DEFINING LEGITIMACY

DEFINING LEGITIMACY:

A HARTIAN CONCEPTION OF JUDICIAL ACTIVISM

By

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Abstract:

Democracies in the Western world are caught in a politically charged debate over the legitimacy of judicial actions that alter, negate, or deny force and effect to law that does not seem to be progressing. In this thesis, I argue that in order to make any serious progress towards resolution, we need to clarify our terms: *what criteria determine when adjudicative officials act with legitimacy*? In order to determine the criteria of legitimacy, we need to situate judicial activism within legal theory. I utilize Hart's descriptive-theoretical account of law as developed in *The Concept of Law* to define the terms of judicial activism. I distinguish first between criteria of moral and legal legitimacy. I later discern a third category of legitimacy – 'institutional'. To move forward on the issue of judicial activism we need to be acutely aware of the different criteria necessary to establish grounds for legitimate judicial behavior. Each category of legitimacy carries with it a different set of justifying criteria. I propose that at the very heart of the confusion over judicial activism is a failure to recognize that there are different grounds for legitimacy. Some argue about legal legitimacy, others moral or institutional. Crucially, few theorists ever bother to distinguish the existence of one set of criteria from another. Thus, the debates about judicial activism are plagued with ambiguities. While this thesis does not resolve the issue about whether judicial activism is justifiable, it does establish the terms that could lead to resolution of the issue. In short, it defines the types of arguments that theorists would need to advance in order to establish if activist behavior by adjudicative officials is morally, legally, or institutionally legitimate.

Dedication:

This thesis is dedicated to the memory of my grandfather, Otto Phillips.

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A. *PROTAGONISTS AND ANTAGONISTS*

I

Judicial activism, colloquially speaking, occurs when judges, acting in their official capacity, change or distort the law, as Margit Cohn and Mordechai Kremnitzer explain:

> Under the traditional visions of the judiciary, activist judges will be those that change existing law, supplement their decisions with high rhetoric or obiter dicta, attempt to settle questions of social policy or otherwise extend the judicial remit beyond the settlement of specific disputes.[1]

In most contexts, the term 'judicial activism' has a pejorative connotation. It generally refers to the abuse, by judges, of the powers and position entrusted to them. When used pejoratively, the implication is that the judiciary has a passive role to play within a legal system – judges are supposed to uphold and respect the law instead of ignoring or reshaping it. This means a number of things. Most importantly, it means that judges are supposed to decide cases solely according to law (in whichever way this is understood) and not according to ulterior concerns. Further, they are not supposed to venture too far into the domain of 'law making'.[2]

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[1] Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model', *Canadian Journal of Law and Jurisprudence* 18 (2005), 333.

[2] Virtually every critic of judicial activism will recognize, however, that legal indeterminacy, at least in a few cases, will mean that judges need to exercise a form of discretionary judgment. Most critics recognize that the law cannot provide complete, or at least completely clear, guidance to the judiciary. Judges, therefore, often do need to reach beyond such traditional sources of law as statues and precedents to resolve a dispute. These critics, of course, will seek to minimize the degree to which judges exercise such discretionary powers, but they will nevertheless recognize that no legal system can provide complete and / or certain guidance for the application or identification of law and therefore a *limited* degree of discretionary power is necessary for dispute resolution. Notably, even those theorists (such as Dworkin) who recognize that there is *always* a correct legal answer to a dispute will concede that it is quite often far from clear what that answer is. Judges will therefore need to use contestable judgment when determining the answer to these unclear cases.

Those that hurl the pejorative 'activist' towards members of the judicial branch implicitly extol 'restraint' as the appropriate virtue for judges to emulate. A good judge seeks to limit, as far as possible, the role of her own hand in and upon the legal system. Good judges make themselves as invisible as possible, allowing the 'law' to guide decisions in cases that come before them instead of other considerations that they might believe to be better. Judicial restraint, it is argued, is crucial if a society is to exhibit the 'rule of law'. Without judges manifesting the virtue of restraint, the very meaning of law is spurious. Judicial restraint and the meaningful existence of a system of law go hand-in-hand.

The critics of judicial activism tend to fall into two groups: 'Texutalists' and 'Originalists'.[3] Textualists argue that the judiciary must restrain itself to legal texts alone when interpreting or identifying law. They hold that legal interpretation is (or at least ought to be) a semantic exercise. When judges begin interpreting the law according to standards that are not explicitly and clearly present in the text, they have strayed beyond their proper realm. Originalists, on the other hand, argue that instead of relying purely on legal texts, judges ought to identify and apply law according to the intent of the framers of legislation. A responsible judiciary, even if it thinks the framers fundamentally mistaken in their legislative choices, ought nevertheless to apply and identify law as the framers / legislators would want. In hard cases, they should exercise their discretionary judgment by getting 'inside the heads of the framers', as much as is possible, and look at

[3] This is not to suggest that all Originalists or all Textualists are necessarily antagonistic to judicial activism. It is certainly quite possible that some Originalists or Textualists will actually be proponents of judicial activism, at least in certain situations. All I mean to suggest here is that the arguments used for restraint of judicial activity typically stem from these two camps.

the case through the framers' eyes. Justice Antonin Scalia is a forceful proponent of this view having much influence, particularly in the United States.[4]

Whatever their theoretical disagreements, what both the Originalists and the Textualists hold in common is (at least a *prima facie*) fundamental commitment to democratic legitimacy and the 'rule of law'. To use Scalia's rather misleading phrase, they "take [this] need for theoretical legitimacy [in adjudication] seriously."[5] When judges, who are typically not elected (and thus unaccountable) change and distort the intent of a legislative body that represents 'the people', the principle of responsible government – a principle of paramount importance in any democratic regime – is called into question. If citizens cannot control how law is identified or applied then it scarcely matters what they vote. When judges within a legal system fail to restrain themselves from deciding cases according to their specific values and concerns, a society ceases to be ruled by law – instead, the society is ruled by what Ran Hirschl has termed a 'juristocracy'.[6] In such a system, judges supplant the legislators as the primary law making agents and law becomes 'the will of the judges' not the 'will of the people'. Without judicial restraint, a small and unaccountable group of elites becomes the *de facto* governing body for a society.

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[4] For a quick overview of Scalia's views see 'Originalism: The Lesser Evil', in the *University of Cincinnati Law Review* (1989).
[5] *Ibid,* 862. This phrase is obviously misleading as several non-Originalists and non-Textualists (notably Ronald Dworkin) take the need for theoretical legitimacy very seriously. See, for instance, Chapter 5 of Dworkin's *Justice in Robes* (Cambridge, Mass: Belknap Press, 2006) for an interesting defense of theoretical legitimacy that is both non-Originalist and non-Textualist in nature.
[6] Ran Hirschl, *Towards Juristocracy* (Cambridge: Harvard University Press, 2004).

II

While the term 'judicial activism' typically has a pejorative connotation, some have chosen to see it in a more positive light. There are at least three distinct ways of understanding judicial activism that are non-pejorative. The first is from the perspective of Natural Lawyers.[7] Briefly, some Natural Lawyers argue that judges have a duty, first and foremost, to do 'justice' or uphold 'natural rights'. Law, properly so-called, is a fundamentally moral enterprise. A municipal legal system must derive its legal norms from higher laws (the 'natural law'). When municipal legal systems create ordinances that are fundamentally and indisputably immoral, these cannot properly count as law – they are bastardizations of law and are law in name only, as Aquinas argues, "the like are acts of violence rather than laws; because...*a law that is not just, seems to be no law at all.*"[8] Judges, when faced with such laws, may have an obligation to rectify the situation and bring these purported laws back into step – to make the lower law (the municipal law) conform with the higher law (the natural law) upon which it is parasitic. The judge, in such cases, has the duty to uphold the 'truer' or higher law; thus, activism is necessary in the event of a failing in municipal legal systems to conform to the proper demands of law.

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[7] By Natural Lawyers I intend here *substantive* Natural Lawyers as opposed to *procedural* Natural Lawyers. Substantive Natural Lawyers insist that law, to be law at all, must not be fundamentally in tension with objective and true moral criteria. Procedural Natural Lawyers, on the contrary, insist only that law must be carried out in accordance with basic principles of fairness that are necessary for the very existence of law itself. Unlike substantive Natural Lawyers, they hold that law is sometimes compatible with egregious moral error. In spite of this, they argue that if law is to have any *meaningful* existence, it must be consistent with a certain 'internal' or 'procedural' morality that is unique to law itself. Lon Fuller is a prominent example of what I would call a procedural Natural Lawyer – see his *The Morality of Law* (Fredericksburg, VA: Yale University Press, 1964).

[8] St. Thomas Aquinas, *Summa Theologica*, (New York: Benzinger Brothers, 1947), Question 96. For a modern discussion of natural law, see John Finnis, *Natural Law and Natural Rights* (Toronto: Oxford University Press, 1980).

The second non-pejorative use of the term is what I term 'Dworkinian'. This closely resembles the Natural Lawyer's perspective with a few subtle differences. Dworkin argues in favor of what he calls 'Law as Integrity'. The law, according to Dworkin, is not simply a matter of the rules explicitly enumerated by statutes and precedents; instead, law is an *interpretive* concept involving a two-part analysis of fit and justification. In order to determine the answer to the question 'what is the law?' in a particular case, judges need to identify more than simply the facts, statutes, and case law; they also need to determine principles of political morality that are imbedded in the statutes and case law themselves. The very idea of law, for Dworkin, involves justifying the use of a society's coercive power against individuals. Judges thus have an obligation to ensure that their decisions are justified by sound principles of political morality and this means that in some cases, judges need to decide in ways that break from what might be clearly worded or intended statutes or precedents. For Dworkin, when judges break with what would otherwise seem to be clear precedents or statutes in order to uphold embedded principles of political morality, judges are not 'changing' or 'distorting' the law; rather, they are living up to its demands.

A third way of understanding judicial activism in a non-pejorative light is what I term the 'conscientious dissenter'. Unlike the Natural Lawyer or the Dworkinian, the conscientious dissenter does not have to recognize a higher law or hold an interpretive concept of law (they may, but this is not necessary). Instead, the conscientious dissenter judge refuses to apply the law as it presently exists to certain cases that come before her because she believes the principles behind the law are repulsive, or that the law will fail

to bring about the best consequences, or that applying the law would violate some of her deep-seated convictions. The conscientious dissenter judge attempts to do what she believes is right *despite* the law stipulating that she should decide to the contrary. This is very different from the other two non-pejorative understandings of activism, as such judges recognize that, in changing or distorting the law in a particular case, they are acting outside of the law and violating their 'legal duty'. Instead of acting according to law, judges, in such cases, act in spite of it. It is important to note that the conscientious objector judge does not need to spell out or articulate their motivating reasons when acting contrary to law; nor do they need to present a boisterous or belligerent attitude. A judge, while speaking well of the law and generally presenting an attitude of deference, may quietly subvert what she feels are repugnant laws through making subtle (and perhaps unwarranted) distinctions, refusing to grant leave to appeal, failing to consider certain precedents, or any number of similar methods. Often the more successful such judges are in masking their actions, the greater the likelihood that they will avoid scandal or risk their decisions being overturned.

Clearly, much rests on the stance we take towards judicial activism – we have both negative and positive interpretations of judicial activism on offer. The political stakes are high and, with a careful and impartial eye, we can see that there is something to gain and something to lose with the extremes of both positions. If we follow the antagonists of judicial activism all the way, we seek to prevent judges from using their position to do either evil or good. We place our trust in the ability of law and legislators to 'get things right' - come what may. Sometimes the law will get things right; sometimes

it will not. The key is that the law (or as the Originalists would have it, the legislator) is sovereign and judges do not question its authority when determining cases before them. On the other hand, if we follow the proponents of judicial activism all the way and encourage judges constantly to make a conscious effort to make the law conform with common (or at least prevalent) convictions and values, we concede that the force of law will never be certain – even in cases that clearly fall within the umbra. We concede that there will be constant unpredictability as judges alter and distort the law as they see fit. More so, allowing judges this remarkable power to reshape law as they see fit opens up the possibility of judges manipulating the law to foster certain ends with which they associate – some of which may be seriously harmful to the rest of society, or simply be morally abhorrent. If legislators can go wrong, so can the judges. This, however, seems to be (at least partially) offset by the crucial fact that judges will be able to remake the law in cases where the law and the legislators go seriously wrong. Judicial activism, it would seem, allows judges to protect both groups and individuals from occasions where the law turns tyrannical. We are thus faced with these serious questions:

(1) Are we forced to choose between these two extremes, and if so, how do we decide?

(2) If we are not forced to choose, how do we navigate between these two poles?

III

This essay represents an effort to establish clarity about the issue of judicial activism. Western legal systems are stuck in the throngs of a debate over the legitimacy of judicial activism that does not seem to be progressing. We are caught in an ever-swinging

political pendulum, our society oscillating between calls for activism and restraint. If we are to have any hope of solving the dilemma that activist behavior by adjudicative officials[9] poses - or if we cannot solve the dilemma, at least minimally shrink the oscillations - we need to embark on a sober examination of the issue. To do so, we need to depoliticize the issue and examine the phenomenon from within the structure of the legal system itself; that is, we need to establish a general descriptive account of judicial activism that allows both protagonists and antagonists of judicial activism to access a common framework of understanding that prevents the two sides from simply talking past one another. This suggests, importantly, that we must relate the issue of judicial activism to legal theory. If we are going to argue productively about the issue, we need to make sure we capture the essence of what judicial activism means within a theory about the nature and meaning of a legal system.

Herein, I develop a general theoretical account of judicial activism within a revised Hartian framework. I argue that Hart's general theory of law provides a magnificent skeleton with which to give shape to the issue of judicial activism. In the final analysis, I reach a few tentative conclusions about whether judicial activism is legitimate within a society, arguing that while there may be good reasons not to want adjudicative officials in a society to engage in judicial activism, there can be both legal and non-legal reasons to justify activist behavior. I conclude by suggesting, quite controversially I am sure, that there will *always* be agent-based moral justificatory

[9] I use the term 'adjudicative official' throughout this paper in order to clarify that judicial activism, despite the name, is not merely about judges but also about other officials within a legal system (such as members of human rights tribunals) that perform adjudicative functions.

reasons for judicial activism. I will not embark on the voyage of enumerating what these justifying moral reasons may be – I save this endeavor for another effort. In the end, the task I leave proponents of judicial activism is to articulate and defend plausible moral criteria that could legitimate adjudicative agents rendering decisions that change, negate or deny force and effect to existing law.

I proceed in five separate stages. First, I outline Hart's basic understanding of law as the union of primary and secondary rules. A firm grasp and articulation of the Hartian conception of law is essential for future moves and arguments in my paper. The descriptive account of judicial activism I advance in future sections rely heavily on Hart's framework; therefore, I need to begin with a detailed account of the union of primary and secondary rules as advanced in Hart's *Concept of Law*.

Second, I develop a preliminary descriptive-theoretical account of judicial activism using Hart's model. While I do introduce a few creative moves at times to plug open holes, I believe the entire account to be generally consistent with Hart's basic framework and ideas. The purpose of this section is to give a clear picture of the different dimensions associable with judicial activism, as discernable within the Hartian map of law. Using this guide, and relying particularly on Hart's account of secondary rules (especially the Rules of Adjudication), I give a detailed analysis of what it might mean to suggest that adjudicative officials engage in 'activist' behavior. In this section I detail the grounds that determine the legal and moral legitimacy of judicial activism.

In the third section, there is a long and systematic review of the basic challenges and ideas of Hart's most famous adversary – Ronald Dworkin. The first part of this

section is an elaboration of the challenges that Dworkin believes are devastating to Hart's account of law. I discuss this challenge because, if his criticisms hold true, my general descriptive account of judicial activism is in jeopardy. I focus particularly on how Dworkin believes that Hart's rule-based account of law and adjudication fails to capture some important, seemingly non-rule based, elements of the law. In the second part of this section, I articulate and expand Dworkin's alternative account of law – 'Law as Integrity'. I attempt to capture, as succinctly as possible, the basic elements of his creative efforts. This component is necessary as it explains a serious (and perhaps even plausible) alternative descriptive account to a Hartian framework for judicial activism. In addition, this detailed account of Dworkin's position serves as a backdrop to introduce a few of the distinctions I introduce through the remainder of this paper which I believe serve to strengthen a Hartian account of judicial activism.

The fourth section has two major components. First, it very briefly summarizes and develops a few responses available within legal positivism to Ronald Dworkin's attack. I articulate the ways that legal positivism has effectively dealt with Dworkinian criticisms without resorting to an 'interpretivistic' conception of law. I attack Dworkin, (and perhaps by implication, other legal positivists) in particular for the failure to recognize a distinction between 'institutional' and 'legal' obligations, arguing that much of what Dworkin says can consistently be incorporated into a Hartian framework if the distinction is heeded. As a related point, I articulate the serious mistake Dworkin makes in his legal theory when he confuses and conflates a theory of law with a theory of adjudication.

In the fifth and final section, I accomplish three key goals. The first is a refinement of the descriptive account of judicial activism that is outlined in Section B. Secondly, I contrast the refined account of judicial activism against a Dworkinian 'interpretivist' account, demonstrating that Dworkin cannot match the Hartian account in any of the categories of explanatory power, clarity, or consistency. I assert that one of the major causes of our perpetual confusion about judicial activism is the choice of a poor framework of understanding the issue – one that often relies on Dworkinian assumptions. Finally, I make a few tentative conclusions about judicial activism, arguing, most importantly, that there will *always* be grounds for legitimate judicial activism within a legal system. I argue that judicial activism, even if legally illegitimate, is often required of a responsible moral agent acting as an adjudicative official. The ultimate implication of a Hartian theory of judicial activism is that adjudicative officials might find their legal obligations morally unsupportable. Barring a convincing theory that decisively establishes the moral merits of law both as it applies in a specific case, as well as how law affects a society more generally, there may be compelling reasons for adjudicative officials to alter, negate, or deny force and effect to law.

B. *LAW AS THE UNION OF PRIMARY AND SECONDARY RULES*

I

In the *Concept of Law*, Hart portrays a legal system as centered on the 'Union of Primary and Secondary Rules'. This important insight into the nature of law has fundamentally reshaped the way that legal theorists understand the phenomenon. Even those theorists that reject Hart's theory are forced to recognize that "as almost everywhere else in legal philosophy, constructive thought must start with a consideration of his views."[10] This section will expand and clarify Hart's thesis in order to establish the basic structure I will use to understand and begin to resolve the issue of judicial activism. My own position is largely a refinement of his analysis, with a few creative additions at certain points. After a careful and detailed account of Hart's position on primary and secondary rules, I will proceed to show the reasons why Dworkin has attacked this model.

II

Chapters 2-4 of the *Concept of Law* are largely a response to John Austin's 'Command Theory' of law. In his lectures on jurisprudence, Austin insisted that law ought not to be understood as an extension of morality (as the Natural Lawyers proposed), but rather as a series of orders, backed by threats, that emanate from a sovereign. Austin adamantly insisted that:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry. A law, which actually exists, is a law, though we happen to

[10] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard Press, 1978), 16.

> dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.[11]

There exists a legal system, according to Austin, when an individual or group within a society forces others within that society to obey their directives through the threat of sanctions for non-compliance. It matters not in the least whether these directives are morally sound, or contrary to certain 'fundamental principles', or whatever else. All that matters is that there is an identifiable sovereign or sovereigns whose commands are habitually obeyed by the bulk of the society, but who, in turn, are not in the habit of obeying any other members or groups within the society.

While Hart wholeheartedly embraced Austin's claim that certain laws may be morally pernicious and nevertheless still be law, he vehemently denied the veracity of the Command Theory. Firstly, this theory was incapable of explaining the stability and continuity of a legal system. This objection is particularly acute when it comes to the issue of the succession of sovereignty, as Hart argues, "mere habits of obedience to orders given by one legislator cannot confer on the new legislator any *right* to succeed the old and give orders in his place."[12] If all that defines a legal system is habitual obedience to a sovereign, how can we explain the ability of legal systems to install new sovereigns? It would seem that with the new sovereign there are no habits of obedience and yet their commands still seem to create law. For example, in a democracy when a newly elected legislature replaces an old one there are no established habits of obedience to this new

[11] John Austin, *The Province of Jurisprudence Determined* (New York: Prometheus Books, 2000), 185.
[12] H.L.A. Hart, *The Concept of Law*, Second Edition (Toronto: Oxford University Press, 1994), 55. (Hereafter cited as *CL*)

legislature, yet it would seem that despite the lack of a habit of obedience to this new legislature, their commands do create law.

The Command Theory also is incapable of explaining the existence of what Hart calls 'power-conferring rules'. There are certain laws that grant officials or private citizens the ability to do certain things. A citizen, for instance, can use the law to create a contract, to establish wills, or to marry. The ability to do such things, Hart notes, "is one of the great contributions of law to social life."[13] There may also be laws that grant powers to certain bodies to legislate. Powers, for instance, may be conferred upon provincial governments by a federal government. Hart recognizes that "there is a radical difference between rules conferring and defining the manner of exercise of legislative powers and the rules of the criminal law, which at least resemble orders backed by threats."[14] The question is how these power-conferring laws are properly understood as orders backed by threats. When a power is granted, there does not always seem to be a sanction for not using it. The power simply enables citizens or officials to do certain things with law facilitating this. These power-conferring rules seem to be inexplicable if we subscribe to the Austinian Command Theory.

Most importantly, Austin's Command Theory fails to recognize a distinction between being 'obliged' and being 'obligated'. According to Hart, being obliged to obey "is, in the main, a psychological [statement] referring to the beliefs and motives with which an action was done."[15] An obligation, on the other hand, has nothing to do with the

[13] *Ibid, 28*
[14] *Ibid*, 31
[15] *Ibid*, 83

psychological state of individuals. Instead, an obligation "remains, true even if [one] believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience."[16] Austin's theory, according to Hart, thus fails to account for the existence of legal *obligations*. Hart criticizes Austin through the analogy of a gunman robbing a bank. The gunman demands that the bank clerk hand over the money to him or else he will shoot. Austin's Command Theory, according to Hart, is nothing more than the gunman situation applied to the whole society. Individuals within a society, like the clerk, simply give into the demands of the powerful sovereign that threatens them with coercion. Yet this seems to be a gross mischaracterization of a legal system. We do not generally speak of law as something we should only follow if we are under a sufficient threat of force. The law is ordinarily supposed to impose an obligation on us, even if we fail to understand it, and even if there seems no serious threat of sanction for our non-compliance. If in a society there is a law that prohibits littering in a public park, it matters not whether anyone will see me throw my candy wrapper into the bushes. In littering, I already have breached my legal obligation in spite of the fact that nobody will ever know of my actions. It is certainly open to question whether the law will actually be able to

[16] *Ibid.* Throughout this paper, I will rely on a similar understanding of the term 'obligation'. It implies the existence of certain expectation for behavior that is non-optional, identifiable according to some specific standard. Further, the existence of an obligation does not depend on whether any individual (including the individual actor) will ever have knowledge of whether there was a breach of the obligation. Notably, this definition of obligation does not imply that we need to have ultimately persuasive reasons to do as the standard establishing the obligation requires. In short, I do not hold the claim made by individuals, such as Raz, that "an action is obligatory only if it is required by a protected reason which does not derive merely from the fact that adherence to it facilitates realization of the agent's goals." (See Joseph Raz, *The Authority of Law* (Toronto: Oxford University Press, 1979), 235) Whether there is any reason, independent of the standard itself, to act as the standard requires is irrelevant, on my understanding, to the concept of an obligation. For a divergent understanding of the concept of an obligation, see Raz's article entitled 'Promises and Obligations' in P. Hacker's *Law, Society, and Morality* (Oxford: Oxford University Press, 1977).

oblige me to act in this case; however, in spite of this issue, my legal *obligation* not to litter remains.

Hart believed that Austin's particular brand of legal positivism was for these reasons (and many more) untenable as a legal theory. The Command Theory led to absurdities and contradictions; it also failed adequately to describe certain key features of the law. Whatever Austin's failures, however, Hart was quick to praise him for his attempt to bring clarity to our thinking about law. Reflecting on Austin's impact on jurisprudence Hart remarked that while he was often wrong, "when this was so he was wrong clearly. This is a sovereign virtue in jurisprudence."[17] What Austin endeavored to do was bring careful, sober, clear thought into the realm of jurisprudence. In all his writings, Austin strove for simplicity and clarity in order better to explain the functioning of a legal system; Hart saw his project as in the same vein.

III

A new start was needed if a positivistic jurisprudence was to be tenable. In chapter 5 of the *Concept of Law*, Hart embarks on a different path by distinguishing between the 'internal' and 'external' perspectives of law. He explains that "it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct."[18] When one takes the external perspective towards the law, one:

[17] Hart, 'Law and the Separation of Law and Morals', 593
[18] *CL*, 89

> ...is content merely to record the regularities of observable behavior in which conformity with the rules partly consists and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met. After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict with a fair measure of success, and to assess the chances that a deviation from the group's normal behavior will meet with hostile punishment.[19]

In taking the external perspective, the observer of a legal system is concerned with being able to discern patterns of behavior within a society. This perspective is concerned with the ability to *predict* what will ensue when individuals in that society engage in certain activities. There is no need to discern why agents act as they act – it is only necessary to discern what happens when they act in certain ways. The whole goal of this perspective is to identify a pattern of behavior. As Hart is apt to note, knowledge from the external point of view can be extremely helpful – "such knowledge may not only reveal much about the group, but might enable [one] to live among [a society] without unpleasant consequences which would attend one who attempted to do so without such knowledge."[20]

Using the external perspective alone to describe law, however, leads to a few serious descriptive errors and complications. Most important among them is the fact that it cannot account for the guidance of conduct within a society in terms of rules. According to Hart,

> If...the observer really keeps austerely to [the] extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behavior, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty. Instead, it will be in terms of observable regularities of conduct, predictions, probabilities, and signs. For such an observer, deviations

[19] *Ibid*
[20] *Ibid*

> by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow and nothing more.[21]

For those that recognize their authority, rules function as *standards* for behavior within a society. When we allow rules to guide our behavior we do not look to them merely as indications of what is likely to happen if we fail to comply; instead, we conform our behavior to rules precisely because the rule creates a requirement for us or enables us to do something (in the case of power-conferring rules). This is the essence of the internal perspective. For those that take this perspective, "the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility."[22] The existence of a rule thus validates hostility against dissident members of a society in the event of its breach, if one takes the internal perspective. The breach represents a failure on the part of an individual or individuals to comply with a requirement by which they were bound. Thus, Hart argues that:

> What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, viz., in all the familiar transactions of life according to rules.[23]

The external perspective cannot accurately describe the basic day-to-day life of the law, as well as its purported normativity, as Jules Coleman notes: "understood… as the exercise of a basic capacity to adopt a pattern of behavior as a norm – the internal point of view is essential to the explanation of [law's] normativity."[24]

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[21] *Ibid*, 89-90
[22] *Ibid*, 90
[23] *Ibid*
[24] Jules Coleman, *The Practice of Principle* (Toronto: Oxford University Press, 2001), 88.

A complete theory of law, then, must be able to account for both the internal and the external perspective; it must be able to explain both of the ways that individuals within a society can approach the law. There are those that regard the rules established by the legal system as imposing obligations upon them that all members of the society (themselves included) are bound to obey. There are also those in a society that may not recognize any duty to conform their behavior to the law. They may fail to understand the law as a legitimate set of standards by which to govern their own behavior. Hart therefore recognizes that "one of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence."[25] Austin may have been able to account for certain elements of the external perspective of law, but his theory was utterly incapable of explaining the internal perspective. Instead of explaining it, Austin's account neglects it. Austin stipulates what seem to be rather artificial definitions that do a great injustice to the very phenomenon he so desperately wanted accurately to describe.

IV

So how then do we capture the essence of a legal system? Hart proposes that we recognize the existence of two different types of rules within a legal system: primary rules and secondary rules. Primary rules are rules of conduct; they are 'duty-imposing' rules. Examples of these rules include prohibitions on murder and violence, as well as such things as speed limits. The existence of primary rules makes behavior in some way 'non-

[25] *CL*, 91

optional' – they impose obligations upon all members in society to whose conduct they apply. Secondary rules, on the other hand, are rules about primary rules. According to Hart, "they may all be said to be on a different level from the primary rules; in the sense that while primary rules are concerned with the actions that an individual must do, these secondary rules are all concerned with the primary rules themselves."[26] These rules help us to "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation determined."[27] They in some way relate to the primary rules, telling us certain things about the primary obligations we have. The existence of these secondary rules, for Hart, is a defining and essential characteristic of a legal system. Without them, a legal *system* is impossible.

To make this point, Hart examines what a society would be like that only had primary rules of obligation and no secondary rules. Primitive societies, Hart speculates, may well operate purely on primary rules. Such a society would simply develop and accept certain standards governing behavior, but these standards would exist in a fragmented and disorganized way. This is not to say that the society would have no stability. On the contrary, a society that regulates itself purely according to primary rules may exhibit remarkable stability. There could be long accepted standards of behavior that the society has adopted since time immemorial. These standards may even simply be beyond question.

While it is indeed possible for such a primitive society to order itself according to primary rules alone, Hart questions if a larger society could successfully exist in such a

[26] *Ibid*, 94
[27] *Ibid*

way: "It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment could live successfully by such a regime of unofficial rules."[28] This is because a larger society would face three crucial problems in trying to order itself according to primary rules alone. First, it may be *unclear*, at times, what the actual standards are for the society. In the case of uncertainty, a society governed by primary rules alone will have no way of discerning what the actual standards are – "there will be no procedure for settling doubt."[29] In the event of uncertainty, there can be no definitive way of settling whether a rule is part of the society or not. Second, the society will have no ability to consciously and deliberately change and modify the rules. Hart calls this the defect of the "*static* character of rules."[30] Since the primary rules would simply be a matter of habit, any change in the rules would depend on the gradual habituation of the group. There would be no way to quickly adjust, introduce, or eliminate a rule. Finally, there is the problem of how to enforce and determine the breach of rules. Relying on a society to self-regulate its primary rules of obligation is *inefficient*. There needs to be an identifiable body or individual that will make decisions about what the legal obligations are, as well as to determine when breaches have occurred and what remedies or sanctions might follow. As Hart explains, "Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally and authoritatively the fact of violation."[31]

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[28] *Ibid*, 92
[29] *Ibid*
[30] *Ibid*
[31] *Ibid*, 93

V

Secondary rules come into existence in order to reduce the problems of rule uncertainty, their static nature, and the inefficiency of applying and enforcing them. They provide remedies that help to overcome these basic problems. There are three basic types of secondary rules, each of which is a remedy to a corresponding defect of primary rules: rules of recognition, which remedy the problem of uncertainty; rules of change, which remedy the static nature of rules; and rules of adjudication, which remedy inefficiency. The existence of all these types of secondary rules within a society is sufficient to establish the existence of a legal system, as Hart explains:

> The introduction of remedy for each defect might, in itself, be considered a step from the pre-legal world into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system.[32]

The introduction of any one of these remedies to a society is a development from a fractured series of obligations to an organized system of them. When all three are found together, we find ourselves in a society that indisputably has a legal system. If we can identify secondary rules of these sorts, we are dealing with a legal system. If we cannot identify any of these secondary rules, we are not dealing with what is properly called a legal system, but rather with something best termed 'pre-legal'. If only one or two of these secondary rules exists, whether there is a legal system may be a question with an indeterminate answer.

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[32] *Ibid*, 94

According to Hart, "The union of primary and secondary rules is at the centre of a legal system."[33] In fact, this is what helps describe the internal perspective of the law; in order "to do justice to [law's] distinctive, internal aspect we need to see the different ways in which the law-making operations of the legislator, the adjudication of a court, the exercise of private or official powers, and other 'acts-in-the-law' are related to secondary rules."[34] If we hope adequately to describe the behavior of those participants within a system that regard the law as a guide for their behavior, we need to understand the nature of a legal system's secondary rules and how these rules recognize, alter, and determine the content of primary rules.

The Rule of Recognition

The first type of secondary rule is the 'Rule of Recognition'. This rule remedies the problem of rule uncertainty. Scholarship on Hart has focused heavily on the way he defines this rule, for it functions as an 'ultimate rule' in any legal system as it is used to determine the existence of all other rules within the system. A Rule of Recognition, Hart explains, "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[35] The development of a Rule of Recognition plays a crucial role in the move from the 'pre-legal' to the 'legal', as this rule, by identifying

[33] *Ibid*, 99
[34] *Ibid*
[35] *Ibid*, 94

what counts as an authoritative rule in the society, brings the other rules into a functioning *system* as opposed to a fragmented and disconnected series of primary rules.

With the Rule of Recognition, Hart notes that we "have the germ of the idea of legal validity."[36] This rule is essential for a society to be able to determine the validity of other rules within the system – "we can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition."[37] What counts as law for the system and its officials is determined according to this rule. It is a guide for them to determine what the law is, and even whether there is any law at all on certain matters. The Rule of Recognition is essential for identifying when a system has authoritatively adopted a rule as part of its set, and when the system has not.

There are a few important things to note about the Rule of Recognition. First, the Rule of Recognition exists within a system *only* because it is accepted and practiced. There is no further *legal* justification possible for the rule.[38] The recognition rule can only be determined as a matter of social fact – it rests on no deeper foundations than its use by officials in the practice of identifying the law, as Les Green explains, "the ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but

[36] *Ibid*, 95. This is not meant to imply that a Rule of Recognition cannot have a deeper non-legal justification. There may be good political and moral reasons to have a certain Rule of Recognition. What matters here, however, is that the Rule of Recognition only exists because it is recognized by officials of a legal system as the determinative and fundamental test for law. Whether or not it is a good rule is irrelevant to its status as the ultimate determinant of legal validity

[37] *Ibid*, 103

[38] Indeed, if a further justification for this rule were possible, it would cease to be a social rule at all and thus no longer be 'positivistic'.

a social rule that exists only because it is actually *practiced.*"[39] This rule is what is often "left unstated [and] forms the normal background or context of statements of legal validity and is thus said to be presupposed by them."[40]

It is also worth noting that all of this means that there, in fact, may be a tension between whether a Rule of Recognition is actually practiced and whether this rule is actually a 'good' rule to have as the ultimate criteria for determining legal validity. This is a key part of Hart's jurisprudence, as the Rule of Recognition may turn out to be a poor rule for determining legal validity and yet continue to function as an identifier of validity. Hart insists that "when we move from the statement that a particular enactment is valid, to the statement that the rule of recognition of the system is an excellent one and the system based on it is one worthy of support, we have moved from a statement of legal validity to a statement of value."[41] More will be discussed on this in the subsequent sections, but for the moment it is crucial to note that, for Hart, there is no reason to assume that the Rule of Recognition of a system will necessarily be a good rule for a society to have. A legal system can function in spite of having a morally or structurally flawed Rule of Recognition (the rule may simply be extremely unclear and constantly contested). The Rule of Recognition may be imperfect and much uncertainty may surround it; none of this is problematic for Hart's account. All this implies is that a society can develop poor, unclear, or even morally abhorrent fundamental rules. A society that shapes its practice around an uncertain fundamental rule is certainly caught in an interesting problem, as the

[39] Les Green, 'Legal Positivism', *The Stanford Encyclopedia of Philosophy* (online)
[40] *CL*, 108
[41] *Ibid*

Rule of Recognition is supposed to help solve the problem of uncertainty – this is part of its very essence. Yet even if it fails to create any certainty or clarity at all, it can still function as a (seriously flawed) Rule of Recognition.

In addition, Hart points out that the Rule of Recognition of a society can be simple or complex. A system may have a very simple Rule of Recognition that may be as trivial as 'whatsoever the king decrees is law'. Yet, Hart recognizes, "in a modern legal system where there are a variety of sources for law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents."[42] A Rule of Recognition may consist of a series of interrelated rules, the combination of which will establish all the criteria for legal validity. This rule, Hart would later remark, may even "incorporate as criteria of legal validity conformity with moral principles or substantive values."[43] For Hart, there are very few (if any) restraints on what can count as part of the Rule of Recognition within a society. Even to identify exactly what the Rule of Recognition is or entails may be a source of deep-seated controversy. All that matters is that, whether simple or complex, the vast majority of officials within the system recognize the rule – in other words, there needs to "be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity."[44]

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[42] *Ibid*, 101

[43] *Ibid*, 250. Hart's decision to allow a Rule of Recognition to incorporate moral principles has been a source of constant dispute within legal positivism. Some, such as Joseph Raz and other so-called 'exclusive' legal positivists have chosen to reject Hart's claim that this is possible as they regard it as inconsistent with law's 'authority' or its 'guidance' function. See, for instance, Joseph Raz, *Ethics in the Public Domain* (Toronto: Clarendon Press, 2001), chapters 9 and 10 as well as Scott Shapiro's 'Law, Morality, and the Guidance of Conduct' in *Legal Theory,* vol. 6 (2000).

[44] *CL*, 115

Rules of Change

The second type of secondary rule is what Hart refers to as 'Rules of Change'. These rules concern how individuals or officials within a system are able to alter, create, or eliminate other rules within the system. Rules of Change help to overcome the defect of static rules. Recall that in a primitive society governed only by primary rules it would be extremely difficult to alter the nature of the primary rules in order to deal with new developments in a society. When Rules of Change are introduced into a society, the primary rules are more easily adjusted and molded according to changing needs and circumstances, thus making the law a far more useful tool for social coordination and control. Rules of Change make rules adaptable in ways that would otherwise not be so easy.

Hart recognizes that "there will be a very close connection between the rules of change and the rules of recognition"[45] as the Rules of Change must be understood in relation to criteria establishing the validity of other rules. The Rule of Recognition establishes these conditions for validity; thus, Rules of Change in some way need to relate to these. If Rules of Change are to affect the legal system in which they are a part, they need to be consistent with and identifiable by the Rule of Recognition. Much like the Rule of Recognition, Rules of Change also "may be very simple or very complex: the powers may be unrestricted or limited in various ways: and the rules may, besides specifying the persons who are to legislate, define in more or less rigid terms the

[45] *Ibid*, 96

procedure to be followed in legislation."[46] It may be uncertain in many cases if the Rules of Change were properly exercised, and hence whether they have actually (or 'validly') altered the primary rules of a system.

Introducing the Rules of Change helps Hart to overcome the problem of explaining the power-conferring rules that plagued Austin's account of law. Legislators or other identified individuals within a legal system may have certain powers within their purview to change or alter other primary or secondary rules of a system. These rules help explain how individual citizens can use the law to do such things as create contracts, establish wills, or marry. Citizens and officials can do such things through the law because they are empowered by certain Rules of Change to effect alterations in the primary and secondary rules of the system. They are granted certain limited powers of change to effect their own legal obligations, as well as the legal obligations of others. If they exercise these powers in a proper manner, they are able to create new primary obligations and / or confer new powers on other agents. Rules of Change thus can apply not just to public powers, but to private citizens or entities as well.

Rules of Adjudication

The final category of secondary rules is 'Rules of Adjudication'. These rules are introduced in order to rectify the problem of the 'inefficiency' of enforcing and determining the breach of rules within a society. If a society is governed purely according to primary rules, it will be up to the whole society at all times to exert the appropriate

[46] *Ibid*

social pressure in the event that an individual or group violates the rules. More so, in the event that a primary rule is less than clear, there will be no set procedure for determining whether the rule was breached (or perhaps whether there even was even a rule in existence to breach at all). Rules of Adjudication help to ease this problem. They coordinate the "diffused social pressure [by] empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken."[47]

Waluchow rightly notes that in the *Concept of Law*, "the importance of secondary rules of adjudication is seriously underestimated."[48] Hart himself even seems to agree with this criticism, as he confesses in the *Postscript*, "I said far too little in my book about the topic of adjudication."[49] In the *Concept of Law,* he seems more concerned about articulating the Rule of Recognition and therefore he gives a rather cursory account of these crucial rules of adjudication.

Here, I will attempt quickly to expand upon what Hart seems implicitly to suggest by these rules. While much of what follows is not explicitly stated in the *Concept of Law*, I do believe that it is perfectly consistent with Hart's position. I want to tease out exactly what Hart implies by these rules, without straying beyond the confines of Hart's position.[50]

Rules of Adjudication exist in two different ways: first, they identify "the individuals who are to adjudicate" and second, they "define the procedure to be

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[47] *Ibid*, 96
[48] Wilfrid Waluchow, *Inclusive Legal Positivism* (Toronto: Clarendon Press, 1994), 76.
[49] *CL*, 259
[50] I will save the much more detailed and complex analysis that *does* stray beyond Hart's framework for later. Here, however, I want to be as faithful to the text and Hart's actual ideas as is possible.

followed."[51] With regard to the former, Rules of Adjudication confer certain powers on individuals within a society to determine whether breaches of the primary rules have occurred. These individuals are thus granted the ability authoritatively to determine (at least): (1) what the law is and (2) whether the law has been breached. Rules of Adjudication establish law courts and other legal dispute-resolving institutions within a society. They also determine the realm over which a judge may adjudicate. These powers are not necessarily unlimited – certain individuals (or courts) may only be given the power to adjudicate over certain types of laws falling within a certain realm. For instance, a judge appointed to a court that resolves family claims may well have no ability to adjudicate criminal cases. Judges may accordingly have the appropriate power conferred upon them to adjudicate only within a specified realm or jurisdiction. The Rules of Adjudication stipulate these limits and confer these powers.

With regard to the latter, Rules of Adjudication establish the way that courts and other adjudicative bodies (or individuals) are to conduct their affairs. It seems there are two elements to this category. First, these rules establish the protocol for how judges are to decide cases. These secondary rules may establish certain criteria that must be followed if a judge is to determine a case 'authoritatively'. For example, there may be a requirement that judges hear both the prosecution and the defense attorney's arguments if they are to rule on a case – the principle of *audi partem alteram*. If a judge refused to hear the defense attorney's arguments, the judge might not be empowered to rule authoritatively on the case at hand. Second, these rules may establish a hierarchical

[51] *Ibid*, 97

structure. While a judge or adjudicative agent may be duly empowered to decide certain case, a higher entity may be empowered to overrule their decision or grant an appeal. Rules of Adjudication may establish when a certain court can be overruled and on what grounds.

Crucially, Hart notes that it is impossible to conceive of Rules of Adjudication completely independently of a Rule of Recognition:

> ...a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a 'source' of law.[52]

Adjudicative officials are empowered by the Rules of Adjudication to resolve disputes relating to the primary and secondary rules. If these agents are actually going to do this, it needs to be possible to determine what the primary rules are. Such a determination requires some basic notion of a Rule of Recognition; hence, Hart believes that while it may perhaps be possible to have a Rule of Recognition independently of Rules of Adjudication, it is utterly impossible to have Rules of Adjudication independently of a Rule of Recognition. The act of adjudicating implies that there is *something* to adjudicate – therefore there needs to be some way to determine the content of what is going to be adjudicated, and this is precisely the role of a Rule of Recognition.

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[52] *Ibid*

VI

The combination of primary rules with these three secondary rules is integral and necessary for the existence of a legal system, as Hart argues: "the union of primary and secondary rules is at the centre of a legal system."[53] Yet, while this remains true, "it is not the whole" as this fails to explain the entirety of a legal system. More can and is said about legal systems beyond this basic assertion. There is a larger story that needs to be told. What the description of law as the union of primary and secondary rules does, however, is establish a framework within which to make sense of all the other types of data that we may need to categorize within a legal system. By understanding these secondary rules, as well as how they relate to primary rules, we have a basic blueprint for understanding every conceivable system that we might want to describe as 'legal'. Hart believes that, while this does not solve all the confusions about what we mean by a 'legal system', it does set us on the right path.

[53] *Ibid*, 99

C. HART'S THEORETICAL FRAMEWORK FOR JUDICIAL ACTIVISM

I

Having laid out the bare details of Hart's account of law, I will now proceed to apply his conception of law to the issue of judicial activism. My purpose in this section is threefold. First, I intend to demonstrate that a coherent and consistent understanding of judicial activism can emerge from within Hart's framework. The clutter and confusion that surrounds the issue dissipates when judicial activism is aligned with Hart's analysis. While Hart never explicitly dealt with judicial activism, he bequeathed to us a remarkable map with which to navigate the issue.

The second purpose of this section is to establish a few helpful distinctions, in addition to Hart's analysis, that will help us be able to recognize when judicial activism is legitimate, according to the terms of a legal system, as well as when judges have stepped beyond their powers and duties and engaged in activism illegitimately. While Hart's *Concept of Law* provides us with the essential tools to do most of this, a few creative moves are required. In this section I will introduce a number of distinctions that flow from Hart's analysis and which, I believe, are completely consistent with it. In subsequent sections, I will develop an analysis of judicial activism that parts ways with a few of Hart's ideas; however, here I intend only to unpack the basic implications for judicial activism of Hart's conception of law as the union of primary and secondary rules.

Finally, this section shall establish, at least partially, a general theory of adjudication that will help to frame the issue of judicial activism. The irony here is that it does not seem that Hart ever intended to commit himself to an adjudicative theory.

Different legal systems, Hart maintained, would have different rules about the obligations and powers of the adjudicative officials. Beyond recognizing that a legal system would develop certain Rules of Adjudication, however, Hart was unwilling to venture. Herein I propose that there are a series of very basic and necessary conditions as to what an adjudicative agent must do if their actions are to count as 'adjudicating' within a legal system. I believe that this minimal adjudicative theory is consistent with Hart's analysis.

All three goals of this section contribute to a single overarching goal: to make a feasible case for how to both describe and resolve the problem of judicial activism within a Hartian framework. While I will later tinker with certain parts of this analysis, it should be apparent that we are much closer to resolving the dilemma that judicial activism forces on our legal and political systems if we utilize Hart's model. He gives us a remarkable structure by which to describe and criticize the actions of the judiciary – a structure that, while flawed and incomplete in certain respects, offers a much more promising practical solution to this very real legal dilemma than what his opponents have proposed. In this section, as for most of this paper, I assume that the reader will be largely convinced that Hart's general description of a legal system, as articulated in Section B, is accurate. In particular, I assume that his distinction between primary and secondary rules, as well as the existence and interaction of the Rule of Recognition, the Rules of Change, and the Rules of Adjudication, accurately reflects legal practice. While I will not have the space within a paper of this length to discuss all (or even most) of the possible attacks that have made against Hartian legal positivism, I will issue several rejoinders to his most forceful opponent, Ronald Dworkin, in future sections that should allay a number of serious

concerns. My key purpose, I must make clear, is not to issue a sweeping and thorough defense of Hart's theory of a legal system; instead, it is to show how judicial activism is explained and clarified through Hart's framework.[54]

II

A large part of the challenge posed by judicial activism is defining the phenomenon. Largely because of its typical use as a pejorative, establishing a consistent definition agreed upon by all parties is challenging. In his article 'Judicial Activism and Conservative Politics', Ernest Young aptly recognizes that the term 'activist' is often used "as a convenient shorthand for judicial decisions that [individuals] do not like."[55] Cohn and Kremnitzer similarly recognize that: "Too often, 'judicial activism' has been used pejoratively by those who disagree with the outcome of a decision."[56] In addition, Kent Roach correctly, and succinctly, notes that:

> Most commentators never bother to define precisely what they mean by judicial activism. The accusation of judicial activism is thrown around to bolster disagreements about particular judicial decisions and to imply judicial overreaching, if not actual impropriety. Debates about judicial activism can be frustrating in part because of the absence of definitions. Reliance on the shorthand code word judicial activism means that the implicit assumptions that are made about judging, rights, and democracy are not identified, even though they may be controversial…[I]t is not too much to expect that those who engage in debates

[54] While I do not endeavor to provide a complete defense of Hartian positivism, I should note that the success of a paper such as this one in demonstrating the utility of Hart's theory for solving or clarifying practical social problems ought to be considered as an additional reason to adopt the theory. Thus, if I am successful in clarifying judicial activism within a Hartian framework, this paper lends further support to the plethora of reasons for why we ought to adopt Hartian legal positivism.

[55] Ernest A. Young, 'Judicial Activism and Conservative Politics', *University of Colorado Law Review*, 73 (Fall 2002), 1141.

[56] 'Judicial Activism: A Multidimensional Model', 334.

> about judicial activism should define what they mean by this loaded and slippery term.[57]

What all of these authors recognize is that the political stakes associated with the term often leads to its inconsistent and unfair usage. Unless judicial activism is carefully defined, it turns into nothing more than a pawn in a high stakes political game. If we are to avoid being caught in this game, we need to be very clear about our subject matter – *what does it mean for a judge to be 'activist'?*

I propose the following general definition: *judicial activism occurs within a legal system when adjudicative officials consciously and deliberately either effect changes in the law, or refuse to give existing law force and effect.* Adjudicative officials are therefore properly labeled as 'activist' when, through their willful actions, they in some way alter the content or force of law. This definition captures what I take to be the essence of judicial activism – the conscious, deliberate, and law-changing effect of judicial actions in and upon a legal system. This definition also captures the intuition that we can actively affect something not merely by our engagement, but also by our willful refusal to engage. As has frequently been determined in cases of criminal responsibility and civil liability, as well as in most ethical theories, we are often held accountable not only for those things that we do, but also for those things that we willfully omit doing.[58]

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[57] Kent Roach, *The Supreme Court on Trial*, (Toronto: Irwin Law, 2001), 97.

[58] I believe that both sides of the judicial activism debate can agree, in general, about this definition of judicial activism. What I suspect that both sides will argue, however, is that the definition fails because it is far too thin. Given the political import of the term, a 'thicker' definition of judicial activism will certainly be demanded. I refuse to do this, at least at this stage, as I want to establish an accurate descriptive account of how the judiciary can alter and negate legal sources. What I want to do is demonstrate that there are a number of divergent ways that the term can be correctly applied. In what follows I will demonstrate that the sheer fact of judicial activism is not in itself problematic – what matters is whether the judiciary acts legitimately in doing so. As Michael Giudice has suggested elsewhere and in a different context, I propose that we distinguish carefully between our 'existence' and 'justification' conditions for judicial activism. See

Judicial activism thus seems to be fundamentally about the law-altering activities of judges. Where theories about judicial activism critically diverge is in their answer as to whether these disruptions are legitimate ones. All sides in the judicial activism debate seem to agree that adjudicative agents can and do effect changes in the law; the question is under what conditions these agents are able to do so legitimately.

At its heart, the debate about judicial activism centers on *legitimacy*. This clearly explains why the issue carries with it such political import – if judges are acting illegitimately, there is a serious problem brewing within the legal system. Legal officials need to play the proper role established for them. If they systematically fail to play this role, the very existence of law within a society seems to come into question. Adjudicative officials engaging in widespread illegitimate activities undermine, and perhaps may destroy, the functioning of the very system they seem professionally obligated to uphold.

Thus, a discussion about judicial activism raises the following essential two questions for a legal system:

(1) Is it ever legitimate for adjudicative officials to alter the content of, or deny force and effect to, law?

(2) What criteria determine if it is legitimate for adjudicative officials to alter the content of, or deny force and effect to, law?

How we answer these two questions determines our position on judicial activism. A negative answer to the first question asserts that it will never be legitimate for adjudicative agents to alter the content of any law or deny any law force and effect. This

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his 'Existence and Justifications Conditions of Law' in the *Canadian Journal of Law and Jurisprudence,* vol. 16, no.23 (January 2003). My definition, as stated here, covers only the *existence* conditions for judicial activism.

means that under *no* conceivable system of law will adjudicative agents be able legitimately to alter law's content. Few, if any, theorists hold this position. This position would imply that all common-law legal systems in which judicial decisions create new legally binding precedents are illegitimate systems of law. Proponents of this answer would have to insist that there could never be any situation whatsoever arising wherein an adjudicative official will be acting legitimately in altering the content of law or in denying a law force and effect. Most, if not all, theorists therefore answer the first question in the affirmative, insisting that there is *at least* one possible situation that could arise in some (even hypothetical) legal system in which it would be legitimate for adjudicative officials to alter the content of law. While I leave open the possibility that some theorists may choose to answer the first question in the negative, I proceed on the assumption that everyone (or at least nearly everyone) is on board with answering the first question in the affirmative.

The second of these questions is clearly the more interesting of the two and this is where divergent paths are paved amongst theorists. The issue of judicial activism is so divisive precisely because we are unable to agree on what criteria determine whether adjudicative agents are legitimately changing the content of law or refusing to give it force and effect. Agreement on this issue would solve most of the problem – at least at a theoretical level. If it were clear what criteria determine whether judicial activism is legitimate, we would simply need to examine an adjudicative official's actions against these criteria. We would thus have a method for either exonerating or convicting the adjudicative officials of neglect of their duty – either through their overreaching or

through their omissions. In what follows, I will examine the criteria for legitimate adjudicative activity discernable through Hart's framework.[59]

III

Hart, along with other legal positivists, recognizes that there can be a fundamental divergence between law and morality. Whether law exists is a separate question from whether it ought to exist.[60] It will be recalled that Hart follows Austin in asserting that "[t]he existence of law is one thing; its merit or demerit is another."[61] For Hart, a law can be legitimate or illegitimate in two different ways. First, a law can be legitimate according to the terms of the legal system that gives rise to it. Notice that this does not imply any *necessary* appeal to law being consistent with moral terms. A law is identifiable within a system, according to Hart, if it arises according to, and/or in conformity with, the conditions stipulated in the legal system's Rule of Recognition. These conditions may include certain moral criteria or they may not. A proposition is thus a valid or legitimate law simply if it is identifiable in accordance with the society's Rule of Recognition. If the proposition does not accord with, or conform to, the Rule of Recognition, it is not a valid

[59] I wish to warn the reader in advance that a complete answer to the question of what legitimizes judicial activism will not be given – I have neither the space nor the clarity (as of yet) to engage in a systematic analysis of the specifics of these criteria. More so, as will be clarified below, this criteria may be contingent on the type and nature of the legal system in which certain adjudicators find themselves.

[60] As I have noted in Section B, Hart recognizes that, in some systems, moral criteria can be a determinative factor for legal validity, but this does not necessarily have to be so. That a law exists, for Hart, is determined according to the conditions established by a Rule of Recognition. The recognition rule can incorporate moral criteria as part of its test for validity, but this is not necessary. Hart thus defends what has become known as 'Inclusive Legal Positivism'. Section E will provide a deeper discussion of the difference between Hart's 'Inclusive' positivism as distinguished from 'Exclusive' positivism.

[61] Austin, *The Province of Jurisprudence Determined*, 185

or legitimate law of the society. This first sense of 'legitimacy' will be termed *legal legitimacy.*

There is, however, a second sense in which we can speak of 'legitimacy'. A law, on this second conception, is legitimate if it accords with some non-legal criteria. Conversely, it is illegitimate if it violates these criteria. While there is an array of non-legal criteria against which the legitimacy of a law can be analyzed, Hart generally explains the non-legal criteria as questions about whether law is legitimated on moral grounds. Morality, here, is construed extremely widely to encompass a whole constellation of issues. Law is testable for legitimacy, therefore, not only in accordance with the terms of the legal system, but also on the grounds of whether certain laws *ought* to be laws of the system. The mere existence of a legal fact does not imply that this ought to be the case. When testing if a law ought to be part of a society's legal system, we are testing the law for its *moral legitimacy.*[62] Moral legitimacy here implies that a law achieves or accords with some end or principle identifiable independently of the legal system.[63]

The question of what criteria define whether an adjudicative agent has legitimately effected alterations in the law or denied law force and effect is therefore

[62] Moral legitimacy being used here as a slight misnomer – I intend it in the broadest of senses in order to cover all questions of legitimacy that involve concerns about 'what ought to happen all things considered?'

[63] It is important to see that that moral legitimacy and legal legitimacy can (and hopefully often do) overlap. They are not mutually exclusive categories. The difference between them is the *test* applied. Legal legitimacy depends on a test from within the confines of the legal system (i.e. is it identified according to the Rule of Recognition). Moral legitimacy is tested by criteria established independently. The legitimacy of judicial activism, I propose in the forthcoming analysis, is only a problem when there is tension between the two with regard to what an adjudicative official ought to do. If they do as they ought to do, both according to moral and legal criteria, there is no issue with the legitimacy of their activist behaviour. If they fail on both criteria, clearly these officials have acted wrongly. When criteria for legality and morality come into tension, we have a serious dilemma on our hands and it is precisely here that we need to think carefully through the meaning and implications of the different notions for the legitimacy of judicial activism.

separable into two very different issues: *legal* and *moral*. The former criteria concerns whether an adjudicative agent has acted within the rules established by the legal system itself; the latter criteria tests whether adjudicative actions are legitimate in virtue of extra-legal criteria. I will begin with an analysis of Hart's conditions for legal legitimacy before proceeding to develop an account of moral legitimacy.

IV

As was explained in the previous section, Hart understands law to be a union between primary and secondary rules. Primary rules of obligation stipulate what actions are to be done or forbidden. Secondary rules concern the recognition, alteration, and adjudication of the rules of a system. They determine what the law is, how it can be changed, and how to resolve disputes about law.

I propose that Hart is able to explain the legal legitimacy of judicial activism by explaining how the secondary rules may empower adjudicative agents to effect changes in the legal system. *When appropriate secondary rules exist that empower adjudicative agents to alter or deny force and effect to law, and adjudicative officials act within the scope of these rules, the adjudicative officials' actions are legally legitimate.* A careful examination and articulation of the secondary rules of a system therefore provides the necessary criteria for determining whether an adjudicative agent has acted within the parameters of legal legitimacy. Let me explain.

Law, according to Hart, is *conventional*; its existence is contingent upon a convergent practice arising within a society about what will be recognized as 'law'. In a

legal system, a convention develops about how to identify legitimate legal rules from illegitimate (or 'spurious') legal rules. Again, this fundamental convention is what Hart terms the Rule of Recognition and it is both essential to explaining law's 'internal perspective' as well as its social nature, as Coleman helpfully explains:

> Hart's position, widely misunderstood and mistakenly criticized – is that law is made possible by an interdependent convergence of behavior and attitude: a kind of *convention* or social practice that we might characterized as an "agreement" among officials on the criteria for membership in the category "law". The relevant social practice is comprised of two elements: convergent behavior and a critical reflective attitude towards that behavior – an acceptance of it… This reflective, critical attitude is the so-called "internal point of view"… For Hart, the practice of officials creates and sustains criteria for membership in the category "law". Law is made possible by the existence among officials of a practice of adhering to criteria of legality or validity. The rule that captures this practice is what Hart calls the "rule of recognition": it is the signature of a legal system.[64]

In addition, we have seen that this rule can be remarkably simple or remarkably complex. We have also seen that the Rule of Recognition can itself be a source of great uncertainty. It may be unclear what exactly law in a society is because that society's Rule of Recognition is unhelpfully vague. In spite of all this, however, Hart holds that it is only through the Rule of Recognition that we can determine what law is - this is what crucially distinguishes him from the Natural Lawyers. We can only determine legal validity according to a conventionally established Rule of Recognition. Without appeal to such a rule, there can be no formal criteria for distinguishing a legitimate legal rule from an illegitimate one.

Fundamental therefore for any criteria of legal legitimacy is the existence of a Rule of Recognition. This rule allows agents to determine what rules exist in their legal

[64] Jules Coleman, *The Practice of Principle*, 75-76.

system. The existence of this rule alone, however, is not enough for a complex legal system. We have seen earlier that a functioning and modern legal system needs to have the flexibility to create, change, and eradicate (at least some of) its primary and secondary rules. A legal system needs to be able to adapt to changing conditions and needs, otherwise it will be rendered obsolete. A system therefore adopts Rules of Change that empower certain individuals or entities to alter the rules. A legal system *confers powers* on certain agents to effect these changes. When they exercise these powers properly, they legitimately alter the law.

Together with the Rules of Change and the Rule of Recognition, there are the Rules of Adjudication. The Rules of Adjudication, it will be recalled, confer powers, as well as duties, on certain members of society authoritatively to determine whether legal obligations have been breached. The Rules of Adjudication determine who the adjudicative agents are, as well as what they must take into account in deciding cases. These rules prevent the chaos that would emerge if all individuals in a society were to determine for themselves what the law required of them.

Judicial activism forces us to call into play all three types of secondary rules. When we are curious about whether adjudicative officials have legitimately altered law or if they were within their proper powers to deny a law force and effect, we need to know three things. First, we need to know if these agents are properly identified by the Rules of Adjudication to determine the law in the case. Does the adjudicative official have the appropriate purview to decide the case at hand? If so, has the case been determined according to proper procedures? Second, we must determine if the adjudicative agent

possesses the appropriate powers of change. Was the adjudicative official empowered to alter the law? Finally, we need to discern what the law was prior to the actions of the adjudicative official. According to the Rule of Recognition, what was the law? In addition, we need to ask (conjointly), what is the law consequent to the adjudicative official's actions? Has the adjudicative official established law that ought properly to be acknowledged under the Rule of Recognition of the system?

V

Before proceeding to examine how the interplay of these questions determines the legitimacy of judicial activism, it is necessary to take a detour into concerns about the role of the adjudicative branch in any legal system. While Hart does not discuss any necessary duties for adjudicative officials, a few seem necessarily to follow from his position, as well as from any accurate description of adjudication. What I intend to do over the next few paragraphs is establish a basic (and very general) theory of adjudication that flows from, and links with, Hart's Rules of Adjudication. By identifying the basic duties and role of an adjudicative official within a legal system, it will be possible to clarify in greater detail when and if the agent's actions are legally illegitimate. We need a framework for understanding what it is that an adjudicative official does if we are to identify when the official has breached a duty. Nothing in this section suggests that additional duties from those enumerated herein are not incumbent on judges. I recognize, to the contrary, that legal systems nearly always supplement the basic duties listed here with additional ones. All I wish to maintain here is that adjudication within a legal

system, as both a descriptive and a conceptual truth, involves certain necessary obligations that Rules of Adjudication address. This section also enables us to recognize that sometimes judges can act in accordance with some of their duties while neglecting the others. Legitimacy may thus not be an all-or-nothing claim – it may admit of degrees and components. It may even involve a balancing of several different duties.

It is an uncontroversial truth that, whatever else adjudicative officials do, they are assigned the task of *interpreting*. These officials certainly may play additional roles within a system. They may, for example, offer advice to legislative officials about how to draft legislation. They may even engage in legislative or quasi-legislative activities. However, these activities are by no means part of the defining role of adjudicative officials *qua* adjudicative officials. What distinguishes the adjudicative function from other possible functions that these officials have within a legal system is their principal task of interpreting. By this I mean to suggest nothing more than that adjudicative officials need to take some data and make concrete determinations of what this data *means* in specific situations. Later a much more elaborate theory of interpretation will be discussed in the exposition of Dworkin's ideas, but for present purposes, all I intend is interpretation in this minimal sense.

A necessary part of what adjudicative officials in a legal system are assigned the task of giving meaning to is the Rule of Recognition and those sources of law identified by this rule.[65] Without the existence of this rule and these sources identified by it, adjudicative officials would have no role to play as *adjudicative* agents in a legal system.

[65] They may also have to interpret non-legal criteria to arrive at judgments, but these officials must, in some way, appeal to legal sources.

These provide the basic data to which concrete meaning must be given. Identifying what is law according to the Rule of Recognition is, however, not always a simple matter, and as Coleman has noted, this may be problematic for two different reasons. First, it may be unclear what the rule actually is – there may be confusion about what the *content* of a rule is. Second, we may be confused about what the rule requires – it may be challenging to determine how a rule ought to be *applied.*

My claim that adjudicative officials necessarily must interpret sources of law derived from a Rule of Recognition by no means suggests that discerning what these sources are is an easy matter. In fact, in a later section I argue that part of what adjudicative officials do, as part of their enterprise, is establish, through upholding and defining a Rule of Recognition, what these sources of law are. Nevertheless, what I am after at present is the simple idea that adjudicative officials cannot fulfill their essential role as interpreters without some sources to interpret.

VI

In addition, in *every* legal system, adjudicative officials are assigned the task of discerning and / or interpreting *fact* and *law,* as well as mixed questions of fact and law.[66] In cases that come before them, adjudicative officials must first determine what actions or events have transpired; they need to establish a 'factbook'. These officials then have the

[66] This is not meant to suggest that adjudicative officials cannot have the responsibility of only determining one or two of these elements. An official, for instance, may only have the task of determining questions of fact while another official may be responsible for determining questions of law and questions of the mixture of fact and law. What I mean to suggest here is that adjudication always involves these three issues. The Rules of Adjudication simply establish which individuals will determine which of these questions and by which procedures.

task of discerning what the law is – what are the relevant legal sources? When both have been determined, adjudicative officials make the final crucial step of establishing the relationship between fact and law. They interpret what the law requires with regard to the facts at hand. They take their data (law) and interpret what it means in the case at hand – what does the law require with regard to the given facts?

I maintain that the essence of what an adjudicative official does is threefold: first, they establish a factbook; second, they establish what the law is; third, they interpret what the law means in relation to the established factbook. None of this, of course, needs to be done consecutively – an adjudicative official does not need to ascertain everything that is fact, and then proceed to ascertain all the sources of law, before finally moving to interpretation. The process may occur concurrently and it may even involve many steps. Adjudicative officials may look at some facts and some law, realize that the relation between the two is complex, and proceed to need to determine more facts and more law in order to arrive at an interpretation. The basic point, however, is that all three elements are necessary in any adjudicative process.

The following is an example of what I mean by this. How would an adjudicative official resolve Hart's infamous 'no vehicles in the park case'?[67] When this case comes before a judge, the judge first needs to determine what has transpired – what are the facts of the case? In this case, let us assume the following facts are determined by the official: individual x was riding his conventional bicycle through the park while it was crowded during the morning. He rode his bike at a speed that bystanders estimated to be no more

[67] I take this example from Hart's response to Lon Fuller in the *Harvard Law Review* 71, no. 4 (February, 1958), 607.

than 5 km an hour; thus, riding the bike at a relatively safe speed. In addition, no one and no property was harmed by the bicycle or its rider. Officer *z* arrested individual *x* in the park that same morning on the charge of operating a vehicle in the park. Having established this, the judge needs to ascertain what the law is – what legal sources are relevant to this case? The judge notices that a federal statute exists, passed well before the infraction, which reads 'no one shall operate or control a vehicle within any public park'. The judge further notes that there is a history of precedent regarding the interpretation of the statute – a vehicle, defined in the case of *Individual 'Y' v. The State* by an appellate court, is 'any mechanized apparatus that is propelled by the power of a motor'. The judge now proceeds to interpret the case – how do the facts relate to the law? In this case, a determination needs to be made as to whether the statute governing vehicles in the park applies to the actions of individual *x*. The judge, examining both the statute and the history of judicial decisions (both accepted sources of law in the judge's state), needs to determine whether individual *x*'s bicycle was a 'vehicle'. The judge determines, on the basis of the facts presented, that while the statute was unclear, existing precedent clearly supports the interpretation that a bicycle was not a vehicle. A bicycle, while it may be a mechanized apparatus, is clearly not propelled by a motor. Thus, the judge renders a decision to quash the charge of violating the 'no vehicles in the park' law in favor of individual *x*. While this example could certainly be (and soon will be) complicated by a number of different factors, this provides a basic illustration of how I intend to break up the determinations of fact and law, and the correlative interpretive activity. None of this is

supposed to be original and I intend this to be in perfect accordance with any introductory law school textbook.

VII

Rules of Adjudication determine: (1) *who* has the ability to determine the facts, the law, and what the two mean in conjunction and (2) *how* the facts, the law, and their conjoined meaning are to be discerned. They confer powers on adjudicative officials which allow them to determine the meaning of the crucial elements of adjudication – facts, law, and their combined meaning. They also, importantly, can place obligations on adjudicative officials when discerning the three elements. A full statement of a legal system's Rules of Adjudication *must* have a power-conferring element that empowers certain individuals or entities to act as adjudicative officials. In addition, although it is not strictly necessary, a legal system may have duty-imposing components established within its Rules of Adjudication. Adjudicative officials almost always are bound by Rules of Adjudication to interpret fact and law in accordance with certain procedures and standards. The existence of such rules places them under a number of restrictions when they engage in determinations of law and fact, as well as the relationship between the two.

In order to understand and analyze the legal legitimacy of judicial activism, we need to be acutely aware of how the Rules of Adjudication can affect the key elements of the adjudicative process. We also need to be aware of how the Rules of Adjudication may establish duties that relate to the Rule of Recognition and the Rules of Change. The

following represents an important (but non-exhaustive) list of ways that the Rules of Adjudication function, as well as how they relate to the other secondary rules.

To begin, and as has been noted above, Rules of Adjudication often limit the scope of powers within the purview of an adjudicative official. A judge may have adjudicative powers that are confined only to a certain limited *jurisdiction*. It may be the case, for example, that family court judges cannot make criminal determinations. They may have the limited powers to settle questions about access and custody, but they cannot decide whether a father ought to be thrown in jail for his failures. The Rules of Adjudication, in such circumstances, determine what is legally beyond the reach of the adjudicator's power. In order to exercise legal legitimacy in their determinations, adjudicators need to stay within the confines of their legally prescribed powers. A failure to do so results in a legally illegitimate decision.

These jurisdictional components may apply, in addition, to questions of fact, law, and the mixture of the two. Adjudicative officials may only be able to determine certain questions of fact and law according to the Rules of Adjudication. Administrative law in Canada provides a concrete example of how the secondary Rules of Adjudication may limit adjudicative determinations in each of these areas. Superior courts of justice in Canada, beginning most clearly with the 1979 case *CUPE v. N.B. Liquor Corp.,* recognized that a statutory tribunal, protected by a strongly worded privative clause (in this case s. 101 of the *Public Service Labour Relations Act*), as a general principle, cannot be overruled on questions of *fact* provided that such tribunals do not discern these facts in

a way that is "patently unreasonable."[68] The Supreme Court in *N.B. Liquor Corp.* recognized that while a superior court always has inherent jurisdiction over questions of *law*, protected statutory tribunals must be given deference on questions of fact. This case thus neatly shows how superior courts can have a limited purview for adjudication. In Canada, unless a protected statutory tribunal determines facts in a manner that is 'patently unreasonable', the courts have no power to review their determinations of fact. With regard to law, however, the courts have the power to review these tribunals for errors according to a 'correctness' standard. A superior court can review a tribunal for errors in law, but (barring 'patent unreasonableness') not errors of fact.[69]

In addition to jurisdictional limitations, a legal system's Rules of Adjudication may impose certain duties and powers upon adjudicative officials to determine questions of fact, law, and their admixture in specific ways and according to specific criteria. The existence of these rules limits the discretionary powers that would otherwise exist for adjudicative officials in interpreting cases at hand. They also may determine when judges are both empowered and obligated to effect changes to a society's legal system.

Adjudicative officials may be empowered (and simultaneously obligated) to effect changes to law according to either 'mandatory' or 'directory' requirements. The Attorney General of Manitoba in the 1985 *Reference Re: Manitoba Language Rights* nicely articulates the difference between the two:

> Courts have drawn a distinction between requirements which are said to be "directory" and those which are said to be "mandatory"... Non-compliance with a

[68] *CUPE v. N.B. Liquor Corporation* [1979] 2 S.C.R. 227

[69] It is worth noting, however, that much of this has been altered and revisited in the recent and important decision in *Dunsmuir v. New Brunswick* [2008] SCC 9.

> directory requirement does not result in what was done having no effect whereas if a mandatory requirement is not complied with all of what is done is a [legal] nullity.[70]

In exercising their powers according to mandatory requirements, courts quash or alter legal sources because they are invalid according to a system's Rule of Recognition and other criteria identified according to the Rule of Recognition (i.e. a constitution) as determinative of legal validity. In the event that a tension exists between a purported law and these criteria, a court may be both empowered and duty-bound to declare the purported law null and void (or legally invalid) to the extent of the law's inconsistency with the criteria for validity. In acting on a mandatory requirement, adjudicators deny force and effect to purported laws by recognizing that they are in some way inconsistent with the very criteria for legal validity. In such cases, adjudicative officials are not properly said to 'alter' the law – they merely refuse to give force to legally invalid sources. The purported laws, since they are invalid, cannot have the status of law and hence must not be given force and effect by the legal system.[71] An adjudicative official's exercise of power in this manner is thus properly described as a *clarification* of law and not an alteration of it.

In acting on directory requirements, adjudicative officials strike down or alter law in a slightly different manner. In effecting the law according to these directory

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[70] *Reference Re: Manitoba Language Rights* [1985] 1 S.C.R. 721, par. 34.

[71] It may be possible that mandatory requirements, if certain Exclusive Legal Positivists are correct, are fundamentally inconsistent with the conventional nature of law. I do not wish to get into this objection for two reasons. First, Hart seems quite supportive of the existence of mandatory powers, especially in the post-script when he asserts his support for Inclusive Legal Positivism. Second, I have no need to ponder the existence or non-existence of these powers here. I simply intend to show a number of important ways that legal systems could purport to empower their officials – whether a legal theorist can sensibly or consistently assert the existence of mandatory powers is a separate inquiry altogether. While I believe we have good reason to assert as a descriptive point the existence of mandatory rules (especially in constitutional regimes), I leave this dilemma unresolved.

requirements, adjudicative officials act in accordance with secondary Rules of Change, identified by the Rules of Adjudication. Adjudicative officials may be instructed by Rules of Adjudication, to consult certain legal or even non-legal standards or principles in order to resolve questions of fact, law, or the mixture of the two. An adjudicator, for instance, may be instructed, in the event that a piece of legislation creates certain problems for a society, either to strike the legislation down or to rework it according to some other criteria. Notably, adjudicative officials not only are empowered by these Rules of Adjudication, they also have a corresponding legal duty to exercise them in a certain way. They have an obligation to negate or alter law according to the standard or principle identified by the directory requirement. In failing to act on a directory requirement, they actually neglect a legal duty incumbent upon them – even though the law they are instructed to negate or alter is still valid until they exercise this power.

Beyond the jurisdictional restrictions, and mandatory and directory requirements, Rules of Adjudication establish legally binding procedures for the determination of law, fact, and mixed law and fact. Adjudicative officials, as well as litigating parties, are typically obligated to follow strict procedures when engaged in a process of adjudication. Adjudicative officials are legally bound to follow and enforce these strict procedures when carrying out their duties. With regard to the topic of judicial activism, this is of particular importance as procedural requirements can result in the inadmissibility or inapplicability of certain evidence. Adjudicative officials can be under a legal duty to ignore even clear and damning facts in the event that these facts are not discernable according to proper procedures. Whereas mandatory and directory requirements empower

adjudicative officials to alter questions of law, the procedural requirements empower them to alter or negate questions of fact. Rules of Adjudication stipulate what adjudicative officials are to count as admissible in the adjudicative process and what they are to reject. These officials are legally empowered, and indeed legally obligated, only to discern and consider in adjudication the 'proper' facts.

These only represent a few of the important ways that Rules of Adjudication can empower and obligate adjudicative officials to alter and negate facts, law, and their admixture. Divergent legal systems will establish their own diverse Rules of Adjudication. This short list of general features of the Rules of Adjudication serves to illustrate some of the key ways that these important secondary rules can legally obligate and empower adjudicative officials to negate and alter laws and facts.

VIII

If Rules of Adjudication function in the manner thus far described, we have a solid descriptive framework that enables us to pinpoint legally illegitimate judicial activism. *Judicial activism is legally illegitimate when adjudicative officials either: (1) alter or deny force and effect to the law, as ascertained according to the Rule of Recognition, when they do not have the appropriate powers granted to them according to the secondary rules of the legal system, or (2) violate duties incumbent upon them as discerned according to the secondary rules when they alter or deny force and effect to law. Conversely, judicial activism is legally legitimate if adjudicative officials: (1) alter or deny force and effect to law in conformity with, and according to, powers that are*

within their purview, as discernable through the secondary rules, and (2) in altering or denying force and effect to law, they do not violate duties that are incumbent upon them, as established according to the secondary rules of their legal system.

This framework, while crucial for helping to give a clear understanding of how to determine the legitimacy of judicial activism from a legal standpoint, is still unable to give specific answers for what adjudicative actions are legally illegitimate in any given system of law. While the secondary rules, and specifically the Rules of Adjudication, necessarily require that certain individuals or entities be identified as having the power to make findings of fact, ascertain what law is, and interpret how fact and law relate, this is all they minimally must do; all other Rules of Adjudication are contingent features of divergent legal system. What this means is that in order to determine the legal legitimacy of an adjudicative agent's activist behavior within a legal system, we need to ascertain what the specific Rules of Adjudication are within that system - we need to discern what specific alterations adjudicative agents are legally empowered to affect. Adjudicative officials may never be legally empowered to change law or deny it force and effect. Conversely, in a certain system they may always have the legal power to do so. They may be under no legal obligations in a certain system – they may have unlimited discretionary powers to decide cases. They may also have minimal leeway.

This leads to a key problem: a clear determination of the legal legitimacy of judicial activism is only possible if we generally agree about the nature and content of the Rules of Adjudication. Indeterminacy with regard to the existence and meaning of the Rules of Adjudication leads to indeterminacy about the legal legitimacy of judicial

activism. Hart, of course, would recognize that this problem is unavoidable, no matter how we look at the issue. Like other rules of law, the secondary Rules of Adjudication are just as liable to have a core meaning as well as a 'penumbra of uncertainty'. It may be unclear in certain cases and circumstances exactly what powers adjudicative officials possess according to the Rules of Adjudication. It may also be unclear what duties adjudicative officials are under; even more so, it may be unclear when they have breached these duties. In all likelihood, there will be clear cases where any reasonable individual can unequivocally state that the occurrence of judicial activism was legally legitimate or illegitimate; however, it is also probable that there will be a number of challenging cases wherein the legal legitimacy of judicial activity will be subject to widespread disagreement.

We ought, in such circumstance, to be mindful of Coleman's important distinction between questions of how a rule ought to *apply* and questions of what the *content* of a rule is. This distinction is as relevant to the Rule of Recognition and Rules of Adjudication as it is to other general legal rules. There is remarkable agreement about what legal rules actually exist – in fact, in most legal systems, serious disagreement about what the law actually is are rather infrequent. Generally, the problem is in how the law applies. With regard to the legal legitimacy of judicial activism, the question that we most often will have to answer is not whether a law exists that permits adjudicative officials to effect changes; rather, the issue typically is under what circumstances such a law applies. While I do not believe that anything in this paper will bring us closer to a general answer to this pertinent issue, it should help us sharpen our attention on it.

IX

Judicial activism is not confined, however, purely to questions of what adjudicative officials are *legally* empowered or obligated to do. Beyond questions of the legal legitimacy of their decisions, questions of *moral* legitimacy often arise: regardless of what the law may have been, how ought an adjudicative official to have acted? Once again, questions of moral legitimacy, for the purposes of this paper, are any questions that pertain to how adjudicative officials ought to act, regardless of any purely legal (or institutional) considerations. They are extra-legal concerns about either how agents acting within a legal system affect individuals that have cases heard before the courts or how their actions affect the greater society.

Morally legitimate judicial activism occurs when adjudicative agents alter or deny force and effect to law in order to achieve a 'better' conclusion than the law, prior to their intervention, required. Morally illegitimate judicial activism occurs when adjudicative agents, in altering or denying force and effect to law, prevent it from achieving what would have been a 'better' conclusion than the one resulting from the adjudicator's activism. More simply, if adjudicative agents alter, negate, or deny force and effect to law in accordance with ultimate reasons for action,[72] they are acting morally legitimately; if they behave contrary to these ultimate reasons for action, they are acting morally illegitimately.

[72] I use the term 'ultimate reasons for action' in order to allow the possibility that adjudicative officials may base their reasoning on a vast number of different concerns including ethical principles and / or certain consequences. The best moral answer may even blend the two. The point is simply that moral legitimacy is whatever it would be best for an adjudicative official to do after all reasons for acting are considered.

There is, of course, a glaring vagueness looming in this definition: is it the *results* of the adjudicative agents' actions that count as the criteria for moral legitimacy, or is it the *intent* to bring about better results? Moral legitimacy, as understood here, may imply both. Further refinements can certainly be made. We can speak, on one hand, of moral legitimacy as tested by a consequentialist standard.[73] On the other hand, we can speak of moral legitimacy as tested by a standard of the adjudicative agent's intent. We can ask, that is, about the adjudicative agent's actions from an objective or a subjective standpoint. Activist judicial behavior is assessable on both levels. Thus, the two tests for moral legitimacy may diverge. For example, we may be able to speak highly of an adjudicative agent's good will in the attempted alteration of a patently flawed law, while at the same time criticizing the agent for, through altering the law, actually making the flawed law even worse. Conversely, it is possible to applaud the excellent outcomes of an adjudicative agent's alterations to law, while at the same time criticizing the agent for the intent to alter the law in order to further their own selfish ends.

X

Following Hart, it is important to recognize that with respect to the issue of judicial activism, legal legitimacy and moral legitimacy may diverge. This claim will be challenged in the following section on Dworkin, but for Hart, it is quite conceivable – indeed it is frequently the case - that a legal system may give rise to laws that ought not to be followed. It may also give rise to adjudicative obligations that adjudicative agents

[73] Here I do not mean the specific school of moral philosophy.

morally ought not to uphold. These flawed laws are in need of alteration (if not outright negation) or, at the very least, agents ought not to give these laws force and effect. In order to deal with the case of these flawed laws, an adjudicative official may well, by a fortunate occurrence, be able to exercise legal powers, in a manner perfectly consistent with his legal obligations, in order to effect appropriate changes or deny the law force and effect. In such a case, an adjudicative agent is able to act legitimately, from both a moral and a legal standpoint; all is well here. There is, however, the much more problematic case when adjudicative agents face flawed laws that they are asked to give force and effect to, but which they have no legitimate legal powers to deny force and effect to, negate, or alter. In cases like this, things become very complicated. Adjudicative agents may face a serious dilemma between acting legally legitimately or morally legitimately. It may be impossible for them to act within the confines of their secondary rules and still adjudicate in a way that does not allow the law to do significant harm to individuals or their society. The price of engaging in judicial activism in order to rectify a flawed law, in such cases, is legal illegitimacy. Adjudicative officials, by thwarting or altering the law without the cover of – or perhaps even in direct violation of – the appropriate secondary rules, sacrifice legal legitimacy for moral legitimacy. In so doing, they cease to play their assigned role under the rules of the system.

The question that defines the polarized debate over judicial activism comes to the fore in the case of conflict between what would make a decision morally legitimate and what would make it legally legitimate. When there is no conflict between the two, judicial activism is indisputably legitimate – in most cases, judicial activism that successfully and

clearly incorporates the two types of legitimacy fails to attract any attention. When adjudicative officials are caught between divergent paths, however, the road they travel becomes significant. Most critics of judicial activism (those that I earlier argued use the term in a 'pejorative' context), insist that adjudicative officials, when they are caught in the dilemma of choosing to act with moral or legal legitimacy, must act within the confines of legal legitimacy alone. Most proponents of judicial activism, on the contrary, insist that, at least sometimes, moral legitimacy alone is what counts. If adjudicative officials can achieve moral ends within the confines of legal legitimacy, this is certainly preferable; however, in the event of an irreconcilable divergence between legal and moral legitimacy, moral legitimacy is to be preferred.

Before proceeding, it is worth stopping to note how much Hart's framework helps to clarify the dilemma. While the framework (at least at this stage) fails to give any definitive answers, importantly, it gives clarity about what defines the terms of legal legitimacy. If both protagonists and antagonists of judicial activism take heed to the distinctions made herein and carefully study the nature of the secondary rules in their respective systems, the debate between the two will certainly be much more fruitful, and the oscillations on our political pendulum may well be less radical. If we can hone our discussion on the appropriate issue (i.e. are we concerned with the *moral* or the *legal* legitimacy of the adjudicative official's actions) it seems that we can at least begin to talk to each other rather than through each other.

XI

With questions of the relationship between moral legitimacy and legal legitimacy, Hart's attitude is ambivalent. Law is crucial for a society's organization. It provides opportunities for society to guide behavior and eradicate some of the inefficiencies latent in a pre-legal society; law is a crucial tool for achieving certain social goals. The problem for Hart, however, is that law can be used to achieve both good and evil ends - there is no guarantee that law will be used in a society to achieve only good ends. Significantly, law can even help iniquitous regimes within a society better achieve their insidious objectives. This is a situation that has come to be known as 'Hart's Hell'. Law may be harnessed for the benefit of a corrupt regime. It is often malleable and effective for just such a task.

This seems to suggest, for Hart and many other legal positivists, that there may be no content-independent reasons to act as the law requires - whether we ought to act in accordance with law is a matter of how much the law conforms to our moral reasoning.[74] The law simply imposes legal obligations on citizens - whether these legal obligations equate with our moral obligations is a question that depends on the content of the law and the nature of our moral reasoning. Hart therefore seems to suggest that, at least in some cases and in some systems, there may be good moral reasons for adjudicative officials to alter or deny force and effect to law.

What Hart does not completely answer, however, is whether legal legitimacy may, at least in some systems, be *prima facie* endowed with moral legitimacy. Arguments about the importance of respecting the 'will of the people' in democratic regimes may

[74] See especially Joseph Raz, *The Authority of Law*, Chapter 12

provide *prima facie* reasons to endow the law with moral legitimacy in democratic systems. In such systems, one could argue that in violating legal legitimacy, we necessarily violate moral legitimacy.[75] This is not a topic, however, I wish to address at the moment – primarily because this would take my analysis into a realm in which I do not yet feel confident. What I simply want to note is that it is possible that in some systems there may be good reasons to maintain that legal legitimacy always carries some moral legitimacy,[76] but this of course depends on the nature of the system in which adjudicators find themselves. It is also worth mentioning that even if it turns out to be the case that moral legitimacy is always associable with legal legitimacy in a particular system, it need not be *decisive*. It is possible that even though I ought, as an adjudicative official, to respect the autonomy of a democratic government, if that government legally obligates me to render a morally abhorrent decision (e.g. to imprison every member of some peaceful minority group), there may be a compelling reason to put the one factor aside in favor of the other more important one. There is the question of whether a threshold exists past which legal considerations that may be *prima facie* imbued with moral legitimacy no longer outweigh certain, more important, moral considerations.

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[75] It is important to note here, however, that democratic regimes often empower adjudicative officials according to the Rules of Adjudication to alter, negate, and deny force and effect to law. If an adjudicative official acts so as to overrule a law on the basis of powers properly conferred and entrusted to him or her, this ought to be regarded as an action that accords with 'the will of the people'. If this analysis is accurate, the Textualist and Originalist arguments do not seem relevant, provided of course, that the empowering secondary rules to overrule legislative acts are in strict conformity either with the 'texts' or with the 'intent of the framers'. In most of the legal systems in which Originalist and Textualist arguments have arisen, there is little reason to doubt that a significant number of the powers granted to adjudicative officials according to the Rules of Adjudication were intended.

[76] It would be wise to recognize that simply because it carries *some* moral legitimacy does not mean that this ought to be decisive. I may have moral reasons (e.g. respect) to obey my father and mother, but if my father and mother issue an order to kill my brother, the egregiousness of the moral offense may give reason to overrule the moral imperative to obey. Therefore, simply because there may be some moral merit in acting according to law does not necessarily make the case that we ought to obey it.

Simply because the law may have some moral legitimacy does not mean it necessarily ought to be followed.

D. RONALD DWORKIN AND LAW AS INTEGRITY

I

While Hart's account of law as centered on the union of primary and secondary rules is remarkable in its simplicity and clarity, as well as in its descriptive ability, it is not without its detractors. Most powerful among these detractors has been Ronald Dworkin. Resultant from his disagreement with Hart, legal philosophy has become more divided; even legal positivism itself, which was supposed to have been saved by Hart's reworking has divided because of Dworkin, splitting into the so-called 'inclusive' and 'exclusive' camps. In his article 'The Model of Rules,'[77] and more significantly, in his book *Law's Empire*, Dworkin embarked on a creative, yet as I will attempt to argue later, ultimately unsuccessful campaign against Hart's depiction of a legal system.

The purpose of this section is to outline the main challenge to Hart's depiction. As much of what I have argued requires an acceptance of Hart's basic concept of law as the union of primary and secondary rules, it is essential that I discuss Dworkin's challenge. Herein I will articulate Dworkin's main argument in two stages. First, his critique of Hart's depiction of the legal system as fundamentally 'rule based' will be explained. A brief discussion will ensue about his crucial distinction between legal *rules* and legal *principles*. The second, and much longer part, is an examination of Dworkin's more considered views that developed as a result of the 'Model of Rules' and are most clearly

[77] This article was republished as a chapter in *Taking Rights Seriously* as 'The Model of Rules I'. In this paper I cite the article as it initially appeared in *The University of Chicago Law Review*, vol. 35, no.1 (Autumn, 1967), hereafter 'Model'.

described in *Law's Empire*. This part is a general summary and articulation of Dworkin's theory of 'Law as Integrity' and its two-fold dimensions of *fit* and *justification.*

While Dworkin is certainly not Hart's only critic, he has proven to be the most influential. His understanding of 'Law as Integrity' has given rise to a number of new schools of thought that, if not explicitly, at the very least implicitly, find their animating ideas arising from Dworkin's work. I am confident, although I will not be able completely to defend the idea, that if one can adequately respond to Dworkin's key criticisms, one will be able to silence the vast majority of Hart's detractors - by striking the roots, it will be impossible for the flowers to blossom. This is precisely what I propose here. I want to get to the very foundations of Dworkin's objections in order to show in subsequent sections why these foundations fall. This section is therefore not merely about Dworkin and Hart; it is much more generally about the Dworkinian legacy in jurisprudence. If it can be shown that this Dworkinian legacy leads to mistaken conclusions, fails properly to describe the phenomenon, or if it simply can be accounted for in a better, clearer, and simpler manner, there will be good reason to reject the poor foundations.

I do not, however, discuss Dworkin's views only with a view to later disproving them. His ideas provide a springboard for my refinements of Hart's framework. Dworkin notices interesting issues that ought to be accounted for in a theory of law – a few of which require recognition if we are accurately to describe judicial activism. Thus, I examine Dworkin Janus-faced – looking towards both the destruction and recovery of his views.

II

In 'The Model of Rules', Dworkin argues that Hart's "positivism…is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important role of… standards that are not rules."[78] This is because Hart, according to Dworkin, is committed to three crucial tenets. First, he is committed to the view that law is determined according to its *source* or pedigree (this is implied by Hart's Rule of Recognition). Dworkin explains that:

> The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed. These test of pedigree can be used to distinguish valid legal rules from spurious legal rules…and also from other sorts of social rules… that the community follows but does not enforce through the public power.[79]

Hart's secondary Rule of Recognition is used to identify whether a law is valid. Dworkin seems to understand that the test for validity is done simply by tracing how a law stems from some underlying Rule of Recognition, the existence of which is determinable strictly according to certain facts about the behavior of officials and citizens within the society.

In a complex legal system, to determine if a rule is valid, we need to trace back "a complicated chain… from that particular rule ultimately to the fundamental rule."[80] Dworkin rightly recognizes that Hart's Rule of Recognition may not be possible to apply 'mechanically' – "We can apply no mechanical test… [as] the rule of recognition is

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[78] Model, 22
[79] *Ibid*, 17
[80] *Ibid*, 21

identified by the fact that its province is the operation of the governmental apparatus of legislatures, courts, agencies, policemen, and the rest."[81] The rule rests on social facts and these facts are often complex and changing; therefore, the exact Rule of Recognition may be extremely difficult to determine. Nevertheless it is supposed to be there waiting to be discovered, and upon careful examination it will be possible to test other possible rules against this master rule to determine their validity.

Notably, Dworkin believes that Hart's ultimate test for the Rule of Recognition must be essentially determinable by these social facts alone and not by conformity with moral principles or some other content-based standard. While we may not be able to determine with complete clarity what the Rule of Recognition is or entails, we know that "there is no danger of our confusing the rule of recognition of a community with its rules of morality."[82] The Rule of Recognition exists entirely because it is being *practiced* – moral or other such standards may or may not be practiced by officials; thus, they are incapable of determining legal validity.

The second thing that Hart and other legal positivists are committed to, according to Dworkin, is the idea that the law is comprised *exclusively* of exhaustible legal rules. When these rules are incomplete or give no guidance to judges about how to make a determination in a case at hand, judges need to consult some source or standards external to the law in order to render a decision. Hart, would therefore seem to hold the view that:

> The set of… [all] valid legal rules is exhaustive of "the law," so that if someone's case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason)

[81] *Ibid*
[82] *Ibid*

> then that case cannot be decided by an official "applying the law." It must be decided by some official, like a judge, "exercising his discretion," which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.[83]

Legal positivism, because it equates the law with legal rules that are identifiable according to their pedigree, implies that the law can run out and leave 'legal gaps'. When these exist, judges can only close them by creating new law in their place and rendering decisions, *ex post facto*, on the litigants – as Dworkin insists, "Positivists hold that when a case is not covered by a clear rule, a judge must exercise his discretion to decide that case by what amounts to a fresh piece of legislation."[84]

Hart is thirdly, and relatedly, committed to the idea that legal obligations only exist for individuals or entities when their actions are addressed by a law that is both specific and valid. Dworkin argues that, for a legal positivist:

> To say that someone has a "legal obligation" is to say that his case falls under a valid rule that requires him to do or to forbear from doing something... In the absence of such a valid legal rule there is no legal obligation; it follows that when the judge decides an issue by exercising his discretion, he is not enforcing a legal obligation as to that issue.[85]

When judges have cases that come before them, they can only determine the content of the litigants' legal obligations by checking the facts of the case against the valid rules of the system. If there is no clear relationship between the facts and the rules, the judge needs to determine the case according to standards that were not available to the litigants prior to their questioned activities. This means that judges determine questions of legal rights and obligations, in these indeterminate cases, after the fact. They engage in

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[83] *Ibid*, 17
[84] *Ibid*, 31
[85] *Ibid*, 17-18

legislative activities to settle the proper realm of the litigants' rights and obligations and impose these decisions on them, in effect, retroactively. Judges cannot apply law to the litigants' case when there are no rules to follow; thus, the existence of legal rights and obligations is exhausted when the rules are exhausted.

III

Dworkin insists that Hart's account of law, since it is actually committed to these three tenets, is seriously flawed. What it misses, he argues, is the fact that a legal system is not composed entirely of legal *rules*, but also of legal *principles*. The distinction between the two is a logical one. Legal rules "are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[86] Rules work in an 'on' or 'off' manner. They either determine the answer to a question in the affirmative (yes the litigant had a legal obligation – there was a rule) or in the negative (no the litigant did not have a legal obligation – there was no rule). A logical feature of a rule is that it must apply or it must not apply – it cannot only 'partially' apply. Principles, on the other hand, do not have this 'all-or-nothing' feature about them. Instead they have a "dimension of weight or importance. When principles intersect… one who must resolve the conflict has to take into account the relative weight of each."[87] If there is conflict between two legal rules, one of them must be put aside altogether – the two cannot coexist. With principles, however, things are different. If two

[86] *Ibid*, 25
[87] *Ibid*, 27

contradictory principles exist, one does not have to be set aside. In such a case, "one of [the rules] cannot be a valid rule."[88] The principles are weighed against each other and a decision is rendered on the basis of which counts more. Instead of applying in an 'on' or 'off' fashion, principles apply 'more' or 'less'; thus, with principles, "it makes sense to ask how important or how weighty it is."[89]

IV

As has already been noted, Dworkin believes that Hart's account of law is only capable of accounting for the existence of rules within a legal system. The question is whether there are, or could possibly be, legal systems that could identify the certain principles (or other standards, such as policies[90]) as law. Is it possible that officials within a legal system would rely on certain non-rule based criteria to arrive at judgments?

Dworkin correctly insists that there are, in fact, legal systems that *do* rely on certain standards that logically differ from the all-or-nothing form of rules to guide the decisions of judges. Importantly, the legal systems that rely on such non-rule based standards are not remote; they are cited in the decisions of American and British (among other) legal systems in the judicial decisions. As evidence, Dworkin cites two prominent cases in the American system, *Riggs v. Palmer* and *Henningsen v. Bloomfield Motors, Inc.*, which explicitly rely on principles to validate their decisions. In the *Riggs* decision, the court argued that:

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[88] *Ibid*
[89] *Ibid*
[90] *Ibid*, 23

> [while] it is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give [the inheritance] to the murderer…all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.[91]

In the *Henningsen* decision, a similar type of non-rule based standard was applied:

> We must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens…[Yet,] is there no principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of iniquity and injustice?... More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other.[92]

In both of these cases, the judges seem to be doing two things: (1) they are identifying that there are certain standards that ought to guide their decisions that do not have the form of rules; (2) they are identifying these standards as *legal* ones – they do not believe they are identifying standards that are independent of the law to resolve these cases.

Dworkin argues that these are just two of a plethora of cases in which judges appeal to legal principles in order to resolve legal disputes. If this is true, Hart is in a real conundrum; either he has to claim that the judges have made a mistake and 'not applied law' – they have somehow gone outside of it, contrary to their claiming that they are doing (2), or Hart must claim that the U.S., and any other country that appeals to legal principles in their judgments, are not 'actual' legal systems (in which case the notion of a legal system would seem extremely strange and artificial since the U.S. according to any

[91] *Ibid*, 23-24
[92] *Ibid*, 24

but the most ardent skeptic clearly does have a legal system). Hart is committed to one of these two options, according to Dworkin, because legal positivism (for the reasons cited in section II) is committed to the view that law is:

A. Identified exclusively by its pedigree.
B. Composed exclusively of rules.
C. Only able to create legal obligations if there are existing legal rules.

The second of the two options available is so absurd that Hart would not seriously consider it – the U.S. and many other systems in which judges appeal to legal principles to resolve cases are in indisputably legal systems.

Hart thus appears saddled with the first option. What would happen if Hart were simply to argue that in all cases where judges acted as though principles were valid law, these judges were 'deluding' themselves? Hart could insist that in these cases the judges were truly reaching beyond the 'real' law that consists of legal rules to a 'pseudo' law.

This answer, however, also seems to be a failed solution. The point of Hart's enquiry was to establish a 'descriptive sociology'[93] of the legal practice. His theory seems to make the judicial practice of calling the principles that judges cite 'law' into a "grotesque joke."[94] If judges really do appeal to these things and officials within the system really do treat them as law, Hart's theory is a failure as his purpose is to give a clear descriptive account of how law *actually* functions. Judges truly *do* think of these things as law and they apply them as such; thus, Hart's theory stands in direct contradiction to the very 'internal perspective' to law that he was so intent on capturing.

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[93] *CL*, vi.
[94] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 44. (Hereafter cited as *LE*)

V

If Hart's theory is suspect and (like the legal realists) seems to make a 'grotesque joke' out of certain key practices of legal officials, is there a better theory? Is there a theory that can explain not only the existence of legal rules, but also take into account the judicial practice of considering other standards that are not rules in their judgments?

Dworkin argues in *Law's Empire*, that the solution is not to tinker with and fine tune Hart's details, but to abandon legal positivism altogether in favor of 'Law as Integrity' - or what, since Dworkin, has become known as 'Legal Interpretivism'. Dworkin believes that an Interpretivist theory of law is capable of not only explaining the existence of legal rules, but also accounting for the existence of legal principles. It is capable of describing the nature of law in a way that better accounts for the actual practices of judges and other legal officials than legal positivism. Ironically, Dworkin insists that 'Law as Integrity' can capture Hart's 'internal perspective' better than Hart himself actually can as it is able to pull together certain neglected, yet central, pieces of the puzzle. As Dworkin explains, his work attempts, in a way that Hart does not, to take up the "internal, participants' point of view: [*Law's Empire*] tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face."[95]

As a preliminary definition, *Legal Interpretivism is the view that the law of a society is determinable by the best political justification of its legal history and practice.* The law is not identifiable merely by pointing to a series of utterances from identified

[95] *Ibid,* 14

authorities; rather, it is an evolving justificatory practice. What the law actually is can only be determined by embarking on a massive historical sweep of all existing legal practices and then determining the best possible justification according to principles of political morality for those past practices. To identify law therefore involves *interpreting* past legal history in its best light.

VI

Dworkin fundamentally agrees with Hart that "law is a social phenomenon."[96] This is what seems to distinguish his work from the perspective of the substantive Natural Lawyers. The existence of a legal system is not in some way determined by some 'higher' law or moral considerations that have an independent existence from legal practice, as Aquinas or Finnis would argue. Dworkin seems to agree with Holmes, that "law is not a brooding omnipresence in the sky."[97] It is not in some sense 'out there' beyond us. While the implications of Dworkin's work may seem reminiscent of something like this, he does see an important and subtle distinction in what he is doing. What distinguishes his work from the work of the Natural Lawyers is the requirement that the existence of law be determined, in all cases at least partially, on the basis of existing legal practice. While the law is not exhausted by existing legal practice, it is always in some way parasitical upon it.

While this is true, law is not just a matter of establishing social facts. It has another dimension that is part of its very essence – it is argumentative:

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[96] *Ibid*, 13
[97] *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917)

> [Law's] complexity, function, and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions.[98]

At the very essence of the practice of law is debate over what existing propositions of law mean. Propositions of law are "all the various statements and claims people make about what the law allows or prohibits or entitles them to have."[99] These propositions of law, in turn, are justified on the basis of further claims – "propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic."[100] Dworkin believes that whenever a proposition of law is invoked, it concurrently invokes a series of deeper propositions, the existence of which are supposed to support that same proposition of law. Dworkin refers to these as the 'grounds' of law.

People can disagree in two different ways about law: empirical and theoretical. When they have an *empirical* disagreement about the law, they disagree on certain verifiable facts about the law. Dworkin gives the example of a California speed law. Two individuals could disagree about whether or not there is a statute that has been passed that in fact stipulates a certain speed limit for a certain road. By consulting the statute book, these individuals could verify whether such a law is, in fact, on the books. *Theoretical* disagreement, is much different and much more problematic. As Dworkin explains, this

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[98] *LE*, 13
[99] *Ibid*, 4
[100] *Ibid*

type of disagreement is about "law's grounds."[101] When there is a theoretical controversy in the law, there is disagreement over what deeper considerations support the existence of a certain proposition of law. There could be disagreement, for instance, over whether there is an unstated principle in the common-law, as we saw in the *Riggs v. Palmer* case, that 'no man shall profit from his own wrongdoing'.

It is principally in the case of *theoretical* disagreement that Dworkin's claim that a large part of law is 'argumentative' comes to the fore. When lawyers have a theoretical disagreement in a case before them, they argue about what the proper grounds of law actually are. While they may be in complete empirical agreement that some statute does state '*x*', they may differ about what the proper grounds of accepting *x* are, as well as how *x* relates to the larger legal practice which is supposed to support *x's* very existence. The idea is that, underlying all the propositions of law, there are deeper foundations that are relied upon to support them. These underlying criteria, however, are rarely (if ever) entirely articulated. Thus, when a case comes before a court, the officials often have the task of discovering and articulating these previously unarticulated grounds of law if they are to resolve the matter.

Lawyers will argue back and forth about what these grounds are and what they imply. They will attempt to demonstrate to judges that certain grounds of law exist that support their clients' case. It is crucial to note that this is precisely where Dworkin begins to impart the importance of legal principles. The legal principles appealed to in such cases as *Riggs* and *Henningsen* are courts' attempts to elucidate the grounds of law.

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[101] *Ibid*

VII

Dworkin expounds the view that the very point – the *essence* – of a legal system is that it is used to justify the coercive power of a society over an individual, as he explains:

> Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified. The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort.[102]

Law is fundamentally tied to the justification of coercion. It is about vindicating the society when it seeks to infringe the liberty of certain of its members. The title of Dworkin's early work - *Taking Rights Seriously* – reveals a great deal about his general conception of law. Legal practice, in its essence, is about arguing what rights we have against one another, as well as what rights we have against the larger society. Law is, at its core, about arguing where our boundaries of liberty begin and where they end, as he explains, "the heart of any positive conception of law… is its answer to the question why past politics is decisive of present rights. For the distinctions a conception draws between legal rights and other forms of rights and between legal arguments and other forms of argument, signal the character and limits of the justification it believes political decisions provide for state coercion."[103]

Crucially, this means that law, in contradistinction to the project of the legal positivists, is never distanced from questions of political morality. Legal positivists, such

[102] *Ibid,* 98
[103] *Ibid,* 117

as Hart, understand law as something like a 'guide' for conduct. It allows the state to organize and coordinate the activities of individuals and it allows the individuals to have an idea of what actions they are supposed to engage in and refrain from doing. Dworkin, however, regards law as a fundamentally *justificatory process*. It is about how legal officials, in the process of adjudication, ought to act towards the object that they are interpreting. They understand that the purpose of propositions of law is to justify the coercive actions of the state. Thus, their job is to interpret how the propositions of law that they find embedded within the history of legal practice (legal practice here meaning both legislative and adjudicative actions), are able to justify the use of coercion in the disputes that come before them. The argument thus is about law's fundamental *purpose*: Hart and Dworkin seem to have radically distinct understandings of the aims of a legal system. The former believes law to have a fundamental purpose of guiding conduct, the latter a purpose of justifying the state's use of force. Of course, both recognize that law typically does both guide and justify; however, the question is what happens in the fringe cases where one or the other seems not to exist. What identifying attribute do we look to in a society when we call its actions legal?

For Dworkin, the political is never wholly distinct from the legal. The adjudicative branch is always embedded in a 'political' enterprise, insofar as its task is to justify the state's use of coercive power. He chastises the 'plain-fact' or 'legal formalist' view that would have judges simply apply propositions of law without giving any thought to how these propositions relate to law's essential justificatory purpose, as Dworkin explains, "these positivist theories… support the plain-fact view of law, that genuine disagreement

about what the law is must be empirical disagreement about the history of legal institutions."[104] These plain-fact theories of law are not at all concerned about the deeper, and more significant, *theoretical* disagreements about propositions of law.

An accurate theory of law does not simply point to the 'propositions of law' that can be empirically identified - claiming that beyond these readily agreed upon sources no more can be said, as well as beyond which judges are left (strong) discretion to decide as they see fit. According to Dworkin's positivist, such questions not clearly resolved by appealing directly to these propositions are inherently political and controversial and thus cannot be covered by 'law'. Dworkin argues that, on the contrary, an accurate theory of law is one that embraces its very nature – a nature that is fundamentally imbued with a political task – to justify coercion.

Two crucial parts must be present in any theory of law if that theory claims to be a complete theory:

> A full political theory of law…includes at least two main parts: it speaks both to the *grounds* of law – circumstances in which particular propositions of law should be taken to be sound or true – and to the *force* of law – the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstance. These two parts must be mutually supportive. The attitude a full theory takes up on the question how far law is commanding and when it may or should be set aside, must match the general justification it offers for law's coercive mandate, which in turn is drawn from its views about the controversial grounds of law.[105]

Legal positivism gives a (largely flawed) account of the *grounds* of law. It focus on what conditions are required if we are to say that some *x* is a proposition of law – what is it that makes *x* a legal proposition as opposed to some other non-legal proposition? This is

[104] *Ibid*, 33
[105] *Ibid*, 110

where the questions seem to cease. The positivist's goal is descriptive. To venture into questions beyond the grounds of law is, for them, to enter into something that is beyond the scope of their descriptive project. If they were to consider questions about the force of law, they need to engage in justificatory questions that cannot be answered from a detached, external viewpoint. And it is not merely legal positivists who do this:

> Academic tradition enforces a certain division of labor in thinking about law. Political philosophers consider problems about the force of law, and academic lawyers and specialists in jurisprudence study issues about its grounds. Philosophies of law are in consequence usually unbalanced theories of law: they are mainly about the grounds and almost silent about the force of law. They abstract from the problem of force, that is, in order to study the problem of grounds more carefully.[106]

If there is this fundamental overlap between the grounds of law and the force of law, philosophies of law have been misguided in their pursuit. By neglecting a core part of the picture, they have painted a distorted and misshaped portrait of legal practice.

VIII

How then does Dworkin characterize a legal system? He insists that law is necessarily involved in political concerns, involves a justificatory element, and that it is social in nature. So how does Dworkin characterize law in order to account for these elements? Hart argues, it will be recalled, that we need to look for some conventional Rule of Recognition that establishes the conditions for legal existence within a society. This 'master rule' in conjunction with the Rules of Change and Rules of Adjudication establish the basic conditions that allow us to identify that a society has 'law'. Dworkin

[106] *Ibid,* 111

proposes that instead of understanding law as fundamentally *conventional*, we recognize that "law is an *interpretive* concept."[107] Law is an *attitude* that participants in a legal system take towards existing practices and sources. At its very core, it is an evolving practice that is defined by the meaning ascribed to it by those that participate within the 'legal' enterprise.

In order to demonstrate how law is possible to understand as an interpretive concept, Dworkin gives the following hypothetical situation:

> Imagine the following history of an invented community. Its members follow a set of rules, which they call "rules of courtesy," on a certain range of social occasions. They say courtesy, "Courtesy requires that peasants take off their hats to nobility," for example, and they urge and accept other propositions of that sort. For a time this practice has the character of taboo: the rules are just there and are neither questioned nor varied. But then... all this changes. Everyone develops a complex "interpretive" attitude towards the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value... The second is the further assumption that the requirements of courtesy... are not necessarily exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose *meaning* on the institution – to see it in its best light – and then to restructure it in the light of that meaning.[108]

Courtesy, in this community, represents what Dworkin intends as an 'interpretive concept'. It evolves with the meaning participants within the community give to it. When the 'interpretive attitude' towards courtesy develops, the 'rules of courtesy' cease to define what courtesy is. It is no longer just a matter of taking our hats off for the nobility – instead, courtesy is now identified by the complex, and often competing, meanings that

[107] *Ibid*, 87
[108] *Ibid*, 47

the participants instill into the practice. To identify what courtesy requires, one who takes the interpretive attitude determines how to see the concept in its 'best light'. The interpretive attitude would lead one to ask: what practices would *best* characterize courteous behavior? It may turn out that the archaic rule of tipping one's hat for the nobility no longer fully characterizes the practice in its best light. Seen from the standpoint of participants that see value in the practice, tipping one's hat for all citizens (as opposed to just the nobility) may now seem to be the proper, or best, way to characterize courteous behavior. Thus, courtesy is not exhausted by an enumerated list of 'rules' of courteous behavior; rather, courtesy evolves with the attitudes and values of its participants.

Law functions analogously to this community's concept of courtesy. Judges and other officials within a society determine law not purely by existing rules but instead according to an *interpretation* which sees these rules in their best possible light. They examine the legal practices and sources that exist and impose the best meaning upon them. Note that this does not imply that judges ever entirely disregard the existing practices or sources – to the contrary, the legal practices and sources are the basic building blocks of interpretation. Judges need some basic datum upon which to impose meaning. What they do, instead of disregarding these practices and expounding whatever they think is the best theory period, is take these basic components and build them into as strong and beautiful a building as they possibly can. According to Dworkin, "[j]udges normally recognize a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories

about the best interpretation of their responsibilities under that practice."[109] While judges often alter and realign the existing propositions of law in order to make them appear in their best possible light, they rarely totally ignore these propositions.

IX

Crucial to Dworkin's Integrity theory of law is the idea that the law must speak with 'one voice' – "the adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness."[110] The law cannot be identified piecemeal, one proposition at a time; it must be identified holistically, the veracity of each individual proposition of law depending on its ability to fit together with all, or at least most, of the other propositions. A judge determining what the law is in a particular case needs to look at the whole spectrum of what law is and what it is attempting to do instead of just the specific proposition(s) that give rise to the case at hand. The judge, in determining all cases, must examine how the law, if it were to be the product of a single hand, would look. The law is thus identified by its unity and consistency, not by its individual propositions taken in isolation.

Law as Integrity turns the pertinent concern of judicial activism on its head. The activism discussion largely focuses on whether judges are merely supposed to 'find' law

[109] *Ibid*, 87
[110] *Ibid*, 225

or whether they are, in some cases, able to 'invent' law. Dworkin argues that, to the contrary:

> Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question of whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.[111]

In deciding cases at hand, judges must balance the backward-looking and forward-looking concerns. First, judges need to align their judgments with existing legal practices – their judgments must *fit* within the current system. They need to determine cases in conjunction with the history of legal practice in a society. A judgment cannot arise in a vacuum; it must appeal to existing propositions of law and, to some (minimal) extent, it must mesh with them. This dimension of fit in determining cases functions as a threshold condition for law. A judge fails to make a correct legal decisions of their decision ceases to pass a test of fit within a system. It should be noted here that Dworkin is not so silly as to think that a legal decision must fit with each and every proposition of law that exists. A system is likely to give rise to contradicting principles that cannot all be made to mesh with a decision. He is also aware that there are certain propositions of law that are more pertinent than others are. It is far more important that a decision mesh with the more important propositions than the less important ones. A judge's inconsistency with a few peripheral propositions is far less troubling than a judge's inconsistency with foundational and prominent ones.

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[111] *Ibid*

However, this backward-looking dimension is not the whole story. Hart and other legal positivists (or Conventionalists, as Dworkin calls them) make the mistake of thinking that the dimension of fit is the ending – for Dworkin, this dimension is just a beginning. The second key part is the dimension of *justification.* Judges, he argues, "may find… that no single interpretation fits the bulk of the [law] but… more than one does. The second dimension of interpretation then requires [them] to judge which of these eligible readings make the work in progress best, all things considered."[112] It is possible, indeed probable, that a number of the possible interpretations available to a judge in a case will (at least minimally) mesh with the history of legal practice. A case may be determinable in a plethora of divergent ways, all of which are minimally consistent with existing legal practice. When this is true, the judge must turn to discerning which of the alternatives available *best* justifies the state's use of coercion in the case at hand. The judge must delve deeply into arguments of political morality to discern the correct answer to the case.

This is precisely how Dworkin sees the solution to the problem of whether judges find or make law. They need to determine how to decide consistently with existing practices (hence, they need to *find* what those existing practices and conventions are). They also need to justify law and its coercive mandate (hence, they need to *make* the law the best that it can be). Dworkin does offer a word of caution here, however:

> …the formal and structural considerations that dominate on the first dimension figure on the second as well, for even when neither of two interpretations is disqualified out of hand as explaining too little, one may show the text in a better light because it fits more of the text or provides a more interesting integration…

[112] *Ibid,* 231

> So the distinction between the two dimensions is less crucial or profound than it might seem. It is a useful analytical device that helps us give structure to any interpreter's working theory or style.[113]

The distinction between fit and justification is not as clean as it may appear. The two merge into each other. Because a judgment fits the past legal history, it consequently may be grounds for why it is the best justifying decision. It is not simply the case that once we pass the fit threshold, we simply proceed to justification with no consideration of fit, as he explains:

> [A judge] need not reduce his intuitive sense to any precise formula; he would rarely need to decide whether some interpretation barely survives or barely fails, because a bare survivor, no matter how ambitious or interesting it claimed the [law] to be, would almost certainly fail in the overall comparison with other interpretations whose fit was evident.[114]

Thus, the forward-looking and the backward-looking elements often significantly overlap and the dimensions of fit and justification neatly merge into each other.

X

Law as Integrity finally culminates in the hypothetical judge 'Hercules'. Dworkin introduces Hercules as an example of how Law as Integrity would ideally function. This judge is offered as a model for how both to adjudicate hard cases and, relatedly, for how to identify the law of a community. Hercules is a "judge of superhuman intellectual power and patience who accepts law as integrity"[115] and must use these virtues do decide hard cases that come forth in a legal system. This hypothetical judge is introduced not in

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[113] *Ibid*
[114] *Ibid*
[115] *Ibid*, 239

order to show what judges are actually like, but rather to show what judges *ideally* would be like. Dworkin does not hold that any Hercules does, or even will, exist within any legal system; instead, he points to Hercules as a paradigm of what a judge must strive to become – a mold for judges to model themselves after.

Law, according to Dworkin, is what this ideal adjudicator would determine law to be. To identify law in cases that come before him, Hercules takes into consideration the whole history of legal practice. He has the capacity to grasp all the relevant precedents and history that exist within a society. Hercules also has an exceptionally keen mind for identifying and unifying principles of political morality. He is able to grasp what is best according to these principles. Hercules puts together these two elements and makes the best constructive interpretation that is possible in the cases that come before him. He makes balanced decisions that combine the whole history of legal practice with the best principles of political morality that are identifiable within these practices.

This ideal adjudicator pulls together all of the disparate pieces of an imaginary legal puzzle; creating a conception of law that resembles a 'seamless web' in which all of the strands mutually support one another. Hercules identifies the best interpretation of legal practice - one that both identifies and vindicates the legal history of a community. This task is an enormously complex undertaking. It asks a judge to pull together a massive array of (often) competing and contradictory principles and practices and create an interpretation that both unifies and justifies them all. As Dworkin explains, Hercules is required to:

> ...test his interpretation of any part of the great network of political structures and decisions by asking whether it could for part of a coherent theory justifying the

> network as a whole. No actual judge could compose anything approaching a full interpretation of all of his community's law at once. That is why we are imagining a Herculean judge of superhuman talents and endless time.[116]

The identification of law, according to Law as Integrity, is remarkably complex – so much so that the actual law (defined as the best interpretation of a community's legal practices, as identifiable by an ideal adjudicator) may be epistemically impossible for ordinary judges to identify. However, while it is true that "no actual judge could compose anything approaching a full interpretation of all of his community's law at once… [a]n actual judge can imitate Hercules in a limited way. He can allow the scope of his interpretation to fan out from the cases immediately in point to cases in the same general area or department of law, and then still farther, so far as this seems promising."[117] A non-Herculean judge can participate in the Herculean enterprise and do everything he can to identify what the law ideally is within a certain limited scope.

The judge's *duty* is to decide as nearly as he can to what Hercules would decide. When confronting a hard case he fails to live up to his calling if he simply exercises strong discretion and concedes that the law has 'run out'. Law as Integrity, on the contrary, insists that the law *never* runs out. The law only runs out, Dworkin insists, if we accept the misguided view of legal positivists and their insistence that law is identified according to its pedigree alone. If we take the richer Interpretivist account of law – the one that identifies law as the best justification consistent with past legal history – we recognize that law is never exhausted. There is always a uniquely correct answer to a case at hand. A judge is never allotted discretion, *carte blanche,* in challenging cases. The law

[116] *Ibid*, 245
[117] *Ibid*

is always there waiting to be found - and it is the judge's task, even when the law is exceptionally difficult (if not utterly impossible) to find, to search as hard as he can for it.

XI

As this section has made clear, Dworkin has offered a powerful challenge to the Hartian conception of law and judicial obligation. He forcefully challenges Hart's claim that we can identify law according to conventional secondary rules. His challenge is twofold. First, Hart's identification of law purely according to its pedigree fails properly to describe how a complex legal system actually can identify law. The rule-based nature of Hart's conception completely ignores the existence of legal principles that figure prominently in most (if not all) developed legal systems. Second, Dworkin offers a competing account of law that is supposed better to capture our intuitions about the way that legal practice actually functions, understood through the eyes of those that are part of the practice. He explains that his theory "takes up the internal, participants' point of view: it tries to grasp the argumentative character of our legal practice by joining with that practice and struggling with the issues of soundness and truth that participants face."[118] Hart's theory, while it seeks to capture the internal perspective, "ignores[s] questions about the internal character of legal argument, so [his] explanation [is] impoverished and defective."[119] Dworkin's theory purports to explain, in a way that Hart cannot, the role of arguments about political morality in framing judicial decisions. While Hart can somewhat capture the 'backwards-looking' element of relating judgments to existing

[118] *LE*, 14
[119] *Ibid*

legal practices, he could not capture the 'forwards-looking' justificatory element that relies heavily on arguments about political morality. Law as Integrity, on the contrary, captures both elements, better articulating the very essence of judicial practice.

E. MEETING THE DWORKINAN CHALLENGE

I

In section C, I developed a conception of judicial activism within a Hartian framework. I argued that judicial activism is fundamentally concerned about legitimacy and that, following Hart, we can understand that the legitimacy of adjudicative officials' actions is testable both on a legal standard (according to both the primary and secondary legal rules of a system) and on a moral standard (what ought a judge to have done, all things considered). I insisted that much of the confusion and polarization that surrounds judicial activism results from a tension between some individuals arguing about legal legitimacy and others arguing about moral legitimacy. I concluded that if we follow Hart and be clear about which of the two we are concerned with, we are certain to reduce some of the serious disagreements concerning the status and desirability of judicial activism in our society.

The Dworkinian challenge calls into question two crucial elements of my analysis. First, it questions the very nature of law as the union of primary and secondary rules. Instead of understanding law as a social phenomenon centered on a Rule of Recognition (supplemented by Rules of Change and Rules of Adjudication) that creates rules of primary obligation, Dworkin insists that we understand law as an interpretive concept. How we determine the legality of judicial actions, if we follow Dworkin and adopt 'Law as Integrity', involves more than simply identifying the powers of judges to alter or negate the law; instead, the legal legitimacy of judicial actions turns on how well they can *justify* their decisions according to the dimensions of fit and justification. The legal

legitimacy of adjudicative officials' negations and alterations is never a 'yes' or 'no' question about whether these officials possess an appropriate power and have heeded an incumbent duty; rather, the legal legitimacy of such alterations or negations rests on the official's ability appropriately to tie together past legal history with concerns of political morality that are supposed to be embedded within that same legal history. Legal legitimacy is thus a question of whether adjudicative officials 'more' or 'less' successfully tie together these two concerns of fit and justification. A judgment that portrays law in a better light, even if it alters what would otherwise seem a case that falls within the umbra, and even if it is unclear whether an adjudicative official possesses the appropriate powers to change the law, may well be legally legitimate.

The second (and related) element of my analysis that Dworkin calls into question is the very feasibility of distinguishing 'moral' from 'legal' legitimacy. Since the Legal Interpretivist argues that the legality of judicial decisions is a matter of balancing the dimensions of fit and the dimensions of justification, it seems difficult to distinguish 'law as it is' from 'law as it ought to be'. Dworkin does mention that often the sheer gravity of a long line of cases supporting a poor judgment may be insurmountable (the 'embedded mistake'); however, this concession to the side, in the vast majority of cases, and with *any* discretionary cases, the correct *legal* answer to a legal question necessarily involves the correct answer to questions of political morality. Law is fundamentally about how the state justifies coercion against its citizens. This means that the judicial obligation is to come up with the best answer for why or why not coercion ought to be used against an individual or group. If this is true, it is a serious error to separate questions of moral

legitimacy from questions of legal legitimacy, as moral legitimacy creates legal legitimacy when it comes to defending a society's use of coercion.

If Dworkin is correct, we certainly need to reject the promising theoretical framework for understanding judicial activism elaborated in section C. If law is not properly understood as the union of primary and secondary rules and if it makes no sense to separate questions of moral and legal legitimacy, the Hartian framework must be rejected. In the proceeding section, I argue, to the contrary that some of Dworkin's more important insights can be incorporated within the Hartian framework. By heeding some important distinctions and recognizing a third sense of legitimacy, institutional, I believe that we can make sense of some of Dworkin's more pressing criticisms and concerns - legal positivism can embrace Dworkin's insights within the Hartian framework without losing its substantial commitments. While there is a way to incorporate some of these elements into a richer framework for understanding judicial activism, there are other elements of Law as Integrity that must be rejected. I claim that some of Dworkin's alternative views about the nature of law are fundamentally problematic. In particular, I follow Waluchow, Raz, Coleman and others in insisting that Dworkin seriously confuses law with adjudication. There is a substantial difference between the two enterprises that needs to be articulated and respected if we are to have a proper understanding of the legal system. The Dworkinian failure to appreciate this not-so-subtle difference leads to a serious misrepresentation of the nature of law. In the end, I argue that if we heed the distinction between law and adjudication and if we define a tertiary branch of legitimacy

(institutional), the Hartian framework for describing and analyzing judicial activism is both feasible and manifestly more illuminating than a Dworkinian one.

II

A glaring ambiguity exists that needs to be rectified. In sections B and C, I detailed and unpacked Hart's notion of primary and secondary rules and described his concept of law as the union of the two. What we need to clarify is whether all of Hart's secondary rules need to be understood as binding legal rules. The problem is that Hart fails to unpack the exact nature of the secondary rules that create, adjudicate, and alter the primary ones. What creates serious confusion is whether the norms themselves are what we identify as law, or whether it is how the norms are practiced by the officials of that system that determines their status as law. In his article 'Negative and Positive Positivism', Coleman identifies this very ambiguity with regard to the Rule of Recognition:

> The notion of a rule of recognition is ambiguous; it has both an epistemic and a semantic sense. In one sense, the rule of recognition is a *standard* which one can use to identify, validate, or discover a community's law. In another sense, the rule of recognition specifies the *conditions* a norm must satisfy to constitute part of a community's law. The same rule may or may not be a rule of recognition in both senses, since the rule one employs to determine the law need not be the same rule as the one that makes law determinate.[120]

What Coleman recognizes is that the Rule of Recognition, as a secondary rule of the system, has two possible interpretations. On one hand, it can be interpreted purely as a descriptive statement of how a society determines what is law and what is not. On the

[120] Jules Coleman, 'Negative and Positive Positivism', *The Journal of Legal Studies*, vol.11, no.1 (Jan., 1982), 141. (Emphasis added)

contrary, it can be interpreted as a statement of the very conditions that are supposed to guide the behavior of officials and other subjects of a legal system. The difference is that the former is descriptive whereas the latter is prescriptive. A Rule of Recognition can therefore either describe legal practice or be a statement of what norms establish legality. If we understand the Rule of Recognition as descriptive, it does not have to identify legal validity – legal validity is a matter of what the adjudicative officials and other officials within a system do in their official practice. If we understand a Rule of Recognition as prescriptive (or norm creating), it functions as a source for criticizing the practice of both legal subjects and officials – including adjudicative officials. What it does is establish the ultimate criteria of legality that founds a legal system. Even if legal officials systematically fail to live up to its requirements, the law is what this fundamental rule stipulates.

The difference is of critical importance and is a large part of what divides so-called 'Inclusive Legal Positivism' (hereafter ILP) from 'Exclusive Legal Positivism' (hereafter ELP). ILP identifies law according to the conditions of validity that stem from a socially constructed Rule of Recognition. ELP, on the contrary, identifies law according to the official practices of adjudicative officials. Both recognize law as a social phenomenon (law's existence is contingent on the presence of certain social facts). The key difference is that ILP accepts that there can be law even if there is no history of official adjudicative practice of that law, whereas ELP insists that law can only exist when official adjudicative practice exists. For ILP legal norms can exist even before legal

officials have recognized them, whereas with ELP legal norms cannot exist without a history of official legal practice.[121]

While it is obvious how ELP is consistent with the 'Social Thesis' (i.e. that law is contingent on social facts), it is less clear with the case of ILP. Proponents of ILP argue that the existence of law stems from a Rule of Recognition that, once systemically recognized, becomes normative. So the Rule of Recognition is both contingent on social facts (it must be socially recognized as the source of law) while at the same time it is normative (its existence determines legality). The challenging conceptual question faced by ILP is: *to what extent does the existence of normative criteria within a Rule of Recognition undermine its social nature*? Here I think we are wise, once again, to heed Coleman's distinction between the 'content' of a rule and its 'application'. There can be widespread agreement that a certain constitutional law forms part of the Rule of Recognition of a system while it being unclear how this law is to be interpreted. This problem is particularly acute in systems with entrenched charters of rights. While all officials may recognize that conformity with these enumerated rights is part of the ultimate criteria of legality, what these specific rights mean in concrete circumstances can be the subject of serious disagreement. This does not mean that these rights are not part of the Rule of Recognition, nor does it mean that their meaning is unclear in all cases, what it means is that in some cases (and sometimes this is a significant number of cases) how a rule applies is a matter of dispute. Perhaps most importantly for the matter at hand, what

[121] Michael Giudice's 'Unconstitutionality, Invalidity, and Charter Challenges' in *The Canadian Journal of Law and Jurisprudence,* vol. 15, no.69 (January, 2002) neatly summarizes the debate and conceptual commitments of ILP and ELP.

this means is that officials can systematically misapply a rule and that rule can still be a rule of the system. That the Rule of Recognition is misapplied, even by every agent in the system, does not mean that it ceases to exist.[122]

While heavy debate has ensued about the nature of the Rule of Recognition and how law is identified according to it, the precise status of the other secondary rules, notably (for this paper) the Rules of Adjudication have not been discussed in depth in the literature on Hart`s secondary rules. Do the Rules of Adjudication and Rules of Change suffer from a similar ambiguity as the one that surrounds the Rule of Recognition? Surely the reason that there has been so little discussion on this possible ambiguity is that both the Rules of Change and the Rules of Adjudication, as identified earlier, are parasitical on the Rule of Recognition. So if this ambiguity concerning the Rule of Recognition exists, it is carried over into the Rules of Change and the Rules of Adjudication.

The framework for judicial activism articulated in section C relies heavily on Rules of Adjudication. The question is whether the Rules of Adjudication are descriptive or prescriptive: are they simply a *statement* of how adjudicative officials, as a matter of fact, determine cases, or do they establish *criteria* that determine whether adjudicative actions are legal? The difference is crucial. The argument in section C implies that the Rules of Adjudication actually establish normative criteria that legally bind the actions of adjudicative officials, as well as establishing the conditions that empower them. As such they establish the essential criteria for determining the legal legitimacy of adjudicative

[122] As an example, I would draw attention to the infamous *Reference Re: Manitoba Language Rights* [1985] 1 S.C.R. 721. In this decision it was ruled that *all* acts of the Manitoba legislature were invalid because they had not been passed in French as well as English. Even though virtually all courts and legislatures had treated unilingual statutes as law, it was ruled that they were legally null and void as these statutes failed to live up to the fundamental constitutional requirements that they be published bilingually.

actions. If these rules are not to be understood as prescriptive but as descriptive, legal legitimacy is really a meaningless concept. One cannot criticize a judge for failing to act according to the Rules of Adjudication if all one means by the Rules of Adjudication is simply a description of what adjudicative officials tend to practice in deciding cases. All one can say is that this or that adjudicative official acts contrary to or in conformity with a certain tendency among other adjudicative officials - not that they have broached some standard that they were obligated to uphold.

As is certainly clear, I intend Rules of Adjudication in the prescriptive sense herein.[123] They establish normative constraints on adjudicative officials that, even if broached or not practiced, are nevertheless to be regarded as legally binding upon them. That every adjudicative official in a system may systematically breach the Rules of Adjudication does not establish that the Rules of Adjudication are not rules of the system. In such a case, I would insist that all adjudicative officials of the system are acting contrary to the requirements of legality - they are acting legally illegitimately. While I intend a fully prescriptive understanding of the Rules of Adjudication herein, I do not want to denigrate from the importance of a purely descriptive understanding of the Rules of Adjudication either. It is indeed quite possible to develop a general rule about how adjudicative officials tend to decide cases, one that does not simply point to requirements of legality but also to other factors as well. What I do not do in this paper, however, is treat this general rule about how officials adjudicate as an accurate description of when adjudicative officials act with legal legitimacy.

[123] In the postscript to the *Concept of Law*, I believe that Hart also takes this stance - see *CL*, 256-259.

III

Having noted that the secondary Rules of Adjudication, as articulated herein, are intended to be a set of rules that prescribe when adjudicative officials are under legal duties and when they possess legal powers, we can now begin to discuss some of the important challenges posed by Dworkin. To begin, one of Dworkin's strongest challenges to Hart has been his challenge about the nature of what Dworkin calls 'legal principles'. Dworkin, as explained in section D, insists that law is not exhausted by 'legal rules' which function in an all-or-nothing fashion; rather, law also involves legal principles which do not apply in an all-or-nothing fashion, but instead apply more-or-less. How much any principle applies depends on the nature of the case and involves balancing that principle against competing ones. While some of these principles are explicitly identifiable within legal statutes and decisions, some are implicitly embedded – an adjudicative official can 'discover' them by looking closely at patterns of reasoning within case history. Whether explicit or implicit, Dworkin argues that adjudicative officials are legally bound to take these principles into consideration and 'weigh' them in their official decisions. If Dworkin is correct, adjudicative officials are bound by a legal duty to weigh these principles in legal decisions – the failure of an adjudicative official properly to weigh a required principle creates legal illegitimacy.

In response, it is far from obvious why this is detrimental to the Hartian understanding of secondary rules. Adjudicative officials *can* (although not necessarily) be under a legal-adjudicative obligation to consider certain legal principles in their decision making and law creating activities. Nothing Hart says runs contrary to this. Dworkin

mistakenly criticizes legal positivism when he claims that "[t]he set of [all] valid legal rules is exhaustive of "the law," so that if someone's case is not clearly covered by such a rule... then that case cannot be decided by an official "applying the law"."[124] Hartian positivism is committed to the view that all law must be identified according to a Rule of Recognition and therefore all law, to be law, must have a valid source – this much is true. Where Dworkin misses the mark is in his assertion that only the 'all-or-nothing rules' can be valid constraints on adjudicative activities according to a Rule of Recognition. Valid legal sources (i.e. the Rules of Adjudication) can prescribe that adjudicative officials weigh certain general principles when discerning facts, law, and their admixture.[125] Adjudicative officials can have legal obligations to adjudicate cases according to legal principles – the existence of such duties arising because they have been imposed upon them according to secondary Rules of Adjudication that are themselves valid according to the Rule of Recognition. This remains true even though it may often be difficult to discern if and when adjudicative officials are, in fact, under such a legal obligation.

IV

In addition, even when adjudicative officials are not under a strictly legal obligation to apply certain principles in rendering their decisions, they may be under a certain obligation that is not properly described either as legal or as moral. In his commentary on constitutional law, A.V. Dicey has noted that certain systems of government may be limited not merely by law but also by what he calls 'conventions'.

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[124] *LE*, 17

[125] For Hart's own defence of this issue, see Hart's postscript, *CL* 259-262.

There may be situations in which governments, while not strictly required to do or refrain from something according to constitutional law, nevertheless have a constitutional obligation arising through political conventions. These conventions are not strictly binding by law but nevertheless function as normative constraints on what governments and their agents are able to do.[126] In his recent book, *The Living Tree*, Waluchow neatly summarizes this point:

> [Constitutional conventions] are informal conventional rules arising within the practices of the wider political community… that often impose important limits on the basic government powers established by constitutional law. The political community observes these conventions and does so with the clear understanding that strict conformity is not only the norm but also mandatory. The violation of a constitutional convention might result in serious *political* costs… But it is generally understood that… they are not *legally enforceable*.[127]

The existence of constitutional conventions forms part of the basic framework that regulates government activities. They exist precariously, to be sure, as they do not have the force of law; nevertheless, being aware of their existence is crucial to understanding the proper obligations of governments.

I propose that such conventions also regulate and bind the activities of adjudicative officials. In a legal system adjudicative officials can be, concurrently, under both a legal obligation and what I term an 'institutional' obligation when deciding cases.

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[126] See A.V. Dicey, *The Law of the Constitution*, 10th Edition (London: Macmillan, 1965). Patrick Monahan al *Constitutional Law*, 3rd Edition (Toronto: Irwin, 2006), 7-8.

[127] Wilfrid Waluchow, *The Living Tree* (Toronto: Cambridge, 2007), 28. Patrick Monahan also offers a clear description of constitutional conventions in his *Constitutional Law*, 3rd Edition (Toronto: Irwin, 2006), 7-8. According to Monahan, "constitutional conventions [are] rules of political behaviour that are regarded by political actors as binding on them but are not enforced directly by the courts. Some of the most important rules of political behaviour exist as constitutional conventions." (7) In addition, and importantly to this paper, Monahan suggests that constitutional conventions "usually arise in circumstances where some official or institution is granted a very broad discretion. A constitutional convention will limit the manner in which this discretion can be exercised by specifying the circumstances or factors that must be taken into account by the official or institution that has been granted the authority in question." (7 n.9)

By an institutional obligation I intend something similar to Dicey's conventions – a normative constraint on adjudicative activities that are not properly characterized as law, nor are they properly characterized as a strictly moral obligation. I refer to these as institutional obligations because they owe their existence to the customary practices of legal institutions. Adjudicative officials, for instance, when deciding a case, may find that they are left strong discretion according to the Rules of Adjudication to determine some question of law, fact, or their admixture. Technically, in such a case, the law is wide open and they are *legally* free to decide as they see fit. This may not, however, exhaust their obligations as adjudicative officials within an institutional setting. Where the law does not dictate how they are to proceed, there may be a number of institutionally established restrictions concerning how they ought to adjudicate. While these do not impact the legality of the adjudicative decision, they may form the basis for serious sanctions (such as removal from office) or, at an extreme limit, may result in other agents of the legal system refusing to give force to their judgments – even if they were, strictly speaking, legally valid. In such cases we are wise to describe the situation as one in which adjudicative officials act with legal legitimacy while failing to act with institutional legitimacy.

A simple hypothetical example may clarify this point. Imagine a case in which a Canadian Supreme Court justices, confronted with excellent and equally compelling arguments from both the plaintiff and the defendant in a civil case decides that they will flip a coin to determine who will win. More so, these justices do so candidly, explaining in their reasons of judgment that both sides presented equally compelling cases and

therefore they resorted to flipping a coin. How do we accurately describe this situation? Barring any explicit legal rule that prohibits the use of a coin to resolve tightly contested cases, it would still appear that the justices have violated a certain expectation of interpretation. Even if it remains true that they did have generally wide-open legal powers to determine a unclear case, there is an institutionally established and institutionally practiced obligation that cases are not to be determined using a coin toss. It seems clear that these adjudicative officials will have acted illegitimately according to professional standards associated with their institutional obligations; thus, we can properly describe their actions as institutionally illegitimate – these officials violated a norm of behaviour incumbent upon them which were established not by law, but by customary expectations of the legal institution.[128]

V

It is important to be clear in this distinction as confusing legal obligations with institutional obligations can have a significant impact on how we describe and evaluate judicial activism. By confusing the two we may mistakenly claim that an adjudicative official has acted legally illegitimately when what we really have in mind is a failure to live up to a institutional obligation. This is precisely where I think that Dworkin goes wrong. Recall that Dworkin argues that a crucial part (if not the most crucial part) of the process of adjudication is the justification of state coercion. The law is supposed to provide reasons for why or why not the state is able to coerce its citizens. An adjudicative

[128] There may also be a good case for describing the decision as 'morally illegitimate', although this may depend on the nature of what exactly the adjudicative official has decided.

official is obligated, according to Dworkin, to discern whether a case merits the use of the state's coercive mandate or whether it fails. To reach this conclusion adjudicators have to discern whether the grounds of law are justified if brought into force.

The question I pose to Dworkin is simply this: if adjudicative officials fail properly to justify coercion in a specific case, does this mean that their decision does not legally bind? There *may* be a legal-adjudicative obligation in a system that makes the legality of the decision contingent upon justifying state coercion in some way,[129] but there is nothing necessary about this. In systems where no legal obligation to justify the state's coercive mandate exists, it does seem absurd to claim that the failure to justify coercion leads to a legally illegitimate decision. If a case is resolved by an adjudicative official, acting within his or her proper sphere, following all proper procedural rules, their decision *does* legally bind – even if their decision fails to give a clear justification of how the state uses or fails to use coercion against the citizen. To claim that the adjudicative official has failed in creating law or living up to his or her legal obligations is to give a faulty description of the situation. The specific attitude that the adjudicative official takes towards the case, the specific way that they exercise their interpretive and discretionary powers, is utterly irrelevant to the legality of their decision, provided there is no breach of the Rules of Adjudication.

This analysis does not suggest, however, that the adjudicative officials are under no ulterior institutional obligations that supplement (and perhaps even supersede) the Rules of Adjudication. An adjudicative agent, particularly in modern Western

[129] A system, for instance, could simply establish legal standards that protect citizens from laws that unfairly coerce them – a Charter of Rights or a Bill of Rights for example, are supposed to do just this.

democracies such as the U.S. and Canada, may have a strong institutional obligation to ensure that the law's coercive mandate is justified in all cases brought before them. A failure to use their discretionary powers to ensure this may rightly be classified as an institutional obligation upon them by the very nature of the office they hold and its place within our democracies. More so, the establishment of a widespread practice amongst other adjudicative officials may establish a customary institutional obligation upon the official. The presence of a long and well-established tradition of interpreting cases in a certain way gives a strong indication of an entrenched institutional obligation. Despite its conventional practice, it fails to be law, at least in this example, because the Rules of Adjudication, as established according to a fundamental Rule of Recognition, do not point to this practice as a *valid* legal rule. The fact that it does not possess legal validity discounts it as a *legal* obligation, properly so-called.

Dworkin is therefore correct to recognize that there is an obligation upon adjudicative officials to uphold individual rights against undue coercion by the state in modern Western democracies. But he is wrong to claim that this is a general legal obligation on adjudicative officials in every legal system.[130] In fact, many of Dworkin's fundamental criticisms against legal positivism stem from a similar mistake. His conception of 'Law as Integrity' is best conceived as a politico-institutional conception of the obligations of adjudicative officials rather than a proper theory of law. It is precisely here that legal positivists have been quick to note Dworkin's shortcomings. The major

[130] This, of course, is not the case when the courts are adjudicating cases arising under the *Bill of Rights*, or the *Canadian Charter of Rights and Freedoms* in which courts have a legal obligation to uphold individual rights against laws that attempt to use the state's coercive power to infringe these rights.

error of Dworkin's theory is that instead of giving a proper account of law, it gives an account of adjudication. That is, instead of giving an answer to the question 'what is law?', Dworkin answers the question 'how do officials resolve cases?'. The two projects, while intimately related, are conceptually distinct, and, as Wil Waluchow notes, "Dworkin collapses the two into one."[131] As I have attempted to demonstrate above, how officials resolve cases before them may involve obligations that are not properly understood as legal. Particularly, when it comes to some of the discretionary powers of adjudicative officials, I argue that their lack of strong discretion is not a result of legal restraints but institutional restraints instead. Even though, legally, adjudicative officials may have a vast array of possible interpretations of a case at their disposal, institutional obligations may significantly limit their proper sphere of discretion leaving little, if any room, for them to make creative decisions.

Furthermore, following from Dworkin's unfortunate error of collapsing an adjudicative and legal theory into one, we are faced with the dilemma of misunderstanding how the grounds of law impact their institutional force. Dworkin, by tangling a theory of law with a theory of adjudication makes the mistake of associating law with whatever obligates an adjudicative official in making a decision. The problem, as Waluchow has noted, is that:

> ...the law is not always legally binding on judges. Sometimes its force may, indeed must, legally, be overcome by judges. One immediate and crucial implication of this point is that it is very dangerous to identify a theory about the nature (or grounds) of law with a theory of adjudication. If the law is sometimes not legally binding on judges, but we nevertheless attempt to identify the law with

[131] *Inclusive Legal Positivism*, 32

> whatever is binding on judges in adjudication, we run a serious risk of missing our mark… Dworkin does just that.[132]

What Waluchow recognizes is that often simply because something is the law does not necessarily mean that it will be decisive in adjudication. Often adjudicative officials, as I explain in section C, will both possess a legal power to alter or negate law and, concurrently, be under a legal obligation to use that power. This means that, quite contrary to Dworkin's theory, the existence of law does not entitle us to a certain legal decision. The law does not always legally bind in adjudication. Dworkin's insistence that a proper theory of law should involve an overlap between legal grounds and their institutional force seems to miss the mark here. There is no legal obligation to uphold legal rights when there are appropriate adjudicative powers (identifiable according to the Rules of Change and Rules of Adjudication) to overcome the force of law. In the absence of these powers there is, of course, a legal obligation for adjudicative officials to grant law its proper force; however, in the presence of these powers there is no obligation, and in fact, there may be a legal obligation instead to deny force to law in the case of a directed power.

VI

I have argued throughout that if we are interested in discerning when adjudicative officials have engaged in illegitimate behaviour we need a clear understanding of what precisely they have done that is illegitimate. Have they violated their legal duties, their moral duties, or their institutional duties? Clearly if we follow Dworkin's theory, we lose

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[132] *Ibid*, 33-34

sight of this altogether. Instead, we conflate a theory of law with a morally charged theory of adjudication and the three senses of legitimacy collapse into a perplexing, politically charged mess. To be candid, if we attempt to solve the dilemma of judicial activism according to a Dworkinian framework we both misconceive the very nature of what adjudicative officials are doing and we become embroiled in a hopeless situation in which we criticize adjudicative officials from a number of different angles all at once with no sense of how these criticisms are distinct. Dworkin's theory is incapable of disentangling the divergent obligations of the adjudicative officials and therefore must be rejected as part of a possible solution to the dilemma posed by judicial activism.

F. CONCLUDING ANALYSIS

I

I now have the burden of explicating how my descriptive framework actually helps to clarify and resolve the political chaos created by the protagonists and antagonists of judicial activism. I will revisit the positions of both the protagonists and the antagonists and show how their arguments are actually directed at cross-purposes at certain essential points. My primary purpose throughout has been to demonstrate that clear thinking about how the law functions and the nature of a legal system leads to clarity in the important (and divisive) political discussions about the obligations of adjudicative officials. Crucially, I have argued throughout that there exist distinct obligations that are incumbent upon the judiciary that need to be understood in separate ways. The failure of both protagonists and antagonists of judicial activism to pinpoint exactly which obligations they are concerned with in defending or attacking adjudicative officials is the predominant reason the issue is so divisive, confusing, and not moving forward. It is not enough, I submit, simply to argue that an adjudicative official has acted illegitimately. What we need, if our debates are to be constructive and resolvable, is a claim about what specific type of illegitimacy an adjudicative official has engaged in when altering, negating, or denying force and effect to law. In some cases clarity about this issue is enough to resolve the debate entirely – the disputants simply recognize that they are concerned with different types of claims. In other cases, of course, clarity about the issue does not resolve the dilemma - and I have no pretensions to claim that this descriptive-theoretical account of judicial activism can resolve all issues. What I do insist, however,

is that this clarity can allow the disputants to identify precisely *where* they disagree. It ensures that their disagreement is a clear and necessary one. If disputants are able properly to articulate their disagreement, we have a crucial first step towards resolution. Knowing where and why we disagree does not eradicate the problem, but it does ensure that our arguments can at least be directed to the right points.

In addition, this final section makes a few basic arguments about the relationship, and the primacy, of moral, legal, and institutional obligations. I assert that whatever the content of the legal and institutional obligations, the primary obligation on the adjudicative official is always the moral one – as legal and institutional obligations rest themselves on the strength of the moral claims supporting them. What matters, I suggest, is not the obligations placed upon adjudicative officials by legal or institutional requirements; instead, *what matters is the agent-specific moral justification(s) for why legal and institutional obligations ought to be fulfilled.* Adjudicative officials are moral agents; thus, if adjudicative officials participate in, or neglect, legal and institutional requirements, they are to be held accountable for both the intended as well as the actual effect of their actions. All of this is a suggestion as a complete and compelling argument on this matter requires a deep (and herein unaccomplished) account of the nature of human moral agency. In spite of the inconclusiveness of this, the implication is that judicial activism requires a serious inquiry into the links between morality, human agency, and professional responsibilities – an inquiry that, as of yet, is not present in the literature on judicial activism and which I fully intend to engage with in future endeavours.

II

In section A, I outlined a few basic arguments associated with the protagonists and the antagonists of judicial activism. The antagonists generally fell within either the Textualist / Formalist position (adjudicators must confine themselves solely to the wording of statutes or precedents when deciding cases) or the Originalist position (adjudicators must decide cases according to the intent of the framers of legislation). Protagonists, on the other hand, generally derived their position on judicial activism from the Natural Law perspective (adjudicators must make law conform to objective and unchanging moral truths), the Legal Interpretivist or Dworkinian perspective (adjudicators must use the law to justify coercion), or the perspective of the Conscientious Objector (adjudicators cannot allow the law to violate their moral convictions).[133] I now intend to show how each of these positions needs to be reinterpreted in light of the descriptive framework developed above.[134]

The antagonists of judicial activism tend seriously to confuse the divergent senses of legitimacy. Scalia clearly demonstrates this latent ambiguity in his thinking when he makes the following claims:

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[133] I must clarify here that I do not hold the view that any of the above perspectives are necessarily fitted into the category of protagonists or antagonists – I use the word 'generally' to convey this point. There are Originialists / Textualists that may well be protagonists of judicial activism in certain cases. Natural Lawyers and Dworkinians may also be keen to chastise the judiciary for activist behaviour and thus be antagonists of judicial activism. Nothing about these views necessarily makes them protagonists or antagonists. All I have meant to suggest both here and in the introductory section is that the most prominent attacks or defences of judicial activism have been associated with these specific frameworks.

[134] While I am currently confident in the analysis that proceeds, I do not believe that my argument rests on the specifics. What matters is that this analysis demonstrates *how* a revised Hartian framework could significantly clarify and resolve some of these issues. I am willing to concede that I may not have things entirely correct; however, my claim still holds true if only it demonstrates that through using this framework the issues can be partially resolved and greater clarity achieved.

(1) "The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes."[135]

(2) "I take the need for theoretical legitimacy seriously…originalism seems to me more compatible with the nature and purpose of a constitution in a democratic system."[136]

These two claims address the issue of legitimacy. The problem is that the first sense of theoretical legitimacy seems to be a claim about *legal* legitimacy, whereas the second is about *moral* legitimacy. Scalia's discussion about how an adjudicative official ought to determine law therefore rests on two separate claims. The first is that the official ought to consider himself or herself bound to the specific legal criteria that stems from a Rule of Recognition (in this case the Constitution is being identified (perhaps incorrectly) with the US Rule of Recognition). He seems to agree with both Hart and I that in order to act with legal legitimacy, an adjudicator ought to possess the proper powers (in this case the power to review legislation). He argues, therefore, that in the US there is a breach of legal legitimacy when adjudicators attempt to undermine federal statutes by reading in considerations not explicitly endorsed by the framers of the constitution.[137] His second theoretical commitment, however, is of a very different nature. It suggests that judges lack moral legitimacy when they exercise their 'purported' legal powers to attack legislation on the basis of non-conformity with constitutional requirements. This line of

[135] Scalia,'Originalism', 854
[136] *Ibid*, 862
[137] Scalia favours the view that the obligation to uphold the constitution rests with the legislature and not the courts. The courts lack a proper legal power, on this reading, to inquire into and render binding decisions on the conformity of federal statutes with constitutional provisions.

argument is about how adjudicators ought to decide cases and determine law, whether there is an existing legal requirement for them to do so or not.

I am not criticizing Scalia with inconsistency here – in fact, claims 1 and 2 are quite consistent. What I am asserting is that Scalia's Originalist argument interweaves two very different types of claims which need to be disentangled. It would be possible to argue that, in the US at least, adjudicative officials are not exercising a proper legal power when reviewing federal legislation for constitutional errors, while at the same time insisting that they morally ought to exercise such a power in order to prevent government violations of human rights. The inverse would also be true – we could argue, for instance, that while adjudicators do possess a legal power to inquire into and strike down federal statutes that seem inconsistent with constitutional provisions, morally they ought not to exercise this power because it would undermine democracy and the 'will of the people'. Scalia, I argue, could therefore be right on one sense of legitimacy but wrong on the other. This point is lost, however, if we fail to define our sense of legitimacy. In critiquing or defending Scalia's Originalism, I therefore submit, we are best to eradicate the latent ambiguity and speak clearly about what in his Originalist position we agree or disagree about: Does it accurately describe the legal situation in the US? Or does it accurately capture the moral obligations that adjudicators ought to be under? Or does it do both or neither? I would further submit that this type of confusion applies to a large part of the issue surrounding Textualism. Is Textualism suggesting that adjudicators ought to determine law according to written legal statutes alone because they are under a proper secondary Rule of Adjudication to do so? Or is it that by doing so, they will better

achieve an important objective of law, one that is undermined when adjudicators depart from the text? Or is it the case that both are true?

Clarifying our position is crucial in that it determines the *standards* for success in our argument. If we are arguing for legal legitimacy or illegitimacy, we need to inquire into the primary and secondary rules of the system and determine how and if these apply. We need to make an argument for the existence of certain rules that govern the behaviour of adjudicative officials as determinable according to the Rule of Recognition and those norms that stem from it. With moral legitimacy, the argument takes a very different form. We do not argue from the existence of a conventional practice; instead, we argue about the actual or intended outcomes of the actions of adjudicative officials and whether these actions ought to have been pursued, even if the secondary rules neither empower nor obligate them to act in the way that is morally most appropriate. Our arguments, therefore, can only be comprehensible in discussions about legitimacy if they address the correct issues. If we are concerned with whether an adjudicative official is legally empowered by the secondary rules of the system to strike down an unconstitutional text and we argue (without referencing any of the secondary rules), that if adjudicators do so, it will undermine the 'will of the people', our arguments are not only invalid, they are simply unintelligible.

III

Obviously the same point applies, *mutatis mutandis*, to arguments made by protagonists of judicial activism. If we are to argue cogently and intelligibly for the

legitimacy of activist behaviour by adjudicative officials, it is important to establish whether we are insisting on moral, legal, or institutional legitimacy. The onus of clarity applies as much to the protagonists as the antagonists. There is the interesting challenge posed, however, by the Natural Lawyers and the Dworkinians in that they associate legal legitimacy *conceptually* with moral legitimacy. As I discussed above, Dworkinians are particularly problematic in the area of legal and moral legitimacy because they link the criteria of legality necessarily with conformity to certain moral criteria. Therefore they argue that activism can be legally valid if it is justified by a higher moral principle by which the law is supposed to be identified.[138] They claim that to distinguish the criteria is to make a serious conceptual error – legitimacy in law and legitimacy in morality are two sides of the same coin. The mistake, they would argue, in my analysis is that, while my analysis is all probably true if a legal system exists as Hart describes it, in reality law is different. Law is about moral justification so that if we cannot justify something morally, it cannot count as law.

To reiterate, I responded to Dworkin in section E by claiming that, as a descriptive point, it is perplexing (if not patently absurd) to insist that an adjudicative official, acting

[138] It is perhaps worth noting here that Natural Lawyers and Dworkinians, as I stated in a footnote above, are not necessarily forced to defend judicial activism simply because there are moral reasons to believe that the adjudicator ought not to have the legal obligation that they do. Aquinas, argues, for instance that while laws that are fundamentally in tension with morality do not "bind in conscience", they nevertheless ought to be followed and upheld in certain circumstances "in order to avoid scandal and disturbance." See the *Summa Theologica*, Question 96, Article 4. Importantly as well is the claim made by John Finnis that Natural Lawyers do not deny the logical separation between positive law and morality. See his *Natural Law and Natural Rights*, 26-28. Natural Lawyers, as I discussed in section A, simply recognize that law *ought* to be derived from the true moral principles discernable through reason. If Finnis is correct, and I believe on this point that he is, substantive Natural Lawyers already tacitly acknowledge (and nothing in their work refutes) the importance of the distinction between moral and legal legitimacy as I have defined it above. A Hartian framework for law is therefore not incompatible with a theory of natural law – or at least not incompatible with Aquinas' or Finnis' particular (and prominent) conceptions of natural law. Thus it may be that only Dworkinians *conceptually* require that law and morality conjoin.

within the proper confines of their powers, does not render legally binding judgments if they are morally flawed in some crucial way. It also seems to be a serious mistake to assert that an adjudicative official is under a legal obligation to do or refrain from doing something only if this obligation is morally justifiable. It is perfectly possible for an adjudicative official to have a morally pernicious legal-adjudicative obligation. For example, an adjudicative official in a certain regime could be instructed by a secondary adjudicatory rule to treat the testimony of all women in court as inferior to the testimony of men, so that if a man testifies in a way that contradicts a woman's testimony, the man's testimony is considered and the woman's rejected (at least to the point of the inconsistency). While I assume that most of us would recognize this as a morally abhorrent adjudicatory rule, it nevertheless seems quite possible that an adjudicative official could be *legally* bound to enforce this rule so that we could claim they failed to uphold their legal duty when they take a woman's testimony as true and a man's contradictory testimony as false.

But Legal Interpretivism is not concerned with establishing a theory of what the legal obligations of the adjudicator are; instead, it is about understanding law as an argumentative process in which a state attempts to justify its use of coercion against individuals. For Dworkin and other Legal Interpretivists, law is a process – it is what a system *does* (justifying coercion) rather than what it *is* (a series of norms identified according to a Rule of Recognition). There are certainly good reasons to dispute this line

of thinking – in particular there is no reason to think that law is always used in order to justify coercion.[139]

But, in addition, there are convincing reasons to think that Dworkin himself would benefit from a careful distinction between the law as it currently is (the best answer that compromises fit and justification) and what the law ought to be. An adjudicative official is obligated as a legal official, according to Dworkin, in some cases to uphold morally pernicious propositions of law in the event that they are 'embedded'.[140] Because certain propositions of law have been given force by a system for a long period of time, an adjudicative official fails to act properly in denying such a proposition of law force and effect in a case before him or her. This does not mean that the proposition of law is morally justified – on the contrary it represents a failure of the institution through history. This is precisely where even Dworkin may benefit from a careful distinction between the moral and legal obligations of the adjudicative officials with regard to the topic of activism. If an adjudicative official refused to give force and effect to an embedded mistake, then it may be useful to notice that they may have done something morally sound but nevertheless legally wrong. For example, prior to the 13th amendment of the U.S. Constitution, many judges upheld fugitive slave laws, including the Supreme Court itself in the infamous *Dred Scott* v. *Sandford* case.[141] Their prominent use appears to have

[139] Kramer, for instance, has cogently and convincing claimed that officials can establish and uphold a legal system purely for their own selfish or 'prudential' interests. See Matthew Kramer, *Where Law and Morality Meet* (Toronto: Oxford, 2004), especially chapter 5. Hart makes a similar point when he argues about how law's malleable nature can be harnessed to do both tremendous harm and tremendous good. Agents in a legal system may not have any desire to justify coercion – they simply notice that it is prudent to rely on the regulative nature of law to help them achieve their own selfish or corrupt objectives.
[140] Ronald Dworkin, *Taking Rights Seriously*, 121
[141] *Dred Scott* v. *Sanford* 60 U.S. 393 (1857)

created an 'embedded mistake'. It would be useful to be able carefully to distinguish in such cases whether a judge may have a 'legal' obligation to follow the embedded mistake as opposed to a 'moral' one. A lower circuit judge that refused to return a slave to their 'rightful' owner following the *Dred Scot* decision may have made a legal error according to Dworkin, but certainly it is not clear that this judge has made a moral error – in fact, I suspect most would argue for the moral soundness of such a decision. Thus, it would seem that even Dworkin ought to heed this distinction when discussing judicial activism. We want to know if an adjudicator ought to have acted in a certain way, but the correct answer can only be determined if we ask the right question - 'According to what sense of legitimacy have adjudicative officials acted properly or improperly?' Even on Dworkin's (I believe mistaken) conception of law, there are important reasons to heed a distinction between the legal and moral legitimacy of an adjudicative officials decisions.

IV

What is most interesting is the way that my proposed framework can actually allow for the protagonists and the antagonists successfully to agree about important substantive issues. Two disputants can recognize, for example, that they agree on the existence of a legal duty for adjudicative officials to act in a certain manner. Having agreed on this point, our disputants can now focus their arguments on whether there exist institutional obligations or moral obligations on the adjudicative officials. They may still significantly disagree about the existence of these ulterior obligations; however, in spite of the disagreement, they can at least acknowledge the proper types of argument for their

debate. The most frustrating, and I suspect most common, type of error in deliberation about judicial activism occurs when one disputant makes a claim 'an adjudicative official has a legal duty to do *x*' and the other disputant makes a claim 'an adjudicative official ought morally to do *y*'. This, as should be clear, is really not a debate at all as the disputants hold two completely compatible and reconcilable claims. Neither argument attacks the substantive merits of the other.

We also must be acutely aware of these divergent senses of legitimacy when framing what, exactly, it is that we want when we attack or defend judicial activism in general. Is it that we want to have additional legal powers retracted or added – do we want to change the Rules of Adjudication? Or is it that we want to acknowledge an existing non-legal convention that binds adjudicative officials – are we trying to explicate or deny the existence of an institutional duty? Or are we trying to encourage legislators or adjudicative officials to act in accordance with or to recognize some moral criteria – do we want to raise awareness about and encourage proper moral behaviour? We need to know our specific target otherwise our pleas are misdirected. This is ultimately the fundamental thesis of this paper: *we cannot even begin to justify or admonish the actions of adjudicative officials that alter, negate, or deny force and effect to law unless we clearly articulate which specific obligations they are under*. If there are different obligations incumbent upon adjudicative officials, as I believe has been demonstrated throughout, distinguishing between these obligations is a first and necessary step towards agreement about judicial activism. Put more strongly, unless we do so, we will be caught

in the perpetual pendulum of calls for restraint and activism that I described in the opening section.

V

As the reader will no doubt notice, little in this thesis has actually resolved the dilemma of judicial activism. All it has done is shed light on the nature of the debate and what has caused serious confusion between the protagonists and the antagonists. In the next couple paragraphs I outline a few direction posts flowing from the above analysis that sets criteria for resolution. My intent is to establish a few serious questions and burdens that require answers from both the proponents and the antagonists if they are to provide convincing and compelling arguments for the legitimacy of judicial activism. This final section thus represents a way forward, as well as a challenge to legal theorists. While failing to give decisive arguments, it expands the possible implications of the above framework for the substantial disagreements about judicial activism.

Above all else, I make two key suggestions. The first is that judicial activism, both practically and theoretically, ought to focus on agent-centered arguments. Judicial activism is about the obligations of adjudicative officials and therefore it must speak to *their* specific reasons for action. The second is that, within this agent-centered perspective, we need to develop convincing arguments for *why* adjudicative officials ought to uphold their legal and institutional obligations in the event that they conflict with moral obligations. Clearly this argument speaks to those that deny that adjudicative officials can never violate their legal or institutional obligations. I suggest that the

strength of our arguments about why adjudicative officials ought to refrain from engaging in legally illegitimate judicial activism rests on there being strong moral criteria for why the law ought to be as it is. I see no compelling arguments that explain why in all cases an adjudicative official, faced with what he or she regards as morally abhorrent law, ought to act according to a legal duty to uphold that law.

VI

I have constantly reiterated that judicial activism is concerned about discerning when adjudicative officials act to alter, negate, or deny force and effect to law legitimately. The legitimacy of the activist behaviour of adjudicative officials depends on their fulfilling incumbent obligations as determined according to standards of morality, institutional convention, and legality. What I believe is missing from this discussion, and indeed missing within the literature on judicial activism itself, is a discussion of the difference between an adjudicative official asking 'ought I act so as to alter, negate, or deny force and effect to the law in this particular case?' and a political or legal theorist asking 'ought adjudicative officials have a general obligation to alter, negate, or deny force and effect to the law in cases before them?'. The latter question asks whether judicial activism is generally justifiable. It asks whether there are any reasons why, systemically, judicial activism could be justifiable. In the former case, however, the question is quite different. An adjudicative official is forced to decide, based on their own unique circumstances, whether activism ought to be pursued.

This difference is of serious consequence. If we look at the legitimacy of judicial activism from a systemic perspective, questioning the compound effects of judicial activity we are faced with a very different perspective than with the adjudicative official being asked to determine a case in which a specific individual or individuals will be directly affected by their actions. Our general arguments validating or invalidating judicial activism, according to legal, institutional, and moral criteria, may not adequately describe the concrete situation of an adjudicative official. Adjudicative officials, in determining concrete cases with real human beings, may find a number of their own reasons to justify judicial activism that cannot exist on a systemic level. Theoretically, for example, a judge may agree that the 'will of the legislator' ought to be respected. He may also agree that there is an institutional and / or legal duty incumbent on him to avoid allowing his personal moral concerns to dictate the right answer to a case. Nevertheless, the judge may not uphold a certain law because it violates some deep seated religious principle that he or she holds, refusing because such acting so as to uphold the law would make them a participant in some serious unholy endeavour. The point is that such agent-specific justifications create serious problems for general arguments about the status of judicial activism that have not been adequately discussed. Adjudicative officials have their own specific identities, histories, and convictions. These cannot be systemically articulated and yet seem to be critical data in determining whether they ought to engage in activist behaviour.

More importantly perhaps, what is missing in the discourse about judicial activism is a concrete answer to the question of how moral, legal, and institutional duties relate –

which are of greater importance? This is a question that I am disappointed to have been unable to have answered in this paper. If a legal or institutional duty can exist independently of a moral duty, as the legal positivists have insisted, what possible bearing ought a legal or institutional duty to have on adjudicative officials? This is a crucial question to the debate about judicial activism. As it stands, there exist no general and compelling justifications within the framework established above for why we ought to do anything that is legally required of us without some moral argument about the virtue of either a particular law or a legal system in general. What this means is that, barring some clear argument about the virtue of law in a specific legal system, there is no reason to assert that simply because an adjudicative official is under a legal or institutional obligation, they should act on this obligation. Ironically, while to think clearly about the standards of legitimacy for judicial activism we need to conceptually distinguish moral, legal, and institutional criteria, the latter two types of criteria require moral argumentation to establish whether an adjudicative official ought actually to act on them. The challenge of making these arguments within our divergent legal systems is the greatest task facing both protagonists and antagonists of judicial activism. Simply shouting that an adjudicative official has violated a legal or institutional duty does not on its own make the case that he or she, in the final analysis, ought not to engage in judicial activism. Although, as I have argued above, we ought to thank such an individual for at least noting clearly which obligations they believe adjudicative officials have violated. The question we need an answer to is: *why does it matter that they have violated their institutional or legal duties*?

Finally, as a consequence, it seems that, without these concerns being adequately addressed and explained, there always exist agent-based moral justifications for judicial activism even when legal and institutional obligations run clearly to the contrary. Whenever adjudicative officials encounter situations in which it seems that, according to their own convictions, they would act better all things considered in violating the law, there exist *no* compelling arguments at present (at least within the framework developed above) for why they ought to follow their legal or institutional obligations. This suggests that if the moral convictions that favour violating legal or institutional duties are stronger than the moral reasons that would point to upholding these duties, we cannot escape the reality that the adjudicative official ought to engage in activist behaviour and alter, negate, or deny force and effect to law. I do not mean to suggest, however, that there are no moral reasons to uphold the law – in fact, there may be many and they may be decisive. What I am suggesting, however, is that, at least from the perspective of the adjudicative official acting as a moral agent, the fact that a legal or institutional duty is incumbent upon them does not constitute an argument for what they ought to do unless this same argument is tied to moral reasons, that they recognize as legitimate, for why the law ought to be upheld. None of this is meant to be conclusive, I should note; rather, it simply represents the serious dilemma that I think needs to be addressed in future work – and this involves questions of moral agency, the relationship between moral and legal legitimacy, and whether there are moral reasons to uphold professional obligations. What this thesis has done is merely establish the framework and terms that creates and defines

the problem. Hopefully, by being clear about the issues and properly describing them, we can begin to move towards a solution.

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