) amongst non-deterministic rules. We could invoke, for example, the principle of *generalia specialibus non derogant* – that the provisions of a specific rule should override the provisions of a general rule. To do so, we would treat rule (1) as the general rule, and invoke the aforementioned principle to suggest that given rule (2)’s more specific application to the subclass of dog owners rather than the general public, it should consequently override rule (1). Hart provides a conceptual framework that permits such a situation; Dworkin, on the other hand, seems unable to make space for it in these terms.

²³ Ibid, pgs. 24; 27.

²⁴ Hart, *The Concept of Law*, pg. 251.

²⁵ Ibid, pg. 256.

Dworkin may retort that we have dug ourselves into a hole: is the foregoing example not a perfect illustration of Hart's failed treatment of judicial discretion? Is the invocation of the principle that *generalia speciallibus non derogant* not an example of how judges behave when they find themselves in the 'doughnut hole'? Here, Hart offers an unfortunately half-hearted retort: "whatever the answer is to this philosophical question, the judge's duty will be the same [...] It will not matter for any practical purpose whether in so deciding cases the judge is *making* law in accordance with morality [...] or alternatively is guided by his moral judgment as to what already *existing* law is revealed by a moral test for law."²⁶ This agnostic position seems too feeble to counter the force of Dworkin's critique, but I think it is easily sharpened.

Specifically, let us clearly recall Hart's definition of judicial discretion: "the law in [hard] cases is fundamentally *incomplete*: it provides *no* answer to the questions at issue in such cases. [Judges] are legally unregulated and in order to reach a decision in such cases the courts must exercise the restricted law-making function which I call 'discretion.'"²⁷ This scenario arises when a substantially open-textured legal rule governs the case at hand, or a novel fact-situation arises where no pre-existing legal rule is directly applicable. But we must stress that this 'discretion' is only 'strong' when the law is taken to be its referent – it does not mean, as the legal realists would have it, that the judge arbitrarily decides the case on the basis of what they consumed for breakfast.²⁸ That the judge cannot rely upon a primary rule backed by a rule of recognition is not logically sufficient to produce an unprincipled decision. Indeed, this strong view of discretion should not be attributed to Hart. The judge may well need to exercise a creative agency and "make law" – but the act of judicial lawmaking can still derive its logic and structure from objects that exist outside the domain of legal rules.

This brings us to Dworkin's straw-manning of Hart when it comes to the subject of principles. Recall that Dworkin accuses Hart of being unable to accommodate cases where lawyers posit not that they "ought to have the duties and responsibilities" prescribed by a given principle, "but that they do have them" already.²⁹ This implies that whereas Dworkin recognizes principles as pre-existing entities,

²⁶ Ibid, pg. 254.

²⁷ Ibid, pg. 252.

²⁸ Kozinski, Alex. 1993. "What I Ate for Breakfast and Other Mysteries of Judicial Decision Making." *Loyola Los Angeles Law Review* 26: 993-1000.

²⁹ Dworkin, *Taking Rights Seriously*, pg. 55.

Hart ignores their existence altogether. But this is not what Hart's concept of law requires. As Hart stresses, Dworkin's critique "ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called 'soft positivism' and not as in Dworkin's version of it 'plain-fact' positivism'."³⁰ In other words, Hart does not deny that principles can be part of the law. But even more critical is his telling usage of the word "incorporate" in the foregoing statement ("that the rule of recognition may *incorporate* as criteria of legal validity conformity with moral principles or substantive values"). This construction would be illogical if by it Hart means that the law "creates" or "constitutes" legal principles. Rather, it can only be a coherent formulation if Hart treats principles as pre-existing entities. Herein lies the key to the richness of Hart's positivism that is quashed by Dworkin's caricature: When a judge incorporates a principle within a decision bearing precedential force, the creative act does not lie in the *creation* of the principle but in the *bestowal of a new status* upon a *pre-existing* principle. When judges make law, they are not making principles; rather, they are *converting moral objects into legal objects*. Indeed, this is the very reason why human rights activists turn to litigation strategies to promote social change. It would do a marriage equality advocate little good to argue in the public sphere that he has a legal right to marry a person of the same sex – such an argument, however passionate, would not obtain him a marriage license. Hence when said advocate brings suit in court, his mention of a "constitutional right" to marriage equality is merely an attempt to rehearse a proposed holding for the court rather than a description of the right's legal status. In other words, what the advocate is referencing in the 'here and now' is a moral right, and what he is arguing for in the 'soon to be' is the legal codification of that right.

But one does not have to take Hart's word, or accept my interpretation, to embrace the foregoing conclusion – we may turn instead to Hart's adversary to cogently articulate the soft positivist approach. Consider the following excerpt from *Taking Rights Seriously*:³¹

"Any adequate theory [of legal interpretation] will distinguish, for example, between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution. Suppose that my political theory provides that every man has a right to property of another if

³⁰ Hart, *The Concept of Law*, pg. 250.

³¹ I am indebted to a discussion with Lucia Rafanelli for surfacing the significance of the excerpt.

he needs it more. I might yet concede that he does not have a legislative right to the same effect; I might concede, that is, that he has no institutional right that the present legislature enact legislation that would violate the Constitution, as such a statute presumably would. I might also concede that he has no institutional right to a judicial decision condoning theft. Even if I did make these concessions, I could preserve my initial background claim by arguing that the people as a whole would be justified in amending the Constitution to abolish property [...] I would claim that each man has a residual background right that would justify or require these acts, even though I concede that he does not have the right to specific institutional decisions as these institutions are now constituted.”³²

Leave it to Dworkin to make the “soft positivist” case for Hart! For within Dworkin’s slippery language of “background rights” and “residual rights” on the one hand, and “institutional rights” and “legislative rights” on the other hand, lies the crucial distinction between moral principles and legal principles. Litigants and lawyers may reference the former to achieve their legalization; judges may invoke them as guides when faced with open-textured law; and legislators may codify them via their inclusion in a civil code or a statute. But until these acts bestow legal status upon them, it is illusory to speak of the existence of legal principles as opposed to moral principles.

III. Concluding Remarks

There remains something fickle – and unsatisfying – about treating the “Hart-Dworkin” debate as a “debate” and proclaiming Hart the winner. This is because, as Hart’s perceptively notes, “[l]egal theory conceived [...] as both descriptive and general is a radically different enterprise from Dworkin’s conception of legal theory [...] as ‘interpretive’ and [...] partly evaluative, since it consists in the identification of the principles which both best ‘fit’ or cohere with the settled law and legal practices of a legal system and also provide the best moral justification for them.”³³ When Hart wrote *The Concept of Law* as a constructive critique and alternative framework to Austin’s *The Province of Jurisprudence Determined*,³⁴ he necessarily restricted himself to the domain of his interlocutor: namely, that of describing the essential nature and boundaries of the law itself. It is unsurprising, then, that Dworkin’s interpretive framework, which provides a political and moral theory whose function is to contextualize, justify, and offer a coherent evaluative standard for the law, appears so orthogonal to Hart’s mission. But insofar as it was Dworkin, and not Hart, who initiated this debate, and insofar as its manifest aim

³² Dworkin, *Taking Rights Seriously*, pg. 93.

³³ Hart, *The Concept of Law*, pg. 241.

³⁴ Austin, John. 2000 [1832]. *The Province of Jurisprudence Determined*. Amherst, NY: Prometheus.

was to evaluate the internal validity of Hart's positivism rather than its external functionality or critical purchase, then it only seems appropriate to evaluate Dworkin's efforts on Hart's terms. We must turn, then, to the realm of descriptive jurisprudence, and in this light Hart's concept of law not only survives but persuasively defeats Dworkin's critique.