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FACULTY OF LAW

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DWORKIN'S CRITIQUE OF HART'S  
VERSION OF POSITIVISM

Doctoral Dissertation

Belgrade, 2013

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## Data on doctoral dissertation

Title	Dworkin's Critique of Hart's Version of Positivism
Summary	<p>As the dominant way of examination of the legal phenomenon, legal positivism was exposed to criticism, primarily by natural law theorists. However, the most complex criticism of positivism came by Ronald Dworkin. The main target of his criticism is Hart's version of positivism, because after more than fifty years since it was created, Hart's theory is still a paradigm of positivistic approach to examining of law, while Hart is considered as the most prestigious and influential representative of that approach.</p> <p>Dworkin's critique of Hart's version of positivism was developing more than twenty years, and on the basis of this critique, Dworkin finally set his own theory of law. That fact alone indicates the extraordinary complexity of Dworkin's critique of Hart's version of positivism. Therefore, in the main part of this dissertation that critique is divided into two parts: descriptive and methodological critique.</p> <p>In descriptive critique which is represented in Dworkin's first major work "Taking Rights Seriously" (1977), he claims that legal positivism describing the law taking into account only legal rules, but not legal principles. Influence of the legal principles can be seen in so called hard cases, which are settled not on the basis of legal rules, but on the basis of legal principles. In this way, Dworkin argues that legal positivism is unable to properly respond to the main task – to describe the legal practice. Dworkin's descriptive critique divided positivists into two groups – those who represent an exclusive, and those who represent an inclusive variant of positivism. This critique was a significant improvement in jurisprudence, because that critique launched one of the most important issues in modern theory and philosophy of law.</p> <p>Methodological critique came later and was formulated in Dworkin's most famous book "Law's Empire" (1986). In this critique he attacked the very foundations of legal positivism, i.e. his major methodological preferences. Referring to the first doctrine of positivism that law is understood as fact, Dworkin argues that if it is true, among lawyers may not be disagreements about law, unless one of them makes a mistake in determining the empirical facts. Since this is not the case, Dworkin</p>

	<p>argues that it is theoretical disagreement. Theoretical disagreement is not a disagreement about the law, but about its morality. On this basis, he rejects the idea of law as a fact and argues that the law is interpretative concept, which means that the disagreements within the jurisprudence are usually interpretive disagreement over the criteria of legality, but not empirical disagreement about the historical and social facts.</p> <p>In the concluding chapter, we examined the importance and scope of Dworkin's critique of Hart's model of law. The methods of comparative analysis are presented achievements and limits of modern positivism, as well as Dworkin's distinctive approach to examining of law.</p>
Key words	Ronald Dworkin, Herbert Hart, Legal positivism, Legal principles, Rule of recognition, Theoretical disagreement
Scientific area	Legal Sciences
Specific scientific area	Legal Theory
UDK	340.12

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		(1931-2013).....	219
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# I

## 1.

(Herbert Hart)<sup>1</sup>

(Ronald Dworkin)<sup>2</sup>

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3 D irdre M. Dwyer, „The Three Lives of Herbert Hart“, *Oxford Journal of Legal Studies*, Vol. 26, No. 2 (2006), . 411–423; George C. Christie, „Dworkin’s ‘Empire’“, *Duke Law Journal*, Vol. 1987, No. 1, . 157 .

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“ ” “ ” “ ”



Rules I“

„The Model of

Concept of Law“,

„The

„The Concept of Law“ (1994. .)



„Taking Rights Seriously“

„Taking Rights Seriously“,

13

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<sup>12</sup> Scot J. Shapiro, „Hart-Dworkin debate: A Short Guide for the Perplexed“, Public Law and Legal Theory Working Paper Series, No. 77, March 2007, . 3.

<sup>13</sup> „ , „ „ , . 45.





2.

2.1.

2. 2.

„The Model of Rules I“,  
„Taking Rights Seriously“ 1977.



„Taking Rights Seriously“,

2. 3.

„Taking Rights Seriously“

„A Matter of Principle“

„Law’s Empire“  
Seriously“

„Taking Rights

„Law’s Empire“



#### 2.4.







## II

### 1

#### 1. 1.

(*Norberto Bobio*),

„ 15

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<sup>15</sup> Norberto Bobio, „Sur le Positivisme juridique“, u Mélanges en l’honneur de Paul Roubier, t. I, Paris, 1961, str. 56.

<sup>16</sup>

„ [...] ; ,  
( )“, , 2000,  
. 11.



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(Jeremy Bentham)

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. Karl Olivecrona, „Law as Fact“, Stevens & Sons, London, 1971, . 60-61.

(David Hume)

Human Nature“, <http://www.gutenberg.org/ebooks/4705>,

22

III,

. David Hume, „Treatise of , II.





*per genus proximum et differentia specifica.*

”<sup>28</sup>

*per genus et differentiam*

*differentiam*

*per genus et*

*sui generis*

<sup>29</sup>

”

<sup>30</sup>

*genus* ”

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<sup>28</sup> *Ibidem.*

<sup>29</sup> Herbert Hart, “Definition and Theory in Jurisprudence” u *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford, 1983, str. 23.

<sup>30</sup> ” ” „ .73.



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33 “ ”

，1980， . 304.

34 “ ”

，2008， . 101.



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( , .); 2) ”

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” “ ” “

*genus differentia.*

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“ 36

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“ 38

<sup>35</sup> Herbert Hart, “Definition and Theory in Jurisprudence”, . 9-12.

<sup>36</sup> “, . 7.

<sup>37</sup> , *ibidem.*

<sup>38</sup> “ - ” (1)

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„ 40

41

(Peter Winch),  
Relations to Philosophy“

„The Idea of Social Science and Its

42

43 je,

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<sup>40</sup> „ „ „ . 7.

<sup>41</sup> , *ibidem*.

<sup>42</sup> Peter Winch, „The Idea of Social Science and Its Relations to Philosophy“, Routledge, London, 2007, 3.

<sup>43</sup> *Ibidem*, . 18.

„ 44

„ 45

(Neil MacCormick)

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<sup>44</sup> Michal Sládek, „ , 2010/3, . 147.

<sup>45</sup> *Ibidem*, . 147-148.

( , )

„ 46

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<sup>46</sup> Jonathan Swift, „Gulliver’s Travels“, <http://www.planetebook.com/ebooks/Gullivers-Travels.pdf>

<sup>47</sup> , *ibidem*, . 149

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2. 1.

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<sup>48</sup> Hans Kelsen, „The Pure Theory of Law and Analytical Jurisprudence“ u *Harvard Law Review*, 55, 1941.  
<sup>49</sup> Frederick Schauer, „Positivism Before Hart“, *Canadian Journal of Law and Jurisprudence* Vol. X-  
XIV, No.2, 2011, . 467 .

(William Blackstone).

”

„<sup>50</sup>

<sup>51</sup>

„The Province of Jurisprudence

Determined“

<sup>52</sup>

(*laws properly*

*so called*)

(*laws improperly so called*).<sup>53</sup>

<sup>54</sup>

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<sup>50</sup> , *ibidem*, . 25.

<sup>51</sup> *Ibidem*.

<sup>52</sup> hn Austin, „The Province of Jurisprudence Determined“, Cambridge University Press, Cambridge, 2001, . 18.

<sup>53</sup> *ibidem*, . 20.

<sup>54</sup> *Ibidem*, . 54.

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<sup>55</sup> *Ibidem*, . 24.

<sup>56</sup>

. 158.

“, John Austin, *ibidem*,



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“ 58

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<sup>57</sup> *Ibidem*, . 21-22  
<sup>58</sup> , *ibidem*, . 87.

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„[ ]

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<sup>59</sup> Candance J. Groudine, „Authority: H. L. A. Hart and the Problem with Legal Positivism“, *The Journal of Libertarian Studies*, Vol. IV, No. 3, 1980, . 277.

<sup>60</sup> , *ibidem*.

<sup>61</sup> *Ibidem*, . 102.

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763

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<sup>62</sup> *Ibidem*, . 104.

<sup>63</sup> „[...]“

<sup>64</sup>

, *ibidem*, . 101.

.“, *ibidem*.

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“66

“67

„[ ]

“68

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<sup>65</sup> *Ibidem.*

<sup>66</sup> , *ibidem,* . 140.

<sup>67</sup> *Ibidem,* . 144.

<sup>68</sup> , ” — “ 3/2011, . 14.  
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: ”  
“ ” . 74-76.

2. 2.

(*social rule*<sup>69</sup>)

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<sup>69</sup> „ *social rule*

( *custom-type rule*)

*social rule. ocial rule* (

3/2011, . 16.

<sup>70</sup> Neil MacCormick, „Legal Reasoning and Legal Theory“, Oxford University Press, Oxford, 1994, c . 277.



(*internal aspect*).

“72

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” “ ” “ ” “).

( “ ),

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<sup>72</sup> *Ibidem.*





<sup>75</sup> Ibidem.  
<sup>76</sup>

“ ” — “ ” . 19.  
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### 2. 3.

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<sup>79</sup> Roscoe E. Hill, „Legal Validity and Legal Obligation“, *The Yale Law Journal*, Vol. 80, No. 1, 1970, . 61-63.

<sup>80</sup> , *ibidem*, . 147.

<sup>81</sup> *ibidem*, . 151.

: Bronislaw Malinowski, „Crime and Custom in Savage Society“, egan Paul, Trench, Trubner & Co. ltd. - Harcourt, Brace & Company, inc., New York – London, 1926. Arthur Sigismund Diamond, „Primitive Law“, Longmans Green & Co. London, 1936. Karl Nickerson Llewellyn, Edward Adamson Hoebel, „The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence“, W.S. Hein & Company, 1941.



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( . )  
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“ 85

“ (rule of recognition)<sup>86</sup>,

(rules of change),

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<sup>85</sup> *Ibidem*, . 153.  
<sup>86</sup>

*rule of recognition*  
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, *rule of recognition*  
, *rule of recognition*  
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, *ibidem*, . 110.

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<sup>87</sup> , *ibidem* , . 153.

<sup>88</sup> *Ibidem* , . 141.

„ 89

„ 90

(Joseph Raz)

(Rolf Sartorius),

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<sup>89</sup> *Ibidem*, . 153.

<sup>90</sup> , *ibidem*.

<sup>91</sup> Rolf Sartorius, *ibidem*, str. 137-138.

<sup>92</sup> „ , 1988, . 66-68.

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93 , *ibidem*, . 112.



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<sup>94</sup> , *ibidem*, . 169.

<sup>95</sup> *Ibidem*, . 154.

<sup>96</sup> M “, . 124.

<sup>97</sup> *Ibidem*.

<sup>98</sup> “, . 21.

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*Ibidem*, . 160.

, *ibidem*, . 154.

“, . 112-113.

III 2. 3.

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106

<sup>103</sup> *Ibidem.*  
<sup>104</sup>

<sup>105</sup> *Ibidem*, . 86  
Guido Fasso, „Historie de la Philosophie du Droit - XIX<sup>e</sup> et XX<sup>e</sup> siècle“, L.G.D.J., Paris, 1976, str. 235, Ko , *ibidem*, . 40, , „

<sup>106</sup>

3.

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[*customary laws*],

[*duty-imposing laws*]

„...“, Joseph Raz, „The Concept of Legal System“, Clarendon Press, Oxford, 1983, str. 199. Joseph Raz, „The Authority of Law“, Clarendon Press, Oxford, 1979, str. 92-94, Peter Hacker, *ibidem*, str. 23.

( . - ),  
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I V ).  
(existence criteria) .<sup>107</sup>

„[ ] ?  
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„<sup>108</sup>

„[ ]  
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110

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<sup>107</sup> Joseph Raz, „The Authority of Law“, . 1.

<sup>108</sup> *Ibidem.*

<sup>109</sup> *Ibidem.* . 2

<sup>110</sup> *Ibidem.*

<sup>111</sup>

3. 1.

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112

, *ibidem*, . 175.







“ 116

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“ 117

**3. 3.**

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<sup>117</sup> , *ibidem*, . 119.

3. 4.

*Law*).

*(minimal content of Natural*

<sup>118</sup> Joseph Raz, *ibidem*.

<sup>119</sup> *Ibidem*, . 2.

<sup>120</sup> Rolf Sartorius, „Hart’s Concept of Law“ *Essays in Legal Philosophy*, R. S. Summers (ed.), Basil Blackwell, Oxford, 1971, . 66.

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<sup>121</sup>

<sup>122</sup> *Ibidem.*

, *ibidem*, . 150



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 „ 128  
 ( )  
 129  
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 „ 130

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. John Finnis, „Natural Law and Natural Rights“, Clarendon Press,  
 Oxford, 1980, . 82.

<sup>128</sup> , *ibidem*, . 251.  
<sup>129</sup>

„  
 ( )  
<sup>130</sup> *Ibidem*, . 257. „ *Ibidem*, . 256.

### III

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„The Model of Rules I“ 1967.

„Taking Rights Seriously“ 1977.

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<sup>131</sup> Brian H. Bix, „Natural Law: The Modern Tradition“, *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Jules Coleman, Scott Shapiro (eds.), Oxford University Press, Oxford, 2004, . 75-76, 84-85, 96.

<sup>132</sup> Ronald Dworkin, „Natural’ Law Revisited“, *University of Florida Law Review*, No. 34, 1982, . 165.



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**1.1.**

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## 1.2.

„Riggs vs.

Palmer“ 1889. <sup>139</sup>

<sup>138</sup>

„“ . 132.

<sup>139</sup> Charles Silver, „Elmers’s Case: A Legal Positivist Replies to Dworkin“, *Law and Philosophy*, Volume 6, 1987, . 383.

(Gray)

(Earl) je

*common law-*

1960.

1888.

490.

. 25-30.

“, 45-46.

„()”

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... „142”

( II 3. 2.)

“ 143

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<sup>143</sup> *Ibidem.*

).<sup>144</sup>

„Riggs vs. Palmer“,

145

*posterior derogat legi priori.*<sup>146</sup>

*Lex*

147

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<sup>144</sup> *Ibidem*, str. 48.

<sup>145</sup> *Ibidem*, str. 49.

<sup>146</sup>

147

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„148

[...]

[...]

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<sup>148</sup> *Ibidem*, str. 53

“ *Ibidem*, str. 51.



Riggs [...] *facto*“.<sup>149</sup>

*ex post*

1.3.

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“ 150

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<sup>149</sup> *Ibidem.*  
<sup>150</sup> *Ibidem.*  
<sup>151</sup> *Ibidem.*  
<sup>152</sup> *Ibidem.* . 56.

(weak)

153

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„[ ]

[<sup>154</sup>],

“ 155

120

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<sup>153</sup> Scott Shapiro, „The 'Hart-Dworkin' Debate“, . 11.

<sup>154</sup> 136.

<sup>155</sup> *Ibidem.* . 57.

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[...]

*(penumbra)*

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*(open texture)*.

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*(penumbra)*.

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<sup>158</sup> *Ibidem*, . 71.

<sup>159</sup> . 136.

<sup>160</sup> “, . 189.

<sup>161</sup> , *ibidem*, . 187.

*lex loquens.*

( )

162

163

164

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<sup>162</sup> *Ibidem*, . 191.  
<sup>163</sup>

( , . )

<sup>164</sup> , *ibidem*, . 58.

[

„ 166

„Riggs vs. Palmer“

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165

<sup>166</sup> *Ibidem*, . 59

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<sup>167</sup> *Ibidem.*







171

„Riggs vs. Palmer“

„[ ]

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<sup>171</sup> *Ibidem*, . 62.

“ 172

173

“ 174

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<sup>172</sup> *Ibidem*, . 63.  
<sup>173</sup>

<sup>174</sup> , *ibidem*.

, *ibidem.*

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[<sup>178</sup>]

“<sup>179</sup>

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178

, *ibidem.*

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„*rules manqueés*“<sup>180</sup>  
 „*rules*“  
*manqueés,*  
 „181“

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( ).  
 (Graham Poll) 2002.  
 „Riggs vs. Palmer“.  
 (Jose Murihno)  
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<sup>179</sup> *Ibidem.*  
<sup>180</sup> *Ibidem.*  
<sup>181</sup> *Ibidem.*

*ibidem.* . 64.

„[ ]

„ 182

#### 1.4.

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<sup>182</sup> *Ibidem.*

(test of pedigree),

Riggs Heningsen.



[ ]<sup>183</sup>

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“ 186

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<sup>183</sup> *Ibidem*, . 65.

<sup>184</sup> Scott Shapiro, *ibidem*, . 12.

<sup>185</sup>

<sup>186</sup> , *ibidem*, . 66.

187

188

( II 2. 4.),

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<sup>187</sup> *Ibidem.*

<sup>188</sup>

<sup>189</sup>

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“, . 159-169.

”

*legal institutions*

; . ],

“, *ibidem*, . 67.

( II 2. 1.).

“ 190

191

( II 3. 1.).

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<sup>190</sup> *Ibidem.*

<sup>191</sup> *Ibidem,* . 68.



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“ 194

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“ 195

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<sup>194</sup> *Ibidem.*

<sup>195</sup> *Ibidem,* . 70.

<sup>196</sup> Scott Shapiro, *ibidem,* . 14.

*ex post facto.*

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197

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( ) ,

“ . , *ibidem* , 145.

198

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<sup>198</sup> , *ibidem*, . 314.  
<sup>199</sup>

David Lions, „Principles, Positivism, and Legal Theory“, *Yale Law Journal*, No 87, 1977, . 415 .



200

201

- 1)

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<sup>202</sup> *Ibidem.*

, *ibidem.*

, *ibidem.*

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*superior,*

*Lex posterior Lex*

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, *ibidem*, . 314-315.

. oseph Raz, *ibidem*, str. 40.

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<sup>206</sup> Ibidem, . 317.

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## 2.2.

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<sup>207</sup> *Ibidem.*  
<sup>208</sup>

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[...]

, *ibidem*, . 46 48.

<sup>209</sup> *Ibidem.*

. *Ibidem*, . 50.

” “ , 210

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211

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<sup>210</sup> , *ibidem*, . 195.  
<sup>211</sup>

„[ ]

Scot J. Shapiro, „Hart-Dworkin debate“, . 16-17.

212

“ 213

[ ]<sup>214</sup>

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<sup>212</sup> , *ibidem*, . 326.

<sup>213</sup> *Ibidem*, , 327.

<sup>214</sup> *Ibidem*, , 327-328.



„[ ]

(*Cardozo*)

(*Radcliffe*),

(*Oliver Wendell Holmes*)

(*Macmillan*),

(*Reid*)

„ 216

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<sup>215</sup> *Ibidem.*

<sup>216</sup> *Ibidem*, . 328-329.

“ 217

### 2.3.

218

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<sup>217</sup> *Ibidem*

<sup>218</sup> Scott Shapiro, *ibidem*, . 17.

, *mutatis mutandis*

(,,

„219).

(*numberless*)

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220

VIII  
(987-1031§),

VI

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*regulae iuris,*

„[

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(pedigree thesis).

(separation thesis).

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“ 221

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221 , *ibidem*, . 169.



222

Herbert Hart, „Lon L. Fuller: *The Morality of Law*“, *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford, 1983. . 361.

223 Scott J. Shapiro, „Was Inclusive Legal Positivism Founded on a Mistake?“, *Ratio Juris*, Vol. 22, No. 3, 2009, . 327.

224 *Ibidem*.

225 Andrei Marmor, „Exclusive Legal Positivism“, *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Jules Coleman, Scott Shapiro (eds.), Oxford University Press, Oxford, 2004, . 110.



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<sup>226</sup> *Ibidem.*  
<sup>227</sup> *Ibidem.*, . 110-111.  
<sup>228</sup> *Ibidem.*

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229

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’Riggs vs. Palmer’

(*moral requirement of fairness*)“.<sup>230</sup>

### 2.3.2.

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- „all law is source based, and anything which is not source based is not

law“.<sup>231</sup>

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<sup>229</sup> , *ibidem*, . 318 .

<sup>230</sup> Kenneth Einar Himma, „Inclusive Legal Positivism“, *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Jules Coleman, Scott Shapiro (eds.), Oxford University Press, Oxford, 2004, . 140.

<sup>231</sup> Andrei Marmor, *ibidem*, . 104.

232

233

(*judicial custom*).

234

232

, *ibidem*, . 37-38.

(*recognize*)

). [...]

second ed, Clarendon Press, Oxford, 1983, str. 211-212.

233 Genaro Rubén Carrió, „Legal Principles and Legal Positivism“, Abeledo Perrot, Buenos Aires, 1971, . 25.

234 Scott Shapiro, „The 'Hart-Dworkin' Debate“, . 20.



*ipso facto*

236

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<sup>236</sup> Joseph Raz, „The Authority of Law“, Clarendon Press, Oxford, 1979. . 46.

<sup>237</sup> „ „ „ „ . 51.

3.

*ex post facto.*

*(right thesis).*

238

239

240 (

(*legal policies*).<sup>241</sup>, .

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<sup>238</sup>

<sup>239</sup> *Ibidem*, . 45, 115.

<sup>240</sup> *Ibidem*, . 115.

<sup>241</sup> *Ibidem*, . 116.

“, . 115.

*legal policies*

“, . 138.

(institutional rights)

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242 Livingston Baker, „Dworkin's Rights Thesis: Implications for the Relationship Between the Legal Order and the Moral Order“, *Brighnam Young University Law Reiview*, 1980, . 839.

243 je (right) .  
 : „  
 [...].  
 .“, *ibidem*, . 239-240.



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<sup>244</sup> John Finnis, „Natural Law: The Classical Tradition“, *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Jules Coleman, Scott Shapiro (eds.), Oxford University Press, Oxford, 2004. 34-37.

<sup>245</sup> : „  
“; *ibidem*, .

121.

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246

, *ibidem*, . 139.

247

William Lucy, „Adjudication“, *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Jules Coleman, Scott Shapiro (eds.), Oxford University Press, Oxford, 2004. . 219.

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„ . 142.







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„The Model of Rules I“

„The Model of Rules II“

„A Matter of Principle“

„Law’s Empire“

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1.1.

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, 2) 3)  
*(fidelity)*.<sup>250</sup>

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250 „ „, .13.



254

*Brown* 1954.

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1954.

*Brown,*

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<sup>253</sup> *Ibidem.* . 14-15.

<sup>254</sup> Scott Shapiro, „Hart-Dworkin debate“, . 29.

<sup>255</sup> Ronald Dworkin, „A Matter of Principle“, Harvard University Press, Cambridge-Massachusetts, 1985, . 295.

1.2.

*view of law).*

*(plain-fact*

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<sup>256</sup> Scott Shapiro, *ibidem*, . 30.

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258 Scott Shapiro, *ibidem*.

259 *ibidem*, . 19.

“, . 17.

, *Brown,*

“ 260

*Snail darter case.*

1973.

(*Tennessee Valley Authority,*

TVA),

( 100 )

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<sup>260</sup> *Ibidem.*

(David Etnier),

snail darter (*Percina Tanasi*).<sup>261</sup>

snail darter

VA

vs. Hill“

, 1978. „TVA

*Burger*).

(Warren

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<sup>261</sup> Robert Jay Goldstein *et alia*, „American Aquarium Fishes“, Texas A&M University Press, 2000, . 291

<sup>262</sup> , *ibidem*, . 31.

„ “ (carry out),

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darter

snail

(Lewis Powell)

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(McLoughlin)

19. 1973, 18 ,

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<sup>263</sup> *Ibidem*, c . 32.

(Baker's amendment),

. Snail darter



1967.

*common law-*

*(Court of Appeal)*

„ (true state of the law).<sup>264</sup>

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<sup>264</sup> *Ibidem*, . 37.

„ 265

„Riggs vs. Palmer“,

„ (statute).

„ 266

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<sup>265</sup> *Ibidem*, . 37-38.

<sup>266</sup> *Ibidem*, . 26.

267 (

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268

„Riggs vs. Palmer“,

*(letter of the statute)*

( ) *(statute itself)*.

267

Ronald Dworkin, „A Matter of Principle“, . 146-166.

268

(theory of legislation),

(.)

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” “ ” “ 269

Hill“ „TVA vs.

1973.

—

” “ (what law is made by a particular text).<sup>270</sup>

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<sup>269</sup> „ ” „ .27.  
<sup>270</sup> *Ibidem*, .33.

**1. 3.**

*Snail darter,*

271

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<sup>271</sup> *Ibidem,* .47.



*iniusta non est lex*<sup>273</sup>,

*Lex*

<sup>274</sup>

<sup>275</sup>

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<sup>272</sup> *Ibidem*, . 40-41.

<sup>273</sup> „*Lex iniusta non est lex*“, 2010/4, . 70-73.

<sup>274</sup> John Finnis, „Natural Law and Natural Rights“, . 360

<sup>275</sup> *ibidem*, . 45.



of Law“,

„The Concept

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— — „ 276

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<sup>276</sup> *Ibidem*, . 43.

„Hart rejected Austin’s account of legal authority as a brute fact of habitual command and obedience. He said that the true ground of law lie in the acceptance by the community as a whole of a fundamental master rule (he called this ‘rule of recognition’) that assigns to particular people or groups the authority to make law. So propositions of law are true not just in virtue of the commands of people who are habitually obeyed, but more fundamentally in virtue of social conventions that represent the community’s acceptance of a scheme of rules empowering such people or groups to create valid law. For Austin the proposition that the speed limit in California is 55 is true just because the legislators who enacted that rule happen to be in control there; for Hart that proposition is true because the rule of recognition accepted by the British people makes judges’ declarations law subject to the powers of other officials – legislators – to repeal that law if they wish“.  
Ronald Dworkin, „Law’s Empire“, Harvard University Press, Harvard, 1986. . 34.

( II 2. 4.).

[ ].<sup>277</sup> —

( II 3. 1.)

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<sup>277</sup>

, *ibidem*, . 169.

1. 4.

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278 , *ibidem*, . 44.

279

“ , 19.

a,

14/2008, . 318-319.

*Snail darter*

280

(*repair*)

281

*Snail darter,*

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<sup>280</sup> , *ibidem*, . 46, Scott Shapiro, *ibidem*, . 33.

<sup>281</sup> Scott Shapiro, *ibidem*.

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<sup>282</sup>

, *ibidem*, . 47.

<sup>283</sup> *Ibidem*, . 48

“ 284

285

” “  
*Snail darter,*

(*reforming*)

286

*Snail darter*

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<sup>284</sup> *Ibidem.*  
<sup>285</sup> *Ibidem.* . 49  
<sup>286</sup> *Ibidem.*







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„ 288

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<sup>288</sup> *Ibidem.*

( II 1. 2.).

*(semantic sting).*

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„Riggs vs. Palmer“.

290

„Brown“,

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<sup>289</sup> *Ibidem*, . 57.

<sup>290</sup> *Ibidem*, . 52-53.

„Brown“

2.





( III 2. 3.),

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( )<sup>294</sup>,

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<sup>293</sup> Herbert Hart, „Positivism and the Separation of Law and Morals“ u *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford, 1983, . 54-55. ,, “, . 301-302.

<sup>294</sup> 279.



( II 1. 2. 1.).

295  
296

, *ibidem.* “ . 7.

„297

(John Rawls)

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[ ] „299

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<sup>297</sup> *Ibidem.*

<sup>298</sup> *ibidem,* . 217-218.

<sup>299</sup> „ „ , 1998. , 23. “

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[.]“, Jules L. Coleman, Ori Simchen, „Law“, *Legal Theory*, 2003/9,



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(propositions of law)<sup>[304]</sup>

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, *ibidem.*

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*propositions of law,* ” *tel quel*

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, *ibidem.*

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*Ibidem.*

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*Snail darter*

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<sup>309</sup> Scott Shapiro, *ibidem*, . 38.

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<sup>310</sup> Veronica Rodriguez-Blanco, „A Defence of Hart’s Semantics as Nonambitious Conceptual Analysis“, *Legal Theory*, 2003/9, . 100 . Nicos Stavropoulos, „Hart’s Semantics“, *Hart’s Postscripts*, Jules Coleman, (ed.), Oxford University Press, Oxford/New York, 2001, . 62 .

(*repair argument*),

*darter*

, *Snail*

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<sup>311</sup> Scott Shapiro, *ibidem*, . 38.

312

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314

(*purposivism*),

(*interpretative methodology*)

“ 315

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<sup>312</sup> *Ibidem*, . 40-52.  
<sup>313</sup>

<sup>314</sup> Scott J. Shapiro, „What is the Rule of Recognition (and does it exist)?“, *Public Law & Legal Theory Research Paper Series*, Research Paper No. 181, 2009, . 15-16.

<sup>315</sup> Scott J. Shapiro, „Hart-Dworkin debate“, . 43.

(fixed)

„Edwards vs. Canada“

*Snail darter*

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“ 316

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<sup>316</sup> *Ibidem.*

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3.1.

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“ 317  
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... (fit) 319  
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64.  
318 ”  
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319 ... “ , *ibidem*, . 64.  
320 , *ibidem*, . 65.





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### 3. 2.

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, 2007, . 110-111.

( ) ,

*(Thomas Hobbes)* je,

*(John Locke)*,

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<sup>324</sup> „[...]”

, 1991, . 133.

Fragmented text consisting of various punctuation marks (commas, periods, apostrophes) and some faint characters scattered across the page.

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“*Ibidem*, . 151-152.

. 142-144.

, 2011, . 273.

„<sup>328</sup>  
(*Jean*  
*Jacques Rousseau*) (*Immanuel Kant*),

: 1) , 2)  
3) <sup>329</sup>

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<sup>328</sup> *Ibidem*, . 275.

<sup>329</sup> , *ibidem*, . 127-131.



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334 Ronald Dworkin, „Freedom’s Law“, Oxford University Press, Oxford, 1999, . 17.

„ „

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<sup>335</sup> „ ( 1945.) „, Ronald Dworkin, „Freedom’s Law“, . 20.

<sup>336</sup> *Ibidem*, . 38.  
<sup>337</sup> , *ibidem*, . 309.  
<sup>338</sup> Ronald Dworkin, *ibidem*, . 70.  
<sup>339</sup> „, *ibidem*.



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*. Ibidem.*

<sup>341</sup> *Ibidem.*

<sup>342</sup> *Ibidem.*

“ (moral reading)

343

(fresh)

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Bill of Rights“,

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„The  
( 1791.

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<sup>343</sup> Ronald Dworkin, „Freedom’s Law“, . 2.

<sup>344</sup> *Ibidem.*

<sup>345</sup> „Bill of Rights“

<sup>346</sup>

, *ibidem*, . 26.

347

: „[...]”

„ 348

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[...]

(content),

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<sup>347</sup> Ronald Dworkin, *ibidem*, . 7.

<sup>348</sup> *Ibidem*, . 7-8.

<sup>349</sup> *Ibidem*.

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### 3. 3.

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<sup>350</sup> *Ibidem*, . 73.

351

(*classificatory strategy*).

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<sup>351</sup> John Rawls, „The Laws of Peoples“, Harvard University Press, Harvard, 1999; Joseph Raz, „Human Rights without Foundations“, *The Philosophy of International Law*, (eds. Samantha Besson, John Tasioulas), Oxford University Press, Oxford, 2010, . 321 ; John Skorupski, „Human Rights“, *The Philosophy of International Law*, (eds. Samantha Besson i John Tasioulas), Oxford University Press, Oxford, 2010, . 357.

<sup>352</sup>

Ronald Dworkin, „It is absurd to calculate human rights according to a cost-benefit analysis“, *The Guardian*, Wednesday, 24 May, 2006.

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2003,

: „[ ]

“ 356

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1648.

<sup>354</sup> Ronald Dworkin, „Justice for Hedgehogs“, Harvard University Press, Harvard, 2011, . 321.

<sup>355</sup>

<sup>356</sup> Ronald Dworkin, *ibidem*.

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357

(*savage discrimination*)

358

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“ 360

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<sup>357</sup> Ronald Dworkin, „Is democracy possible here?: principles for a new political debate“, Princeton University Press, New Jersey, 2006, . 34.

<sup>358</sup> Ronald Dworkin, „Justice for Hedgehogs“, *ibidem*.

<sup>359</sup>

<sup>360</sup> Ronald Dworkin, *ibidem*, . 323.

361

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(*authenticity*).

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<sup>361</sup>

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<sup>362</sup> Ronald Dworkin, *ibidem*, . 324.

<sup>363</sup> *Ibidem*.



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2001, . 16.





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1. 2.

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( II 2. 3.),

(Jules Coleman)

<sup>367</sup>

: „

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[...]“<sup>368</sup>

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<sup>367</sup> Jules Coleman, „Beyond the Separability Thesis: Moral Semantic and Methodology of Jurisprudence“, *Oxford Journal of Legal Studies*, Vol. 27, 2007/4, . 598-599.

<sup>368</sup> „ „ „ „ . 295.



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“ 369

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„ 371

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( ) „ 371

<sup>369</sup> Andrei Marmor, „Legal Positivism: Still Descriptive and Morally Neutral“, . 683.

<sup>370</sup> „ II – ?“, , 2010/3, . 13.

<sup>371</sup> *Ibidem.*

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<sup>372</sup> Ronald Dworkin, „Hart’s Postscript and the Character of Political Philosophy“, *Oxford Journal of Legal Studies*, Vol. 24, 2004/1, . 1 .  
I“, , , 2002, . 499 .  
<sup>373</sup> *Ibidem* . 2.

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<sup>374</sup> Julie Dickson, „Evaluation and Legal Theory“, Hart Publishing, Oxford and Portland, Oregon, 2001. . 101 .

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, *ibidem*, . 17.  
, *ibidem*, . 299.

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, *ibidem*, . 294-295.

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, *ibidem*.

“ , *ibidem*, . 32.

„Law’s Empire“,

„Brown“,



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<sup>382</sup> - „The Decline and Fall of Law’s Empire“ (Robert Moles) „My Reply to Stanley Fish (and Walter Benn Michales): Please Don’t Talk About Objectivity Any More“.

<sup>383</sup> Brian Leiter „Beyond the Hart/Dworkin debate: the Methodology Problem in Jurisprudence“, *American Journal of Jurisprudence*, Vol. 48, 2003, . 18.

(Herbert Lionel Adolphus Hart) (1907-1992)

Cheltenham

College Bradford Grammar School,  
New College

1929.

1932.

( I-5)

New College

1952.

1968,

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Brasenose College,

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Прилог 1.

## Изјава о ауторству

Потписани Милош Здравковић

број индекса \_\_\_\_\_

### Изјављујем

да је докторска дисертација под насловом

Дворкинова критика Хартове верзије позитивизма

- резултат сопственог истраживачког рада,
- да предложена дисертација у целини ни у деловима није била предложена за добијање било које дипломе према студијским програмима других високошколских установа,
- да су резултати коректно наведени и
- да нисам кршио/ла ауторска права и користио интелектуалну својину других лица.

Потпис докторанда

У Београду, 26. марта 2014.

Милош Здравковић

Прилог 2.

## Изјава о истоветности штампане и електронске верзије докторског рада

Име и презиме аутора Милош Здравковић

Број индекса \_\_\_\_\_

Студијски програм \_\_\_\_\_

Наслов рада Дворкинова критика Хартове верзије позитивизма

Ментор проф. др Драган Митровић

Потписани Милош Здравковић

Изјављујем да је штампана верзија мог докторског рада истоветна електронској верзији коју сам предао/ла за објављивање на порталу **Дигиталног репозиторијума Универзитета у Београду**.

Дозвољавам да се објаве моји лични подаци везани за добијање академског звања доктора наука, као што су име и презиме, година и место рођења и датум одбране рада.

Ови лични подаци могу се објавити на мрежним страницама дигиталне библиотеке, у електронском каталогу и у публикацијама Универзитета у Београду.

Потпис докторанда

У Београду, 26. марта 2014.

Милош Здравковић



Прилог 3.

### Изјава о коришћењу

Овлашћујем Универзитетску библиотеку „Светозар Марковић“ да у Дигитални репозиторијум Универзитета у Београду унесе моју докторску дисертацију под насловом:

Дворкинова критика Хартове верзије позитивизма

која је моје ауторско дело.

Дисертацију са свим прилозима предао/ла сам у електронском формату погодном за трајно архивирање.

Моју докторску дисертацију похрањену у Дигитални репозиторијум Универзитета у Београду могу да користе сви који поштују одредбе садржане у одабраном типу лиценце Креативне заједнице (Creative Commons) за коју сам се одлучио/ла.

1. Ауторство
2. Ауторство - некомерцијално
3. Ауторство – некомерцијално – без прераде
4. Ауторство – некомерцијално – делити под истим условима
5. Ауторство – без прераде
6. Ауторство – делити под истим условима

(Молимо да заокружите само једну од шест понуђених лиценци, кратак опис лиценци дат је на полеђини листа).

Потпис докторанда

У Београду, 26. марта 2014.

Милош Здравковић