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COMING TO GRIPS WITH THE LAW:

In Defense of Positive Legal Positivism

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This article seeks to parry Ronald Dworkin's assaults on the legal-positivist thesis that the authoritative norms in any legal system are ascertained by reference to some overarching set of criteria that may or may not require the making of moral judgments. Four main lines of argument are presented. First, Dworkin does not establish that judges disagree with one another at a criterial level in easy cases; second, even if criterial disagreements are indeed present (at least subterraneously) in all cases, they will be quite sharply limited by the need for regularity at the level of outcomes in a functional legal system; third, Dworkin errs in thinking that legal conventions must be static, and he further errs in thinking that the adjudicative practices of American law can plausibly be portrayed as based solely on convictions and not on conventions. Finally, with his recent reflections on the metaphysics of morals, Dworkin helps to reveal the resilience of a doctrine (*viz.,* soft or inclusive positivism) that he seeks to confute.

Anyone engaged in a defense of legal positivism should hesitate before seeking to counter the anti-positivist volleys in Ronald Dworkin's jurisprudential writings. Although Dworkin has professed to do battle with positivism in order to clear the way for his own theoretical project, he has based his criticisms on a conception of the appropriate aims and methods of jurisprudence that is strikingly at variance with the positivist conception. Hence, the debates between Dworkin and his opponents create the impression of being missed connections more often than responsive encounters.[1]

1. Despair concerning this point suffuses the "Postscript" to the second edition of H.L.A. Hart's THE CONCEPT OF LAW 238 (1994) [hereinafter Hart, "Postscript"]. *See also* Brian Bix, JURISPRUDENCE: THEORY AND CONTEXT 97–99 (1996); Nigel Simmonds, *Why Conventionalism Does Not Collapse into Pragmatism,* 49 CAMBRIDGE L. J. 63 (1990); Philip Soper, *Dworkin's Domain,* 100 HARV. L. REV. 1166, 1167–68, 1170–75 (1987). The principal texts by Dworkin which I consider in this essay are TAKING RIGHTS SERIOUSLY (1978) [hereinafter *TRS*]; *A Reply by Ronald Dworkin, in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247 (Marshall Cohen ed., 1984) [hereinafter "Reply"]; LAW'S EMPIRE (1986) [hereinafter *LE*]; *Legal Theory and the Problem of Sense, in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 9 (Ruth Gavison ed., 1987) [hereinafter "Theory"]; *Objectivity and Truth: You'd Better Believe It,* 25 PHIL. & PUB. AFF. 87 (1996) [hereinafter "Objectivity"]. (The overall book edited by Ruth Gavison will hereinafter be cited as Gavison, ISSUES;

Doubtless, the blame for the aridity of some of the aforementioned debates does not lie entirely on one side or the other. All the same, Dworkin himself bears a substantial share of responsibility for this situation of people talking past one another. In defiance of his own methodological precepts concerning interpretive generosity, he has quite often attributed theses to positivists which no members of their camp would accept. Because his accounts of the general ambitions and specific claims of legal positivism have sometimes been bemusingly distortive, his genuinely important challenges can become obscured. Anyone who endeavors to parry or defuse those challenges must separate them from the caricatures that intermittently accompany them.

There are, indeed, grounds for serious misgivings about the likelihood of fruitful controversies between Dworkin and his legal-positivist opponents. Whereas jurisprudential positivists attempt to elaborate the basic features of legal systems generally, Dworkin is principally concerned to elaborate and justify the foremost features of the American legal system (and the English legal system, to a lesser extent). As a consequence, any retorts by positivists to his strictures—any retorts highlighting possible characteristics of law that are largely or wholly absent from the American legal regime—can seem misdirected or heavy-handed. This difficulty is aggravated by the fact that Dworkin himself declines to distinguish clearly between the jurisprudential explication of the concept of law and the theoretical explication of the workings of a particular legal system. Although he is interested chiefly in the latter, he frequently adverts to it in terms more suitable for the former. As quite a few commentators have remarked,[2] Dworkin tends to move back and forth between speaking about *law* and speaking about *the law*; that is, he equivocates between speaking about a general type of institution and speaking about one instance of that general type. Problematic in itself, his equivocation is particularly troublesome because it pertains to a disjunction that sets his own theoretical enterprise off from the enterprise of the positivists (in that the positivists concern themselves with *law,* whereas Dworkin concerns himself with *the law*). Dworkin can inadvertently lead us into thinking that many of his remarks have more of a bearing on the claims of legal positivism than they in fact do.

Nonetheless, despite the potential pitfalls in a confrontation with Dworkin, the task is well worth the effort. Given the overall importance of his

and the overall book edited by Marshall Cohen will hereinafter be cited as Cohen, DWORKIN.) This essay comprises slightly more than one-third of a long chapter on Dworkin from my forthcoming book LAW WITHOUT TRIMMINGS: A DEFENSE OF LEGAL POSITIVISM. I have made numerous modifications to facilitate the abridgment of the chapter. I thank the editors and the anonymous readers for their helpful suggestions.

2. *See, e.g.,* John Finnis, *On Reason and Authority in Law's Empire,* 6 LAW & PHIL. 357, 367–68 (1987); Ruth Gavison, "Comment," *in* Gavison, ISSUES, at 21, 25–27; H.L.A. Hart, "Comment," *in* Gavison, ISSUES, at 35, 36–40 [hereinafter cited as Hart, "Comment"]; Hart, "Postscript," at 246–47. *Cf.* Steven Burton, *Ronald Dworkin and Legal Positivism,* 73 IOWA L. REV. 109–13, 128–29 (1987); P.H. Nowell-Smith, *Dworkin v. Hart Appealed: A Meta-ethical Inquiry,* 13 METAPHILOSOPHY 1, 9–10 (1982).

work, and given the anti-positivist flavor of many of his well-known writings, no defender of jurisprudential positivism can afford to ignore him. Moreover, even if his work as a whole were less prominent and impressive than it is, some of his onslaughts against positivism have an independent significance. Albeit some of his accusations are misguided, several of them are highly perceptive and are therefore occasions for the clarification or amplification of some key positivist doctrines. Preoccupied though Dworkin may be with the theoretical explication of one specific regime of law, he has made a number of claims that are endowed with a jurisprudential breadth. Those claims stand or fall as general philosophical theses (relating to law), rather than merely as observations about the American legal system. Partaking of a comprehensive sweep, they are direct challenges to the philosophical theory propounded by legal positivists—who must therefore show that Dworkin's theses can be rebutted or absorbed.

My focus herein will lie principally on *Law's Empire,* but I shall also have to turn to some of Dworkin's earlier and later works for certain crucial elements of his position. This article looks specifically at his assault on the notion that the authoritative norms in any particular legal system are ascertained by reference to some overarching set of criteria, which H.L.A. Hart dubbed the "Rule of Recognition." We shall thus be devoting attention to the "positive" side of legal positivism—that is, to aspects of positivism beyond a "negative" insistence on the separability of law and morality.[3] To be sure, Dworkin has also attacked the "negative" side of legal positivism by proclaiming time and again that legality and morality are inextricably connected. A full-scale defense of legal positivism against his challenges would therefore have to question his claims about the law–morality relationship.[4] All the same, although this essay in itself does not constitute a comprehensive reply to Dworkin, it endeavors to present much of the first half of such a reply.

I. UPHOLDING THE RULE OF RECOGNITION: A FIRST STEP

In continuation of a tactic adopted in *Taking Rights Seriously,* Dworkin devotes many of the early pages in *Law's Empire* to the presentation of some difficult cases from American and English law (*LE,* 15–30). His prime purpose in adducing those cases is to maintain that the differences of opinion occurring therein are theoretical disagreements—disagreements of a sort that supposedly cannot be acknowledged by legal positivists. What is revealed is that divergences among judges within a particular legal system occur not just in relation to specific outcomes (borderline outcomes), but

3. On the distinction between "positive" and "negative" positivism, *see* Jules Coleman, *Negative and Positive Positivism, in* MARKETS, MORALS AND THE LAW 3 (1988).

4. Just such a challenge is undertaken in the second half of the chapter from which this essay is excerpted.

also in relation to the fundamental criteria that guide the judges' decisions about the existence and content of legal norms. This situation of criterial discord ostensibly belies the positivist account of law, wherein the officials of each legal system are said to accept a Rule of Recognition that serves as a shared point of reference for their law-ascertaining and law-applying activities.[5]

Let us begin by noting that, even if Dworkin's presentation of hard cases is accurate as far as it goes, it does not in fact establish that judges differ with one another at the criterial level in *easy* cases (which constitute the vast majority of cases, including most of the potential cases that never reach the courtroom at all). Of course, Dworkin does not imply that criterial divergences become manifest in easy cases; because such cases are dispatched without multiple concurring and dissenting opinions, there is no opportunity therein for any criterial divergences to surface. However, he insists that such divergences do obtain in easy cases as much as in hard cases, albeit without coming to the fore. Though the theoretical disagreements among judges in easy cases remain submerged, they lurk beneath the surface. Precisely in this respect, "easy cases are . . . only special cases of hard ones" (*LE,* 266).

Yet the recountal of hard cases in the first chapter of *Law's Empire*—to which Dworkin adverts at numerous junctures in his subsequent chapters—does not in itself go any way toward showing that judges adhere to different sets of criteria when ascertaining the law in easy cases. Any validly drawn conclusion about easy cases must derive from some other source. Having apprehended the open theoretical disagreements in hard cases, we cannot straightaway infer that they are paralleled by latent theoretical disagreements in routine cases. Moreover, given that no theoretical disagreements gain expression in routine cases, Dworkin cannot rely solely on the texts of official judgments as the basis for his position.

Perhaps the point at issue here can be settled through some sort of empirical study that would pose questions to judges about their standards for ascertaining the existence and content of legal norms in easy cases. If judges are sophisticatedly self-conscious about those standards as they decide easy cases—even though they do not write any separate opinions in such cases—then each judge can answer the aforementioned questions through straightforward introspection. A resolution of the point at issue here would be just as plainly empirical as any resolution of a dispute that hinges on people's recollections of their conscious attitudes.

More likely, however, is that most judges as they deal with easy cases do not have any detailed sense of the theoretical criteria that underlie their

5. For some accounts of Dworkin's position, *see* Andrei Marmor, INTERPRETATION AND LEGAL THEORY 3–9 (1992); Charles Silver, *Elmer's Case: A Legal Positivist Replies to Dworkin*, 6 LAW & PHIL. 381, 386–87 (1987); John Stick, *Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in Law's Empire,* 34 UCLA L. REV. 371, 376–81 (1986). For Dworkin's earlier attack on Hart's notion of the Rule of Recognition, *see especially TRS,* chs. 2, 3.

handling of those cases. Their replies to a questionnaire will thus be elaborations and interpretations of their attitudes (previously subconscious attitudes), rather than sheer recollections. In that event, however, their replies will not necessarily be definitive. Other interpretations of their behavior in easy cases can legitimately emerge. Let us recall here the method of *Law's Empire,* where Dworkin endeavors to interpret the practice of legal decision making rather than the attitudes of the participants in that practice. He affirms that "it is essential to the structure of [a practice such as legal decision making] that interpreting the practice be treated as different from understanding what . . . participants mean by the statements they make in its operation" (*LE,* 55), and he asserts that "a social practice creates and assumes a crucial distinction between interpreting the acts and thoughts of participants one by one . . . and interpreting the practice itself, that is, interpreting what they do collectively" *(LE,* 63). Interpretation, as opposed to the gathering of data through questionnaires, is the relevant activity here. In other words, the task of fleshing out the subconscious presuppositions of various judges in easy cases is a task that requires an interpretive understanding of the overall practice of adjudication. Because of the likelihood that many judges' presuppositions in easy cases are indeed subconscious, the judges themselves do not have privileged access thereto. Their answers to questions about those presuppositions must vie with other credible answers, which will likewise be interpretations. Thus, instead of awaiting the distribution of questionnaires to judges,[6] we may confine ourselves to the various data—the judicial opinions and decisions—for which Dworkin seeks to account. He has to establish that an interpretation of the data that posits a continuity between difficult cases and straightforward cases is superior to an interpretation that posits a discontinuity.

Now, interpretive jousting would doubtless be unnecessary if there were not any plausible reasons for thinking that judges might switch from one set of law-ascertaining criteria to another when moving from easy cases to hard cases. If there were indeed no such reasons, Dworkin could rely on the overt theoretical disagreements in hard cases as clear-cut evidence of subterraneous theoretical disagreements in easy cases. Unfortunately for him, however, it is far from incredible that a judge might be impelled by one set of considerations in straightforward cases and by quite another set in difficult cases. Such a disjuncture is indeed quite likely.

Let us ponder a variant of one of the examples included in Dworkin's summary of some hard cases. Suppose that all the judges within a legal system *L* adhere in easy cases to the principle that the language of any statute should be construed in its ordinary sense only. Suppose further that a difficult case arises in *L,* as the ordinary wording of a statute will yield an

6. At any rate, even if all or most judges as they deal with easy cases do have a detailed sense of the law-ascertaining criteria that guide their decisions therein, and thus even if the distribution of questionnaires to the judges is appropriate, we can usefully engage in some general speculations about the likely findings of those questionnaires.

absurd result when applied to some particular problem. Some judges stand by their normal position and do not allow the ridiculous result to deflect them from their reliance on the everyday meaning of the statute's language. Other judges depart from their usual focus on everyday meanings and address themselves instead to the broader intentions of the legislature (which militate against the ludicrous outcome that would ensue from a reliance on the everyday meanings). In routine cases, these relatively imaginative judicial officials do not tacitly or expressly advert to the law-making body's wider intentions; rather, in such cases, they join with their fellow officials in concentrating only on the ordinary significance of the statutory wording. In extraordinary cases, however, they believe that a shift of focus is both obligatory and permissible. Because some of their colleagues believe otherwise, the extraordinary cases are marked by theoretical disagreements.

In the scenario just sketched—a scenario that is far from outlandish—the law-ascertaining decisions of the judges in *L* are governed by a common point of reference in easy cases. Only in difficult cases do some of the judges find themselves at odds with others, at the level of outcomes and at the level of criteria. Hence, if someone were to take note of the criterial divergences that emerge during the difficult cases in *L,* and if he or she concluded that those divergences are present (though very often submerged) in all of *L*'s cases, the conclusion would be invalid and false. With regard to a substantial majority of the actual and potential cases, there can be a solid criterial consensus among *L*'s judges.

A champion of Dworkin's ideas might respond to this analysis in either of two ways. First, he or she might maintain that my last couple of paragraphs have inappositely characterized the criteria to which the judges in *L* adhere. Instead of cleaving to one set of criteria for easy cases and another set for hard cases, the relatively imaginative judges in *L* accept the following bifurcated principle in easy cases and hard cases alike: "Give effect to the ordinary meaning of statutory language, except in those cases where doing so would lead to absurd results." The less imaginative judges in *L* accept only the first half of this principle, in easy cases and hard cases alike. Hence, there are indeed criterial divergences among *L*'s judges in straightforward cases as well as in difficult cases (though of course the divergences do not become manifest in the straightforward cases). So a supporter of Dworkin might argue.

Such a retort founders, for it collapses Dworkin's stance into that of legal positivism. Dworkin himself contends that the positivists submit the following explanation of the disharmony among judges in hard cases: "Each [judge] uses a slightly different version of the [Rule of Recognition], and the differences become manifest in . . . special cases" (*LE,* 39). If Dworkin's attempt to highlight the criterial disagreements among judges in any regime were nothing more than an insistence that the various judges' law-ascertaining standards overlap very significantly while diverging on peripheral matters, then his putative critique of positivism would be an out-

right reaffirmation thereof. A bifurcated-principle riposte made on his behalf is in fact a capitulation.

Supporters of Dworkin might therefore pursue a second and more subtle tack. They will still wish to declare, of course, that theoretical disagreements among *L*'s judges are present in easy cases as well as in hard cases. At this stage, however, their claim is not that the imaginative judges of *L* subscribe to a bifurcated principle while the other judges of *L* subscribe to a simple principle; their claim, rather, is that the imaginative judges endorse the simple principle for easy cases only because they endorse the touchstone that is encapsulated in the second half of the bifurcated principle. In other words, the imaginative judges in easy cases attach ordinary meanings to any statutory wording because they believe that the broader intentions of the legislature require this mode of interpretation in such cases. The focus on the everday sense of language is a product of the primary focus on the broader aspirations of the law-making body. In routine cases as much as in tricky cases, then, the judges in *L* differ with one another about the fundamental standards for the application of laws. The less imaginative judges take ordinary linguistic usage to be decisive, whereas the more imaginative judges receive their guidance from the overall aspirations of the legislature. Although the judges' approaches coincide practically in straightforward cases, they diverge practically in difficult cases and diverge theoretically in all cases.

This second postulated rejoinder is more robustly and subtly Dworkinian than is the first rejoinder (as long as the broader aspirations of the legislature are understood as transcending the intentions and aspirations of any of the individual legislators). Supporters of Dworkin would hope to argue that their interpretation of the judicial decisions and opinions in *L* is superior to my positivist interpretation. We must inquire whether the Dworkinian position is analytically preferable to my own position and whether the two positions are clearly distinguishable. The discussion here will quickly lead into my broader defense of the positivist conception of the Rule of Recognition.

Both the Dworkinian account of *L* and my positivist account—in either its original version or its bifurcated-principle version—are consistent with the relevant data. Each of the accounts can be said to fit. However, the Dworkinian account attains its plausibility as an accurate exposition only by imitating or following the positivist account. The Dworkinian approach has to come to grips with the fact that most cases in *L* do not give rise to any overt theoretical disagreements. Advocates of that approach acknowledge the lack of controversy by allowing that the imaginative and unimaginative judges alike reach decisions in easy cases on the basis of the ordinary meanings of statutory language. But the Dworkinians then seek to contrast their own approach with that of the positivists by insisting that the attentiveness of the imaginative judges to ordinary patterns of usage in easy cases is itself derivative of the rationale that those judges invoke when faced with difficult cases. However, this extra layer of exposition by the Dworkinians is emphati-

cally not required by the data, for the positivist exposition handles all the data without it. Running afoul of Occam's Razor, the superfluous overlay of Dworkinian interpretation does not yield a model that accounts any better for *L*'s judicial decisions and opinions than does positivism's more austere model. (To be sure, Dworkinians would commend their approach as preferable because it incorporates a different conception of the consensus that prevails in *L*'s easy cases. We shall consider this point shortly.)

Should the legal positivists who explicate the pattern of decisions in *L* feel obliged to reject the Dworkinian interpretation altogether? The appropriate answer here is plainly negative; the positivists can perfectly well avouch that the underpinnings for the imaginative judges' decisions in easy cases might be in line with what the Dworkinians maintain. If the Dworkinian insistence on the presence of criterial divergences in *L*'s easy cases is nothing more than a claim about the aforementioned underpinnings—a claim that *L*'s imaginative judges focus on everyday meanings in easy cases out of a concern for the legislature's broader aspirations, whereas the unimaginative judges focus on everyday meanings without any concern for such aspirations—then the Dworkinians are stating nothing which the positivists must repudiate. A positivist who offers an account of *L* will endeavor to provide an analysis that captures the pattern of consensus in easy cases and disagreement in hard cases. Such an analysis can and should leave entirely open any questions relating to the ulterior concerns and motives of the officials whose judgments are under consideration. While accepting that the Dworkinian account of *L* is one possible elucidation of the imaginative judges' behavior in easy cases, positivists can of course still emphasize that in such cases the imaginative judges and unimaginative judges adhere to a common point of reference. In sum, a legal positivist should regard the Dworkinian interpretation as one possible extension of his or her own analysis—an extension not dictated by the data but also not at odds with them.

II. UPHOLDING THE RULE OF RECOGNITION: A SECOND STEP

This section initiates a more wide-ranging defense of the Rule-of-Recognition thesis against Dworkin's onslaughts.[7] In *Law's Empire*, Dworkin's prime

7. For some of the many previous ripostes to Dworkin on this point, *see, e.g.,* Michael Bayles, *Hart vs. Dworkin,* 10 LAW & PHIL. 349, 353–61 (1991); Jules Coleman, *supra* note 3, at 12–27; Jules Coleman, *On the Relationship Between Law and Morality,* 2 RATIO JURIS 66, 72–75 (1989); Jules Coleman, *Authority and Reason, in* THE AUTONOMY OF LAW 287, 289–96 (Robert George ed., 1996); Hart, "Postscript," at 254–59; Charles Silver, *supra* note 5, at 387–90. Also clearly relevant are some of the remarks in Gerald Postema, *"Protestant" Interpretation and Social Practices,* 6 LAW & PHIL. 283, 300, 301, 315–16 (1987). Throughout this discussion I take the Hartian view that each legal system has one overall Rule of Recognition made up of numerous criteria (some of which might not be clearly ranked). I do not see any reason to stipulate that some criteria are separate Rules of Recognition. For such a stipulation, *see* Joseph Raz, THE AUTHORITY OF LAW 95–96 (1979).

tack is to expose theoretical disagreements in the law and to exploit those disagreements as a launching pad for his interpretive approach to jurisprudence. My present discussion will attempt to defuse his arguments about theoretical disagreements and to raise some queries about the interpretive approach.

Let us first clarify the objectives that Dworkin is pursuing. When he lays bare the theoretical disagreements in a number of hard cases, and when he goes on to say that such disagreements are present (though very often unactivated and thus obscured) in all cases, he is not suggesting that easy cases are unusual or that concrete legal outcomes are seldom predictable. To be sure, he once or twice tosses off comments that may seem to bespeak such a view. Near the very beginning of *Law's Empire,* for example, he writes that "the more we learn about law, the more we grow convinced that nothing important about it is wholly uncontroversial" (*LE,* 10). Even in this incautious statement, the words "important" and "wholly" indicate that Dworkin is hardly denying the occurrence of routine cases. Still more indicative of his cognizance of such cases is a passage from *Taking Rights Seriously* in which he actually seeks to highlight the role of controversy in the law. There he denies that "disagreements among judges [are] limited only to extraordinary and rare cases," but he immediately expands on this observation by claiming that "disagreements among judges of this sort are very frequent, and indeed can be found whenever appellate tribunals attempt to decide difficult or controversial cases" (*TRS,* 62). Difficult and controversial cases in appellate tribunals are undoubtedly quite frequent, as is attested by the thickness of the casebooks in various doctrinal areas of the law; nonetheless, they form only a very small proportion of each such area's actual and potential cases (most of which never come before a trial court, much less before an appellate tribunal). Someone who underscores the frequency of judicial disagreements by pointing to their presence in difficult and controversial appellate cases is presumably aware that the implications of vast swaths of the law do not provoke any interesting disagreements—or indeed any disagreements, period. Likewise, when asserting that "[l]awyers . . . often call for changing even settled practice in midgame" (*LE,* 138), Dworkin propounds a narrative of jural change that makes clear that the ostensibly dramatic departures within the American and English legal systems are typically the culminations of gradual processes of evolution in the settled regions of the law (*LE,* 136–39).

Some key elements of Dworkin's theory in *Law's Empire* confirm what has just been said here. For example, having chosen the term "paradigms" to indicate concrete phenomena that are so easily handled by the prevailing schemes of classification as to be wholly unproductive of controversy in all ordinary settings (*LE,* 72–73), Dworkin contends that "[t]he interpretive attitude [in law as in other social practices] needs paradigms to function effectively" (*LE,* 138). Equally to the point are his efforts to assure his

readers that his model of law-as-integrity can account for the occurrence of easy cases. In some important and prominent passages (*LE,* 265–66, 350–54), he submits that his model of law is fully consistent with the fact that the legal implications of myriad actual or potential situations are so straightforward that "we need not ask questions when we already know the answer" (*LE,* 266). Perhaps even more telling is the prominence of the touchstone of "fit" within Dworkin's interpretive approach. That touchstone is what separates interpretation from invention, and is one of the two principal dimensions of the jurisprudential theory that Dworkin commends. It is central to his ideals of integrity and fairness. Yet the touchstone of fit would have no purchase if the law were largely unsettled from one moment to the next. When Dworkin writes that an interpreter "needs convictions about how far the justification he proposes at the interpretive stage must fit the standing features of the practice to count as an interpretation of it rather than the invention of something new" (*LE,* 67), the existence of numerous "standing features" is taken for granted.

Dworkin is quite right to acknowledge that any viable legal system must be characterized by a substantial degree of settledness and regularity.[8] If in a certain society the implications of a very large proportion of the prevailing legal norms are indeterminate not only in controversial appellate cases but also in the everyday workings of the law, then no full-fledged legal system exists within that society. Though any jural regime is bound to include a number of aspects that are unsettled or open-ended, the sheer operativeness of any such regime as a jural regime entails a considerable measure of predictability and routineness. If serious controversy is typical rather than exceptional—that is, if the legal consequences of people's multitudinous actions are ordinarily (rather than occasionally) "up in the air" and truly murky—then "lawlessness" is the correct designation for such a state of affairs.

We should now reevaluate the significance of Dworkin's highlighting of overt theoretical disagreements in hard cases. Let us concede *arguendo* that the criterial divergences which become exposed in such cases are also present (subterraneously) in easy cases. How damaging to legal positivism is such a concession, if it be a concession? The short answer to this question is that Dworkin's attentiveness to hard cases should be welcomed as salutary rather than resisted as threatening. His work, set within its proper limits, can serve to refine the insights of positivism rather than to undermine them.

8. I need not altogether deny Frederick Schauer's claim that, within a Dworkinian world, legal rules quite frequently give way to their underlying reasons when there are serious clashes between the two. *See* Frederick Schauer, *The Jurisprudence of Reasons,* 85 MICH. L. REV. 847 (1987). I need only contend that circumstances involving such clashes—circumstances likely to generate difficult appellate cases—are vastly outnumbered by the myriad circumstances in which such clashes do not occur. Schauer would probably agree. While avouching that "[a]s a descriptive enterprise, [Dworkin's work] seems much more accurately to characterize the nature of much of appellate adjudication than did its positivist opponents," he doubts "whether [Dworkin's jurisprudence] accurately characterizes the idea of law itself" (*id.* at 870).

Although some other critics of Dworkin have likewise sought to defuse his anti-positivist broadsides by accommodating them within positivism,[9] this maneuver has not been sufficiently connected to an emphasis on the routineness of the law's quotidian functioning. Once we apprehend the extent to which the ordinary workings of a legal system must be regularized if the system is to be viable as a regime of law—an extent which varies from system to system, but which is always considerable—we can see that Dworkin's attack on the Rule of Recognition is untroubling for the positivist. Criterial divergences among judges may well exist in straightforward cases as well as in difficult cases, but they exist against a background of extensive commonality. The sorts of criterial divergences that Dworkin recounts in his hard cases are important but fairly superficial. For example, when judges disagree whether the ordinary meanings of statutory language or the broader intentions of the legislature should be deemed decisive, they are hardly disagreeing about the wider question whether the legislature's enactments lay down authoritative standards. Similarly, when judges disagree about the extent to which considerations of policy can be invoked to distinguish precedents, they are hardly disagreeing about the wider question whether precedents not plausibly distinguishable are generally binding.

Of course, the firm agreement on the deeper criteria comprised in the Rule of Recognition would be hollow if judges continually clashed with one another about the proper application of those criteria. A consensus on abstract precepts is consistent with chaos at a practical level.[10] However, the chief reason for my drawing attention to the officials' consensus on the more profound layers of the Rule of Recognition is that such a consensus is almost certainly necessary (though not sufficient) for officials' agreement at the level that matters most: the level of concrete outcomes, the "bottom line."

Though the regularity essential for the very existence of a legal system as such does pertain to the rationales for specific decisions, it pertains even more importantly to those decisions themselves. If most jural officials in a regime *R* disagreed with one another most of the time about the concrete legal implications of people's actions, their treatment of those actions would be erratic and chaotic rather than norm-governed. Their regime would not be a regime of law, where behavior is generally subsumed under the regulating and guiding sway of norms. To see the force of this point, we should ponder an example involving routine behavior such as one's strolling down a pathway. Suppose that some of *R*'s officials feel that anybody's strolling down a particular pathway between 2:00 and 3:00 is mandatory and permissible, whereas a roughly equal number of the other officials believe that it is permissible and not mandatory; in addition, a roughly equal

9. For an early example, *see* E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute, in* Cohen, DWORKIN, at 3, 16–19.

10. This point (in a different context) is emphasized in Matthew Kramer, HOBBES AND THE PARADOXES OF POLITICAL ORIGINS 99–122 (1997).

number of others believe that it is forbidden and not mandatory, while a roughly equal number of others believe that it is forbidden and mandatory[11]; still others feel that issues relating to strolling down the pathway are nonjusticiable. Suppose further that the officials disagree just as dizzyingly about the concrete legal implications of most of the other routine actions (and unusual actions) in which people might engage. In these circumstances, *R* is not a regime of law at all. It is not a regime in which officials as a group handle the effectuation of norms with a substantial measure of regularity and consistency. It is instead an arena of official factions, within which the populace is subjected to a bewilderingly higgledy-piggledy array of contrary signals and interventions.

This example has been deliberately unrealistic and indeed extravagant in order to bring out vividly a key feature of any actual legal system: the routineness and patternedness of the system's workings at the level of concrete results. Through vast stretches of people's lives within any such system, the legal consequences of most facets of their behavior are clear-cut. To be sure, every jural system exhibits unsettledness and fluidity, to a greater or lesser degree. No such system can provide for all contingencies in a manner that obviates any development of its norms, even in the unlikely event that an absence of development would be regarded as desirable. To some extent, then, the generation of particular outcomes in any regime of law is less than perfectly regularized and predictable. Nonetheless, insofar as an operative system of law exists and functions, the specific legal implications of people's conduct in a multitude of domains do typically partake of regularity and predictability in great abundance.

Dworkin himself is hardly unaware of the centripetal forces that are inevitably present in any viable legal system. He writes: "Every community has paradigms of law, propositions that in practice cannot be challenged without suggesting either corruption or ignorance. Any American or British judge who denied that the traffic code was part of the law would be replaced, and this fact discourages radical interpretations" (*LE,* 88). He further states: "Law would founder if the various interpretive theories in play in court and classroom diverged too much in any one generation. Perhaps a shared sense of that danger provides yet another reason why they do not" (*LE,* 88–89). A legal system operates as a set of institutions that establish and administer authoritative norms. If such a system exists—in contrast with a chaotically uncoordinated tug-of-war by vying factions—the officials therein must converge to a very considerable degree in their perceptions concerning the particular outcomes that are required by the prevailing norms.

How, then, do the centripetal forces at work in any legal system bear upon

11. An action can be both mandatory and forbidden. A person can have both a duty to φ and a duty to abstain from φ-ing; what cannot be true is that a person has both a duty to φ and a *liberty* to abstain from φ-ing.

Dworkin's attack against the positivists' belief in a Rule of Recognition? As we have observed, his attempt to refute that belief is centered on his charting of theoretical disagreements in hard cases. Such disagreements, Dworkin presumes, are present even in easy cases where they fail to surface. We now can see, however, that our acceptance of this conclusion does no harm at all to the positivist conception of law. Though criterial divergences may always be present, they cannot go beyond the point where they would bring about substantial indeterminacy and erraticism in the law at the level of concrete results. At any rate, they cannot go beyond that point if the officials are to maintain a functional legal system. Widespread though the criterial divergences among the officials may be, the practical impact of those divergences—their tendency to produce a welter of discordant conclusions about the specific jural consequences of people's behavior—must be quite limited. If a legal system is to endure as such, the rivalry among judicial perspectives will be cabined by the need for most officials to agree on the "bottom line" in most circumstances.

In this connection, recall my earlier discussion of the hard cases where imaginative and unimaginative judges are embroiled in controversies over the correct way of dealing with statutory language. As was stated there, Dworkinians would probably claim that the imaginative judges orient themselves toward the broader intentions of the legislature in routine cases as well as in knotty cases. What gives that claim its credibility is the fact that it does not overlook or gainsay the routineness of the routine cases. It acknowledges that the imaginative and unimaginative judges agree heartily on the appropriate *results* in easy cases; more precisely, in regard to any such case, it assimilates the specific substance of the legislature's underlying intentions (on which the imaginative judges rely) and the specific substance of ordinary linguistic usage (on which the unimaginative judges rely). By presuming that the general intentions of the legislature for the application of statutes in straightforward cases will center on the everyday significance of the wording in the statutes' provisions, the Dworkinian view accepts that the imaginative and unimaginative judges concur firmly with one another in easy cases at the level of the "bottom line." The criterial divergences that separate the imaginative from the unimaginative do not prevent a judicial consensus on the apposite concrete outcomes of easy cases. Abiding theoretical disagreements are structured in ways that enable unanimity concerning the disposition of myriad cases. No colorable theory of law could deny as much. Only because the Dworkinians' approach acknowledges the consensus among judges on the proper outcomes of most potential or actual cases, do Dworkinian claims about the constant presence of criterial divergences enjoy any plausibility.

Theoretical disagreements among judges in any viable legal system are thus subordinate not only to the deeper layers in the Rule of Recognition, but also to the pressures for regularity in the detailed implementation of

the law. Moreover, these two forms of subordination are closely linked. As was remarked earlier, a state of virtual unanimity among judges on the fundaments in the Rule of Recognition is almost certainly necessary for a very substantial measure of agreement among them on the concrete applications of the law. Hence, given that a legal system is not sustainable as such unless officials are indeed in accord with one another to a considerable extent about the law's specific implications, it is likewise not sustainable unless the officials are unanimous or virtually unanimous in their acceptance of the precepts that make up the bedrock of the Rule of Recognition. Criterial divergences among officials obtain against the background of the officials' unanimity on the foremost criteria in the Rule of Recognition; and the intensity and range of the divergences will be limited as far as is necessary for the preservation of a large degree of regularity in the day-to-day administration of the law. Such will be true, that is, if the legal system containing the divergences is to endure as a functional legal system.

Accordingly, Dworkin's alertness to theoretical disagreements in hard cases can be welcomed by legal positivists. On the one hand, his pointing out of such disagreements is undoubtedly salutary, for it serves to counter the notion that the officials who run an operative legal regime must be in harmony with one another about all or nearly all the criteria that make up the Rule of Recognition. Within many legal systems, and certainly within the American and English legal systems, quite a bit of room exists for disaccordance at the criterial level. On the other hand, despite the importance of the criterial divergences (and despite their prominence in casebooks consisting almost entirely of appellate opinions), they are perfectly compatible with the healthy existence of a Rule of Recognition. As long as the disunity remains within the confines that have been sketched here, it does not impair the vitality of a legal system. Judges who differ with one another about some of the criteria in the Rule of Recognition can and do concur with one another about the most significant criteria therein and about the practical legal consequences of most instances of conduct.

In other words, officials' acceptance of the Rule of Recognition—a key element in the positivist model of law—does not perforce (or even typically) involve their unanimity on all the guidelines or precepts which that overarching rule comprises. If every official or almost every official subscribes to the paramount criteria in the Rule of Recognition, and if officials generally converge in their assessments of the concrete legal implications of most events, then their disagreements over a number of subordinate criteria do not negate their acceptance of the Rule of Recognition as described by legal positivists. Those disagreements are consistent with the unity and sustainability of a legal regime. To be sure, positivists can learn (and have learned) from Dworkin to ponder more carefully the potential for disharmony among officials in regard to the ascertainment of legal norms; however, there is no reason to believe that the presence of such disharmony necessitates the abandonment of the positivist account of law.

III. UPHOLDING THE RULE OF RECOGNITION: A THIRD STEP

Supporters of Dworkin may feel that my arguments so far have overlooked the principal arrow in his anti-positivist quiver. We must therefore now consider a distinction that he originally drew in the third chapter of *Taking Rights Seriously* and that he has presented afresh in *Law's Empire.* (My discussion will focus on the later treatment, in *LE,* 136–39, 145–46.) Is the positivist account of law belied by the distinction between a consensus of conviction and a consensus based on convention?

A consensus of conviction exists when people converge in their judgments about appropriate behavior but do not count the fact of their convergence as an essential ground for reaching those judgments. A consensus based on convention exists when people do indeed look upon the fact of their general agreement as an essential reason for arriving at the judgments on which they agree. A typical example of the former sort of consensus is the widespread acceptance of the proposition that the torture of babies is wrong; a typical example of the latter sort of consensus is a community's acceptance of the proposition that each pedestrian should bow to his or her fellow pedestrians when encountering them on a stroll.

Dworkin contends that the convergent behavior and attitudes of officials are better understood as matters of conviction than as matters of convention. Now, before we look more closely at his arguments, we should briefly note a few preliminary caveats. First, although his distinction between conviction and convention is powerfully and subtly drawn, it is more problematic than it initially appears—largely because of the point that Thomas Hobbes so piquantly expressed when he wrote that "he that should be modest, and tractable, and performe all he promises, in such time, and place, where no man els[e] should do so, should but make himselfe a prey to others, and procure his own certain ruine, contrary to the ground of all Lawes of Nature, which tend to Natures preservation."[12] By reflecting on Hobbes's observation, we can see that the cogency of many basic moral and prudential propositions does hinge on a general acceptance of those propositions by one's fellows. Dworkin broaches this point (*LE,* 145–46), but his response to it is rather weak. Still, we need not here pursue this matter any further. Whatever may be the limitations of the conviction/convention

12. Thomas Hobbes, LEVIATHAN 110 (Richard Tuck ed., 1991). Hobbes's pithily stated point is developed at greater length (without reference to Hobbes) in William Boardman, *Coordination and the Moral Obligation to Obey the Law,* 97 ETHICS 546, 552–53 (1987). As elegantly concise as Hobbes is the Book of Isaiah: "Justice is turned back, and righteousness stands afar off; for truth has fallen in the public squares, and uprightness cannot enter. Truth is lacking, and he who departs from evil makes himself a prey" (Isaiah 59:14–15). For another snag in the conviction/convention dichotomy, *see* Nigel Simmonds, *supra* note 1, at 77–79. *Cf.* John Stick, *supra* note 5, at 412–13. I should note, incidentally, that I shall herein be using the terms "conventionalist" and "conventionalism" only with reference to the convention/conviction dichotomy, rather than with all the connotations attached to those terms in the fourth chapter of *Law's Empire.*

dichotomy, it clearly retains a significant amount of force. As Hart readily conceded (Hart, "Postscript," 255–56), a *comprehensive* conventionalist account of moral obligations would be exceedingly unpersuasive. Much the same can be said about a comprehensive conventionalist account of prudential precepts.

Second, as might be apparent from what has just been said, the current topic—the question of conventions versus convictions—does not pertain solely to morally worthy legal systems. It pertains equally to regimes in which the officials act purely out of concern for the furtherance of their own interests. Prudential stances and judgments, as much as moral stances and judgments, can form the independent convictions that are here contrasted with conventions as the bases for the task of ascertaining the law. To be sure, because of a preoccupation with the American legal system (a system that is morally worthy on the whole and that involves judicial argumentation that is expressly moral), Dworkin focuses exclusively on moral convictions. For the purposes of this article, there is no need to challenge him on this point. However, we should be aware that the authoritative decisions whose status we seek to pin down—as products of independent convictions or as products of conventions—can be thoroughly prudential in their tenor and motivation.

Third, Dworkin sometimes expounds his distinction in a misleading manner. Most notably, when fleshing out the conventionalist view, he writes: "Perhaps lawyers and judges accept [a paradigmatic] proposition as true by convention, which means true just because everyone else accepts it, the way chess players all accept that a king can move only one square at a time" (*LE,* 136). The analogy between a judge and a chess player is infelicitous, for the proper parallel is between a judge and a scorer (or some other adjudicative official) in a chess match. Chess players in a tournament are the counterparts of ordinary citizens in real life, who have no authority to change the law on their own.[13]

Important though the points covered in these preliminary comments may be, the central weakness in Dworkin's attack on the conventionalist model of law is his ungenerosity. Dworkin appears to believe that the proponents of the conventionalist approach have failed to notice the prominent role of self-reflective argumentation in the legal institutions of England and the United States. He insists that the conventionalists are theoretically committed to an analogy between law and chess, which he perceives as an activity informed by a "crisp distinction . . . between arguments about and arguments within the rules" (*LE,* 137—38). According to Dworkin, chess is a

13. Of course, a chess scorer normally has no authority to change the rules of chess; but, likewise, a judge normally has no authority to change the terms of a statute. Moreover, just as a judge has leeway to interpret a statute on debatable points of application, so a scorer has leeway to interpret the rules of chess insofar as their applications are unclear. On any matters left open by the rules of chess, a scorer can fix the prevailing standards through his own patterns of decisions, and he can adjust those decisions if he becomes convinced of the wisdom of such a move.

game in which the fixing of rules for tournaments is sharply separate from anything that takes place in the tournaments themselves.[14] Within the tournaments, arguments about the rules—as opposed to arguments about the subsuming of certain situations under the rules—are simply out of place. Hence, given that the conventionalists as portrayed by Dworkin are saddled with a belief in the close affinities between law and chess, they must further believe that the arguments made during legal cases do not ever propose changes in legal norms; and they must likewise believe that judicial officials lack authority to make such changes in the course of deciding particular cases. "[A]ny substantive attack on [a legal] proposition will be out of order within the context of adjudication, just as an attack on the wisdom of the rules of chess is out of order within a game" (*LE,* 136). Yet, as Dworkin quite easily establishes, the beliefs that he attributes to conventionalists are ridiculous and untenable. Those beliefs do not correspond at all to the realities of American and English law.

Have conventionalists stumbled in the way that Dworkin suggests? Or are his criticisms trained instead on a caricature of the doctrines that are actually advanced by jurisprudential positivists? We should opt for an affirmative answer to the latter question; here and often elsewhere, Dworkin has not sufficiently endeavored to present an accurate and constructive account of positivism. His toppling of straw men does not tell us much about the genuine merits of the positivist stance.

Any sensible conventionalist will happily acknowledge the salience of self-reflective deliberation and contestation in the American and English legal systems (and in other relevantly similar legal systems). The state of affairs in those legal systems is very much in keeping with the conventionalist model, for the role of the deliberation and contestation is carved out by conventions. When lawyers and judges make arguments in which they call for the transformation of various substantive or methodological norms, they do so because their fellow officials expect or at least permit such arguments—and because the arguments are very likely to be pondered, even if they do not ultimately prevail. Officials' attitudes and actions form a matrix of interconnected expectations, within which the officials can count on one another to anticipate (tolerantly, if not receptively) that some arguments in favor of altering the law may well be advanced. Were there no such matrix, the propounding of those arguments by any official would be pointless and perhaps counterproductive; but, given that the set of interlocked expectations does in fact exist, the reasoned appeals for change do indeed have a point. Legal conventions provide the opportunities for disputation concerning possible modifications to the conventions themselves. They render legitimate the questioning of their own bearings, and provide fora where such questioning can be carried on.

In short, we should eschew Dworkin's assumption that conventions are

14. For a somewhat more nuanced view of chess, *see TRS,* at 101–105.

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inevitably static and that adjustments to them must occur through external interventions rather than through opportunities generated within the conventions themselves. We can thereby reject his claim that conventionalists are unable to account for the patterns of evolution in the American and English legal systems. Conventional practices that serve recurrently as platforms for the initiation of changes to themselves are indeed thoroughly conventional, just as much as conventional practices that are not similarly dynamic. In connection with this matter, as in connection with other matters, Dworkin has erred by presuming that legal positivism insists on one particular mode of adjudication. In fact, the positivist conception of law is fully consistent with a mode of adjudication that leaves room for arguments about the advisability of various departures from the status quo. Such a style of adjudication involves nothing that cannot be accommodated within a conventionalist model; after all, the space for challenges to the regnant conventions is cleared and maintained by the conventions themselves.

Before leaving the current section of this essay, we should note three points. First, nothing said here is at odds with anything in the preceding section. Although the American and English legal systems are relatively dynamic, and although Dworkin is correct in thinking that any adequate theory of law must be able to account for the internal adaptability of those legal regimes, the dynamism occurs within an overall context of routineness and settledness. Dworkin makes clear that the processes of change on which he focuses are highly gradual, extending over several decades. He further observes quite aptly that a fluid and contested state of affairs in any particular area of the law is accompanied by stability in numerous other areas. "[T]he level of agreement . . . is high enough at any given time to allow debate over fundamental practices like legislation and precedent to proceed in the way I described . . . , contesting discrete paradigms one by one, like the reconstruction of Neurath's boat one plank at a time at sea" (*LE,* 139). My defense of conventionalism has attempted to show that the dynamic, self-reflective aspects of American and English legal institutions can be readily explained along conventionalist lines; there has been no suggestion whatsoever that the dynamic self-reflectiveness is a chaotic flux that excludes or greatly impairs the general settledness of legal norms.

Second, contrary to what Dworkin implies, a legal positivist does not perforce have to accept that the workings of any legal system are fundamentally conventional. Though all legal positivists are indeed (wisely) conventionalists, there is a bit of room for a positivist to take the view that the functioning of each legal system is based on a coincidence of officials' independent convictions. What the positivist then has to argue—in order to remain a positivist—is that the convictions need not be moral in tenor. In a wicked legal system, the convictions can be purely prudential. Each official might seek to give effect to certain precepts because he feels that acting on those precepts is in his interest (and in his evil regime's interest) irrespective of whether his fellow officials are largely in accord with him. As

long as the officials' independent prudential calculations converge to yield a substantial degree of regularity and coordination, a functional legal system can ensue. To be sure, any such model of law would be *extremely* far-fetched; but it would not be flatly unintelligible or self-contradictory.

Third, the present section of this essay has sought to demonstrate that the view of Anglo-American law as a set of conventions can withstand Dworkin's criticisms. To establish as much is not per se to establish that Dworkin's own view of Anglo-American law as a confluence of independent moral convictions is incorrect or inferior. A rejection of his view—even a partial rejection thereof—must rest on further arguments. (For the sake of concision, my discussion here will mention only American law; but every facet of this terse discussion will apply equally to English law.)

Now, any proponent of conventionalism should allow that the institutions of American law are very likely perceived by most American judges as morally worthy on the whole. Because of this prevalent perception among American judges, most of them are naturally inclined to regard the general aspects of their work as morally worthy. For example, having an independent conviction in the moral correctness of the principle of legislative supremacy, a judge will feel morally obligated to give effect to legislative enactments regardless of whether his fellow judges do the same. In broad outlines, then, Dworkin's model of consensus-based-on-independent-convictions enjoys credibility as an explication of the workings of American law. It is a plausible alternative to the conventionalist model, at an abstract level.

As soon as we move down into the details of American legal institutions, however, the Dworkinian approach becomes strained. Though it is not utterly inconceivable that American judges harbor independent moral convictions about each of the various complex layers and ramifications in their Rule of Recognition, the likelihood of such a state of affairs is vanishingly small. Dworkin himself is not unaware of this point, as he acknowledges the limits of his model:

> This argument does not prove that absolutely nothing is settled among American or British lawyers as a matter of genuine convention. Perhaps no political argument could persuade American judges to reject the proposition that Congress must be elected in the manner prescribed by the Constitution, as amended from time to time in accordance with its own amending provisions. Perhaps all judges do accept the authority of the Constitution as a matter of convention rather than as the upshot of sound political theory. (*LE,* 138)

Nevertheless, Dworkin goes on to state that "nothing *need* be settled as a matter of convention in order for a legal system not only to exist but to flourish" (*LE,* 138, emphasis in original). On the one hand, strictly speaking, his statement is true; the idea of a legal regime based entirely on officials' independent moral convictions is not starkly unintelligible or

self-contradictory. On the other hand, such an idea is extravagantly outlandish. No one can credibly maintain that American judges accept all elements of the criteria in their Rule of Recognition on the grounds of convention-independent moral principles.

At most, then, the Dworkinian model is only a partial alternative to the conventionalist model as an interpretation of the American legal system. A view of that system as a set of conventions can claim credibility at an abstract level and great cogency at a somewhat more detailed level. By contrast, Dworkin's approach can claim credibility at the abstract level but virtually no plausibility whatsoever at the somewhat more detailed level. Thus, even if we concede *arguendo* that Dworkin's protestantism is superior to conventionalism as an account of the general contours of American legal officials' endeavors, we have every reason to think that conventionalism will be needed in order to account for much of the texture of those endeavors. Even more plainly will conventionalism be pertinent if we are seeking to understand regimes of law that are far less morally benign than the American regime.

IV. MORALITY AND TRUTH

Dworkin, at many junctures in his major jurisprudential writings, argues that positivists are theoretically committed to denying that any legal system's Rule of Recognition can ever include substantive moral tests among its criteria. Because his assertions and arguments along these lines have frequently been assailed,[15] no full-scale exploration of them here is warranted. However, a brief treatment is in order. Let us initially observe *en passant* that most legal positivists firmly reject Dworkin's characterization of their position. Apart from Joseph Raz and his followers,[16] few present-day legal positivists endorse the thesis that moral principles can never serve as legal touchstones for determining the existence and content of valid legal norms. As far as most positivists are concerned, the question of the status of moral principles as criteria for the ascertainment of law is an empirical question about each particular legal system.

The principal task of the current section of this essay is to rectify an unduly sweeping concession made by H.L.A. Hart in his posthumously published riposte to Dworkin on the topic. Throughout the "Postscript" to the second edition of *The Concept of Law,* Hart resisted Dworkin's efforts to classify him as a "plain-fact positivist"; he squarely avouched that moral principles as well as social facts can amount to sources of law (Hart, "Postscript," 247–48, 250–54, 265–66). Whether such principles do indeed amount to such sources in any

15. For the most sustained challenge to Dworkin on this issue, *see* W.J. Waluchow, INCLUSIVE LEGAL POSITIVISM (1994), chs. 6,7.

16. For a recent statement from this school, *see* Eleni Mitrophanous, *Soft Positivism,* 17 OXFORD J. LEGAL STUD. 621 (1997).

particular regime is an empirical matter, rather than something to be settled by verbal stipulation. By taking this view—by accepting that the criteria for legal validity can encompass moral requirements—Hart embraced a stance that he labeled as "soft positivism."

Hart thus made clear that jurisprudential positivism's treatment of the adjudicative role of moral principles is chiefly a doctrine concerning what does not have to be, as opposed to a doctrine concerning what has to be. Specifically, soft positivists subscribe to both of the following two theses: (1) no legal system *has* to include moral principles among its criteria for ascertaining the law; and (2) any legal system *can* include moral principles among those criteria. Dworkin has persistently declared that positivists are theoretically committed to rejecting the latter of these theses, but his unflinching insistence on this point is dubious in light of Hart's robust proclamations to the contrary. Or so we could straightaway conclude, if Hart in his "Postscript" had not made an unwise concession to the Dworkinian position. Before a verdict against Dworkin can be entered, that concession must be withdrawn.

To understand Hart's concession and to grasp its inadvisability, we must take a glance at the claim by Dworkin to which Hart was responding. In *Taking Rights Seriously*, but not in *Law's Empire,* Dworkin contends that soft positivism commits its proponents to a moral-realist metaphysical vision of "an objective realm of moral facts" (*TRS,* 349; "Reply," 250). His argument runs as follows: Soft positivists maintain that moral requirements can be among the official standards for determining the legal validity and content of norms. Thus, for example, if the workings of a particular legal system *L* are subject to a constitutional provision that invalidates any legislative enactments that impose cruel punishments, then the legal validity of any punitive enactment in *L* will hinge on a moral test relating to cruelty. However, if propositions about the validity of punitive enactments in *L* can be true—in much the same way that other propositions of law in *L* can be true—then there must be some set of objective facts to which those propositions can correspond. And as those propositions are partly moral in tenor, some of the relevant facts must be moral facts. Hence, by allowing that moral precepts can figure as authoritative criteria in a legal system's Rule of Recognition, the soft positivists have logically committed themselves to a realist metaphysics of morals. Such a logical commitment is troubling for the soft positivists in two respects. First, it loads them with what some of them would perceive as murky ontological baggage. Second, theses concerning the metaphysically objective status of morality may well turn out to be false or unintelligible; if so, then soft positivism is a doctrine that entails the conclusion that a myriad of pertinent legal propositions in some societies such as the United States are false or are neither true nor false. Vast areas of law in those societies will be spheres of judicial discretion.

Having become uneasy by 1984 with this sort of metaphysical conjuring ("Reply," 300 n.12), Dworkin omits this line of argument altogether in *Law's*

Empire. In his recent work, as we shall presently observe, his conception of moral truth prevents or defuses such a line of argument. Nonetheless, Hart apparently felt rather disconcerted by Dworkin's raising of the specter of moral realism. Hart seems to have endorsed the view that, unless a realm of metaphysically independent moral facts exists, the incorporation of moral criteria into a Rule of Recognition will mean that any norms validated by reference to those criteria are not preexisting laws: "[I]f there are no [metaphysically objective moral] facts, a judge, told to apply a moral test, can only treat this as a call for the exercise by him of a law-making discretion in accordance with his best understanding of morality and its requirements and subject to whatever constraints on this are imposed by the legal system" (Hart, "Postscript," 253). Accurately but somewhat lamely, Hart remarked that the upshot of debates over the ontological status of morality will not make any practical difference for judges. Irrespective of whether moral propositions have any ultimate grounding, each judge will labor under a duty to deliberate carefully when applying any moral criterion that plays a part in determining the validity and substance of legal norms. Having discounted the practical significance of the question of moral ontology, Hart then offered a major theoretical concession:

> Of course, if the question of the objective standing of moral judgments is left open by legal theory, as I claim it should be, then soft positivism cannot be simply characterized as the theory that moral principles or values may be among the criteria of legal validity, since if it is an open question whether moral principles and values have objective standing, it must also be an open question whether "soft positivist" provisions purporting to include conformity with them among the tests for existing law can have that effect or instead, can only constitute directions to courts to *make* law in accordance with morality. (Hart, "Postscript," 254, emphasis in original)

Given that Hart was almost certainly using the phrase "objective standing" to mean far more than "determinate correctness," this passage effectively marks a wholesale capitulation in the face of Dworkin's original attack on soft positivism.

For two main reasons, Hart was unwise in surrendering. First, Dworkin's more recent conception of moral truth disallows his own original challenge to the soft-positivist model. Furthermore, his challenge can be deflected even in some contexts where his revised conception of moral propositions might be deemed partly inapplicable. Let us consider each of these points in turn.

In *Law's Empire,* Dworkin draws an important distinction between internal and external skepticism (*LE,* 76–86). As applied to morality, internal skepticism focuses on the correctness or incorrectness of various answers to moral problems, and addresses the question whether any answer to a problem is (uniquely) correct. By contrast, external skepticism focuses not on the correctness or incorrectness of answers to moral problems, but on

the ultimate metaphysical posture of those answers. Dworkin neither opposes nor endorses external skepticism in *Law's Empire*; instead, he puts it aside as having no bearing on his interpretive approach to jurisprudence. He is interested solely in the questions tackled by internal skepticism. That is, he seeks to evaluate moral theories and outlooks in order to come up with the right answers to legal and moral problems. Given his purposes and concerns, a rejection of external skepticism would be as misguided as an espousal of it. Rather, it is best dismissed as irrelevant. Striving to apprehend moral truths, Dworkin has no reason to engage in metaphysical speculations—since, even if the speculations are intelligible, they are wholly external to the inquiries wherein moral truth is pursued.

In a generally valuable recent article, "Objectivity and Truth: You'd Better Believe It,"[17] Dworkin has extended and reinforced the stance taken in *Law's Empire*. More strongly than ever, he emphasizes that questions about the objectivity and truth and universality of moral propositions are themselves moral rather than metaphysical. He now does reject external skepticism—not because he views it as wrong, but because he views it (and also any metaphysical stance opposed to it) as unintelligible. If claims about the timelessness and objectivity of moral truths are to make any sense at all, they have to be understood as moral rather than metaphysical claims; accordingly, any skeptical stance that doubts those claims must likewise be understood as a moral stance, if it is to be intelligible at all. Both the affirmations of the objectivity of moral truth and the challenges to any of those affirmations are internal to the deliberations wherein such truth is pursued. To grasp the correct answers to the moral questions about objectivity or to any other moral questions, we have to determine which moral principles and arguments are best (morally best, of course). Having determined as much, we shall not have left anything undone. There is no further set of meaningful inquiries about the correspondence or absence of correspondence between the best moral principles and some metaphysical realm.

Despite the laconicism of this account of Dworkin's thoughtfully developed views about moral truth—an account that reports some of his conclusions without rehearsing the forceful arguments which support them—the implications for his critique of soft positivism should be clear. No longer can Dworkin consistently allege that the soft positivists are committed to a moral-realist doctrine simply by dint of their acknowledging the preexis-

17. The article is marred by only a few inadvisable passages, of which the longest is a two-page critique of Richard Rorty (Dworkin, "Objectivity," at 95–96). Therein, Dworkin misrepresents Rorty's epistemological relativism as the ontological doctrine of Berkeleian idealism. Rorty does his best to dodge and dismiss the metaphysical questions to which Berkeley supplied idealist answers. Of course, some positivists may not wish to join Rorty and the later Dworkin in dodging metaphysical questions about objectivity. Those positivists can instead seek to defuse the early Dworkin's stance by engaging in philosophical inquiries that unpack the concept of objectivity into a number of conceptions, some of which will not involve any moral-realist baggage for a theorist who embraces them. For an approach along these lines, *see* Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority, in* LAW AND INTERPRETATION 203, 241–78 (Andrei Marmor ed., 1995).

tence of many legal norms that have been identified partly through moral tests. Soft positivists need only accept that many moral propositions are true; an acceptance of such a claim does not commit them to an ontologically realist account of morality. Instead, they will be committed merely to the view that moral argumentation on any particular issue (within some range of issues) can in principle yield a verdict that is superior to every other verdict on the issue in question. Such a view is a moral thesis rather than a metaphysical tenet. It does not burden the soft positivists with what many of them would see as unwanted ontological lumber.

Thus, from the perspective of Dworkin's writings in the 1980s and 1990s, his attempt in *Taking Rights Seriously* to establish an integral connection between soft positivism and moral realism should be seen as unsustainable. Moral objectivity is a moral matter, to be postulated and verified (or doubted) through moral discourse; it is not something that can be intelligibly verified or disproved through purely metaphysical speculation. If the soft positivists wish to maintain that a moral test invoked in some particular legal system can yield objectively true answers in various circumstances, they need not be setting forth a realist ontological hypothesis. Instead, as Dworkin himself now emphasizes, the claim about objectivity and truth should be regarded as nothing more than an emphatic moral assertion. Hence, when the soft positivist agrees that legal propositions can be true even if the propositions are about norms that owe their jural validity partly to moral tests, he or she is not necessarily taking on any realist ontological commitments.

To be sure, Dworkin's current conception of morality is still objectivist in that it reconstrues, rather than denies, the objectivity of moral truths. Moreover, his conception is not uncontroversial. Does either of these facts undercut my arguments here? That is, does either of them preclude my defense of soft positivism against Dworkin's original strictures?

Although a soft positivist who avoids moral realism by adopting Dworkin's recent account of moral truths is indeed thereby committed to the notion that such truths are objective (in the sense described by my last few paragraphs), the operative conception of objectivity here does not run afoul of the challenge mounted in *Taking Rights Seriously*. When posing that challenge, Dworkin maintains:

> The . . . claim I took positivism to make is . . . connected with a more general theoretical position that would have to be modified if this claim were abandoned. This . . . claim is most clearly put in the following way. We may suppose propositions of law to be true or false, accurate or inaccurate, without thereby accepting any ontology beyond an empiricist's ontology. The truth of a proposition of law, when it is true, consists in ordinary historical facts about individual or social behaviour including, perhaps, facts about beliefs and attitudes, but in nothing metaphysically more suspicious. (*TRS,* 348)

Dworkin goes on, of course, to contend that soft positivism must abandon the claim delineated in this passage. However, precisely what his current

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conception of morality enables soft positivists to do is to avoid committing themselves to "any ontology beyond an empiricist's ontology." They can presume that numerous legal propositions based partly on moral judgments are true or false, accurate or inaccurate, without having to accept the existence of any entities that would be viewed by empiricists as "metaphysically . . . suspicious." In other words, the conception of moral objectivity currently advanced by Dworkin is not the conception of objectivity from which Hart and other legal positivists have sought to keep their jurisprudential analyses disjoinable. Insofar as Dworkin has shown that moral propositions can be definitively correct (or incorrect) without being grounded in a realist ontology, he has shown that soft positivists are not logically committed to such an ontology and that they are therefore not vulnerable to his original critique.

Dworkin's own recent account of moral truth, however, is controversial—perhaps no less so than moral realism itself. Does his original critique succeed, then, in establishing that soft positivists must abandon "Hart's ambition (and . . . the ambition of positivists generally) to make the objective standing of propositions of law independent of any controversial theory either of meta-ethics or of moral ontology" (*TRS,* 349)? A negative answer is clearly warranted here, for the point of my discussion is not to conclude that soft positivists have to endorse Dworkin's non-realist stance; my point, rather, is to indicate that they do not have to endorse a moral-realist position. As long as they accept that many moral propositions are objectively correct and that many other such propositions are objectively incorrect, they do not have to align themselves clearly with either Dworkin's stance or moral realism. Soft positivism is independent of either of those controversial theories because it is consistent with each of them.[18]

By taking aboard Dworkin's recent reflections on moral truth, then, we can eschew the undue concession made by Hart in his defense of soft positivism. Let us now suppose that a soft positivist does not fully subscribe to Dworkin's optimism about the existence of a single right answer to virtually every legal problem. What are the implications for the matter we have just been considering?

Although any sensible soft positivist will undoubtedly believe that there are uniquely correct answers to quite a few moral questions (such as the question whether genocide is wrong), he or she might well believe that there are no uniquely correct answers to much trickier moral questions. Such a belief is moral rather than metaphysical, but is no less firm for that; quite the contrary. Of course, if the soft positivist becomes a judicial official, then he or she will have to take stands on tricky moral questions insofar as the taking of such stands is necessary for carrying out the judicial task of

18. It is likewise consistent with other doctrines such as Simon Blackburn's quasi-realism. For a vigorous and occasionally acrimonious Internet exchange between Blackburn and Dworkin on the nature of moral truth, *see* http://www.brown.edu/Departments/Philosophy/bears/symp-dworkin.html.

ascertaining the law. The pressures of an institutional role that centrally involves decision making will impel the soft-positivist judge to opt for an answer—and therefore to leave aside other plausible answers—to each knotty moral question *Q* that he or she must address. However, the judge's fulfillment of his or her institutional responsibilities does not perforce betoken a belief that *Q* itself is answerable in a uniquely correct way. Furthermore, even if every judge takes the view that *Q* is indeed so answerable, a theorist removed from the pressures of judicial institutions may well take a contrary view.

Suppose that a soft positivist does in fact believe that there are no uniquely correct responses to a number of difficult moral questions that American judges must answer in the course of their law-ascertaining duties.[19] Is he or she thus committed to the view that, when legal norms are validated partly on the basis of the judges' answers to those difficult questions, the norms have had no legal status prior to the validative decisions? In other words, must the soft positivist accept that such norms cannot rightly be deemed preexistent laws that the judges discover rather than introduce? If so, then Dworkin's critique of soft positivism appears to be pertinent within the limited range of cases involving norms of the sort just described. Apparently, only a soft positivist as robustly confident as Dworkin about the existence of uniquely correct answers to vexed moral questions will be able to evade the aforementioned critique entirely.

From the perspective of the soft positivist, one way of reacting to the new lease of life for Dworkin's critique is to shrug with indifference. After all, the critique now holds up only in regard to norms whose legal status has been determined partly on the basis of moral tests that do not yield uniquely correct outcomes. Many soft positivists will be happy to admit that judges who decide cases by reference to such norms are extending the law rather than exclusively finding it. As long as the soft positivist believes that most moral questions which American judges must address are questions with uniquely correct solutions, he or she need not worry about the occurrence of peripheral cases where no such solutions exist. (Of course, if a soft positivist foolishly believes that all or most of the moral questions that American judges must address are questions *without* uniquely correct solutions, then he or she will be vulnerable to a revised version of Dworkin's original strictures.) Dworkin's critique, in its new and reduced guise, reinstates the core/penumbra distinction that has always been to the liking of positivists. The critique now shows merely that most legal norms validated partly through moral tests are preexistent laws, and that a small proportion of legal norms validated partly through moral tests are not preexistent laws. Soft positivists may well retort: "So what?"

19. For the sake of concision, I refer here only to American judges. My discussion applies, however, to any legal system wherein moral principles figure among the criteria for ascertaining the law.

Another reply available to the positivists goes still further. Even in the relatively small proportion of cases where the ascertainment of the law proceeds via moral questions for which there are not usually any uniquely correct solutions, there can be such solutions in the specific institutional contexts. Suppose that the American legal system requires judges to ask a certain moral question *Q* when determining whether legislative enactments are valid laws. Suppose further that a soft-positivist theorist has concluded that there is no uniquely correct answer to *Q* when it is asked about enactments of a certain type *E*. Nevertheless, the theorist is not automatically committed to the conclusion that *E*-enactments in the United States are never valid laws until they are implicitly or expressly declared to be such by the courts. Let us presume that American legislative and judicial officials are unanimous or virtually unanimous in thinking that *Q* should be answered affirmatively when posed in connection with *E*-enactments. Any maverick officials opting to answer negatively will incur reprimands from their colleagues, who will reverse the mavericks' decisions and deem them to be plainly in error. Legislative officials pass *E*-enactments with the expectation that *Q* will be answered affirmatively in regard to those enactments; judicial officials are aware of the expectations of the legislators, and they fully share the legislators' view about the appropriate answer to *Q*. In these circumstances, the understandings and expectations of the officials confer a context-specific determinacy on *Q* as applied to *E*-enactments. Within the American legal system as described here, the uniquely correct assessment of *Q*'s bearing on any such enactments is that the test laid down by *Q* has been passed. Hence, within that system, an *E*-enactment can rightly be designated as a law whose validity antedates any implementation of the enactment by a court—even though that validity hinges on a moral question to which there would not usually be a uniquely correct answer (in connection with an *E*-enactment).

Dworkin himself adverts to a situation that is strikingly similar to the one just sketched: "A positivist may hold a theory of statutory interpretation such that, if a statute provides that a contract is invalid when it is unconscionable, and the vast majority of [officials think] that a particular sort of contract is unjust, then that sort of contract is, as a matter of law, invalid" (*TRS,* 348). However, Dworkin presumes that the sort of theory which he mentions is different from soft positivism in claiming only "that *beliefs* about justice may be part of the truth conditions of propositions of law" (*TRS,* 348, emphasis in original). He elaborates: "This theory makes beliefs about moral facts, not moral facts themselves, decisive for propositions of law. But for a [soft] positivist the legal validity of a contract might depend, not on whether a contract is believed to be unjust, but whether it is unjust. That theory [i.e., soft positivism] . . . makes a moral fact itself part of the truth conditions of a proposition of law" (*TRS,* 348).

For two reasons, these observations by Dworkin do not cast doubt on the pertinence of my scenario involving *E*-enactments. First, that scenario has

been presented here because it deals with a moral test for which (*ex hypothesi*) there is not usually a uniquely correct determination. In such circumstances, there is no moral truth—no morally best answer—that could serve as part of the truth conditions for certain propositions of law. If there are any truth conditions, they must lie elsewhere; my scenario has suggested where they might reside, as has Dworkin's terse account of the beliefs surrounding a contracts statute. Were we instead pondering the implications of a moral test for which there is a uniquely correct determination in each case, the alternative truth conditions would be superfluous. No account of the officials' beliefs would be needed. But in situations where morality itself does not provide truth conditions, and where soft positivism along the lines recounted by Dworkin is therefore not an option, some alternative truth conditions are indeed necessary (unless we are willing to grant—not unreasonably—that the legal propositions asserted in such situations are neither true nor false). In sum, my scenario involving *E*-enactments is focused only on circumstances to which Dworkin's own description of soft positivism is inapplicable. If my scenario proposes an abandonment of soft positivism, it does so only for settings where the retention of soft positivism is infeasible.

Let us turn to a second and even more important reason for thinking that the pertinence of my scenario is not diminished at all by Dworkin's distinction between moral principles and beliefs about moral principles. His observations tend to run together the perspective of the theorist and the perspective of the participant. If a theorist knows that there usually are no uniquely correct verdicts concerning *Q*'s bearing on E-enactments, then he or she knows that morality itself does not furnish any of the truth conditions for propositions about *E*-enactments within the American legal system. The theorist knows that those conditions must instead consist partly in the unanimous or nearly unanimous beliefs of the American officials—when there is indeed unanimity, and when there consequently are indeed truth conditions for the aforementioned propositions. By contrast, officials who participate in running the American legal system do not answer *Q* by reference to their fellow officials' beliefs. They aptly regard *Q* as a moral criterion, in the application of which they have to make moral judgments; they do not view it as a sociological or psychological criterion, in the application of which they have to make empirical judgments.

Of course, a legal system could include within its Rule of Recognition a sociological or psychological criterion. Officials in some system might take the view that the operative touchstone for legal validity is not the morally correct answer to *Q*, but the beliefs of one another about the morally correct answer to *Q*. In other words, instead of asking what the correct answer to *Q* is, each official would seek to determine which answer to *Q* is perceived as correct by all or most of his fellow officials. But such an odd arrangement, though quite conceivable, is not the state of affairs to which the soft positivists call attention. They are not advancing a thesis about officials' reliance on

sociological or psychological criteria; rather, they are advancing a thesis about officials' reliance on moral criteria. Soft positivists concern themselves with legal systems wherein the officials inquire not about their fellow officials' beliefs, but about the correct answer to *Q* (or to some other moral question that affects legal validity).

Hence, although Dworkin's remarks on the unjust-contracts statute appropriately imply that my scenario involving *E*-enactments has seized upon American officials' virtually unanimous beliefs as some of the truth conditions for propositions about the *E*-enactments, his remarks are misleading if they suggest that the American officials themselves take a similar view of the matter. When considering the implications of *Q* for *E*-enactments, each official presumes that the truth of her determination stems from the nature of the test imposed by *Q;* she does not presume that the truth of her determination derives from the substance of the beliefs held by other officials. Each official is focused only on the particular standards that are the content of her own beliefs about *E*-enactments and *Q*—standards that happen also to be the content of almost every other official's beliefs about *E*-enactments and *Q, ex hypothesi*. Each official, in other words, is engaged in exactly the sort of moral decision making that has been singled out by the soft positivists as one aspect of the process of ascertaining the law in certain jural regimes. No official bases any decisions on sociological or psychological judgments about the attitudes of his or her fellow officials. For the task of pondering *Q*'s bearing on *E*-enactments, moral judgements (as opposed to sociological/psychological surveys) are what is involved.

Dworkin himself, when delineating the tenets of positivism, distinguishes between the semantics and the truth conditions of legal propositions (*TRS,* 348). His distinction reinforces my present point. From the perspective of the officials in the American legal system, there is no disjuncture between the semantics and the truth conditions of their statements about the implications of *Q* for the validity of *E*-enactments. As far as the officials can tell, those statements are about the implications of a moral requirement, and the truth conditions consist (partly) in the nature of that requirement. However, from the perspective of the soft-positivist observer—who knows that there is not generally a uniquely correct answer to *Q* when it is asked about *E*-enactments—the semantics and the truth conditions of the officials' statements diverge. Their statements are indeed about the implications of a moral requirement, whereas the truth conditions of the statements do not lie in the nature of that requirement at all. Rather, from the knowledgeable perspective of the soft-positivist observer, the truth conditions can be seen to consist (partly) in the officials' *beliefs* about the nature of the moral requirement.

Thus, Dworkin's comments on the unjust-contracts statute do no harm whatsoever to my account of the American officials' applications of *Q* to *E*-enactments. When soft positivists maintain that moral principles can serve as criteria for officials' identification of legal norms, they have not debarred

themselves (in appropriate circumstances) from characterizing officials' beliefs as part of the truth conditions for propositions about the validity and content of those legal norms. Though the soft positivists' classification of some moral principles as law-ascertaining criteria in some legal systems is typically a thesis concerning truth conditions set by the principles themselves, it is sometimes a thesis concerning truth conditions set by officials' beliefs about the principles. It is, however, invariably a thesis concerning the moral tenor of the judgments and statements that are made by officials as they invoke the moral principles for the purpose of deciding what the law is.

V. A SUMMATION

This essay has studied one of the two chief prongs of Dworkin's attacks against legal positivism. His challenge to the positivist account of the Rule of Recognition has turned out to be useful in pointing the way toward some beneficial clarifications and refinements, but has certainly not turned out to be devastating. My rejoinders to Dworkin on this matter have been fourfold. First, he does not establish that judges disagree with one another at a criterial level in easy cases; second, even if criterial disagreements are indeed present (at least subterraneously) in all cases, they will be quite sharply limited by the need for regularity at the level of outcomes in a functional legal system; third, Dworkin errs in thinking that legal conventions must be static, and he further errs in thinking that the adjudicative practices of American law can plausibly be portrayed as based solely on convictions and not on conventions; finally, with his latest reflections on the metaphysics of morals, he helps to reveal the tenability of a doctrine (*viz.,* soft or inclusive positivism) that he seeks to confute.

Thus, although Dworkin's broadsides against the positivist conception of the Rule of Recognition do helpfully expose some shortcomings therein—shortcomings which are fairly important but which, happily, are plainly remediable—they do not bring down their target. Legal positivism in its "positive" guise can withstand all of Dworkin's onslaughts.

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