EXPLORING THE ASPECTS OF LAW'S "GOODNESS" IN RONALD DWORKIN'S CRITIQUE OF THE STRONG NATURAL-LAW THEORY

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The scope of this paper is to explore certain aspects of Ronald Dworkin's critique of the so-called "strong" natural-law theory. The author focuses on those aspects of Dworkin's critique that gravitate toward the perspective of law's "goodness", namely, the question of how and to what extent Dworkin and the "strong" natural-law theory, each in its own way, allow the overlap between the concept of law and the evaluative viewpoint according to which substantive aspects of human moral good are pertinent to legal issues. In the first section of the paper, the author presents the central arguments of Dworkin's legal theory by highlighting those theoretical elements that are often considered to be similar to the claims of the natural-law theory in a broad sense. The author then presents Dworkin's main objections to the "strong" natural-law theory, as well as the evaluation of Dworkin's "minimalist" natural-law account through the lens of the proponents of the "strong" theory. In the last section, the author analyses certain aspects of law's "goodness" that have remained mostly implicit or underdeveloped in the debate between Dworkin and the "orthodox" natural lawyers.

Key words: Dworkin; natural-law theory; legal interpretivism; political morality

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1. INTRODUCTION

Is the concept of law inextricably connected to morality to the extent that the reference to substantive human *good* somehow necessarily enters into the definition of law? Can we posit a valid standpoint from which it may be affirmed that law is – in its essence, as well as according to the content of concrete legal rules – substantively *good*? Is *law as it ought to be* somehow already inbuilt into the very notion of *law as it is*? In sum, to what degree is it conceptually permissible to establish an essential overlap between the concept of *law* and the concept of *good*?

Any answer, affirmative or negative, to the above set of questions represents a viewpoint *en route* to a structured understanding of what law *is*, conceptually, ontologically, and functionally. According to H. L. A. Hart's negative answer to these questions, there are no necessary conceptual connections between law as it is and law as morally it ought to be; at best we can speculate about "merely contingent"[1] overlaps or law's tangentially contingent "goodness". The so-called "no necessary connection" argument in favour of essentially separate orders of law and morality permits us, at best, to postulate a merely formal[2] or systemic[3] conception of law's goodness. From legal positivism to recent endeavours of the artefactual legal theory[4], law is conceptually or ontologically envisioned

[1] See Hart, H. L. A., *Introduction*, in: *Essays in Jurisprudence and Philosophy*, Oxford University Press, Oxford, 1983, p. 8. See also Hart, H. L. A., *The Concept of Law* (3rd ed.), Oxford University Press, Oxford, 2012, pp. 187 – 200.

[2] In Hans Kelsen's view, the concept of law may overlap with the concept of good only if we thoroughly reconstruct the "good" according to a purely formal conception of its juristic relevance wholly dependent on the values originating in positive legal norms. According to this position, the concept of juristic good is essentially understood as *that which legally ought to be* or "that which conforms to a social norm; and if law is defined as norm, then this implies that what is lawful is 'good'". See Kelsen, H., *Pure Theory of Law* (translated by M. Knight), The Lawbook Exchange, Ltd., Clark, New Jersey, 2005, p. 66.

[3] According to Joseph Raz's account of purely systemic moral properties of law, the only necessary connection between law and morality amounts to the claim that law, envisioned at the level of an abstract institution, has the essential task to secure a state of affairs wherein certain moral goals – like having a coordinated structure of authority – are realized that could not have been (or would be unlikely) achieved without it. See Raz, J., *About Morality and the Nature of Law*, in: *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, Oxford University Press, Oxford, 2009, pp. 178 – 179.

[4] For example, see Burazin, L.; Himma, K. E.; Roversi, C. (eds.), *Law as an Artifact*, Oxford University Press, Oxford, 2018. See also Burazin, L., *Can There Be an Artifact Theory of Law?*, Ratio Juris, *vol.* 29, no. 3, 2016, pp. 385 – 401.

exclusively as a source-based – *i.e.*, essentially identifiable through socially recognized legal sources – social fact or artefact. This means that law (*what law is*) is structurally separated from claims about *what law ought to be* according to various substantive moral aspects of the human good that are deemed ultimately irrelevant for the identification of the law.

The scope of this paper is to explore aspects of the answer to the above set of questions regarding law's "goodness" that are outlined or may otherwise be contextualized in Ronald Dworkin's (1931 – 2013) critique of what he referred to as the "strong"[5] natural-law theory. Dworkin's critique came from a peculiar theoretical position, since he himself was frequently accused by his critics for "professing" certain arguments that are classically attributed to the natural-law tradition, such as the argument that the concept of law necessarily contains a reference to normative or evaluative standards and is, thus, irreducible to pure source-based social facts.[6] Dworkin was always quite clear in his arguments that the standards of law's "goodness" are higher than those that are contained in the claims for merely contingent, formalistic or systemic moral properties of law. The real question is: how much higher? He clearly argues that "what the law is depends *in some way* on what the law should be"[7]:

> "If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law".[8]

Dworkin's critique of the "strong" version of a natural-law theory, as well as his qualification of the link ("in some way") between *law as it is* and *law as it ought to be*, reveal that the "necessary connection" argument regarding the law-morality intersection may be defended by different – even mutually irreducible and irreconcilable – theoretical positions. It is evident, even from these introductory remarks, that Dworkin's legal theory aims at a conceptual link

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5 See Dworkin, R., *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, 1986, p. 102.

6 For two relatively recent examples of identifying Dworkin's legal theory as a *sui generis* anti-positivist approach that at the same time invites and resists classification as a natural-law theory, see Lyons, D., *Moral Limits of Dworkin's Theory of Law and Legal Interpretation*, Boston University of Law Review, *vol*. 90, no. 2, 2010, pp. 595 – 602; Priel, D., *Description and Evaluation in Jurisprudence*, Law and Philosophy, *vol*. 29, no. 6, 2010, pp. 633 – 667.

7 Dworkin, R., *"Natural Law" Revisited*, University of Florida Law Review, *vol*. 34, no. 2, 1982, p. 165. Emphasis added.

8 *Ibid.*

between law and morality that is certainly below the level of analysis that he considers to be "strong".

In the first part of this paper I will show what I consider to be the most obvious similarities between Dworkin's position and the central claims of the natural-law theory of law and juridicity. I will subsequently present Dworkin's reasons for dissociation from the strong natural-law theory. My next aim is to briefly present some of the most prominent natural lawyers' arguments against Dworkin's association with the natural-law theory. In the final part of the paper I will explore certain aspects of the question regarding law's "goodness" that inhabit the field between Dworkin's legal theory and the strong natural-law theory, but which go beyond their explicit mutual critiques.

For the purposes of this paper – and in accordance with what I believe were Dworkin's intentions when he criticized a version of the natural-law theory that he deemed "strong" – I will henceforth presume that the core claim of the strong natural-law theory is contained in the argument that aspects of substantive human moral good enter into the very definition – the concept or the ontological status – of what law *is*.

2. A DWORKINIAN ACCOUNT OF LAW'S "GOODNESS" AND ITS PROXIMITY TO A NATURAL-LAW LINE OF ARGUMENT

Although Dworkin seldom explicitly addresses the issue of the conceptual interconnectedness of law and morality in terms of the overlap between the notion of law and the notion of "goodness", it is quite clear that this overlap occupies a strategic position on the conceptual map of his views on the nature of law.

> "We cannot identify the correct tests for deciding what the law really is without deploying and defending a conception of legality, and we cannot do that without deciding *what*, if anything, *is really good about legality*. Jurisprudence is an exercise in *substantive political morality*. [...] The cutting edge of a jurisprudential argument is its *moral edge*. [...] We strive to understand legality by understanding what is distinctly important and *valuable* in it".[9]

[9] Dworkin, R., *Justice in Robes*, The Belknap Press of Harvard University Press, Cambridge, 2006, p. 178. Emphasis added. A conception of legality is, according to Dworkin, "a general account of how to decide which particular claims of law are true". *Ibid*., p. 170. It may be said that "legality" denotes the juristic phenomenon at the highest level of analysis, caught in its axiological perspective of the point for having law as an institution and as a practice at all, while also embracing law's concrete social-factual instantiations. See *ibid*., pp. 168 – 171.

In order to understand the full meaning and legal-philosophical impact of these arguments – especially the italicized parts – on the need to establish the sense in which law may (or may not, or must) be said to overlap with "goodness", it will be helpful to revisit the crucial claims of Dworkin's account of the nature of law. The selection and presentation of these claims will be filtered through the question of whether, and to what extent, they resemble the key features of a natural-law approach to the concept of law.

The first important claim in Dworkin's theory of law is his thesis that "law includes not only the specific rules enacted in accordance with the community's accepted practices but also the *principles* that provide the best moral justification for those enacted rules".[10] This claim is developed as a critique to the central thesis of legal positivism, which Dworkin calls the "rule-book" conception[11], according to which law is envisioned exclusively as a set of source-based social facts "explicitly set out in a public rule book available to all".[12] In contrast to legal positivism's rejection of the idea that "legal rights can pre-exist any form of legislation"[13], Dworkin argues that, besides the exclusive appeal to enacted legal rules, law includes also the *justifying legal principles*.[14]

These justifying principles, identified beyond (or at the foundations of) source-based legal rules, point to the "political or moral concerns and traditions" of the political community that support and thereby justify the content of the enacted rules.[15] However, the content of said principles is not exhausted by denoting purely motivational or explanatory background data for enacted rules; according to Dworkin, the justifying principles point to claims about *rights* that citizens have. The principles justify a legal enactment from the "rule book" by "showing that [it] respects or secures some individual or group right".[16] Despite

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10 Dworkin, R., *Justice for Hedgehogs*, The Belknap Press of Harvard University Press, Cambridge, 2011, p. 402. Emphasis added.

11 Dworkin, R., *A Matter of Principle*, Harvard University Press, Cambridge, 1985, p. 11.

12 *Ibid*.

13 Dworkin, R., *Taking Rights Seriously* (2nd ed.), Harvard University Press, Cambridge, 1978, p. xi.

14 *Ibid*., p. 46. "The law then also includes the rules that follow from those justifying legal principles, even though those further rules were never enacted". Dworkin, *op. cit.* (fn. 10), p. 402.

15 Dworkin, *op. cit.* (fn. 13), p. 67.

16 *Ibid*., pp. 82, 343 – 344. Dworkin provides the example of anti-discrimination statutes that are justified by the legal principle according to which a minority has a right to equal concern and respect. See *ibid*., p. 82. Elsewhere, Dworkin will refer to arguments of principle as "right-based". See Dworkin, *op. cit.* (fn. 11), p. 3.

the fact that they (1) may lack the explicit mention in the rule book, (2) pre-exist the rule-book legislation, and (3) belong to a specific group of "principles of personal and political morality", the rights in question are fully *legal*.[17] Thus, in Dworkin's view, the "rule-book" conception of law must be expanded to include the "rights" conception which secures the identification of citizens' moral and political rights that are, even if not explicitly and entirely contained in the rule-book, also included in the concept of law as legal rights.[18] At the same time, although Dworkin's conception of rights that originate in justifying legal principles denies that "the rule book is the exclusive source of rights", it "concedes that the rule book is […] a source of moral rights"[19] in the sense that enacted rules include a necessary reference to a specific kind of political-moral justification.

Dworkin admits that the backbone of this account of the concept of law bears strong resemblance to one of the central features of the natural-law theory, namely, the argument that the identification of law (or deciding which propositions of law are true) gravitates toward "criteria that are not entirely factual, but at least to some extent moral".[20] In other words, Dworkin advocates something very similar to the core claims of the natural-law theory when he postulates the necessity of extending the concept of law also to a specific group of normative moral principles that are not contained in the social-factual rule book of publicly recognized legal sources.

In Dworkin's adjudication-centred legal theory, the insufficiency of legal positivism's rule-book approach, and the need to consult justifying legal principles in the process of the identification of the law, is made particularly manifest in the course of reflection on how to resolve issues that he refers to as "hard cases". We have a hard case when (1) an issue that causes the need to identify the relevant law does not correspond to a state of affairs described in any of the enacted rules from the rule book ("the rule book is silent"), or the "words in the rule book are subject to competing interpretations"[21], and (2) the law may be settled only through a choice between eligible interpretations based on the assessment that this particular choice "shows the community's structure of institutions and decisions […] in a better light from the standpoint of political morality".[22] Thus,

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17 Dworkin, *op. cit.* (fn. 5), p. 96.

18 See Dworkin, *op. cit.* (fn. 11), pp. 11 – 13.

19 *Ibid*., p. 16.

20 Dworkin, *op. cit.* (fn. 5), p. 35.

21 Dworkin, *op. cit.* (fn. 11), p. 16. We are confronted with a hard case when "no settled rule dictates a decision either way". Dworkin, *op. cit.* (fn. 13), p. 83.

22 Dworkin, *op. cit.* (fn. 5), p. 256.

the resolution of issues qualified as hard cases is not just a matter of deciding at one's own discretion and thereby expanding the rule book, nor a matter of choosing, all enacted rules considered, the correct intra-systemic (*i.e.*, *intra* rule book) interpretation of pertinent source-based rules. According to Dworkin, it is a matter of deciding between competing *conceptions of political morality*.[23] In other words, it is a matter of *principles*, including corresponding *rights*, that provide the best political-moral justification (or constructive interpretation) of the legal norms, institutions and practices in a particular political community.[24]

To illustrate the weight of ponderation in hard cases, Dworkin introduces the ideal of an imaginary judge with superhuman intellectual power and patience, whom he names Hercules. In order to reach the best possible political-moral justification of law and the point of legal practice as a whole, Hercules must, for example: (1) elaborate, in advance, a coherent overarching set of those principles of political morality that best justify enacted rules in a given community, so as to be able to enforce them in fresh cases[25], (2) recognize the "easy cases" as just a "special case of hard ones" to which he knows both the rule-book answer and the relevant justification[26], (3) harmonize the justifying principles with other applicable principles as well as with the rule book itself into a consistent retrospective and forward-looking unfolding political narrative[27], (4) be prepared to re-examine some political-moral elements of his justificatory system of legal reasoning from time to time (though he can "never be sure, in advance, when and how")[28], and (5) ask what is the legal relevance of disagreement among lawyers and legal scholars on a particular issue, even if it is easy to identify the relevant enacted rules and "all the facts about what institutions have decided in the past" (*i.e.*, ask: if this is settled law, then "what in the world are they disagreeing about?").[29]

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[23] *Ibid*.

[24] See Dworkin, *op. cit.* (fn. 13), pp. 84, 340; Dworkin *op. cit.* (fn. 7), p. 165; Dworkin, R., *A Reply by Ronald Dworkin*, in: Cohen, M. (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, Duckworth, London, 1983, pp. 247, 254; Dworkin, *op. cit.* (fn. 11), pp. 3, 11, 75, 77; Dworkin, *op. cit.* (fn. 5), p. 262; Dworkin, *op. cit.* (fn. 9), pp. 144, 248; Dworkin, *op. cit.* (fn. 10), p. 402.

[25] Dworkin, *op. cit.* (fn. 5), p. 243; Dworkin, *op. cit.* (fn. 9), pp. 54, 189 n 5, 247 – 248.

[26] Dworkin, *op. cit.* (fn. 5), p. 266.

[27] Dworkin, *op. cit.* (fn. 11), p. 17; Dworkin, *op. cit.* (fn. 5), pp. 225, 227 – 228.

[28] Dworkin, *op. cit.* (fn. 9), p. 56.

[29] Dworkin, *op. cit.* (fn. 9), p. 163. To the critic who might object that ordinary real-life lawyers and judges may reason about concrete legal issues, even hard cases, only through partial justification and from the inside-out – *i.e.*, by starting from specific

When reflecting upon the arguments that he projects onto Hercules's job description, Dworkin asserts that:

> "It is obvious why this theory of adjudication invites the charge of natural law. It makes each judge's decision about the burden of past law depend on his judgment about the best political justification of that law, and this is of course a matter of political morality".[30]

Besides the purported similarity with his understanding of the core argument of natural-law theory – namely, that *what the law is* (*i.e.*, the content of law) depends in some way on *what the law should be* (*i.e.*, on the best political-moral justification at the foundations of enacted law which includes normative principles pointing to existing legal rights)[31] – Dworkin seems to show some theoretical sympathy for the conception of natural rights as well. Rights that the justifying legal principles point to function as interest-based *trumps* "over otherwise adequate justifications for political action" and even over "policies that would indeed make people as a whole better off".[32]

The crucial element for understanding Dworkin's theory of rights is his distinction – "a distinction of capital importance to legal theory"[33] – between justifying legal principles and *policies*. A policy is a collective goal that, all things considered, advances or protects the (economic, political, social, etc.) good of the community according to some conception of general welfare, common flourishing or some sort of public interest.[34] On the other hand, individuals have rights when a principle of political morality justifies their benefits or interests, even if that means quashing an otherwise valid collective goal that, directly or indirectly, damages these benefits or interests.[35] Since Dworkin argues that in issues qualified as hard cases the law should be identified, in addition to con-

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problems and not from overarching grand theories of political morality – Dworkin responds that the principles that are operative in Hercules's reasoning may be helpful to "mortal" lawyers, who "can set no a priori limit to the justificatory ascent" into which a problem will draw either them or the political community and its legal officials. See Dworkin, *op. cit.* (fn. 9), pp. 55, 68; Dworkin, *op. cit.* (fn. 7), p. 166.

30 Dworkin, *op. cit.* (fn. 7), p. 166.

31 *Ibid.*, p. 165.

32 Dworkin, *op. cit.* (fn. 10), p. 329. See also Dworkin, *op. cit.* (fn. 13), p. xi; Dworkin, R., *Rights as Trumps*, in: Waldron, J. (ed.), *Theories of Rights*, Oxford University Press, Oxford, 1984, p. 153.

33 Dworkin, *op. cit.* (fn. 11), p. 2.

34 Dworkin, *op. cit.* (fn. 13), pp. 22, 82, 90 – 94, 294; Dworkin, *op. cit.* (fn. 11), pp. 2-3, 11; Dworkin, R., *op. cit.* (fn. 32), p. 166.

35 Dworkin, *op. cit.* (fn. 13), pp. xi; 294; Dworkin, R., *op. cit.* (fn. 32), p. 166.

sulting the rule book, by determining the justifying principles, he obviously maintains that the relevant law should be settled by detecting existing individual rights and by giving them priority over collective goals or policies, even to the detriment of what may be perceived as community's flourishing.[36]

Dworkin's account of rights is relevant also in cases that could be qualified as "easy", especially in those situations where the rule book leaves no doubt on how to apply the law on certain states of affairs, but where the enforcement of enacted rules would be manifestly unjust and immoral. In accordance with the premises of his legal theory, he first distinguishes and stratifies various stages in the identification of the relevant law in cases of manifestly unjust rule-book solutions, and then evaluates, through those premises, the aspects of the validity and legal or moral obligatoriness of such laws. Dworkin maintains that "evil laws", such as, for example, "Nazi edicts", cannot be said to constitute downright invalid or inexistent laws in one sense, namely, in the pre-interpretive sense in which we identify the textual content of the rule book as recognized social-factual sources of legal obligation. On the other hand, if we include in the concept of law also the interpretive stage in which we detect the underlying principles of political morality and the corresponding rights, even in the face of clarity of enacted unjust rules, then these political-moral rights may be said to trump each "legal" rule-book right that is grounded in an unjust law, and in this sense the "Nazi edicts" were *not law*.[37]

Dworkin's theory of rights is not, according to his own words, dependent upon any "special metaphysical" foundation that would be unacceptable for a liberal legal theory.[38] At this point of our presentation of the main traits of Dworkin's legal theory, it should be clear that his theory of rights is grounded precisely in their capacity to trump *any* argument based on a policy or collective goal, even if advanced through appeals to metaphysical truths regarding individual or common-good morality. His theory of law and rights finds its ultimate point of reference not in metaphysics or philosophical-anthropological truths, but in the nature of law as a social institution, namely, in "some fundamental assumptions about the quality of a decent social organization".[39]

Dworkin's argument on rights as trumps rests on the fundamental postulate of liberal political morality that it is wrong to legally enforce private non-political

[36] Dworkin, *op. cit.* (fn. 24), p. 263; Dworkin, *op. cit.* (fn. 11), pp. 3, 75.

[37] Dworkin, *op. cit.* (fn. 5), pp. 102 – 104; Dworkin, *op. cit.* (fn. 10), pp. 410 – 412.

[38] Dworkin, *op. cit.* (fn. 13), pp. xi – xii.

[39] Dworkin, *op. cit.* (fn. 24), p. 266.

moral beliefs through state policies and corresponding rule-book enacted laws.[40] Thus, the institutional – not metaphysical – foundations of his conception of law are modelled by "the most fundamental of rights": *the right to equal concern or respect*.[41]

> "Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life is nobler or superior to another's".[42]

The right to equal concern and respect may be said to be a *natural* right insofar as it is not the product of legislation or convention[43], but is, instead, embedded in a liberal theory of law as an institution. It is a "fundamental and axiomatic" right in the sense that it is the source of all other particular rights.[44]

The basic right to equality is the core value at the centre of the legal-institutional domain of political morality. The law as an institution "benefits society" not only through *instrumental* properties, such as "predictability or procedural fairness", but also "by securing a kind of equality among citizens" that "improves its moral justification for exercising the political power it does".[45] The value of equality, or equal concern and respect, provides the institution of law with the viewpoint – the "point of law" – that sets the limit on the extent to which "citizens' and officials' views about justice […] figure in their opinions about

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[40] Dworkin, *op. cit.* (fn. 11), p. 205. See also Dworkin, *op. cit.* (fn. 5), pp. 173 – 175.

[41] Dworkin, *op. cit.* (fn. 13), p. xii.

[42] *Ibid*., pp. 272 – 273.

[43] See *ibid*., pp. 176 – 177. In this section of *Taking Rights Seriously*, Dworkin actually posits the right to equal concern and respect as the fundamental right implicit in John Rawls's theory of justice as fairness. However, it may be said that Dworkin really only reads his own arguments into Rawls's theory, as is suggested by Rawls's explicit denial of implying such natural right as foundational for his conception of justice ("This is an ingenious suggestion but I have not followed it in the text"). See Rawls, J., *Justice as Fairness: Political not Metaphysical*, Philosophy and Public Affairs, *vol*. 14, no. 3, 1985, p. 236.

[44] Dworkin, *op. cit.* (fn. 13), p. xv; Dworkin, *op. cit.* (fn. 10), p. 330.

[45] Dworkin, *op. cit.* (fn. 5), pp. 95 – 96.

what legal *rights*" persons have according to "past political decisions".[46] Thus, the right to equality has the characteristic of a political-moral *substantive* value that has a foundational role in the identification of the law in a political community. This means that Dworkin's account of law's "goodness" is not purely formalistic, as legal positivism sustains, nor is it founded upon metaphysical claims about human good, as the classical natural-law theory firmly holds. Instead, a Dworkinian "goodness" of law is manifested in the institutional viewpoint of the juridical meaning of *equality* from which law should be identified, interpreted, and ultimately positivized in the rule books.

The crucial question that must now be answered is: what does this state of affairs – that at the roots of Dworkin's idea of the legal system we find a foundational value that belongs to the sphere of political morality – say about the concept of law?

It certainly confirms Dworkin's objections to legal positivism for "mistaking part of the domain" of the concept of law, namely, the positivized rule-book domain, "for the whole".[47] On the other hand, Dworkin's concept of law resists the complete overlap between the content of principle-based rights and the *ratio* of goal-based policies rooted in non-political or private morality. As we will see in the next section, this latter claim represents the main line of critique that Dworkin advances against the strong natural-law theory.

In the immediate aftermath of his first book, *Taking Rights Seriously*, Dworkin wonders whether the two questions – "what *rights* do persons have" and "which *policies* make the community flourish" – could be, from some viewpoint, considered to constitute aspects of the same question. His response is that, although this line of inquiry is not altogether incoherent, it is "very implausible"[48], precisely on account of both his systematic bifurcation of principles and policies and the predominantly contrasting conceptions of law that correspond to the preference for each of those standards.

Toward the end of his academic career, Dworkin revisited the main thread of the "principles as policies" line of analysis in his reassessment of what he calls the "two-systems picture", wherein the concept of law is determined by envisioning law and morality as two separate systems of norms that somehow, only occasionally, interact.[49] At this stage of his thought, Dworkin seems to have reached a more articulate all-encompassing view of the line of argument

[46] See Dworkin, *op. cit.* (fn. 5), p. 98.

[47] Dworkin, *op. cit.* (fn. 13), p. 47.

[48] Dworkin, *op. cit.* (fn. 24), pp. 265 – 266.

[49] Dworkin, *op. cit.* (fn. 10), p. 402.

he has been, somewhat implicitly, claiming all along. He always understood law as an interpretive concept[50] "whose elucidation requires taking a stand on issues of political morality".[51] In the final, perhaps most mature, stage of his thought, Dworkin is certain that the question of "how does the content of each system [namely, law and morality] affect the content of the other"[52] must be answered in the following fashion:

> "We have now scrapped the old picture that counts law and morality as two separate systems and then seeks or denies, fruitlessly, interconnections between them. We have replaced this with a one-system picture: *we now treat law as a part of political morality*".[53]

Hence, there is one plausible way to treat the questions such as "what rights do persons have", "what makes the community flourish", "what is the law of a political community" under the same doctrinal umbrella of the nature of law. This is the way: instead of starting from "the essence or very concept of law to theories about rights", according to Dworkin, "our journey must be in the opposite direction"[54], namely, by starting from the equality-based theory of rights that is embedded in the institution of law. It is precisely in this way that, as Dworkin says, "deciding what law should be like helps us to see what, in its very nature, it actually is".[55] Thus, a Dworkinian "goodness" of law – the value-fuelled idea of what law, as an interpretive concept, should be like – is determined by positing equality as the fundamental institutional viewpoint of legality from which to interpret and identify the settled law in a political community. This is why Dworkin refers to his own legal theory as "interpretivism".[56] *Legal reasoning* – the identification of the law or determining which propositions of the law are true in a given case at a given time – and *defining law conceptually* both presuppose the complex enterprise of interpretation and justification of

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[50] Dworkin, *op. cit.* (fn. 9), pp. 10 – 12, 168 – 171, 221 – 222. See also Dworkin, *op. cit.* (fn. 5), pp. 87 – 89, 410 – 411.

[51] Dworkin, *op. cit.* (fn. 9), p. 31.

[52] Dworkin, *op. cit.* (fn. 10), p. 401.

[53] *Ibid.*, p. 405. Emphasis added. This argument, from Dworkin's 2011 book *Justice for Hedgehogs*, is already prefigured in his introduction to the 2006 book *Justice in Robes*: "We might do better with a different intellectual topography: we might treat law not as separate from but as a department of morality. […] We might treat legal theory as a special part of political morality distinguished by a further refinement of institutional structures". Dworkin, *op. cit.* (fn. 9), pp. 34 – 35.

[54] Dworkin, *op. cit.* (fn. 10), p. 407.

[55] See Dworkin, *op. cit.* (fn. 9), p. 145.

[56] Dworkin, *op. cit.* (fn. 10), pp. 401 – 402.

enacted rule-book norms against the backdrop of existing rights which, in turn, represent moral kinds of reasons for action because they ultimately rest on considerations of political morality.[57]

3. DWORKIN'S "NATURALIST" CRITIQUE OF THE STRONG NATURAL-LAW THEORY

Dworkin seems to find nothing problematic in his critics' accusation that the less-than-metaphysical interpretive legal theory he developed across his career represents a radical turn in the direction of the classical theory of natural law and natural rights: "Suppose this *is* natural law. What in the world is wrong with it"?[58] When identifying the place of his own theory on the broad conceptual map of the natural-law approaches to the concept of law, Dworkin finds no problem in occasionally labelling his brand of legal "interpretivism" as "naturalism".[59]

However, Dworkin is very careful to highlight the incompatibility between his "naturalism" and what he considers to be a "strong"[60], an "orthodox"[61], or a downright "extreme"[62] version of the natural-law theory. He finds these latter unacceptable and implausible for two interrelated sets of reasons.

His first objection to these, as he maintains, orthodox natural-law theories is that they deny any "difference between principles of *law* and principles of *morality*"[63] in the identification of the law, or, in other words, that they "deny the difference between legal and moral argument in hard cases".[64] In the schema where *justice* is understood as a "matter of the correct or best theory of moral and political rights" settled at the level of personal non-political convictions, while *law* is a matter of identifying "which supposed rights […] are included in or implied by actual political decisions from the past", the strong natural-law theory "insists that law and justice are identical".[65] Whereas legal positivism postulates a thorough separation between legal and moral rules, the natural-law

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57 See Dworkin, *op. cit.* (fn. 24), p. 256. See also Dworkin, *op. cit.* (fn. 9), p. 56.

58 Dworkin, *op. cit.* (fn. 7), p. 165.

59 *Ibid*.

60 Dworkin, *op. cit.* (fn. 5), p. 102.

61 Dworkin, *op. cit.* (fn. 13), p. 339.

62 Dworkin, *op. cit.* (fn. 13), pp. 342, 344; Dworkin, *op. cit.* (fn. 5), p. 35.

63 Dworkin, *op. cit.* (fn. 13), p. 342. Emphasis added.

64 *Ibid*., p. 344.

65 Dworkin, *op. cit.* (fn. 5), pp. 35, 97.

theory that is the object of Dworkin's critique treats them, in his view, as a unique set of rules united in the concept of law.[66] The logical consequence of the strong natural-law line of argument is that "no unjust proposition of law can be true"[67], or, in other words, that "a scheme of political organization must satisfy certain minimal standards of justice in order to count as a legal system at all".[68]

Dworkin's second objection to strong natural-law theories is that they argue for the inclusion of non-political principles of private morality in the process of identification of the law on the premise that these principles "exist in virtue of objective moral truth rather than historical decision", and are thereby "objectively required by the principles of an ideal political morality".[69] Said differently, the arguments of the strong natural-law theory rest on "ontological luxury"[70] that is unacceptable to a "metaphysically unambitious"[71] liberal legal theory, be it legal positivism or Dworkin's interpretivism.

In sum, according to Dworkin's reading of the strong natural-law theory, law cannot be said to be "good" in the substantive sense that is invoked by that theory. In his view, it is unacceptable to hold that certain substantive aspects of human (individual or common) good must necessarily enter, as evaluative standards, into the process of identification, interpretation, or justification of the law. Such a position would have to presuppose – erroneously, in Dworkin's opinion – that the point of reference for the interpretation of the law consists in goal-based *policies* for community's flourishing rather than on the underlying legal principles that point to individual or group rights filtered through the architectonic right to equality.

Dworkin's critique advocates the view that neither the concept of law nor the legal system of a particular political community may be predicated upon – or derive its identity or validity from – ontologically valid objective truths about values extracted "directly from the ordinary requirements of individual personal morality most of us accept for ourselves and others in non-political life".[72] Instead, he says, what "we all together owe others as individuals" when we act, especially through law, on behalf of the political community – this is his defi-

66 *Ibid*., p. 98.

67 *Ibid*., p. 35.

68 *Ibid*., p. 102.

69 Dworkin, *op. cit.* (fn. 11), p. 147.

70 Dworkin, *op. cit.* (fn. 13), p. xi.

71 *Ibid*., p. 177.

72 See Dworkin, *op. cit.* (fn. 5), p. 173.

nition of political morality[73] – is *equal concern and respect*, and not metaphysically ambitious objective moral truths enforceable as common-goal policies. The law of a political community is fully identified – and the concept of law determined – when the viewpoint of the imperative to grasp the underlying infrastructure of rights permissible by the standard of equal concern and respect finds the best diachronic justification of the political community's past decisions and legal norms. This viewpoint is, according to Dworkin, the central case and the limit of law's "goodness".

4. THE RESPONSE OF THE STRONG NATURAL-LAW THEORY: DWORKIN'S MINIMALIST "NATURALISM"

The proponents of the strong natural-law theory tend to articulate their views on Dworkin's critique by challenging the adequacy of the "natural law" label that is sometimes attached to his "interpretivism", rather than by directly addressing his objections to the excessive "strength" of their metaphysical positions. In this section I will only summarily highlight the main elements of the natural lawyers' critique of Dworkin's legal theory. In the next section I intend to move beyond the established *loci* of the discussion between Dworkin and the natural-law theorists in order to explore certain less contemplated aspects of the questions regarding law's "goodness" that are contextualized in this discussion.

Regardless of their sharp critique of his views, natural-law theorists do not hesitate to compliment Dworkin on a number of issues on which his theses prove to be proximate to some of their own core claims. Thus, John Finnis praises Dworkin's effort to introduce the practical viewpoint of *what law should be like* in the interpretation of the sources "in which that law subsists" as well as in the very concept of law – *i.e.*, in *what law*, not only social-factually, but also conceptually, *is*.[74] Dworkin's enterprise is not that dissimilar, at least in some aspects, to Finnis's account of law's "dual life". Finnis argues that law, at the level of its ontological status, includes not only the source-based social-factual existence, but also the evaluative viewpoint from which legal rules – with regard to their content and to the entire legally relevant history of their social-factual existence – may be said to still provide sufficient reasons for action, among

[73] See Dworkin, *op. cit.* (fn. 10), p. 327.

[74] See Finnis, J., *Reason and Authority in* Law's Empire, in: *Philosophy of Law. Collected Essays: Volume IV*, Oxford University Press, Oxford, 2011, pp. 280 – 281.

other criteria, also in light of certain fundamental principles of practical reasonableness or morality.[75]

On the other hand, natural-law theorists criticize Dworkin's preference for "poor" metaphysical resources at the foundation of his case for law's inherently practical or evaluative viewpoint. In Finnis's assessment, Dworkin's architectonic right to equal concern and respect inbuilds in the very concept of law a systematically neutral standpoint "about even the basic elements of the human good".[76] From the perspective of law's substantive goodness, Dworkin's theory rests upon the "reduction of goods for which law is needed to equality".[77]

How does this reduction to equality, combined with systematic neutrality regarding other aspects of the human good, affect the overall categorization of Dworkin's theory as a natural-law position?

In Veronica Rodriguez-Blanco's understanding, despite Dworkin's attention to the interpretive point of law, his account cannot be classified as advocating a goods-based overlap of law and morality. Consequently, she questions whether the core of his legal theory may even be said to rest on a deliberative viewpoint of practical reason and intentional action, since it obviously cannot be assessed, even in principle, in terms of human goods.[78] Robert P. George develops a similar line of critique to Dworkin's conception of rights. In his view, Dworkinian rights – *including the abstract general right to equality* – are derived in a way that is wholly detached from considerations of what is truly good for human beings.[79] It has been pointed out that there is good reason to consider Dworkin's right to equality to be founded predominantly upon the formal-institutional character of the equal personal sovereignty over one's own private autonomy, rather than on substantive equality of personal worth.[80]

In Russell Hittinger's view, Dworkin's natural-law account is "minimalist". It rests on "thin" ontological assumptions on equality that are sufficient to secure

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[75] See, for example, Finnis, J., *A Grand Tour of Legal Theory*, in: *Philosophy of Law*, *op. cit*. (fn. 73), pp. 101 – 102, 107.

[76] Finnis, J., *Introduction*, in: *Human Rights and the Common Good. Collected Essays: Volume III*, Oxford University Press, Oxford, 2011, p. 11.

[77] Finnis, J., *The Nature of Law*, in: Tasioulas, J. (ed.), *The Cambridge Companion to the Philosophy of Law*, Cambridge University Press, Cambridge, 2020, p. 51.

[78] Rodriguez-Blanco, V., *Law and Authority Under the Guise of the Good*, Hart Publishing, Oxford, 2014, pp. 176, 210 – 213.

[79] George, R. P., *Making Men Moral: Civil Liberties and Public Morality*, Clarendon Press, Oxford, 1993, p. 85.

[80] Finegan, T., *Dworkin on Equality, Autonomy and Authenticity*, The American Journal of Jurisprudence, *vol*. 60, no. 2, 2015, pp. 143 – 180.

the connection between the central values of political morality, legal reasoning, and the appeal to individual rights as trumps that structurally precede or underly the enacted legal rules.[81] However, instead of avoiding "metaphysical swamps"[82], Dworkin's legal theory, at least implicitly – from the standpoint of law's ontology and legal reasoning – contains elements that reveal a more determinate and complex juridical-philosophical anthropology than Dworkin is willing to admit. Hittinger argues that the Dworkinian right to equal personal sovereignty over one's own private autonomy – which, in principle, trumps all other substantive goods-based telic viewpoints of law – must necessarily presuppose a sufficiently structured philosophical view that sketches a liberal image of the human person.[83] In other words, Hittinger and the other proponents of the strong natural-law theory argue that Dworkin's conception of the law-morality overlap that grounds law in political morality and invokes equality as the architectonic value-right cannot altogether avoid ontological premises.

5. THE ASPECTS OF LAW'S "GOODNESS" IMPLICIT IN THE DISCUSSION BETWEEN DWORKIN AND THE NATURAL LAWYERS

Dworkin's central argument for law's "goodness" is that the identification of law – and the determination of the very concept of law – necessarily includes the viewpoint that takes into consideration the value or the good of legality, namely, the viewpoint of what is really good about law as an institution. What is really good about law, its "goodness", is then identified as a set of values that pertain to, as he says, "substantive political morality"[84], and that are, as such, ultimately harmonized with the higher requirements of the fundamental right to equality. Dworkin criticizes the strong natural-law theory for expanding this viewpoint of law's "goodness" by including non-political (and non-institutional) moral standards that are based on objective metaphysical truth-claims regarding the aspects of the human good.

In this section I want to challenge Dworkin's critique of the strong natural-law theory. My aim is to show that at least in one important aspect the classical

[81] See Hittinger, R., *Varieties of Minimalist Natural Law Theory*, The American Journal of Jurisprudence, *vol*. 34, no. 1, 1989, pp. 144, 149 – 152.

[82] Hittinger, R., *Liberalism and the American Natural Law Tradition*, Wake Forest Law Review, *vol*. 25, 1990, pp. 476 – 477, 481 – 482.

[83] See *ibid*., p. 477.

[84] Dworkin, *op. cit.* (fn. 9), p. 178.

natural-law theory cannot be said to confuse moral and legal principles when describing the concept of law and identifying the content of settled law. After that, I will argue that Dworkin's legal theory may itself be found guilty of insufficient attention to detailed distinctions between moral and legal arguments in its core claim.

Dworkin holds that the strong natural-law theories deny any "difference between principles of *law* and principles of *morality*"[85] in the identification of the law. I believe there is something to be learned about plural levels of law's "goodness" from showing where exactly Dworkin's critique fails. The classical natural-law theory – perhaps paradigmatically represented by the tradition of Thomas Aquinas's juridical realism – argues, in a way quite similar to Dworkin's, that law and the juridical phenomenon in general is a specialized domain within morality. According to this theory, the law of a political community is neither reducible to moral principles (as Dworkin claims in his critique), nor is it wholly detached from metaphysical assumptions regarding aspects of the human good. The moral principles that point to certain aspects of the human good – *i.e.*, the principles of natural law or the principles of practical reasonableness – *do not* enter into the framework of legal reasoning as metajuridical moral standards of evaluation of positive law.[86] Instead, they enter the viewpoint of law's "goodness" in the form of *natural rights* as *juridical goods* that are the objects of the principles of natural law. Let me briefly explain what I mean by this.

Although they share the ontological identity with the human moral goods picked out by the principles of natural law – for example, human life as a natural right is always human life identified as a basic human moral good – *natural rights* are not primarily moral entities, but genuinely *juridical goods* that structurally precede enacted positive legal rules. According to a Thomistic natural-law account, natural juridical goods or rights differ in scope and extension from basic human moral goods according to a precise set of criteria that must be satisfied for their inclusion in the juridical domain and in legal reasoning.

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[85] Dworkin, *op. cit.* (fn. 13), p. 342. Emphasis added.

[86] Dworkin may be excused for his lack of awareness to this line of argument of the natural-law theory, since many natural lawyers are sometimes insufficiently attentive to the distinction between moral and juridical levels of analysis in their predominantly metajuridical presentations of the legal relevance of natural-law arguments on moral principles and rights. See, for example, the following claim: "This natural-law theory of individual rights and collective interests has the advantage [...] of providing a rational account of the moral foundations of rights by understanding them as implications of intrinsic human goods and basic moral principles which rationally guide and structure human choosing in respect for such goals". George, *op. cit.* (fn. 79), p. 93.

First, natural rights do not owe their juridical character and their inclusion in legal reasoning to the very fact that they refer to values that are morally good and metaphysically or objectively true. The moral status of basic human goods does not of itself generate juridical or legal obligations in a way envisioned by Dworkin. Rather, the juridical character of natural rights comes from a discrete level of "goodness" that is connected to the attainment of ends set by the operative principle of *justice*. We have seen that, in Dworkin's theory of law, justice is understood as a "matter of the correct or best theory of moral and political rights" settled at the level of personal non-political convictions.[87] In the parlance of Thomistic legal theory, justice is the operative principle that constitutes an axiological framework whose overarching end is "rendering to each person his own *right*".[88] In this telic framework, "things", entities, or states of affairs – in the case of natural rights: basic human goods – that are attributed by the principles of natural law or positive law to their designated titleholders are introduced in a specific order of "goodness" not because of their moral status, but because of their attribution as rights and corresponding debts in justice. Thus, although the Thomistic account of *juridical goodness* is not altogether detached from the perspective of moral goodness – to respect life as somebody else's right includes respecting life as a morally perfective aspect of the whole human good of another person and of humanity in general – it is clearly distinguished from it.

Secondly, natural rights do not comprehend the whole domain of basic human moral goods. Rather, they refer only to the domain of that good that is *susceptible to outward and other-directed (interpersonal) potential interference* by another individual or group who, because of the very possibility of interference with the titleholder's lived-out attainment of the good in question, *owe* him the determinate action that essentially consists in "giving" or "respecting" the *ratio* of that good.[89]

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87 Dworkin, *op. cit.* (fn. 5), p. 97.

88 The argument on the right (*ius*) as the "just thing itself" (*ipsa res iusta*) – namely, the very thing, state of affairs or action that constitutes the object of the operative principle of justice – is taken directly from Aquinas. See *S. Th.*, II-II, q. 57, a. 1 – 2; q. 58, a. 1. For the English translation of the texts from Aquinas's *Summa Theologiae*, I have consulted Aquinas, T., *Summa Theologiae: First Complete American Edition in Three Volumes* (translated by Fathers of the English Dominican Province), Benziger Brothers, New York, 1947-1948.

89 For more details on this interpretation of the Thomistic juristic argument regarding the genesis of natural rights, see Hervada, J., *Critical Introduction to Natural Right* (translated by M. Emmons), Wilson & Lafleur Ltée, Montréal, 2020, pp. 7 – 30. See also Popović, P., *The Concept of "Right" and the Focal Point of Juridicity in Debate Between Villey, Tierney, Finnis and Hervada*, Persona y Derecho, *vol.* 78, no. 1, pp. 65 – 103.

In sum, the operative principle of justice establishes a *sui generis* order of human action that is essential for the constitution of the juridical phenomenon, at the highest level of analysis. According to this telic order, a thing, an entity, or other factual or operative state of affairs is *juridical* when it is – in its outward and other-directed domain – attributed and consequently owed to its designated titleholder as his right (*juridical* goodness). This is different from the operative principle of practical reasonableness (*i.e.*, the natural-law moral level of analysis) that engages also the internal subjective dispositions of the agents in view of attaining certain self-referential or other-directed objects – *i.e.*, goods – because they are morally perfective of human persons, understood individually or collectively (*moral* goodness).

In Thomistic juridical realism, natural rights enter into legal reasoning in a way that is similar to Dworkin's justifying legal principles and corresponding individual rights. They form part of law's ontology as an essential aspect of the practical viewpoint that is operative in the process of the identification of the law. Of course, since the Thomistic legal theory considers the content of natural rights to be in clear *ontological continuity* – though *without full identity in evaluative range* – with the basic human moral goods, legal reasoning will provide different results than the one promoted by Dworkin. However, the foregoing analysis should be sufficient to establish that in at least one important aspect the natural-law theory's core claims on legal reasoning – and the correlative distinction between moral and juridical domains – is far more nuanced than Dworkin's critique would suggest.

Notwithstanding the obvious differences between the two approaches regarding the function of rights in legal reasoning, I am convinced that Dworkin's legal theory and the strong natural-law tradition are doctrinal allies in at least one more important argument, besides the already highlighted attention to the practical viewpoint in legal reasoning and the claim that law is a specialized domain of (political) morality. Another common ground of both legal theories is covered by the general line of inquiry that leads to the conclusion on the nature of law. We have seen that Dworkin insists on starting our inquiry on the nature of law *not* from the essence of the concept of law toward theories about rights that people actually have, but in the opposite direction: "deciding what law should be like" – by taking into consideration the juristic phenomena such as rights – "helps us to see what, in its very nature, it actually is".[90] This line of inquiry is strongly echoed in authors from the Thomistic natural-law tradition who claim that the concept of law is not an aprioristic concept, but a result – a

[90] See Dworkin, *op. cit.* (fn. 9), p. 145.

point of arrival – once all the relevant juridical phenomena, especially natural rights, and the properties that render them juridical have been consulted and well-researched.[91]

Next, I want to argue that Dworkin's critique of the strong natural-law theory for confusing moral and legal arguments in the identification of the law might backfire on him. He claims that the "goodness" of law, what is really good about legality, is decided in the context of substantive political morality, and that "the cutting edge of a jurisprudential argument is its *moral edge*".[92] His line of argument on the underlying legal principles that point to rights among which the right to equality has the overarching significance is, in my reading, that moral edge. It is sufficiently clear that Dworkin envisions the right to equality of personal sovereignty over one's own private autonomy as an institutional less-than-metaphysical value of political morality that represents an essential moral module in the concept of law. I am aware that Dworkin considers the incorporation of a moral *module* into legal reasoning to be completely legitimate. I am also aware that his objections to the natural-law theory concern the *full identification* of *all* moral and legal principles in determining what the law is.

But I do not see how a value of political morality can have immediate juridical relevance and constitute an essential aspect of the very concept of law – on the sole merit of a moral argument – and escape the same objection that Dworkin directs at natural lawyers: the confusion between moral and legal arguments. Dworkin's one-system paradigm rests on the thesis that "legal theory [is] a special part of political morality distinguished by a further refinement of institutional structures".[93] However, I do not see what this "further refinement" adds to his essentially moral, or certainly metajuridical, defense of the value of equality that, so it seems, pre-exists and models the legal order.[94] We have already quoted Dworkin's evidently decisive question of "how the content of each system", namely, law and morality, "affects the content of the other as things actually stand".[95] It is easy to notice how, in Dworkin's theory, moral norms "affect" the interpretation of legal norms. It is less obvious how legal norms, and legality itself, affect the content of relevant moral norms and

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91 See Hervada, J., *Problemas que una nota esencial de los derechos humanos plantea a la filosofía del derecho*, in: *Escritos de derecho natural*, EUNSA, Pamplona, 2013, pp. 155 – 159.

92 See Dworkin, *op. cit.* (fn. 9), p. 178. Emphasis added.

93 *Ibid*., pp. 34 – 35.

94 Dworkin often describes the right to equality as the main formative principle for the design of the political order and legal institutions. See Dworkin, *op. cit.* (fn. 13), pp. 180 – 182; Dworkin, *op. cit.* (fn. 7), p. 185.

95 Dworkin, *op. cit.* (fn. 10), p. 401.

influence the juristic analysis and elaboration of moral arguments. Dworkin seems to prefer bending his arguments on principle-based rights toward their overlap with common-good policies – *i.e.*, the *right* to equality as the central *policy* of the political community – rather than explaining how common-good policies may be said to possess a juristic character. In other words, Dworkin has gone much further than legal positivists in explaining the "goodness" of law, but he has not gone very far in clarifying the prerequisites for a discourse on the juridicity of "goodness".

It is more probable that the real difference between Dworkin's legal theory and the strong natural-law position is the metaphysical reach of law's "goodness" and modes of expressing that reach in an authentically juridical line of argument. Dworkin claims that what "we all together owe others as individuals" in our institutional practices, including legal reasoning, is the political-moral value of equal concern and respect.[96] The strong natural-law theory argues that what we *owe* to each other, even in the context of the political common good, is the respect and securing of natural rights as juridical goods which also include – as one right among others – the reference to the value of equality (equal worth of persons, equal opportunities, equality in procedures, etc.). Perhaps the reader could have intuited the crucial importance of a version of this difference even before reading this paper. There is something insightful to be found, however, in understanding the precise stages of the itinerary *en route* to establishing the exact differences and common grounds between Dworkin and natural lawyers regarding the aspects of law's "goodness". Or, to paraphrase Blaise Pascal, there is something of value also in the search itself, not only in the "things themselves" that are the object of the search.[97]

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[96] See *ibid*., p. 327.

[97] See Pascal, B., *Thoughts, Letters, and Minor Works* (translated by W. F. Trotter, M. L. Booth, and O. W. Wight), P. F. Collier & Son Corporation, New York, 1910, p. 52.

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Sažetak

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PREISPITIVANJE VIDIKA "DOBROTE" PRAVA U DWORKINOVOJ KRITICI "SNAŽNE" TEORIJE NARAVNOG PRAVA

Cilj ovog rada preispitivanje je određenih vidika kritike američkog filozofa prava Ronalda Dworkina upućene "snažnoj" teoriji naravnog prava. Za žarišnu točku preispitivanja autor je odabrao perspektivu "dobrote" prava, odnosno pitanje na koji način i do koje granice Dworkin i predstavnici "snažne" teorije naravnog prava, svatko u okvirima vlastitog pristupa, dopuštaju preklapanje pojma prava sa stajalištem prosuđivanja prava sukladno moralnim vidicima ljudskog dobra. U prvom dijelu rada prikazani su ključni argumenti Dworkinove teorije prava s naglaskom na one elemente zbog kojih se Dworkina često smatra predstavnikom teorije naravnog prava u širem smislu. Nakon toga predstavljene su temeljne tvrdnje Dworkinove kritike upućene "snažnoj" teoriji naravnog prava, s posebnim naglaskom na Dworkinovo razlikovanje "snažne" teorije od njegova naravnopravnog pristupa. U nastavku su opisani osnovni smjerovi argumentacije kojima su predstavnici "snažne" teorije naravnog prava upozorili na otklon Dworkinova "minimalističkog" jusnaturalizma od klasičnih postavki naravnopravne teorije. U posljednjem dijelu analizirani su vidici "dobrote" prava koji proizlaze iz predmetne rasprave, s naglaskom na određene manjkavosti Dworkinove kritike "snažne" teorije naravnog prava. Pritom se upućuje i na teorijske sastavnice prema kojima se, unatoč uzajamnoj kritici, ova dva pravno-filozofska pristupa mogu smatrati srodnima.

Ključne riječi: Dworkin, teorija naravnog prava, interpretacijska teorija prava, politička moralnost

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