LEGAL POSITIVISM AND NATURAL LAW RECONSIDERED

1. Introduction

Legal positivism (LP) and natural law theory (NL) have traditionally been construed as mutually exclusive theories about the relationship between morality and the law. Although I endorse a good deal of this traditional wisdom, I shall argue that we can and should construe LP and NL as complementary theories. So construed, they not only are compatible but also state important truths.

Legal philosophers have traditionally been concerned with questions about both the nature of law and the nature of adjudication. Questions about the nature of law raise issues about the existence conditions for valid law and the criteria for identifying what the law requires in justiciable controversies; questions about the nature of adjudication raise issues about how judges should decide cases. Although questions about adjudication raise normative issues, these issues belong to legal philosophy, because they concern the moral and political obligations attaching to a and perhaps the central institutional role within legal systems. Let us distinguish, then, within legal philosophy, between *theories of legal validity* which explain the existence conditions for valid law and the criteria for identifying the content of the law and *theories of adjudication* which explain how judges should decide cases.

For various reasons, legal philosophers have not always distinguished clearly between theories of legal validity and adjudication. Many writers have conflated or at least encouraged the conflation of theories of legal validity and adjudication. For example, much of the literature on judicial discretion encourages the conflation of theories of adjudication with theories of legal validity. Writers on judicial discretion often assume that the issue of how judges should decide hard cases is resolved simply by discovering the extent to which the law is determinate. If the law requires a certain result, then the judge has a duty to reach the corresponding decision.[1] But this connection between the completeness of the law and the nature of adjudication holds only if there is always a judicial duty to apply the law. The existence of such a duty not only requires argument but is, I shall argue, doubtful. Moreover, many legal philosophers, especially American jurists, have encouraged the conflation of theories of legal validi-

ty with theories of adjudication. They have written as if the law consists of just those standards which courts should appeal to in deciding cases.[2] But this asumption also ignores the distinction between what the law requires and what judges should do.

By distinguishing theories of legal validity and theories of adjudication, we can distinguish two versions of the debate between LP and NL: one pertaining to the theory of legal validity (LP1/NL1) and one pertaining to the theory of adjudication (LP2/NL2). LP1 and NL1 represent the LP/NL dispute as traditionally conceived; they represent competing theories about the moral content of the law. NL1 asserts and LP1 denies that the existence conditions for valid law ensure that legal standards satisfy true or sound political morality to some significant extent. NL1 claims that morality is a necessary and perhaps also a sufficient condition of legality,[3] while LP1 denies that morality is either a necessary or a sufficient condition of legality.[4] LP2 and NL2, on the other hand, are competing theories about the moral content of correct judicial decision. NL2 asserts and LP2 denies that the correct judicial decision in any given case must satisfy true or sound political morality to some significant extent. LP2/NL2 is worth formulating as a version of the LP/NL dispute, even if LP1/NL1 is the traditional version of that dispute, first, because the LP2/NL2 dispute is an interesting issue for legal philosophy analogous to the LP1/NL1 dispute, and, secondly, because theories of legal validity and adjudication have not always been clearly distinguished.

The reconciliation of LP and NL depends upon recognizing the distinctions between theories of legal validity and adjudication and, so, between LP1/NL1 and LP2/NL2. The theories of legal validity and adjudication are distinct, and neither theory alone entails the other. Thus, although LP1 and NL1 are mutually exclusive theories about the moral content of the law and LP2 and NL2 are mutually exclusive theories about the moral content of correct judicial decisions, LP1 and NL2 are not incompatible. They are compatible, because they address different issues within legal philosophy. Indeed, I shall argue that LP1 and NL2 are not only compatible but both true. LP1 says something true and important about the theory of legal validity, and NL2 says something true and important about the theory of adjudication. This result allows us to defend the traditional interpretation of LP and identify what is true in NL.[5]

This kind of reconciliation of LP and NL is a large project, and my case for the reconciliation must therefore remain programmatic in some respects. However, this will not prevent a demonstration of the promise of such a program. If LP and NL are to be reconciled by showing the truth of LP1 and NL2, then the reconciliation requires an account of legal validity

and adjudication. In section 2 I present the relevant details of such an account. Section 3 argues that LP1 is true, while section 4 argues that NL2 is true. In the course of sections 3 and 4 I also examine Ronald Dworkin's recent criticisms of LP.[6] Dworkin's criticisms, though interesting, are very controversial. If I am to reconcile LP and NL, I must show that Dowrkin's arguments fail to undermine LP. It is a virtue of my approach to LP and NL that I can explain not only how Dworkin's arguments fail when directed against LP1 but also how they succeed when directed against LP2. Thus, my defense of LP and NL can also be viewed as a way of defending LP while making sense of and accommodating Dworkin's objections to it.

2. Legal Validity and Adjudication

A theory of legal validity explains the existence conditions for valid law and the criteria for determining what the law requires in any justiciable controversy. In this section I outline a theory of legal validity. Of course, the plausibility of this theory, as with any theory of law, depends upon its ability to systematize and explain both the practices of lawyers, judges, and other participants in the legal process and considered beliefs about the nature of law. Although I must leave assessments of the theoretical plausibility of this account of legal validity to the reader, two points are worth mentioning. First, the main outlines of this theory of legal validity are now quite generally accepted in the jurisprudential literature.[7] Second, the ways in which this theory differs from its principal rivals do not affect the reconciliation of LP and NL. LP1 is more obviously true of rival theories of legal validity,[8] and my defense of NL2 depends upon a theory of legal validity only insofar as it presupposes the truth of LP1.

My account of legal validity is intended as a perfectly general theory, providing accounts of legal validity for possible as well as actual legal systems. It will often be useful for purposes of discussion, however, to examine the applications of this theory to particular legal systems, real or imaginary.

Consider first the existence conditions for valid law. Of course, all laws are laws of some particular legal system. At least some standards which are legal standards in a legal system are valid law by virtue of issuing from some authoritative source or having a certain kind of pedigree. Call these standards *first order legal standards*. In most contemporary legal systems, first order legal standards issue from institutional sources such as legislative bodies, judicial bodies, or constitutional conventions. In most legal systems, there are also relations of priority among the various sources of law. H. L. A. Hart and others have claimed that for any legal system the sources of and relations of priority among what I am calling first order legal

standards must be specifiable in a "rule of recognition."[9] A legal system's rule of recognition plays a certain regulative role among participants in the legal process and political officials of the society in question. The content of a system's rule of recognition may be codified in written documents such as a constitution or charter; the rule itself must govern the behavior of legal principals and political officials. For example, the rule of recognition in the United States legal system recognizes roughly three distinct sources of law: legislative, judicial, and constitutional. Any legislative enactment, judicial decision, or constitutional provision which has not been changed, overruled, or repealed is valid law. Moreover, the rule of recognition in the United States legal system establishes the following relation of descending priority among these three sources of law: consitutional, legislative, and judicial.[10]

But first order legal standards and rules of recognition are not exhaustive of the law. There are valid legal standards which have not been authoritatively enacted but which bear the appropriate relationship to the legal system's first order legal standards and rule of recognition. In any particular case, determination of what the law requires will involve interpretation of first order legal standards such as constitutional provisions, statutes, and precedents. Fortunately, these first order legal standards do not exist in a vacuum; they are introduced for certain reasons, perform certain social and political functions, and realize certain principles of political morality. It is thus possible to identify *second order legal standards* which underlie or provide the rationale for the legal system's first order legal standards. These second order legal standards may be said to *quasi-justify* first order legal standards, because, as I argue in section 3, although second order standards may putatively justify first order standards, one standard can underlie or provide the rationale for another without the first standard thereby justifying the second. Here and in what follows, I focus on second order standards which underlie or provide the rationale for first order legal standards, but there may be second order standards which underlie the legal system's rule of recognition, and the same remarks apply *mutatis mutandis* to these second order standards.

Of course, these second order legal standards cannot always simply be read-off from the language of first order legal standards. Identification of these second order legal standards often requires a good deal of theory construction based upon knowledge of why particular first order legal standards were introduced, how they function with other first order legal standards, and what their typical effects are. Examples of second order legal standards within the United States legal system are the common law principle that no one should profit from his own wrong, the criminal law prin-

ciples that 'ought' implies 'can' and that there should be no liability without fault, the principle of contract law that plaintiffs should mitigate damages, the constitutional law principles of privacy or personal autonomy and the priority of moral and political rights over economic rights, and the structural principle of the separation of powers.[11]

In comparison with theories which recognize the legal status of only first order legal standards and rules of recognition, this theory provides a relatively prolific and theoretical account of legal validity. A standard is a legal standard within a legal system, on the present account, just in case it is (a) a rule of recognition within that system, (b) a first order legal standard, or (c) a second order legal standard. First order legal standards are standards having a source specified by the system's rule of recognition, while second order legal standards are standards which quasi-justify, i.e., underlie or provide the rationale for, the system's first order legal standards or its rule of recognition.

While this account explains how to identify *particular laws*, it does not itself explain how to identify *the law* on a particular issue. A theory of legal validity should also provide criteria for determining what the law requires for any justiciable controversy. Although determination of what the law requires on some issue may *turn* on the interpretation of some one legal standard, a vast number of legal standards typically bear on the correct answer to a legal question. Not only are various legal standards relevant in answering a legal question, but also these standards may conflict or at least support different conclusions. Conflicts can arise between as well as within first and second order levels of legal standard. In resolving those conflicts not resolved by the legal system's rule of recognition, weight must be assigned to competing legal standards on the basis of a judgment about the relative importance of the roles which they play in the legal system. The more firmly entrenched within the legal system a particular legal standard is the more legal weight it has. What the law requires in any given case, then, is that decision which provides maximal consistency and explanatory fit with the total body of legal standards duly weighted.[12] In a legal system such as that in the United States, what the law requires in any given case is that decision which coheres best with existing legal principles, constitutional provisions, statutes, and precedents. Clearly, these coherence calculations are complex and controversial and call for the exercise of a good deal of judgment, but neither of these facts shows that one decision does not provide the best fit with the background body of existing law. Indeed, it may well be that there is, at least in principle, nearly always one (non-tie) legal judgment which coheres better than alternative judgments with the legal system's first and second order legal standards.[13]

A theory of adjudication explains how judges should decide cases and so addresses normative issues about the nature of judicial duty. We may ask how judges should decide cases in which the law is clear and determinate as well as how they should decide cases in which the law is unclear or indeterminate. Determining what cases judges should decide and on what grounds they should decide those cases which they should decide requires determination of the nature and extent of judicial obligations, in particular, of the judicial obligation to apply the law. Although the theory of adjudication thus raises normative issues, these issues belong to the study of law, because they concern the moral and political obligations of a central institutional role within the legal system. The nature and extent of the judicial obligation of fidelity to the law differs from the nature and extent of, say, the citizen's obligation of fidelity to the law, because various features of the judge's institutional role and responsibilities provide special reasons for thinking that there is an all-things-considered judicial obligation to decide cases by applying the law.

I will not at this point argue for any particular theory of adjudication, for the defense of any one theory requires settling the debate between LP1 and NL1. In section 4, however, I do defend a particular theory of adjudication. I consider and disarm familiar arguments for the claim that there is always an all-things-considered judicial obligation to apply the law; I argue that the judicial obligation to apply the law is sufficiently sensitive to the moral content of the law that there can be an all-things-considered judicial obligation to apply the law only when the law satisfies significant moral conditions. Moreover, when these moral conditions are not satisfied, there not only is no all-things-considered judicial obligation to apply the law but also may be a judicial obligation to decide the relevant cases on non-legal, moral grounds. It follows that when the law satisfies these moral conditions judges should decide cases in favor of the litigant whose claims cohere best with the total body of legal standards of that legal system and that when the law fails to satisfy these moral conditions judges need not so decide cases and may have an obligation to decide them on non-legal grounds.

3. Legal Validity and Legal Positivism

It is time now to begin our assessment of LP and NL. LP1 and NL1 represent competing theories about the connection between morality and legal validity. In this section I examine the LP1/NL1 debate and argue that LP1 is true. In defending this claim, I argue that Dworkin's recent criticisms of LP do not tell against LP1.

NL1 asserts and LP1 denies that the existence conditions for valid law ensure that legal standards satisfy true or sound political morality to some significant extent. This way of construing the debate between LP1 and NL1 makes its resolution depend upon a judgment about the significance of the moral content which the existence conditions for valid law ensure. But this is as it should be.[14] NL1 would hardly be vindicated if the existence conditions for valid law guaranteed the satisfaction of only the most minimal moral conditions; nor would LP1 be vindicated by a demonstration that the existence conditions for valid law fail to guarantee moral perfection. The interesting question is whether the existence conditions for valid law guarantee the satisfaction of significant moral conditions. If so, NL1 is true; if not, LP1 is true.

The account of legal validity developed in section 2 claims that a standard is a legal standard in a legal system just in case it is (a) a rule of recognition, (b) a first order legal standard, or (c) a second order legal standard of that legal system. First order legal standards are standards having a source specified in the legal system's rule of recognition, while second order legal standards are standards which quasi-justify, i.e., underlie or provide the rationale for, either the system's first order legal standards or its rule of recognition. What the law requires in any justiciable controversy is that decision which coheres maximally with the total body of valid laws of the legal system in question.

Now, of course, legal systems are imaginable in which there is a rule of recognition recognizing true or sound political morality as a source of law. But the existence conditions for valid law do not ensure this. Rules of recognition not only can but typically do specify the sort of institutional pedigree satisfiable by judicial decision, legislative enactment, and constitutional provision. This kind of pedigree does not guarantee the satisfaction of significant moral conditions. Courts can consistently render grossly immoral decisions, legislatures can consistently pass grossly immoral statutes, and constitutions can more or less wholly consist of grossly immoral provisions. Insofar as valid law consists of rules of recognition and first order legal standards, therefore, LP1 is true.

However, it might seem that counting second order standards as legal standards and giving them such a prominent role in the identification of what the law requires leads straight to NL1. Second order legal standards are those principles of political morality which underlie or provide the rationale for first order legal standards. Identification of these second order legal standards requires knowledge of why particular first order legal standards were introduced, how these particular first order legal standards function with other first order legal standards, and what their characteristic ef-

fects are. Consequently, identification of these second order legal standards requires the construction or reconstruction of the theoretical foundations of much of the legal system's structure, institutions, and first order legal standards, and this, needless to say, will involve engaging in a great deal of moral and political theory.

Although this account of legal validity is highly theoretical, it is not thereby committed to NL1. The sort of moral and political theory involved in identifying second order legal standards is *descriptive, not normative*. Descriptive political theory provides the theoretical rationale for particular standards of political morality or for social or institutional behavior of a certain kind, while normative political theory seeks to provide true or sound principles of political morality. The results of descriptive political theory will *coincide* with those of normative political theory if and only if the standards for which the descriptive political theorist is providing theoretical foundations themselves satisfy true or sound political morality. But since it has been shown that these standards, first order legal standards, need not satisfy true or sound political morality to any significant degree, these second order standrds need not satisfy true or sound political morality to any significant degree either.

Thus, there is no reason to suppose that the moral and political foundations of the legal system's first order legal standards are, or that the judge need conceive them to be, true or sound principles of political morality. The identification of second order legal standards depends upon determination of the function of particular first order legal standards. But there is no guarantee whatsoever that the function which first order legal standards perform will be such that the legal system's second order legal standards will approximate moral or political truth. Of course, there may be legal systems whose first order legal standards are sufficiently just as to ensure that their second order legal standards also approximate moral and political truth. But the moral quality of second order legal standards is a contingent matter, not ensured by the fact that second order standards are principles of political morality which are part of the law. To take a very general sort of case, there are, have been, and are imaginable legal systems containing racist statutes which have been enacted in order to deprive racial minorities of political and economic liberties and goods, which reinforce other racist statutes and constitutional provisions, and which characteristically succeed in depriving these racial minorities of various social opportunities and benefits. Such statutes realize basic principles of racist political morality, and these principles of racist political morality are part of the law of those legal systems. This is why second order legal standards are said to quasi-justify first order standards, because, although someone within such a legal

system might sincerely advance principles of racist political morality in justification of his system's statutes, the principles of racist political morality adduced would not in fact justify the statutes. So, LP1 is true of the theory of legal validity; the existence conditions for valid law do not ensure that legal standards satisfy true or sound political morality to any significant degree.

I conclude this section's defense of LP1 with an examination of Dworkin's rejection of LP. Although Dworkin does not always distinguish between theories of legal validity and theories of adjudication or between LP1/NL1 and LP2/NL2, he clearly directs his criticisms of LP at LP1, for his main target is Hart's theory of legal validity and defense of LP1 in *The Concept of Law*.

Three grounds can be distinguished for Dworkin's rejection of LP1. All three arguments concern the kind of justification which a legal theory provides for the laws and legal institutions about which it is a theory. For present purposes, we can construe a legal theory as the theoretical result of the sort of systematic reconstruction of a legal system's institutions and first order legal standards described above.

First, Dworkin argues that constructing a legal theory involves more than appeal to pedigree; it involves engaging in moral and political theory.

> This process of justification must carry the lawyer very deep into political or moral theory, and well past the point where it would be accurate to say that any 'test' of 'pedigree' exists for deciding which of two different justifications of our political institutions is superior.[15]

But how is this an argument against LP1? The legal validity of first order standards is a matter of their pedigree, but the legal validity of second order standards depends not upon their pedigree but upon the relationship of quasi-justification which they bear to first order legal standards. One must engage in moral and political theory in order to identify a system's second order legal standards. But this is descriptive moral and political theory and so does not offend LP1. Dworkin seems to assume that LP1 requires an account of legal validity purely in terms of pedigree, so that LP1 cannot account for the role of theoertical considerations in legal argument.[16] But what LP1 requires is the significant moral fallibility of the law. So recognition that descriptive moral and political theory is part of legal argument is perfectly compatible with LP1.

Secondly, Dworkin appears to argue that the distinction between descriptive and normative political theory collapses, so that approximate moral truth forms part of the existence conditions for valid law.

> If a theory of law is to provide the basis for judicial duty, then the principles it sets out must try to *justify* the settled rules by identifying the political and moral concerns of the community which, in the opinion of the lawyer whose theory it is, do in fact support the rules.[17]

By itself, this passage might be taken simply as a restatement of the dependence of the legal validity of second order standards upon truths of descriptive political theory, which I argued is perfectly compatible with LP1. But the passage also suggests that Dworkin thinks second order legal standards must *justify* first order legal standards. This sounds like an illegitimate slide from what I have called quasi-justification to justification, but Dworkin's moral epistemology may be relevant here. In his discussion of John Rawls's *A Theory of Justice*[18] Dworkin defends a constructivist interpretation of a coherence theory of justification in ethics.[19] A coherence theory of justification in ethics holds roughly that A's moral belief p is (maximally) justified just in case (a) p is part of a (maximally) coherent system of moral and non-moral beliefs, and (b) p's coherence at least partially explains why A holds p. A constructivist interpretation of a coherence theory of justification in ethics holds that coherence is evidence of moral truth because coherence is constitutive of moral truth; truth for a moral belief just is being part of a maximally coherent system of beliefs. A constructivist interpretation of a coherence theory of justification in ethics, therefore, makes moral truth relative to maximally coherent systems of belief. Moral relativism is the thesis that moral truth is relative to social groups. Now if constructivism in ethics implied moral relativism, then the truth of constructivism in ethics might seem to spell trouble for LP1 in two ways. First, relativism makes LP1 difficult to formulate. LP1 asserts that laws and legal institutions may be defective in morally significant ways. But this seems to presuppose the existence of moral truth *simpliciter*, that is, uniquely correct moral claims, which is just what moral relativism denies. Of course, LP1 could be patched up so as to yield the claim (LP3) that the existence conditions for valid law ensure that legal standards satisfy principles of political morality *true for that society*. But now the second problem arises. For if LP1 is formulated as LP3, the distinctions between quasi-justification and justification and between descriptive and normative political theory threaten to collapse. If moral relativism is true, then a standard is justified just in case it is part of community political morality. Since the kind of descriptive political theory involved in quasi-justifying a legal system's first order legal standards would seem to uncover the moral and political commitments of the community whose legal system is in question, descriptive political theory would seem to collapse into normative political

theory, and quasi-justification would seem to collapse into justification. The existence conditions for valid law, then, would seem to include the satisfaction of principles of political morality true for the society whose legal system is in question.

Dworkin nowhere explicitly advances this argument against LP, but we can offer it as a reconstruction of disparate things he does say, and it would make some sense of the quoted passage. However, we can dispose of this argument without going too much further into moral epistemology. First of all, while a coherence theory of justification in ethics is fairly plausible, a constructivist interpretation of the coherence program is far from uncontroversial. Any argument against LP whose soundness depends upon the truth of constructivism in ethics must remain problematic.

Moreover, these arguments against LP1 and LP3 depend for their success not so much upon the truth of constructivism in ethics as upon the truth of moral relativism. In order either to undermine the notion of moral truth *simpliciter* implicit in the formulation of LP1 or to legitimate the slide from descriptive to normative political theory, Dworkin must claim not that moral truth is relative to maximally coherent systems of moral belief (constructivism) but that moral truth is relative to social groups (relativism).[20] But all Dworkin argues for is a constructivist interpretation of coherence theories of justification in ethics, not a relativist interpretation of them. Indeed, if one takes the constraints of coherence at all seriously, then, whether realist or constructivist, one must be skeptical of the truth of moral relativism.

In fact, even if moral relativism were true, this would not defeat LP1 or LP3. Consider the issue about the formulation of LP1 first. The conception of moral truth *simpliciter* which LP1 presupposes and which the truth of moral relativism would undermine is equally presupposed by NL1. So, relativism would "defeat" LP1 only by dissolving the LP1/NL1 dispute altogether. However, the dispute would not have to dissolve; it could be recast as LP3/NL3. NL3 asserts and LP3 denies that the existence conditions for valid law ensure that legal standards satisfy standards of political morality true for the society whose legal system is in question. It might then seem that NL3 would be true, because the distinctions between descriptive and normative political theory and between quasi-justification and justification would seem to have collapsed. But even this is wrong. For if moral relativism were true, then moral truth would be relative to social groups; community morality would be the standard of moral truth. The mistake comes in thinking that descriptive political theory and quasi-justification need involve appeal to community morality. Descriptive political theory and quasi-justification require appeal to those principles of

political morality which underlie or provide the rationale for the legal system's first order legal standards, and these principles need not be principles of community morality. Consider systems of oppressive minority rule.

So no argument from descriptive political theory together with constructivism in ethics succeeds against LP1 or LP3. Constructivism in ethics is controversial; a position in moral epistemology more radical than constructivism, namely, moral relativism is needed to make even plausible the collapse of descriptive political theory into normative political theory and of quasi-justification into justification; and even if Dworkin had an argument for moral relativism, LP1, or at least its cognate LP3, would not be threatened.

Finally, Dworkin argues, in effect, that, although second order legal standards quasi-justify first order legal standards, the quasi-justification which they provide is *not sufficient* for their legal validity.

> In *Hard Cases*, I offered an account of what it means to say that a principle is 'embedded in' or 'implicit in' or may be 'inferred by analogy from' a set of earlier decisions. I said that a principle bears that relationship to earlier decisions, or other legal material, if the principle figures in what I called the best justification of that material. That makes it, of course, a matter of judgment, about which lawyers may and will disagree, whether a particualar principle is indeed 'inferable' from past material. One justification may be better than another (I also said) in two different dimensions: it may prove a better fit, in the sense that it requires less of the material to be 'mistakes', or it may prove a morally more compelling justification, because it comes closer to capturing sound political morality.[21]

Dworkin's first dimension of justification, the dimension of fit, corresponds to what I have called quasi-justification, while his second dimension of justification, the dimension of moral acceptability, requires that second order legal standards be justified. Dworkin's claim is not that candidates for second order legal status which tie along the dimension of fit are then and only then supposed to be assessed along the dimension of moral acceptability. The second dimension does not come in only as a tie-breaker. Rather, Dworkin's claim is that that candidate is to be selected from among all those which have passed a certain threshold of fit entirely upon the basis of its approximation to true or sound political morality.[22]

In section 4 I argue that Dworkin's claim about the interplay between the two dimensions of justification can be defended if construed as a claim about the theory of adjudication. But Dworkin fairly clearly intends his claim as a claim about the validity of legal principles. So construed, however, Dworkin's claim must surely be false. Whether a particular stan-

dard captures true or sound political morality may well be relevant in determining whether judges should decide cases by applying that standard. But it is not at all clear how the moral quality of a standard bears on its legal status. In section 2 I argued that second order standards are legal standards, because they underlie or provide the rationale for legal standards with authoritative sources. Second order legal standards provide the content for first order legal standards by explaining the way in which first order legal standards function within the political and legal system. But why should moral standards *qua* moral standards be regarded as part of the law? In a legal system with grossly immoral first order standards, true principles of political morality, though themselves justified or justifiable, bear *no justificatory relationship whatsoever* to the system's first order legal standards. In a legal system with morally acceptable first order legal standards some true principles of political morality will be legal standards, but this is because these second order standards explain the nature of the system's legal institutions and the function of the system's first order legal standards, not because these second order standards are morally acceptable. It may be desirable for judges to make trade-offs between Dworkin's two dimensions of justification, but that is certaintly not a good way of finding out what the law requires.

So, LP1, and not NL1, is true of our theory of legal validity; the conditions for the existence of valid law do not ensure that legal standards satisfy true or sound political morality to any significant degree. Moreover, Dworkin's criticisms of LP, taken, as he intends them, as criticisms of LP1, are unsuccessful.

4. Adjudication and Natural Law

LP2 and NL2 represent competing theories about the moral content of justifiable judicial decisions. NL2 asserts and LP2 denies that correct judicial decisions must satisfy true or sound political morality to some significant extent. It is important to see that NL2 does *not* follow simply from the fact that the theory of adjudication raises the normative question of how judges should decide cases. For it might well be, as many argue, that judges should always decide cases by applying the law—even when the law is morally deficient. So, the fact that the debate between LP2 and NL2 is a normative debate does not itself show that NL2 is true.

It is the triumph of LP1 over NL1 which makes the separate debate between LP2 and NL2 interesting. For if NL1 had been true, it would have been hard to deny that judges should always apply the law and, hence, hard to deny NL2. But NL1 is false; the law is morally fallible. So, it becomes an interesting substantive question whether judges should always apply the law

and so whether the correct judicial decision must satisfy true or sound political morality to some significant extent. In this section I argue that, arguments to the contrary notwithstanding, NL2 is true of the theory of adjudication. I also argue that something like Dworkin's two-dimensional program of justification provides the correct theory of adjudication.

It is this section of the reconciliation of LP and NL which must remain programmatic in certain respects, for a conclusive resolution of the LP2/NL2 debate would require an exhaustive examination of the sources and extent of all judicial obligations. Of course, I cannot conduct such an examination here. However, this limitation need not undermine the plausibility of the reconciliation. The sort of moral knowledge required to make a plausible case for NL2 is neither all that great nor all that precise. A rough and ready ability to identify the various sources and assess the strength of the principal judicial obligations is all that is required to make a case for NL2. At least, I shall be content if the worst that can be said of this reconciliation of LP and NL is that its defense of NL2 rests upon moral premises which have not themselves been exhaustively examined.[23]

It might seem obvious that a judge's obligation is to apply the law. After all, is not the application of the law the institutional function of the judiciary? Of course, if judges are always obligated to decide cases by applying the law, then the truth of LP2 will simply follow from the truth of LP1. But the question of how judges should decide cases does not admit of so easy a solution. Judicial decisions are political acts which materially affect people's lives and, as such, require justification. Perhaps there always are sufficient moral reasons to justify deciding justiciable controversies by applying the law. But this needs to be shown and cannot merely be assumed.

The question concerns what judges have an all-things-considered obligation to do. A moral consideration creates a *prima facie* obligation if it presents a genuine, but defeasible, obligation. Someone has a *prima facie* obligation to do x if there are good, but not necessarily conclusive, moral reasons for him to do x. A moral consideration creates an *all-things-considered* obligation if it presents an obligation which, in the circumstances, is not defeatable. Someone has an all-things-considered obligation to do x if he has good moral reasons to do x and there is no other action which he has better moral reason to perform. An obligation is *general* if it obtains wherever applicable. Thus, there is a general *prima facie* obligation to keep one's promises if there is always good reason to keep one's promises, and there is a general all-things-considered obligation to keep one's promises if there is always conclusive reason to keep one's promises. I turn now to arguments purporting to show that there is a general all-things-considered judicial obligation to apply the law.

First, the law itself typically requires that judges apply the law; this, the law says, is the institutional function of the judiciary. So judges have whatever obligation to apply the law that ordinary citizens have to obey the law.

I have no quarrel with this argument, but its conclusion falls radically short of the desired conclusion, namely, that judges do have a general all-things-considered obligation to apply the law. In the first place, it has been persuasively argued that there is not general *prima facie* obligation to obey the law; there is not always good reason to obey the law.[24] But even if, contrary to the fact, there were a general *prima facie* obligation to obey the law, this would not provide support for LP2. For the issue concerns what judges have an all-things-considered obligation to do, and even defenders of a general *prima facie* obligation to obey the law recognize that this obligation can be overridden. Even if there were a *prima facie* obligation to obey grossly immoral laws, there is unlikely to be any all-things-considered obligation to obey them. In sufficiently just legal systems, there may nearly always be an all-things-considered obligation to obey the law, but there is not such obligation to obey the law regardless of its moral content. Thus, the argument from the obligation to obey the law cannot establish a general all-things-considered judicial obligation to apply the law.

Second, it might be urged that judges stand in a special moral relationship to the law. Judges typically take oaths of office in which they promise to uphold or apply the law. Oaths are a species of promissory undertaking and, as such, can change one's moral situation. Actions which one might otherwise have had no moral obligation to perform or even positive reason to omit can become obligatory as the result of one's having promised to perform them. Thus, it might seem that the judicial oath of office grounds a general all-things-considered judicial obligation to apply the law.

There are several problems with this line of argument, however. First, if the argument is supposed to support a general judicial obligation to apply the law of any kind, it must assume, implausibly, that all judges voluntarily take their posts and that judicial oaths require only the application of the law and not also the promotion of true or sound political morality. Waiving these issues, the argument still fails to support LP2. This is because promissory undertakings do not always generate even *prima facie* obligations. Just as extorted promises do not generate genuine obligations, promises to perform, participate in, or comply with grossly immoral acts are void *ab initio*. Promises to commit murder or acts of racist violence do not generate genuine obligations which are subsequently overridden by weightier moral considerations; they generate no genuine obligations whatsoever. Of course, the issue concerns what judges have an all-things-considered obligation to do. So even if, contrary to fact, all promissory undertakings

generated *prima facie* obligations, the judicial obligation to apply the law could still be overridden. If the laws in question are sufficiently unjust, then, whether or not the judge has a *prima facie* obligation to apply them as the result of having taken an oath to do so, the judge will not have an all-things-considered obligation to apply those laws. Thus, no argument on the basis of the judge's promissory undertakings can establish a general all-things-considered judicial obligation to apply the law.

Third, perhaps fairness requires judges to apply the law. Fairness seems to require treating similarly situated people similarly. It might be thought that fairness to a litigant seeking recognition of a legal right which the court has recognized before requires that the law be applied and the litigant's legal entitlement be recognized and that fairness to those who have either taken care to abide by the law or been punished for failure to abide by the law requires that the law now be applied to any party guilty of transgressing it. Thus, it might seem, at least once a law has been applied, fairness to and among citizens of the legal system requires the judge to apply the law.[25]

But even if considerations of fairness often provide good reasons for the judge to apply the law, they do not provide a general *prima facie* obligation to apply the law. If someone transgresses a grossly immoral law, there is no argument from fairness to others who have suffered under this law (either by way of the costs of compliance or by way of punishment) that this person be made to suffer too. For instance, there is no argument from fairness to those who have suffered under racist laws in the past that these racist laws should continue to be enforced. Nor does fairness require that a litigant, claiming a legal right under grossly immoral legislation, have his right recognized simply because this right has been recognized in the past. But even if, contrary to fact, arguments from fairness such as these created a general *prima facie* obligation to apply the law, this obligation would certainly be overridden when it required the application of grossly immoral laws.[26]

Fourth, it might be urged that there is another way in which fairness to the citizens of the legal system requires the judge to apply the law. It might be claimed that democratic government of one form of another represents the only kind of law-making procedure which is fair to those who must live under the rule of law. It would be unfair of the judiciary, therefore, to decide cases in any other way than by applying the law. In particular, it would be unfair of the judiciary to substitute its own will for that of democratically constituted bodies.

This argument also fails. First, it fails to generate a *general* judicial obligation to apply the law, since, if it generates obligations at all, it does so only for legal systems with democratic law-making procedures. Moreover,

if the nature of the law-making procedures is to provide a judicial obligation to apply the law, then the law-making procedures must really be fair. But fairness in law-making procedures arguably requires not only democratic procedures but also rough equality of political power among members of the electorate. But this second condition threatens to further restrict the scope of the resultant obligation to apply the law, for not all legal systems with democratic law-making procedures exhibit the requisite equality of political power. Moreover, satisfaction of these procedural requirements is compatible with the existence of gross substantive defects in the law. Democracy, even under conditions of equality of political power, is compatible with systematic discrimination against political minorities. In such a legal system, the law-making procedures are instruments of political oppression. Surely, in these circumstances the mere fact that the discrimination is backed by a popular majority does not guarantee even a *prima facie* obligation to apply the discriminatory laws. In fact, even in democracies under conditions of rough equality of political power in which there are no patterns of systematic discrimination, the law can contain more or less isolated pockets of injustice. Now even if such legal systems are sufficiently just both procedurally and substantively as to generate a *prima facie* obligation to apply the law, this in no way guarantees that judges have an all-things-considered obligation to apply these isolated laws. All of these considerations show that judges in some legal systems sometimes have an all-things-considered obligation to apply the law, and that they have this obligation, when they do, only because certain standards of procedural and substantive fairness have been met.

Fifth, it might be urged that there is a general all-things-considered judicial obligation to apply the law, because, if judges did not always apply the law, the law would fall into disrespect with the result that judges would be encouraged to disregard the law in deciding cases and citizens would be encouraged to disobey the law. Since these consequences are manifestly untoward, judges should always decide cases by applying the law.

This proposal also fails to generate a general all-things-considered judicial obligation to apply the law. For some of the untoward consequences follow, if they follow at all, only if the judge is *perceived* as having failed to apply the law. At least it is only perception of a judge's failure to apply the law which could encourage other judges to ignore the law in deciding cases or encourage citizens to disobey the law. If there are conclusive moral reasons for a judge to refuse to apply the law, there may be good reasons for him to decide the relevant cases on moral grounds and represent his decisions as the result of applying the law. Of course, this may not always be possible or desirable, but, given the complexity of determin-

ing what the law requires in many cases, in unjust legal systems this course of action may well be both possible and desirable. In these situations, judicial decisions would have to be transparent for the argument from the bad consequences of the failure to apply the law to even begin to take hold. But even if judicial decisions were transparent in the way in which this argument requires, it is not at all clear that disastrous consequences would follow. It is necessary to distinguish two different kinds of disrespect into which the law might fall as the result of a judge's refusing (and being perceived as refusing) to apply grossly immoral laws. On the one hand, disrespect might accrue only to those morally objectionable laws which the judge refused to apply; on the other hand, disrespect might accrue to other laws of the legal system as well. Call the first kind of disrespect for the law *local* and the second kind *global*. Now both the importance and the likelihood of a judge's failure to apply certain morally objectionable laws encouraging global as well as local disrespect for the law depends upon whether the immorality of the laws not applied is an isolated or a pervasive feature of the legal system. It is not clear that disrespect for unjust law is a bad thing. So the fact, if it is a fact, that failure to apply unjust law encourages local or global disrespect for unjust law provides no compelling reason for judges to apply unjust laws. The important question, then, is whether in legal systems with only isolated pockets of unjust law failure to apply those laws causes global rather than merely local disrespect for the law, for if it does, then failure to apply unjust laws can cause good laws to fall into disrespect. Since *ex hypothesi* judicial reasoning is transparent, a principled judicial decision not to apply grossly immoral laws should provide no source of disrespect for other laws within the legal system which are morally acceptable. But this shows that there is no reason to fear any disrespect into which the law is at all likely to fall as the result of a judicial refusal to apply morally objectionable laws.

Sixth, and finally, it might seem that even if, as I have argued, none of these arguments is by itself sufficient to generate a general all-things-considered judicial obligation to apply the law, collectively these arguments do establish such an obligation.

But compounding the arguments in this way will not generate any more general *prima facie* obligation to apply the law than any one of the arguments did individually, for I argued that none of these arguments generates a general *prima facie* judicial obligation to apply the law. For those cases in which the arguments do not generate a *prima facie* obligation to apply the law, the arguments cannot be added together to yield a *prima facie* obligation to apply the law, much less to yield a stronger *prima facie* obligation to apply the law. Even where these arguments do establish a *prima facie* obligation to apply the law, their sum is unlikely always to

establish an all-things-considered obligation to apply the law. This is just because whether the judge has an all-things-considered obligation to apply the law depends importantly upon the moral quality of the law in question. Enforcement of immoral laws against people involves the infliction or at least complicity in the infliction of harm upon those people. The justification of causing this kind of harm to people requires strong countervailing moral considerations. Although I have not canvassed all possible sources for a judicial obligation to apply the law, there is no reason to think that the sort of moral reasons a judge has for applying the law, even when they obtain, will always be sufficient to compensate for the harm caused by enforcing grossly immoral laws. This implies that judges have an all-things-considered obligation to decide cases by applying the law *only if* the law to be applied satisfies a certain amount of true or sound political morality.

How high must the moral quality of a body of law be in order for there to be an all-things-considered judicial obligation to apply that law, and how are judges to decide cases in which the relevant body of law does not satisfy this threshold of political morality? As we have seen, there are a number of reasons for judges to apply reasonably just bodies of law. No doubt, these reasons may sometimes justify the application of materially unjust law. But there is no reason to suppose that the application of grossly immoral laws can be justified. However, justified judicial failure to apply the law requires not only substantial immorality in the law but also reasonable certainty about the seriousness of the law's moral defects. Refusal to apply the law is justifiable only if the moral facts upon which that refusal is based are reasonably uncontroversial or at least are important moral considerations on a wide variety of plausible moral theories. If it is determined with reasonable certainty that a body of law does not pass the threshold of political morality, and, hence, if there is no all-things-considered judicial obligation to apply the law, it is still to be determined how the judge should decide the relevant cases. The judge can either decide or refuse to decide such cases. If he refuses to decide the case, he must presumably represent the case as non-justiciable. Whether he should refuse to decide the case and represent it as non-justiciable depends upon answers to various counterfactual questions, e.g., about how amenable the law is to legislative remedy, how higher courts within the legal system would be likely to decide such a case, and what the prospects of compliance with his decision would be if he were to decide the case on non-legal, moral grounds and represent his decision as an application of the law. Since the law in such a case has *ex hypothesi* substantial moral defects, then, if the prospects for legislative remedy are bleak but the prospects for compliance with a decision of his based on moral grounds are good, a strong case can be made for the judge's having an all-things-considered obligation to decide the case on moral

grounds. Although the point of deciding such a case on moral grounds is to do justice to the litigants, the best way to do this, consistent with other obligations and objectives, will likely be to interpret or change the law so as to redress its defects. But if either of these two goals is to be achieved, the judge must decide the case and represent his decision so as to ensure not only moral improvement but also legal recognition. For if the case gets decided and represented in such a way that the legal community will not accept the decision, neither justice to the litigants nor moral improvement in the law will have been secured. What this means is that in deciding such cases judges should not only base their decisions upon moral grounds but also tailor their decisions so as to achieve some acceptance in the legal community. Typically, this will require the judge to make some trade-off between moral improvement and legal continuity.

This discussion leaves unanswered interesting and important questions about just how high the moral quality of the law must be in order for the judicial obligation to apply the law to take hold and about just what the best theory of judicial obligation is where the law does not pass this moral threshold. But enough has been said to settle the LP2/NL2 debate. The correct judicial decision cannot have just any moral content. Judges should decide cases by applying the law only if the law does not have substantial moral defects. If the moral content of the law is not sufficiently high, judges should not apply the law. If judges are to decide such cases, they should decide them at least partly on moral grounds. This vindicates NL2, for the correct judicial decision for any case in which a decision can be justified must satisfy true or sound political morality to some significant extent.

I conclude this section's defense of NL2 by explaining how Dworkin's remarks about interplay between the two dimensions of justification can be defended if construed as an attack on LP2 and a defense of NL2. Recall from section 3 that Dworkin claims that there are two dimensions along which a legal theory may be justified. A legal theory may (i) provide a better legal fit by providing a better rationale for the system's legal standards and legal institutions or (ii) come closer to capturing true or sound political morality. Dworkin claims that in choosing a legal theory one is to choose from among those alternatives which satisfy a certain threshold along dimension (i) that theory which fares best along dimension (ii). Although Dworkin fairly clearly intends this as a claim about the theory of legal validity which would undermine LP1, I argued that his second dimension of justification has no place in a theory of legal validity and so that as an attack on LP1, Dworkin's two-dimensional program of justification fails.

However, judicial decisions must be justified in something like this two-dimensional way if my account of judicial obligation and adjudication is correct. For if the law must satisfy certain moral conditions before there

can be an all-things-considered judicial obligation to apply the law, then the justification of judicial decisions must be two-dimensional. However, Dworkin has the trade-off between the two dimensions reversed. Once a certain threshold of political morality has been reached, the judicial obligation to decide the case in the way which best coheres with the theory which provides the best legal fit takes over. That is, from among those alternative theories which pass the moral threshold, the judge should select that theory to base his decision on, which, as a matter of descriptive political theory, provides the best rationale for the system's legal institutions and legal standards. In any given case, the judge should render that decision which coheres best with the theory so justified.

Dworkin does sometimes write as if his primary concern is to provide a theory explaining the nature of judicial obligation and the justification of judicial decisions, i.e., a theory of adjudication.[27] Insofar as his two-dimensional program of the justification of judicial decisions and his criticisms of LP can be construed as criticisms of LP2, Dworkin's claims can be defended. Since his claims, so construed, are claims about the theory of adjudication, Dworkin's criticisms of LP are compatible with LP1. The problem for Dworkin is that he much more frequently writes as if his primary concern is with the theory of legal validity and his criticisms of LP are criticisms of LP1. So construed, I have argued, Dworkin's principal claims are mistaken. It may be that Dworkin has failed to distinguish clearly enough between theories of legal validity and theories of adjudication.[28]

5. Conclusion

By distinguishing clearly between theories of legal validity and theories of adjudication, we can distinguish two versions of the debate between LP and NL: one pertaining to the theory of legal validity (LP1/NL1) and one pertaining to the theory of adjudication (LP2/NL2). Although LP1/NL1 represents the LP/NL debate as traditionally conceived, the LP2/NL2 debate deserves formulation as a version of LP/NL. First, the LP2/NL2 dispute raises an important issue for legal philosophy which, though separate from the issue raised by the LP1/NL1 dispute, is analogous to it. Moreover, defenders of LP1 and of NL1, even if they have not denied the distinction between legal validity and adjudication, have often ignored this distinction or at least failed to develop theories of adjudication. By distinguishing between theories of legal validity and theories of adjudication and, so, between LP1/NL1 and LP2/NL2, we can effect a reconciliation of LP and NL. In particular, although LP1 and NL1 represent incompatible theories about the connection between law and morality and LP2 and NL2 represent incompatible theories about the connection between ad-

judication and morality, we can and should defend LP1 and NL2. The existence conditions for valid law do not ensure that legal standards satisfy true or sound political morality, while correct judicial decisions must satisfy standards of true or sound political morality. The truth of LP1 allows us to accept traditional accounts of LP, while the truth of NL2 allows us to identify the truth in NL, whether or not it allows us to reconstruct traditional accounts of NL. Therefore, there is an interestng construal of LP and NL on which they are mutually compatible and both true.[29]

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NOTES

1. This sort of tacit assumption is hard to document, but see, e.g., H. L. A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961), pp. 121–44; Ronald Dworkin, "No Right Answer?" in P. Hacker and J. Raz (eds), *Law, Morality, and Society* (New York: Oxford University Press, 1977) and *Taking Rights Seriously*, second edition (Cambridge, MA: Harvard University Press, 1978), pp. 279–90; and Joseph Raz, *The Authority of Law* (New York: Oxford University Press, 1979), pp. 88, 93, 96, 101, 115, 181. Hart and Dworkin have elsewhere denied this assumption; see H. L. A. Hart, "Positivism and the Separation of Law and Morals" reprinted in his *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), pp. 75–77 and *Essays in Jurisprudence and Philosophy*, p. 9; Dworkin, *Taking Rights Seriously*, p. 341.

2. Cf. H. L. A. Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream" reprinted in *Essays in Jurisprudence and Philosophy*, p. 123 and Joseph Raz, "The Problem about the Nature of Law" *Contemporary Philosophy: A New Survey* 3 (1982): 107–25, pp. 111–16.

3. Cf. St. Thomas Aquinas, *Summa Theologica*, Questions 90–97, trs. in A. D'Entreves, *Aquinas: Selected Political Writings* (Oxford: Blackwell, 1948); William Blackstone, *Commentaries on the Laws of England*, vol. 1, reprinted in G. Jones (ed), *The Sovereignty of the Law* (Toronto: University of Toronto Press, 1973), p. 29; and Lon Fuller, *The Morality of Law*, second edition (New Haven, CT: Yale University Press, 1969). Although Aquinas, Blackstone, and Fuller are standardly interpreted as defending NL1, John Finnis and David Lyons have recently offered revisionary interpretations of Aquinas and Fuller according to which they deny NL1. See John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), pp. 26, 360, 364–65 and David Lyons, "Moral Aspects of Legal Theory" *Midwest Studies in Philosophy* 7 (1982): 223–54, pp. 227–29 and *Ethics and the Rule of Law* (New York: Cambridge University Press, 1984), pp. 7–10, 68, 74. I shall not address this exegetical question.

4. Cf. Jeremy Bentham, *A Comment on the Commentaries* and *A Fragment on Government* (London: Athlone Press, 1977); John Austin, *The Province of Jurisprudence Determined* (New York: Noonday Press, 1954); Hans Kelsen, *General*

Theory of Law and State (New York: Russell and Russell, 1961); J. C. Gray, *The Nature and Sources of Law*, second edition (Gloucester, MA: Peter Smith, 1972); Hart, "Positivism and the Separation of Law and Morals" and *The Concept of Law*; Rolf Sartorius, "Social Policy and Judicial Legislation," *American Philosophical Quarterly* 8 (1971): 151–60 and *Individual Conduct and Social Norms* (Encino, CA: Dickenson, 1975); Joseph Raz, *The Concept of a Legal System*, second edition (New York: Oxford University Press, 1980) and *The Authority of Law*; and Neil MacCormick, *Legal Reasoning and Legal Theory* (New York: Oxford University Press, 1978).

5. NL2 is no more revisionary as an account of traditional defenders of NL than is Finnis's or Lyons's account (see note 3). Moreover, NL2 can still provide us with the truth in NL even if it fails as a reconstruction of traditional defenders of NL.

6. Ronald Dworkin, "Political Judges and the Rule of Law" *Proceedings of the British Academy* 64 (1978): 259–87; "Political Theory and Legal Education" in M. Richter (ed), *Political Theory and Political Education* (Princeton: Princeton University Press, 1980); "No Right Answer?"; and *Taking Rights Seriously*.

7. Cf. H. L. A. Hart, "Problems of the Philosophy of Law," pp. 107–08, and "1776–1976: Law in the Perspective of Philosophy," pp. 154–57, both reprinted in *Essays in Jurisprudence and Philosophy*; Dworkin, *Taking Rights Seriously*, pp. 14–130, 338–45 and "Political Theory and Legal Education;" MacCormick, *Legal Reasoning and Legal Theory*, pp. 152–53, 155–57, 166–67, 187, 232–33, 235, 238; Rolf Sartorius, "Bayes' Theorem, Hard Cases, and Judicial Discretion" *Georgia Law Review* 11 (1977): 1269–75, "Social Policy and Judicial Legislation," and *Individual Conduct and Social Norms*, pp. 181–210; Finnis, *Natural Law and Natural Rights*, pp. 286–89; Barry Hoffmaster, "A Holistic Approach to Judicial Justification" *Erkenntnis* 15 (1980): 159–81. Raz, *The Authority of Law*, pp. 37–52, is the only writer I know of who (now) disputes this kind of theory of legal validity. (Hart in *The Concept of Law* may have disputed this kind of theory.)

8. See, e.g., Raz, *The Authority of Law*, pp. 37–52.

9. See Hart, *The Concept of Law*, pp. 97–107; Raz, *The Concept of a Legal System*, pp. 197–200, 211–12 and *The Authority of Law*, pp. 92–95, 150–51; and Finnis, *Natural Law and Natural Rights*, pp. 238–45, 268–69, 276–77.

10. Of course, this issue about the relative *priority* among the sources of law needs to be distinguished from the issue about who are the final *arbiters* of disputes arising over various kinds of law. For example, the fact that the Supreme Court of the United States may be the final interpreter of the Constitution does not show that the Constitution is not superior as a source of law to precedent.

11. There is no reason why a particular standard cannot be both a first and a second order legal standard in a particular legal system. A given principle of political morality could, say, both represent the ruling in a precedent and underlie a body of case or statutory law.

12. Cf. Sartorius, "Social Policy and Judicial Legislation" and *Individual Conduct and Social Norms*, pp. 181–210; and Hoffmaster, "A Holistic Approach to Judicial Justification."

13. See Sartorius, *Individual Conduct and Social Norms*, pp. 181–210 and "Bayes' Theorem . . . " and Dworkin, "No Right Answer?" and *Taking Rights Seriously*, pp. 279–90. Cf. Hart, *Essays in Jurisprudence and Philosophy*, pp. 7–8; "Problems of the Philosophy of Law," pp. 107–08; "American Jurisprudence through English Eyes . . . , " p. 136; and "1776–1976 . . . , " p. 157.

14. Cf. Hart, *The Concept of Law*, pp. 180–207, especially 195–97 and "Positivism and the Separation of Law and Morals," p. 81.

15. Dworkin, *Taking Rights Seriously*, p. 67.

16. Ibid., pp. vii, 17, 81.

17. Ibid., p. 67.

18. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); see, e.g., pp. 19–21, 46–51, 579–81.

19. Dworkin, *Taking Rights Seriously*, pp. 150–83.

20. Of course, if there is a plurality of maximally coherent systems of belief, then constructivism too is incompatible with the notion of moral truth *simpliciter*.

21. Dworkin, *Taking Rights Seriously*, p. 340; see also Dworkin, "Political Judges and the Rule of Law," p. 268 and "Political Theory and Legal Education," p. 186.

22. Dworkin, *Taking Rights Seriously*, pp. 340–42.

23. Of course, I would be concerned if I thought the defense of NL2 rested upon moral premises which there was good reason to think were false.

24. Cf. M. B. E. Smith, "Is There a *Prima Facie* Obligation to Obey the Law?" *Yale Law Journal* 82 (1973): 950–76; A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979); and Raz, *The Authority of Law*, pp. 233–42. Of course, it is the existence of good *moral* reasons to obey the law which is in question here. The existence of prudential reasons to obey the law, though perhaps important to the agent deciding what to do, is not in question.

25. See H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955): 175–91 and John Rawls, "Legal Obligation and the Duty of Fair Play" in S. Hook (ed), *Law and Philosophy* (New York: New York University Press, 1964) for similar arguments that fairness requires obedience to the law. However, neither Hart nor Rawls claims that this kind of argument is sufficient to generate a general all-things-considered obligation to obey the law.

26. Cf. David Lyons, "On Formal Justice" *Cornell Law Review* 58 (1973): 833–61 and *Ethics and the Rule of Law*, p. 102.

27. Dworkin, "Political Judges and the Rule of Law," p. 259 and *Taking Rights Seriously*, pp. 67, 82.

28. Finnis, *Natural Law and Natural Rights*, p. 21, would seem to agree with this diagnosis.

29. Andrew Houston, T. H. Irwin, and Rolf Sartorius provided helpful comments on distant ancestors of the present paper; John Bennett, Michael Greve, David Lyons, and Joseph Raz commented usefully on more recent versions.