Michigan Law Review

Volume 97 | Issue 6

1999

Positivism, Emergent and Triumphant

Vincent A. Wellman

Wayne State University Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Law and Philosophy Commons](#), and the [Legal History Commons](#)

Recommended Citation

Vincent A. Wellman, *Positivism, Emergent and Triumphant*, 97 MICH. L. REV. 1722 (1999).

Available at: <https://repository.law.umich.edu/mlr/vol97/iss6/23>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

POSITIVISM, EMERGENT AND TRIUMPHANT

Vincent A. Wellman*

LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE. By *Anthony Sebok*. New York: Cambridge University Press. 1998. Pp. xiv, 327. \$59.95.

"Positivism" is one of those words that triggers passionate and often contradictory responses. For some, positivism is a pejorative.¹ Lon Fuller, perhaps more than anyone, charged that positivism was confused about the nature of law, blind to law's inherent morality, and morally corrupting to boot.² He even suggested, in different ways, that positivism helped promote the rise of fascism in Europe.³ Others, in contrast, have treated positivism as a modest and undeniable truth about law. Law, they argued, is morally fallible, and accordingly, the existence and validity of law is a matter of social fact rather than moral necessity. H.L.A. Hart, in particular, offered this perspective.⁴ Building on the arguments of Austin and Bentham, his British predecessors, he characterized positivism in ways that took it less as a theory of law by itself than as a starting point for developing a satisfactory theory.⁵ Attributing to positiv-

* Associate Professor, Wayne State University Law School; J.D. 1980, Yale Law School. — Ed.

1. This fact about the history of positivism's "reputation" was examined recently in Frederick Schauer, *Positivism as Pariah*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 31 (Robert P. George ed., 1996) [hereinafter *AUTONOMY*].

2. Fuller developed these criticisms in a number of writings, over a series of years. See, e.g., LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); LON FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958) [hereinafter Fuller, *Positivism and Fidelity to Law*].

3. See, e.g., Fuller, *Positivism and Fidelity to Law*, *supra* note 2.

4. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 599 (1958) [hereinafter Hart, *Positivism*]. What both Austin and Bentham were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.

It is useful, in this connection, to observe that in building his own affirmative theory of the nature of law and adjudication, Hart delayed discussing the natural law-legal positivism divide until after he had laid the foundations of his claim that law is a system of rules. See H.L.A. HART, *THE CONCEPT OF LAW* 181-207 (1st ed. 1961); see also *id.* at 6-13. This indicates, along with other facets of his book, that Hart saw the separability thesis as independent of questions about the nature of legal systems.

5. See Hart, *Positivism*, *supra* note 4, at 601 n.25 (distinguishing five different ideas attributed to positivism and arguing that only some were held by Austin and Bentham).

ism anything more substantial than this, Hart suggested, would risk both misperceptions about law's nature and also confusions about our political and legal obligations.⁶

In terms that are important for appreciating Anthony Sebok's⁷ enterprise, those who have followed Hart's lead take positivism to offer only a "thin" theory.⁸ That is, positivism involves little more than the apparently simple claim that there is no necessary or logical connection between law and morality.⁹ This claim, now standardly called the *separability thesis*,¹⁰ does not by itself entail any particular position about the nature of law or about the nature of judicial decisionmaking.¹¹ Theories about those topics need to be developed, on this approach to positivism, in order to complete our understanding of the nature of law; the separability thesis means only that it cannot be a precondition for the adequacy of such theories that law, or legal rules, must always be moral. Fuller's denigration of positivism, on the other hand, assumed that positivism is a "thick" theory, entailing deep but profoundly mistaken views about the nature of law and adjudication and the fundamental morality of both.¹² This thick theory of positivism should be rejected, Fuller maintained, because its concomitant positions on the nature of law and adjudication are both wrong and pernicious.

Anthony Sebok rejects both these perspectives, at least as regards positivism as it has been found in American legal theory of the last century. Fuller was wrong, Sebok maintains (pp. 46-47, 160-69), because he conflated positivism's core tenets with some of the mistaken ideas of Austin and Hobbes. But, Sebok argues (pp. 18-19), positivism is thicker than H.L.A. Hart's successors have acknowledged. Properly understood, it involves a complex set of commitments, especially as concerns the nature of judicial decision-making. Thus, Sebok's argument proceeds on two levels. One involves an argument (pp. 6, 18-19, 267-317) for what is now called *incorporationism*, or sometimes *inclusivist* positivism.¹³ This is an

6. See *id.* at 606-15 (rejecting the argument that positivism requires a formalist theory of adjudication); *id.* at 615-21 (discussing post-Nazi cases involving "grudge informers" who were punished retroactively).

7. Professor of Law, Brooklyn Law School.

8. See, e.g., pp. 18-19. As Sebok notes, these descriptors were first used by Kent Greenawalt. See p. 19 n.41 (citing Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *AUTONOMY*, *supra* note 1, at 1).

9. This claim is far less simple than meets the eye. See David Lyons, *Moral Aspects of Legal Theory*, in 7 *MIDWEST STUDIES IN PHILOSOPHY* 223, 245 (Peter A. French et al. eds., 1982).

10. See, e.g., p. 30.

11. See Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. LEGAL STUD.* 139 (1982).

12. See Fuller, *Positivism and Fidelity to Law*, *supra* note 2, *passim*.

13. See, e.g., Jules Coleman, *Authority and Reason*, in *AUTONOMY*, *supra* note 1, at 287, 287-88.

inquiry in philosophy of law, advancing incorporationism as against both natural law and also a competing brand of positivism that is usually termed *exclusivism*, or *nonincorporationism*. At the other level, Sebok is developing a thesis of intellectual history, interpreting the twists and turns of twentieth-century American jurisprudence in ways that are fresh and challenging. His focus at this second level is also called "positivism," but in this context what he means is better understood as a theory of adjudication rather than a claim about philosophy of law. In particular, Sebok aims to rehabilitate the theory of adjudication which was propounded by Henry Hart and Albert Sacks in their influential manuscript from the 1950s, *The Legal Process*.¹⁴ As Sebok views it, Hart and Sacks's theory is underappreciated today because, soon after it emerged, it was usurped by conservative critics of the Warren Court, who used it to advance a political agenda that is alien to the Legal Process theory of adjudication.¹⁵

What links these two levels of argument is a claim about the goals, and virtues, of positivism: positivist theories, according to Sebok, seek to develop a theory of law that both accommodates and controls judicial discretion.¹⁶ The contribution of Hart and Sacks to this project is to offer a theory of adjudication that incorporates principles (some of them moral) as part of a complex mechanism for controlling judicial discretion. The contribution of incorporationism is to show that it is possible, consistent with legal positivism's basic tenets, to include moral principles in a theory of adjudication without falling into some kind of natural law position. The result is a rich and complex exploration of the development, in twentieth-century American legal theory, of the theory (or theories) called positivism. By my lights, Sebok is more successful in his argument about intellectual history and especially the hijacking of Hart and Sacks, than in his argument to connect these developments with the incorporationism debate in philosophy of law. But, at every level, this is an admirable piece of work, rich in detail and elegant in its design. *Legal Positivism in American Jurisprudence* is a book that I will long remember and draw from in my own thinking about these issues.

14. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter TLP].

15. See pp. 179-216 ("The False Choice Between the Warren Court and Legal Process").

16. P. 17 ("[L]egal positivism tries to understand law as a system of variably constrained discretion. The positivist recognizes that the law sometimes requires the judge to exercise significant amounts of discretion but distinguishes judicial discretion from sovereign power by tethering the delegation of judicial discretion to the law itself").

THE TRIUMPH OF INCORPORATIONISM

It is useful to begin with the argument about positivism's philosophical commitments, although I regard this as the less impressive part of Sebok's enterprise. For some time, philosophy of law has tended to regard natural law and legal positivism as opposed and incompatible philosophical approaches to law.¹⁷ Along these lines, many positivists distinguish their approach from that of natural law by reference to the separability thesis: to accept that thesis means that positivism denies, but natural law affirms, that there is some necessary, or logical, connection between law and morality. Positivism, on this formulation, allows that some (even most) legal systems might exhibit a connection with morality, because of some fact of, say, the history of those legal systems or perhaps of their particular constitution. But law and morality are still importantly distinct, so that there could well be laws or legal systems, properly so called, which are morally deficient.

While the core idea of the separability thesis can be found in H.L.A. Hart's seminal 1958 essay, *Positivism and the Separation of Law and Morals*,¹⁸ both the term "separability thesis" and the idea's centrality to positivism owe to Jules Coleman's important essay in 1982, *Negative and Positive Positivism*.¹⁹ Coleman's understanding of positivism allows that moral principles might be part of the law of some legal system, and it is this version of positivism that Sebok aims to defend. The alternative view, based on the views of Joseph Raz, rejects the idea that moral principles can be properly part of the legal system and hence is called "non-incorporationism," or "exclusivism."²⁰ On Raz's view, moral principles can be factors in certain judicial decisions but not part of the law.

The status of moral principles has been a recurring problem for positivism. The most forceful and elegant arguments about such principles have been advanced by Ronald Dworkin in a series of essays challenging positivism.²¹ When deciding "hard" cases,

17. See, e.g., Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 241, 242 (Dennis Patterson ed., 1996) ("[P]ositivists and natural lawyers are treated as a contrasting pair.").

18. Hart, *Positivism*, *supra* note 4.

19. Coleman, *supra* note 10.

20. As Sebok observes, Frederick Schauer has also advanced a nonincorporationist version of positivism which he has termed "presumptive positivism." See, e.g., Frederick Schauer, *Rules and the Rule of Law*, 14 HARVARD J.L. & PUB. POLY. 645, 678-79 (1991). Sebok discusses Schauer's arguments, *see, e.g.*, pp. 277-87, but since the crux of Sebok's argument has to do with the role of legal principles, and since Sebok himself views Schauer's argument on this point as parallel to Raz's, *see* p. 280, it is Raz's version of non-incorporationism which poses the most important challenge.

21. Three of Dworkin's essays are particularly important in this regard. See RONALD DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY, *supra*, at 81; Ronald A. Dworkin,

argued Dworkin, judges characteristically make use of norms that appear both to be legal, in some important sense, and also to have significant moral content.²² Dworkin, for example, has made much of the case of *Riggs v. Palmer*,²³ in which the New York Court of Appeals upheld a challenge to an otherwise valid will on the grounds that the will's main beneficiary had murdered the testator to prevent him from changing the will. In its decision, the court relied on what it called a "maxim" of the common law, "no one shall be permitted . . . to take advantage of his own wrong,"²⁴ as grounds for allowing the challenge to the murderer's claim. What the court called a maxim, Dworkin called a principle, but his fundamental claim was of course substantive rather than terminological. The law, he argued, is well-stocked with such principles, and while they express fundamental moral claims, they are also an important component of the reasoning by judges in cases that establish rights and liabilities.²⁵ Thus, on the one hand they are moral principles and yet on the other hand they also appear to be legal — they are principles of *law*, in some nontrivial sense of that word. Thus, Dworkin argued, such principles challenge positivism, at least as along the lines suggested by Austin and H.L.A. Hart.

In responding to this challenge, positivists have split into two camps, each camp offering a different solution to the problem of principles. The exclusivist position owes principally, as I have said, to Joseph Raz. On Raz's view, while moral principles can play an important role in judicial decisions, they do not really become part of the legal system. Their role, as Raz sees it, is that of an outsider, an alien presence. Principles are used or borrowed by the deciding court, just as a Michigan court would use or borrow the law of California in order to decide a controversy where the applicable "conflicts" rules of decision conclude that the dispute is governed by the law of California:

Suppose that the law requires that unregulated disputes (i.e. those with respect to which the law is unsettled) be determined on the basis of moral considerations (or a certain subclass of them, such as considerations of justice or moral considerations not fundamentally at odds with social morality). . . . To conform to [exclusivism] we will have to say that while the rule referring to morality is indeed law (it is determined by its sources) the morality to which it refers is not thereby

"Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982); RONALD DWORKIN, *The Model of Rules I*, in TAKING RIGHTS SERIOUSLY 14 (rev. ed. 1978).

22. See DWORKIN, *The Model of Rules I*, *supra* note 21, at 22-23.

23. See *id.* at 23 (discussing *Riggs v. Palmer*, 22 N.E. 188 (1889)).

24. *Riggs*, 22 N.E. at 190, quoted in DWORKIN, *The Model of Rules I*, *supra* note 21, at 23.

25. See, e.g., Dworkin, *The Model of Rules I*, *supra* note 21, at 22, 28-31; see also Dworkin, *Hard Cases*, *supra* note 21 at 90-94, 105-23; Dworkin "Natural" Law Revisited, *supra* note 21, at 165-66, 169-73.

incorporated into law. The rule is analogous to a 'conflict of law' rule imposing a duty to apply a foreign system which remains independent of and outside the municipal law.²⁶

So, properly regarded, such principles are no challenge at all.

It is important to observe that Raz's exclusion of principles is not motivated by his adherence to the separability thesis. His approach to positivism goes so far as to relegate that thesis to a secondary importance; indeed, at times he seems to abandon it altogether.²⁷ Instead, Raz argues that positivism's central commitment is to something he calls the *sources* thesis, which holds "that the existence and content of every law is fully determined by social sources."²⁸ The "sources" of a law are "those facts by virtue of which it is valid and which identify its content,"²⁹ and Raz contends that it is a constraint on the adequacy of any theory of law that its test for validity and identification of law depend "exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument."³⁰ Moral principles, he holds, cannot meet that requirement.³¹

In contrast, the incorporationist approach to positivism accepts moral principles as properly legal, at least in those instances where the moral principle has been "incorporated" by some affirmative legal act, practice, or provision. So, for example, the Due Process Clause of the Constitution may require judges to reason morally about the actions of the state, but it is not the morality of that clause or of the attendant judicial decisions that make it law; instead, what makes the Clause law is just the fact that it is part of the Constitution.³² Thus, argue the incorporationists, it is the fact that the Clause was included in the Constitution that determines its legal validity, not its moral truth or falsity. This means that law, in any particular jurisdiction, could be moral or not, depending on the facts of that jurisdiction's law — namely, what has or has not been incorporated. Thus, for example, the same reasons that make the Due Process Clause legally valid would also bear on the legal validity, before the ratification of the Thirteenth Amendment, of Article

26. JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW* 37, 45-46 (Oxford University Press, 1979) (footnote omitted).

27. See *id.* at 38-39 (stating that the social thesis leaves open the question "whether or not those social facts by which we identify the law or determine its existence do or do not endow it with moral merit. If they do, it has of necessity a moral character"). As I argue later, one crucial, but unappreciated question in the debate about the separability thesis is whether law's putative connection with morality holds for each individual law, for the legal system as a whole or only for certain essential processes of law. See *infra* text accompanying note 66.

28. Raz, *supra* note 26, at 46.

29. *Id.* at 47-48.

30. *Id.* at 39-40.

31. *Id.* at 40.

32. See Hart, *Positivism*, *supra* note 4, at 599; Coleman, *supra* note 13, at 295.

IV's morally repugnant Fugitive Slave Clause and Article I's infamous provision that counted slaves as only three-fifths of a person.

In sum, where an exclusivist holds that moral principles cannot properly be regarded as part of law, an incorporationist can accept such principles as properly legal. As Raz observes, incorporationism is compatible with the prospect that the identification of some laws will turn on moral argument, but exclusivism rejects that possibility.³³ Moreover, behind this specific issue lies a larger question about the core nature of legal positivism. Incorporationism identifies the separability thesis as positivism's central claim, but exclusivism treats the sources thesis as its foundation instead.³⁴

It should be clear from the earlier discussion why incorporationism is so vital to Sebok. The Legal Process theory of adjudication, much like Dworkin's,³⁵ countenances the prospect that moral principles might be part of the law and not merely sources of law: decisions made according to such principles can, in the appropriate circumstances, be regarded as genuinely legal decisions, and the conclusions derived therefrom can be regarded as valid legal rulings. So, if moral principles may be part of our law, then Sebok needs incorporationism to preserve the claim that the Legal Process school continued and extended the twentieth century legacy of positivism.

Sebok's argument on this issue is, not surprisingly, an expansion of Coleman's approach. To appreciate this position requires that we understand, at least in its basics, the nonincorporationist response. Raz is of course perfectly aware of salient instances, like the Due Process Clause, where legal systems appear to have incorporated moral norms. Why then would he advocate instead this rather byzantine idea whereby moral norms are only referred to by the law and not included in it? As Raz sees it, including moral principles as part of the law would undermine various of the functions that legal systems should perform. The chief problem with moral principles, in the exclusivist's view, seems to be the inherently controversial nature of such principles. Because moral issues are so controversial, judges will not be seen as basing their decisions on something "objective." Judicial decisions based on such controversial principles will not be perceived as both settled and independent and hence will not fulfill their function of settling disputes. Moreover, morality seems to be "insatiable" in that it seems

33. See RAZ, *Legal Positivism*, *supra* note 26, at 47.

34. Compare, e.g., Coleman, *supra* note 13, at 287 with RAZ, *Legal Positivism*, *supra* note 26, at 41.

35. I have argued elsewhere that Dworkin's theory of adjudication, at least as expressed in his early writings, is much the same as Hart and Sacks's. See Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413 (1987).

difficult to incorporate a moral principle into a system of reasoning without including all of morality. If so, then judicial decisions based on moral principles threaten any sense of the autonomy of law: law can no longer be expected to serve as a distinct realm of decision-making, it must instead be continuous with moral reasoning more generally. Judges, as a result, are no longer officials of the legal system with limited powers, but rather all-encompassing moral arbiters.

Following Coleman, Sebok argues that the criteria for judicial decisionmaking are all subject to the rule of recognition: the organizing precept that, in any given legal system, validates the rules which legal officials will treat as binding. The rule of recognition, Coleman contends, is a matter of convergent social behavior by the legal system's officials, including its judges.³⁶ This means, as Sebok describes it, that one legal system's rule of recognition could both include moral principles and recognize what Sebok calls "interpretation rules" as part of its law (pp. 307-12). Glossing over the intricacies, the basic point is that these interpretation rules can constrain the way judges in a given legal system apply moral principles or balance them off against other values of the legal system. Morality, as used in legal decisionmaking, is not necessarily insatiable, nor controversial beyond the capacity of law to settle legal disputes. And so, incorporationism is sustained.

While I am generally sympathetic to incorporationism, I am unsatisfied by this answer. In the first place, it seems to miss the point of incorporationism, because it ultimately denies the morality of moral principles. This issue raises deep questions about the nature of morality, but the idea of a moral principle seems to require that the consequences of a principle, taken by itself, must themselves be moral. That is, if I claim to be applying a moral principle (and if no other principles or values are in play) then my answer must, at a minimum, be morally acceptable; conversely, if the conclusions I draw from a given moral principle are not morally acceptable, then I am applying something other than the principle I claim to employ. But Sebok's interpretation rules violate this requirement.

[F]airness does not have an *a priori* legal meaning, even if it does have a determinate but contested meaning to the Rawlsian and the utilitarian. [H.L.A.] Hart argued that under the English and American legal systems the rule of interpretation concerning legislative supremacy often directs a judge to identify a legal fact notwithstanding the judge's own convictions. We should assume that there are rules of interpretation concerning moral values that also direct a judge to identify the "legal" meaning of words like *fairness*, notwith-

36. See Coleman, *supra* note 13, at 289-96.

standing the judge's conviction of what fairness *really* means, all things considered. [p. 307]

As I read this argument, what's doing the work is the idea that the legal meaning of a particular norm can be different from the norm's meaning outside the particular legal system. Put differently, it is the legal system's rule of recognition which, by use of the rules of interpretation, will determine the application of the moral norm. But, if the moral norm's application in a given legal system is determined by something other than valid moral reasoning (assuming still that the only norm at issue is the moral principle) then the norm is no longer a moral norm. In sum, Sebok's solution seems ultimately to become a kind of nonincorporationist response, because ultimately there are no moral principles at work, only legal ones.

I'm also troubled by this argument because it seems unnecessary for Sebok's overall project. As was noted earlier,³⁷ Sebok's argument about twentieth-century American legal theory depends crucially on the theory of adjudication that was advanced by Henry Hart and Albert Sacks, because their theory countenances principles as part of the law to be applied by judges in important legal decisions. The picture of law advanced by Hart and Sacks is one in which there are various values at work in the legal system — some of them perhaps moral and others likely not. Adjudication, at least in common law systems like our own, may require the application of these values, but it misreads the Legal Process theory to think that only one such value will be relevant or applicable to a controversial decision. To the contrary, important cases may require judges to weigh competing values — principles against policies and against other principles.³⁸ But, if adjudication can involve the weighing of competing principles, or more generally of competing values, then I see no reason why this feature of judicial decision-making should be different if some, but not all, of the legal system's values are moral. In any given case, where multiple and competing values bear on a particular decision, the court may decide to advance one value, because of the balance of reasons, but the value advanced need not be the moral one. The resulting model of judi-

37. See *supra* text accompanying note 16.

38. Dworkin's view of principles and policies reflects this feature of adjudication: principles are logically different from rules, he argues, because principles have a "dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each." DWORKIN, *The Model of Rules I*, *supra* note 21, at 26. The logical difference between rules and principles, as Dworkin describes it, has a further consequence as well. The fact that a given principle applies to a controversy does not require that the judicial decision must adhere to that principle. "We say that our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from wrongs he commits." *Id.* at 25. As a result, a principle "states a reason that argues in one direction, *but does not necessitate a particular decision.*" *Id.* at 26 (emphasis added).

cial decisionmaking will, of course, produce results which are not moral, but for a positivist that is just as is to be expected: positivism does not require that the set of legal decisions be moral. So, incorporationism can be cavalier about including moral principles in the law, or even in the rule of recognition, so long as there are other values at work as well, nonmoral but nonetheless weighty.³⁹

I have made the point in terms of common law reasoning, which involves reasoning from valid rules and norms rather than reasoning from the rule of recognition to identify or validate rules or norms. But, by hypothesis, the incorporationist accepts that the rule of recognition can include values amongst its provisions — if not, moral validity would pose no issue for the incorporationist theory. So, if the rule of recognition can include moral values, it can include others as well and, the incorporationist may argue, could require that nonmoral values sometimes count more than moral ones in the identification as well as in the application of law. Incorporationism, in other words, is not threatened by insatiability, so long as the Legal Process theory of adjudication can be sustained.

THE TWENTIETH CENTURY DEVELOPMENT OF AMERICAN LEGAL THEORY

Sebok's argument about the intellectual history of positivism is almost dialectical in its structure, although he does not invoke that concept or its terminology.⁴⁰ As he views it, American legal theory

39. Sebok's discussion of this point is considerably more involved than I have, or possibly could have, presented in this review. Its central feature depends on an argument about what he terms the "insatiability" of moral reasoning, a point that he employs both in his discussion of incorporationism, pp. 294-307, and also in his argument about certain versions of constitutional interpretation that see the Supreme Court as advancing "fundamental rights." See pp. 259-66; see also *infra* note 64. The issue is complex, but my disagreement with Sebok on the nature of adjudication springs, in part, from my rejection of his insatiability argument. Stripped to its essentials, Sebok's argument is this: any normative system with an insatiable concept — like that of justice — will become a *monistic* system of practical reasoning, in which all decisions will be measured against that insatiable concept. See pp. 260-64. Monism, as he means it, "assumes not only that the choices one makes can be ranked but also that one's reasons are comparable along a common metric." P. 262. Now, it seems plain to me that whatever may be the case for constitutional interpretation, the common law as we know it defies easy categorization along these lines — sometimes appearing monistic and sometimes not. But the real point goes to insatiability: insatiability of the sort that bothers Sebok requires monism, rather than producing it. As a consequence, we can understand how legal systems can block insatiability: any system of law which is not independently committed to producing the morally right answer in every controversy can be comfortable advancing other values as well as morality. Thus, legal reasoning does not necessarily respect the insatiability of moral norms like justice or fairness. To the contrary, a given legal system can instead advance other values, sometimes at the expense of justice or fairness or the like.

40. The following description of the structure of Sebok's argument is, of course, an utter bowdlerization of Hegel's complex and arcane argument for the phenomenological development of "spirit." Hegel's view, in all its intricacy and obscurity, can be found in G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* (J.B. Baillie trans. 1967).

of the past hundred or so years has involved the struggle of an idea — legal positivism — to express itself. It was initially expressed, albeit incompletely, at the end of the nineteenth century by writers who were influenced by Austin. Then, the idea confronted another opposing idea, and in reaction to that opposition was ultimately transformed into something different (and better) than its earlier manifestation. Then, having been transformed, positivism again confronted an opposite idea and again overcame it through yet another transformation. This second dynamic of thesis and antithesis, followed by synthesis, begins with the Legal Process school and the “reasoned elaborationists” of the 1950s, and leads us through the twists and turns both of conservative critics like Herbert Wechsler and Robert Bork, and of natural law theorists like David Richards and Ronald Dworkin, until we arrive at the current moment in intellectual history.⁴¹

A.

The first phase of this story involves the familiar topics of formalism and American Legal Realism, but Sebok’s examination of these ideas yields some surprising conclusions. In the beginning, he contends, positivism was brought to the American legal experience through the influence of the scholars who are now so often denigrated as *formalists*.⁴² Upon closer analysis, these writers — most saliently, Christopher Langdell (pp. 83-97) and Joseph Beale (pp. 97-104) — turn out to be positivists in their views about the nature of law and what makes it authoritative. But the formalists were hamstrung by a woefully inadequate theory of adjudication; this early version of positivism could not conceive of a mechanism by which to control judicial discretion and so it espoused instead a vision of law that left judges little discretion to reconsider the rules of law they sought to apply. Because their theory of adjudication

41. Indeed, Sebok’s own characterization of the debate between incorporationism and its critics is couched in much the same terms. The triumph of incorporationism, which he calls the “New Positivism,” also involves three stages:

First, there was the “founding,” which took place . . . through the publication of H.L.A. Hart’s *The Concept of Law*. Hart set out the essential principles of the New Positivism, and much of the conflict among subsequent New Positivists has been over the proper interpretation of his legacy. The second stage was the critique of Hart’s positivism by Dworkin. Dworkin was a critical player . . . because his restatement of Hart’s theory — for no other purpose than to criticize it — has been very influential among Hart’s later defenders. The final stage, which began in the early 1970s and is still unfolding, involves efforts by New Positivists to answer Dworkin and refine Hart’s work.

P. 268.

42. “Formalism” is, of course, another of those words that is commonly used as a pejorative, to the point where many have wondered if there is any real content to the term, or any real reference. See, e.g., Dworkin, *The Model of Rules I*, *supra* note 21, at 15-16 (“[A]ll specimens [of mechanical jurists] that have been] captured — even Blackstone and Joseph Beale — have had to be released after careful reading of their texts.”). Sebok provides a long discussion of the different strands of criticism of formalism. See pp. 48-60.

was so unsatisfactory, the formalists were belittled first by Holmes (pp. 60-75), then Pound (pp. 32-39), and then the Realists (pp. 75-83, 104-12). The Realists themselves faced criticism by writers such as Lon Fuller who were appalled by Nazi Germany's corruption of law into an instrument for tyranny and oppression. Fuller held no brief for the Realists, but he joined with them in scorning the earlier formalists.⁴³ As a result, reviled by both the Realists and their successors, positivism (in its formalist guise) fell into disrepute.

Before reading Sebok, I had largely supposed that the formalists were unthinking adherents of a kind of simpleminded natural law position. I had supposed this because I had also assumed that American Legal Realism was dominated by Holmes' view of the nature of law: since Holmes espoused a version of the separability thesis,⁴⁴ I therefore assumed that Holmes should be read as a positivist, and hence, so should the Realists who, following in his footsteps, criticized the formalists on many of the same grounds. As a result, when it came to assessing formalism, I was inclined to contrast the formalists with what I assumed to be the positivism of their most vocal critics and accordingly to infer that the formalists must be aligned with natural law. My easy and unreflective path through these issues was no doubt aided by my uncritical adoption of Grant Gilmore's famous characterization of Langdell as rigid, doctrinaire, and essentially stupid.⁴⁵ Sebok's close and careful examination of both Holmes and his formalist targets, Langdell and Beale, leads me to reconsider each and every one of these views. Langdell, in particular, is rehabilitated into an interesting and reflective thinker about the nature of law (pp. 86-97) and not at all the shallow pedant that I had supposed him to be.

At one level, Sebok's conclusions about these familiar topics are surprising. But at another, they are intuitively satisfying. First and foremost, Sebok's analysis of Holmes and Langdell reminds me that these are complex figures, with complicated views that cannot easily be reduced to adherence or rejection of a few basic propositions. Consider, in this connection, the position of Holmes. It is true that Holmes denied that law was conceptually connected with morality, and this denial means that he was to that extent a positivist. But Holmes's embrace of the separability thesis, according to Sebok, had more to do with his skepticism about morality than with a well-thought-out position about the nature of law (p. 68). And, in every other respect, Holmes rejected the core tenets of Austinian positiv-

43. See Fuller, *supra* note 2.

44. See pp. 67-69 (discussing Holmes' acceptance of the separability thesis); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897).

45. See GRANT GILMORE, *THE DEATH OF CONTRACT* 13-15, 106-07 (Ronald K.L. Collins ed., 2d ed. 1995).

ism (pp. 67-68). So, classifying Holmes as positivist is too facile and, as a result, misleading, especially when it comes to thinking about the views of his Realist successors.

Sebok characterizes positivism as resting on a tripod of fundamental tenets which were first articulated by Austin and Bentham. The first of these is the *separability thesis* (already noted): the claim "that there is no necessary connection between law and [morality]" (p. 30). Second is the *command theory*, Austin's (and to some extent Bentham's) argument that all laws are, at bottom, the command of the sovereign (p. 31). Later positivists, such as Kelsen and H.L.A. Hart, rejected the particular details of this theory. But, their respective theories of the nature of law — requiring, in Kelsen's case, a *Grundnorm*, that both identified the particular norms of a legal system and engendered their validity,⁴⁶ and, in Hart's case, a rule of recognition that both identified and validated the legal system's other rules⁴⁷ — can be seen to "depersonalize" the command theory. In effect, Kelsen and Hart analyzed law as derivable not from a distinct person of overweening power but instead from an organizing precept which could play a comparable role in establishing and maintaining a system of law. Finally, there is what Sebok calls the *sources thesis* (pp. 31-32). In point of fact, Sebok's version of this particular idea differs importantly from Raz's and would be more usefully termed the "social" thesis.⁴⁸ The core idea, as Sebok develops it, is that each rule (or norm) of law must be traceable to some identifiable social source (pp. 31-32, 106-07, 159). In Austin's theory, that source was the will of the determinate sovereign and the social fact that the sovereign was owed a habit of obedience by the bulk of the populace,⁴⁹ but in Hart's version of positivism, the relevant social fact would be the acceptance of the rule of recognition by the officials of the legal system.⁵⁰

Viewing the formalists and their realist critics through this three-part analysis,⁵¹ Sebok concludes that the formalists were the

46. See, e.g., HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 110-24 and *passim*.

47. See HART, *THE CONCEPT OF LAW*, *supra* note 4, at 91-93, 95-107.

48. See *infra* note 51. The distinction between the sources thesis and the social thesis derives from Raz's work. See RAZ, *supra* note 26.

49. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 6-20, 199-212 (1984).

50. See HART, *THE CONCEPT OF LAW*, *supra* note 4, at 111-14.

51. There is a deeper difficulty with Sebok's argument on this point — just who should and should not count as a positivist. In his eyes, both the formalists and later the Legal Process school were positivists because, in each case, they accepted positivism's three key tenets — the separability thesis, the command theory (or its modern-day counterpart) and the sources thesis. But, this argument papers over a deep and unresolved tension amongst these tenets, as least as understood by the main disputants. Coleman, for example, understands positivism to involve the separability thesis and the rule of recognition (H.L.A. Hart's counterpart to the command theory), but he rejects the sources thesis, at least as Raz has advanced it. See Coleman, *supra* note 13, at 305-08. Raz, on the other hand, understands

adherents of positivism, although misguided in their picture of adjudication (pp. 104-11). Through a careful analysis of the writings of Langdell, for example, he argues that Langdell accepted each leg of this tripod (pp. 83-97). Holmes, on the other hand, embraced only the separability thesis, and identifying him as a positivist is accordingly inaccurate (pp. 67-68). Finally, the Realists, while often unclear about many of their views, were led away from positivism by their rejection of formalism's theory of adjudication; they embraced none of positivism's core tenets and, at times, rejected some of them outright. The criticisms levelled at the formalists varied with their different critics but, in Sebok's eyes, the most insightful of these critics was Lon Fuller, who scorned formalism just because it rejected any enduring connection between law and morality (pp. 20-24). That is, Fuller recognized that formalism was based on something like the separability thesis and rejected it for just that reason. So, when Fuller began in the 1940s to espouse his distinct version of natural law, hard on the heels of realism's crusade, he both represented, in Sebok's view, the culmination of the earlier criticisms of formalism (p. 20) and also confirmed the characterization of formalism as fundamentally positivistic (p. 42).

Second, Sebok has reminded me to be wary of accepting any view of intellectual history that was propounded by those who were on only one side of an important debate. Consider, in this connec-

positivism to require the sources thesis, but abjures the separability thesis. In particular, Raz acknowledges, positivism as he understands it is consistent with certain kinds of necessary connections between law and morality. In terms of the point made earlier, the sources thesis might lead to denying any necessary connection between morality and each rule of law, or each judicial decision, but does not foreclose some deep connection between morality and the legal system, taken as a whole.

Some part of the difficulty here is terminological. Raz developed his idea of the sources thesis by building from a related, but less aggressive position that he termed the *social* thesis. This he defined as being the claim "that what is law and what is not is a matter of social fact." Raz, *supra* note 26, at 37. As Raz develops the argument, the social thesis has both strong and weak versions, and the weak version is compatible with the claim, "[s]ometimes the identification of some laws turns on moral arguments." *Id.* at 47. Moreover, the strong social thesis, which Raz renames the sources thesis, excludes that statement. *See id.* In other words, the weak social thesis is consistent with incorporationism, but the sources thesis is not. The social thesis seems to be much closer to Sebok's version of the sources thesis, but the difference is important. So, Sebok has clouded the picture by using Raz's crucial term in a manner somewhat inconsistent with Raz's own development. But, the problem goes beyond mere terminology. To make his argument that the formalists, for example, were misunderstood advocates of positivism, Sebok needs an initial characterization of who is, and who is not, properly to be understood as a positivist. And, in order to be illuminating, Sebok's initial characterization of positivism needs to straddle the important dichotomy between incorporationism and nonincorporationism — he would beg the question about who really was a positivist if his test for positivism adopted only the incorporationist's definition, or the nonincorporationist's. So, it makes sense that his initial characterization should include features of both camps, if those features can be used consistently together. *See, e.g.,* Coleman & Leiter, *supra* note 17. But the "sources" thesis is so intimately tied to Raz's version of (nonincorporationist) positivism, and the separability thesis is now so tied to Coleman's alternate approach, that it is disquieting to see them amalgamated together, without an attending acknowledgment.

tion, the case of *Lochner v. New York*,⁵² often derided as the quintessential "formalist" opinion.⁵³ There the Supreme Court invalidated a New York law on the grounds that it violated a norm of freedom of contract, which was assumed by the majority to be enshrined in the Constitution. Descriptions of *Lochner's* formalism have always seemed too pat to me, although I seldom paused to wonder why. A common strand of criticism decries *Lochner's* formalist majority as either knaves or fools. On the one hand, the (knaveish) majority is to be scorned because it decided the case as it did on the basis of a conservative economic policy but "hid" the "true" reasons for its decision. In other words, *Lochner* was wrong because it was antiprogressive in its social policy, but the majority lacked the courage of its convictions. On the other hand, the (foolish) majority is to be mocked because it supposedly believed, of course wrongly, that it did not have any choice about its decision, that it was duty-bound to apply the constitutional norm of freedom of contract, notwithstanding the policy preferences of the people of New York.

I am no fan of formalism, nor of *Lochner*, but this dual criticism has always bothered me, for several reasons, not the least of which is its self-contradictoriness: if the majority was foolish in its belief that it could only advance the norms already enshrined in the Constitution, then it could not also be knaveish for hiding its view of economic policy. Moreover, each branch of this criticism was itself unsatisfying. For instance, how could the knaveish majority have thought to hide its true reasons when Holmes, in his ringing dissent in the same case, so clearly revealed the supposedly "hidden" mission of imposing on us Herbert Spencer's *laissez-faire* social philosophy?⁵⁴ And, even more important, how can the majority's policy preferences be held to be so wrong-headed unless we have a robust theory of constitutional interpretation which establishes a constitutional mandate to further the opposing, progressive, policies?

What is perhaps most important for Sebok's overall argument is the manner in which the Realists proceeded to oppose formalism, because he contends that the Realist's campaign against positivism presaged the later hijacking of positivism's second incarnation, the Legal Process tradition. In the Realists' portrayal, positivism was burdened, as Sebok phrases it, with excess "theoretical baggage" (p. 18). First, the Realists painted a misleading picture of Langdell and Beale and accused them of promoting certain conservative values, at the expense of an honest, and more "realistic" picture of law.

52. 198 U.S. 45 (1905).

53. See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9-64 (1995) (articulating different strands of realist criticism of *Lochner*).

54. See *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

Then, aided by Fuller, the Realists also conflated the formalists' essential positivism with their mistaken theory of adjudication. Thus portrayed as both conservative and obtuse, positivism languished until two developments in the 1950s: H.L.A. Hart's 1958 essay (written after he had spent a year at the Harvard Law School, debating some of these issues with Lon Fuller and Henry Hart), and the emergence (also at the Harvard Law School) of the theory of "reasoned elaborationism" and its theoretical underpinnings in Hart and Sacks's manuscript.

B.

The second phase of positivism's emergence was brought about by the Legal Process school of Henry Hart and Albert Sacks. I welcome Sebok's analysis because I have long been of the opinion that the Legal Process school is a rich and insightful approach to the problems of a theory of adjudication. In my view, the Legal Process school is the dominant theory of adjudication in American law, although Hart and Sacks are not often credited for their contributions. Accordingly, I have been both baffled and frustrated by the way in which they are so often dismissed as relics of a former epoch. Sebok's analysis helps explain why.

In Sebok's telling of the story, Hart and Sacks provide what positivism's early versions lacked: an adequate theory of adjudication. Formalism was hamstrung by a need to see law as consisting primarily of rules; this meant that formalists could not easily explain judicial decisions — so prominent in the common law but also increasingly apparent in constitutional interpretation — where the deciding court reasoned about which rule to adopt or about how to reshape an old rule to meet changes in the social or political climate. Formalism's deficiencies on just this point made it an easy target for its critics. Hart and Sacks provided a theory to rebut the Realists' skepticism about judicial decisionmaking without falling back into the errors of formalism.

The chief contribution of the Legal Process school is to understand that law can consist of more than just rules. More precisely, Hart and Sacks saw that law, as we find it in our own legal system, includes different and distinct elements. First, there are rules (which are familiar enough) and, relatedly, what Hart and Sacks call "standards," rule-like norms which make use of open-ended criteria like "reasonableness" or "due care." These norms operate, as it were, on the surface of legal reasoning: we can observe that most judicial decisions involve the identification of a rule or standard and its application to the controversy at hand. But Hart and Sacks observed that other types of norms are also at work in judicial

decisionmaking: what they called "principles" and "policies."⁵⁵ The distinction between principles and policies can be elusive, but what's salient is the idea that principles and policies are values that, according to the Legal Process school, are part of the law.

Recognizing principles and policies as legal values accomplishes two important things for the development of an adequate theory of adjudication. First, in Sebok's terms, it accommodates judicial discretion. Put differently, it means that valid legal decisions can be other than mechanical: judges can, and will, shape their decisions to further the values which are, on this theory, part of the law. Including principles and policies in the body of law allows courts to render creative decisions, in that judges may appropriately revisit the legal system's norms, rethink the appropriateness of any particular norm, and, in the appropriate case, legitimately craft new solutions to problems faced by the legal system. Indeed, including principles and policies in our understanding of the law means that in some cases, at least, judges are required to be creative: where the previously acknowledged rule or standard no longer serves the underlying values, the law (taken as a whole) requires the deciding court to change the norm.

Second, such decisions are legally valid, because they are instances of judges applying the law and not just advancing their own personal policy choices. Hart and Sacks's picture of adjudication embraces the idea that values (whether moral or other)⁵⁶ are part of the law; what is equally important is the idea that these values constrain judicial decisionmaking. "Underlying every rule and standard . . . is at the least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties" about the meaning of the rule or standard.⁵⁷ Rules and standards are understood in this picture as based on the legal system's values and as justified by those values. So, when courts are called upon to assess any particular norm, they do so in terms of the relevant principles and policies. If the court is called upon to formulate a rule for inclusion in the legal system, then the rule that should be formulated is the rule that best serves the principles and policies of that area of the law. As a result, including principles and policies means that such nonmechanical decisions are nonetheless legally valid. Conversely, if the court is called upon to examine a problematic rule, or to modify it, or to

55. See TLP, *supra* note 14, at 139-43.

56. Hart and Sacks do not argue, in anything like a systematic fashion, that the values which are embodied in legal principles or policies are necessarily moral. But they seem to countenance the possibility that some of their examples — like the principle that no one should be unjustly enriched — either express or reflect the kinds of values that would standardly be thought as moral.

57. TLP, *supra* note 14, at 148.

replace it with a more appropriate norm, the court's examination should address the question whether that norm is still justified by the relevant values.

In sum, Hart and Sacks's theory of adjudication provides the kind of solution that, according to Sebok, lies at the heart of positivism: to accommodate and control judicial discretion. This conclusion, in turn, prompts the inevitable question: if, as Sebok and I both believe, the Legal Process theory is so insightful and so deserving of attention, why has it received so little recognition?

The answer is multifaceted, and fascinating. In the first place, there is the strange history of the manuscript itself. Developed by Hart and Sacks as a teaching vehicle across a span of several years, it reached its final, but incomplete stage in their 1958 manuscript. Thereafter, it was used by them at the Harvard Law School and by professors at other law schools. But, it was never finished and never published. For decades, it was only available as duplicated pages from the Harvard Law School. Finally, after both Hart's and Sacks's death, Bill Eskridge and Philip Frickey undertook to finish and publish it. They published in 1994, but they did not finish. As they explain in their Introduction, there was no way to revise the manuscript, without attempting in effect to rewrite it from the beginning. They decided instead to publish the manuscript as it stood in the 1958 edition, together with their own substantial commentary on the manuscript's significance. Thus, Hart and Sacks's crucial ideas were effectively diminished by the authors' long-term inability to complete their project.

Hart and Sacks's ideas were minimized as well by the nature of the authors' ambitions. Although the manuscript includes, early on, a substantial essay entitled "Introductory Text Notes on the Nature and Function of Law," Hart and Sacks clearly believed that their approach to law could only be understood through the effort of wrestling with various problems and conundra about the making and application of law. As they wrote:

The technique of reasoned elaboration which courts pursue or ought to pursue in the effort to arrive at decisions according to law defies any facile generalization which will convey in itself a working understanding. These materials seek mainly to arrive at such an understanding by grappling with a series of concrete problems of decision⁵⁸

As a result, the reader is left to extract the most important insights from discussions of particularly thorny cases, which are selected and accompanied by text and questions which were both more designed to be provocative than illuminating.

58. *Id.* at 146.

To this unfortunate history, Sebok adds two further dimensions. First, he argues that the impetus of the Legal Process school was "usurped" by various conservative critics of the Supreme Court and its activist posture in the 1950s and 1960s (p. 188). In the legal world of the 1950s, the most salient event was, of course, not the development of Hart and Sacks's ideas but the Supreme Court's decision in *Brown v. Board of Education*.⁵⁹ In 1959, shortly after the last version of the Legal Process manuscript, Herbert Wechsler gave his now famous lecture, *Toward Neutral Principles of Constitutional Law*,⁶⁰ at the same Harvard Law School. Wechsler was critical of the *Brown* decision, ostensibly on the grounds that the decision failed to articulate "neutral" principles which could serve to validate judicial reasoning in other constitutional decisions. On the surface, at least, Wechsler's argument resembled the kind of perspective on judicial decisionmaking that Hart and Sacks were attempting to express: it required that each decision be justified not solely by reference to the rightness of its result, but by reference to the craft and elegance of the judicial reasoning that led to the conclusion.⁶¹ This emphasis on the distinct requirements of professionalism and valid reasoning echoed themes that Hart and Sacks had each expressed in other writings about the activities of the Supreme Court, in addition to their manuscript. As a result, in the minds of many, Wechsler was either an adherent of the Legal Process school, or at least a fellow traveler, and his criticism of *Brown* was taken as an indication that the Court's activism in challenging racial discrimination was somehow contrary to the core of the Legal Process school's theory of adjudication.⁶²

Regardless of the surface similarities between Wechsler's view and Hart and Sacks's, it was a striking *non sequitur* to associate the neutral principles argument with the Legal Process theory of adjudication. First and foremost, the Legal Process manuscript did not attempt to develop a theory of constitutional adjudication. Notwithstanding the exhaustive nature of their discussion of those topics they undertook, they never took up constitutional law in any systematic way. Second, the overall tenor of Wechsler's remarks — that the Supreme Court should avoid articulating or enforcing principles of constitutional law unless they were appropriately "neutral" — was of course inconsistent with the Legal Process school's most

59. 347 U.S. 483 (1954).

60. Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

61. See, e.g., *id.* at 15 (asserting that legal reasoning "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved").

62. See, e.g., G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286-91 (1973).

fundamental assumptions about the nature of law as consisting of values to be served, as well as rules and standards. These values could, and in some instances should, lead to dramatic reconfigurations of the rights of others in the society.⁶³ In fact, Sebok argues, Wechsler, Bickel, and Bork were fundamentally motivated by a skepticism about morality: since moral reasoning was an unreliable basis for constitutional decisionmaking, they turned instead to various versions of "originalism," in the hopes that the supposedly reliable facts about the intent of the Constitution's drafters could legitimate constitutional interpretations in a way that moral principles could not (pp. 191-92, 199-206). And finally, as Sebok demonstrates, Wechsler's criticisms of *Brown* were at odds with Sacks's own writings, in which he discussed and praised the Supreme Court's decision (pp. 122-23).

Nonetheless, the damage was done. And it was solidified by subsequent developments. As Sebok views the story of constitutional law scholarship during the 1960s and 1970s, what Wechsler begat was the later, increasingly more conservative, criticisms of Supreme Court activism in the scholarship of first Alexander Bickel and then Robert Bork. Their increasingly conservative stance meant that, more and more, the Legal Process school was assumed to be both conservative in its leanings and outdated in its views. Finally, the conservative critics of the Supreme Court in turn begat an opposing strand of constitutional law scholarship, that of David Richards, Tom Grey and, most importantly, Ronald Dworkin, all of whom Sebok summarizes under the heading of "fundamental rights" theories (pp. 195-96, 217-22). As Sebok explains the dynamic, the fundamental rights theorists were led to respond to the moral skepticism of the Court's conservative critics (pp. 206-16). The rights theorists were joined in their view that constitutional interpretation could meaningfully be founded on substantive moral values. Although diverse in their particular arguments, the "fundamental rights" theorists converged on a premise that the Court was obligated in its constitutional decisions to advance certain basic values like justice, fairness, or integrity. These writers were led by a complex of reasons both to reject positivism and, since they associated Hart and Sacks with Bickel and Bork, to scorn the Legal Process school in particular. And so, the cycle was repeated: the positivism of Hart and Sacks was tarred with a conservative brush and then ultimately criticized and rejected by those who sought to repudiate the supposed conservatism.

63. See, e.g., TLP, *supra* note 14, at 93-94 (discussing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)) and at 357 (discussing *Norway Plains Co. v. Boston & Me. R.R.*, 1 Gray 263 (1854)).

FITTING THE PIECES TOGETHER?

Sebok's reevaluation of Hart and Sacks's fall from grace in American legal theory and his reassessment of their views are substantial contributions to our understanding of American legal theory. Similarly, his discussion of the dispute between incorporationism and exclusivism and his emendation of Coleman's argument are noteworthy, taken on their own. These arguments seem, however, to be logically independent of one another: Hart and Sacks were misread, and underappreciated, whether or not incorporationism is a better theory of the role of moral principles in the law, and the adequacy of incorporationism does not seem to depend on our preference for the Legal Process school's theory of adjudication. What more does Sebok see in these topics that leads him to link them together in this kind of sustained inquiry? His project somehow requires that these two arguments fit together so as to complete the argument about positivism's reemergence, fitter and more sophisticated, from its various challenges. Unfortunately, what remains unclear is the connection that Sebok sees between these two facets of his argument. Nor is it clear that he succeeds in establishing such a connection, whatever it may be.

For example, it is somehow important to his grander enterprise that Sebok argue not only that Hart and Sacks's is a satisfactory and insightful theory of adjudication, but further that they were truly positivists in their thinking. As I see it, however, this more ambitious argument is unsuccessful.

To begin with, this construal of the Legal Process manuscript goes against the grain. Sebok's argument minimizes just how parochial Hart and Sacks were in their argument. At the level of philosophy of law, the aim of any good theory is to explain the features of law in whatever form we might encounter it. Accordingly, a satisfactory philosophical account of law must range over legal systems in a variety of political contexts — monarchies and dictatorships as well as democracies. It must also subsume legal systems of varying structures and complexity — civil law as well as common law traditions, together with socialist legal systems and primitive legal orders where one authoritative person makes, interprets, and adjudicates the law. *The Legal Process* attempts none of this universality. To the contrary, Hart and Sacks examine only those legal systems, such as our own, that come within the Anglo-American tradition. Indeed, to a very great extent, they are unconcerned with anything about lawmaking and application other than adjudication, and even that is mostly limited to judicial decisionmaking. Some sporadic exceptions notwithstanding, their manuscript is principally the development of a theory of adjudication and mostly a theory of adjudication for common law systems similar to ours.

Secondly, while Sebok argues that *The Legal Process* conforms to his positivistic tripod — separability thesis, command theory, and sources thesis — this argument is unpersuasive.⁶⁴ Consider, as one example, his contention that Hart and Sacks embraced the separability thesis. According to Sebok, this position is revealed in what the manuscript calls “the principle of institutional settlement,” which “requires that a decision which is the due result of duly established procedures be accepted whether it is right or wrong — at least for the time being.”⁶⁵ The cornerstone of Sebok’s argument is that institutional settlement entails law’s separability from morality, for his statement of the principle’s definition is immediately followed by the conclusion: “Hart and Sacks therefore recognized that there is no necessary connection between law and morality and therefore embraced a central tenet of legal positivism, the separability thesis” (p. 130).

But the separability thesis does not follow from the principle of institutional settlement. Among other things, Sebok’s argument ignores an important issue about the scope of any purported connection between law and morality. One famous, if suspect, version of natural law, often but perhaps inaccurately attributed to Thomas Aquinas, holds that “an unjust law is no law at all.”⁶⁶ This version of natural law asserts a necessary connection between morality and each law of the legal system. But it is difficult to find natural law adherents who would argue, in any sustained way, that each law must necessarily be moral or just. As an alternative, more contemporary examples of natural law can be seen to argue that there is some kind of connection between morality and the legal system, taken as a whole (as was suggested by Lon Fuller) or between

64. Pp. 129-38, 159. In one other respect, as well, Sebok has shown a propensity to force writers into one camp or another. In his review of the “fundamental rights” version of constitutional interpretation, he distinguishes among different strains of what he labels “epistemic” natural law. Pp. 229-34. The point of the analysis is to capture the efforts of theorists like David Richards and Ronald Dworkin who want to include in constitutional law substantive moral values like justice or fairness, without thereby requiring that each judicial decision serve only that value. Sebok argues on the basis of what he calls the “insatiability” of such moral values, that each of these weaker versions of epistemic natural law collapses into something more aggressive, and less plausible, than its adherents would hope. Pp. 234-56. It seems to me, however, that this argument outstrips the data, because none of these versions of “epistemic” natural law seems to me to be natural law at all. Consider, for example, what he calls Almost Strong Epistemic Natural Law, which he defines as follows: “The existence of a constitution entails the identification of justice as the source of supreme law.” P. 230. But this characterization, like his argument about the principle of institutional settlement, lacks the required universality. This legal theory, whatever it may be called, makes claims only about those legal systems that are built on a constitution, but offers no basis for extending the argument to other kinds of legal systems. The theory is, therefore, not a natural law theory. And the flaws of *Almost Strong Epistemic Natural Law* hold a fortiori for *Not Very Strong Epistemic Natural Law*, p. 231, and for *Weak Epistemic Natural Law*, p. 233.

65. P. 130 (quoting TLP, *supra* note 14, at 109).

66. See, e.g., Brian Bix, *Natural Law Theory*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 17, 223, 226.

morality and some essential process of law (as has been argued by Ronald Dworkin). Conversely, if natural law can assert a logical connection between various kinds of law and morality, then the separability thesis's denial of any logical or conceptual connection must reach all those possible connections: no necessary connection between morality and law, at any level. The principle of institutional settlement, however, cannot by itself establish that there is no connection between morality and the legal system.

A simple example can help here. Suppose the legislature duly enacts, and the executive duly signs, a law discriminating against persons with red hair, or those of Chaldean descent. Institutional settlement requires that the law be "accepted whether it is right or wrong — at least for the time being."⁶⁷ But within our system, it is clear that institutional settlement must coexist with our system of checks and balances, and so the results of duly established legislative and executive procedures can yield, after the appropriate further process, to decisions by the judiciary. Indeed, for the "fundamental rights" theorists that Sebok discussed, it is proper that the legislature's duly established procedures might be displaced by, or be corrected to become, a morally more satisfying result in accord with various fundamental precepts of justice or fairness or dignity. More generally, in a system of law which has some allocation of responsibilities comparable to our own sense of the separation of powers, the principle of institutional settlement might be appealing because one holds that the system as a whole secures moral values, even though the actions of different institutions, taken individually, might nonetheless be unjust. So, various forms of natural law theories could be held consistently with the principle of institutional settlement, and the principle thus has not been shown to entail the separability thesis.

I should be clear about the nature of my disagreement with Sebok's argument. I view the Legal Process manuscript as, on the whole, more positivistic than not.⁶⁸ And, I certainly join with Sebok in rejecting those who interpret Hart and Sacks as committed, in some deep way, to a natural law position: their parochialism vitiates any imputation of a natural law view at least as much as it does the contrary argument. My point is that the record does not require either interpretation, and accordingly I prefer to leave Hart and Sacks out of the traditional philosophical debates about the nature of law.

But this leaves my first question: Why does Sebok feel the need to construe Hart and Sacks as positivists? What would be lost from

67. TLP, *supra* note 14, at 109.

68. See Wellman, *supra* note 35, at 470 ("[The Legal Process] manuscript . . . suggests a positivistic orientation.").

his thesis if the Legal Process school were left as only a theory of adjudication and not a theory of the nature of law as well? The answer is uncertain, but I can venture one hypothesis. I observed earlier that positivism can be thought of as thin or thick and that Coleman, following Hart, understood the philosophical position as thin. Put differently, Coleman views positivism's philosophical claim about the nature of law as independent from the particulars of developing an adequate theory of adjudication. Sebok appears to disagree; to use his own preferred terminology, he seems to want to fatten up positivism into something more than just a theory of law. To be sure, he does not profess great ambitions on this point — he says only that he argues for a somewhat thicker version than does Coleman.⁶⁹ Two aspects of his enterprise, however, suggest otherwise. First, he characterizes positivism's ambitions as larger than just the development of a theory of the nature of law. Legal positivism, he claims, "tries to understand law as a system of variably constrained discretion" (p. 17). This goes beyond the thin theory, linking the theory of law to a theory of adjudication. And, second, if Sebok does not seek a thicker version of positivism, why would he attempt to argue for the important connection between positivism and the Legal Process school? He could be content, instead, simply to appropriate their theory of adjudication as one example of a theory which was consistent with incorporationist positivism.

Indeed, the question is worth posing, whatever Sebok's own aims might be. After all of Sebok's efforts, just how thin is positivism, as he argues for it? If Hart and Sacks's theory of adjudication is satisfactory, does that tell us that positivism is thicker than Coleman might have thought? The answer on this score is still the same as Coleman's: positivism appears to be thin, very thin. Incorporationism affirms that a theory of adjudication like that of Hart and Sacks — one that incorporates moral principles — is still positivistic. But it does not require that every legal system must treat adjudication along those lines. Hart and Sacks's parochialism, as I see it, undermines any claim that their theory of adjudication is universal. What's left, then, is two enterprises, not one: a thin theory of the nature of law, and a rich and provocative theory of adjudication.

69. See pp. 18-19 (disagreeing with the claim that positivism is only a "semantic" and not also an "epistemic" theory of law).