Making Sense of Nonsense Jurisprudence

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Abstract: Did Ronald Dworkin believe that morality is a criterion of legal validity? *No*. Did he think that judges discover law? *Definitely not*. Did he think morality is timeless? *He did not*. But he did think it was universal? *No to that as well*. He did think, at least, that morality was part of the law, because he thought that morality is one of the criteria of legal validity. *No, he did not think that*. How can you say that, obviously Dworkin was not a legal positivist, so he must have been a natural lawyer. *Actually, he was neither*. So what you're saying is that Dworkin invented a new theory of law? *No, his views are a specimen of a theory with centuries of history*. Any other thoughts about Dworkin? *Yes, he was a legal realist*. Are you joking? *I'm really not*. This paper explains why, and why it matters.

I'd tell all my friends but they'd never believe me
They'd think that I finally lost it completely[1]

Contents

* Professor of Law, Osgoode Hall Law School. For helpful comments and discussions on this paper I thank Charles Barzun, Jennifer Nadler […]. Throughout the essay I use the following abbreviations when citing Dworkin's books: Taking Rights Seriously (rev. ed. 1978): TRS; A Matter of Principle (1985): AMP; Law's Empire (1986): LE; FL: Freedom's Law: The Moral Reading of the American Constitution (1996); JR: Justice in Robes (2006); IDPH: Is Democracy Possible Here? Principles for a New Political Debate (2006); JH: Justice for Hedgehogs (2011).

[1] Radiohead, *Subterranean Homesick Alien*, *in* OK COMPUTER (Parlophone 1997).

I. AD HOMINEM PREFACE

I was never a student of Ronald Dworkin. As a graduate student, I got to see him present his ideas in a handful of seminars, and I recall asking a question or two, but I never had a one-on-one conversation with him. As far as I can tell, he never read a word I have written. These opening remarks are therefore ad hominem not in terms of aiming at him, but more an attempt to convey my impressions of Dworkin as a scholar, because I believe those help explain the reception of, and reaction to, his ideas.

I think it is fair to say that by some measures Dworkin was not a good scholar. I think he saw himself as a thinker and that in some sense he considered being a thinker inconsistent with being a scholar. He often distanced himself in his writings from what is considered standard fare in scholarly books: the careful explication of others' views (JH ix), adequate attribution and citation, or the attempt to place his own views in relation those of others. When writing on American constitutional law, he made it clear that he did not bother himself with doctrinal details (FL 35), just as in his writings on moral and political theory he ignored the subtleties that dominate contemporary debates. On the occasions he did discuss others' views, he often reduced lengthy arguments to a quotation of a single sentence. In one particularly notorious case, he dismissed the whole of metaethics, from Plato to present times, as resting on a fundamental error that apparently no-one before him had spotted.[2]

I will add two additional more personal reasons for disapproving of Dworkin's work. If there is one habit that I truly dislike in scholarly work is sloppiness. Academics are paid good money (often good *public* money) and are given ample time and generous resources to look things up. Unlike journalists they do not work to tight deadlines. The least one can ask of them is to make an effort to get things right. Much of Dworkin's written work reflects little interest in that, and this has sometimes resulted not just in misrepresentation of others' views, but also in some very facile arguments against weak versions of the arguments he attributed to his opponents.[3] A more substantive reason for me to be unsympathetic to Dworkin's work is that the foundation of Dworkin's work is anti-naturalistic. Dworkin has argued that the physical and the ethical are "different intellectual domains" (JR 76; also, JH 17). As a naturalist, this is a fundamental difference, on which I disagree with Dworkin.[4]

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[2] *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 89 (1996).

[3] For examples of that see Danny Priel, *In Search of Argument*, 86 TEX. L. REV. 141 (2007) (reviewing IDPH). A concrete example is the views Dworkin attributed to the legal realists. See note 151 *infra*, and accompanying text.

[4] I do not discuss the issue further in this Essay. For my I attempt to consider what a naturalist can profitably take from Dworkin see Dan Priel, Almost Naturalism: The Jurisprudence of Ronald Dworkin (in progress).

I will also go out on a limb and say that I do not think Dworkin was an especially good writer, something that even his fiercest critics often concede.[5] Or, if that strikes you as implausible, that he was not a very clear writer. Perhaps because he was enchanted with the idea of writing for the general public, or at least for the general public who reads the *New York Review of Books*, he opted for a mellifluous, story-like style which made for pleasant reading, but often made it difficult to pin down his precise views. If, as I will contend below, Dworkin's views have been deeply misunderstood despite his repeated attempts over more than forty years to explain them, he must bear much of the blame for this failure (as he admitted at least once: TRS 291).

I have little idea, apart from a few second- or third-hand stories I have heard, about what Dworkin was like as a person, but Dworkin's writings display supreme self-confidence, at times veering on arrogance. More pronounced in his later writings, this attitude manifested itself in unwillingness to take seriously the views of his opponents. In some works, especially in his more "applied" works on American constitutional law, he got close to telling his political opponents that if they only considered their most deeply-held moral beliefs more carefully, they would realize that they do not really believe them.[6]

Put all this together and it is not surprising that Dworkin's work generated a great deal of critical scholarship, much of it dedicated to dismissing his ideas as not just wrong, but as more-or-less worthless. Brian Leiter spoke for many when he said that Dworkin's "views are…implausible, badly argued for, and largely without philosophical merit."[7] In another article, whose title inspired the title of this one, Leiter called Dworkin's ideas "nonsense jurisprudence."[8] John Gardner was ostensibly more generous when he called Dworkin a "theoretically ambitious lawyer,"[9] until one realizes that in the self-important world of legal

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[5] *See* Brian Leiter, *The End of the Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 177 (2004); Scott Veitch, *Ronald Dworkin and the Power of Ideas*, 2004 ACTA JURIDICA 44, 44, 61; *cf.* Richard A. Posner, *Reply to Critics of* The Problematics of Moral and Legal Theory, 111 HARV. L. REV. 1796, 1797–98 (1998).

[6] *See* Priel, *supra* note 3, at 146–47.

[7] Leiter, *supra* note 5, at 166. In another place, Leiter called Dworkin "a gifted sophist, in the pejorative sense of the latter term." Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 VA. L. REV. 1179, 1189 n.25 (2015). For the record, I also was once highly critical of Dworkin. *See* Priel, *supra* note 3. The context was a book (IPDH) in which Dworkin called for serious consideration others' views, and yet displayed an astonishing disregard for his opponents' views. I see little reason to take back any of the criticisms made there.

[8] Brian Leiter, *In Praise of Realism (and Against "Nonsense" Jurisprudence)*, 100 GEO. L.J. 865, 865 (2012).

[9] John Gardner, *The Legality of Law*, 17 RATIO JURIS 169, 173 (2004). In a reprint of the essay in a book, Gardner removed this expression, opting instead to speak of Dworkin's "philosophical ingenuity." JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 183 (2012) [hereinafter GARDNER, LEAP OF FAITH]. But it seems Gardner's earlier statement was the more genuine one, as all references to Dworkin in the book are highly critical. For a flavor see text accompanying note 32, *infra*.

philosophy, there is no worse slight than being called a mere "lawyer." Whatever one thinks of his work, Gardner suggested, it was very different from, and largely irrelevant to, the concerns of legal philosophers properly so called. These are examples of a perception that in many jurisprudential discussions Dworkin's role in current jurisprudential discourse is that of a punching bag. Dworkin's views are presented as so implausible, sometimes as so *idiotic*, that one wonders not just why the critics even bother with them, but how Dworkin ever got a job in the first place.

This Essay presents a different view. I will argue that Dworkin offered a fundamental challenge to the work of most contemporary legal philosophers. The challenge is significant and worth considering seriously. To see it, however, it is necessary to understand what Dworkin actually said. It is the main aim of this Essay to argue that many, both among his critics and his allies, misunderstood Dworkin's ideas. This does not mean I agree with everything he said. I started this Essay with critical remarks on Dworkin (and I will add more in the course of this Essay) to dispel any suggestion that I accept his ideas uncritically or that this is a work of hero worship. Unfortunately, it seems that in the tribal world of contemporary jurisprudence one has to either accept Dworkin's ideas whole, or to reject them outright. Against this, in this Essay I hope to explain why, despite much that I disagree with in Dworkin's work, there is value in reading him carefully.

II. Introduction

I start with some widely accepted views about law and morality. They are meant to look familiar, perhaps even obvious, and they are treated as such by a large number of legal philosophers:

(1) Law is a human creation, as such it has local and temporal characteristics.
(2) Morality is not a human creation. It is timeless and universal. Its contents do not change, and they are true independently of human attitudes.
(3) It follows from (1) and (2) that law and morality are two quite different entities. They may be related in many ways, there may even be some "necessary connections" between them, but these connections should not confuse us into thinking of law and morality as the same, that law is part of morality, or vice versa.
(4) One important connection between law and morality is that morality is the blueprint, or at least the benchmark, for law. We evaluate human laws against universal morality.

In addition to these four points, I add another two. These further points get us into slightly more technical territory, but to anyone who accepts points (1) to (4), these additional points should still sound fairly obvious:

(5) There are certain characteristics that distinguish laws from nonlaws. These characteristics, often called "criteria of legal validity" (or "criteria of legality"), differ from one jurisdiction to another, but all laws are laws in virtue of meeting the required criteria for legality in their jurisdiction.
(6) Though different jurisdictions have different criteria of legality, the criteria have some universal characteristics. Identifying these characteristics central to understanding the nature of law, and as such are a primary task of the philosophy of law.

I will call these views "the basic picture," and as mentioned, I think it is very widely accepted.[10] I think most legal philosophers takes the basic picture to be a pre-theoretical description of reality. It is so widely accepted that many legal philosophers think their job is to explain and perhaps further refine the basic picture, rather than challenge it.

For those who accept the basic picture, points (1) to (5) are largely beyond debate, and it is point (6) where almost all the action is. (There has also been some discussion of point (3), of better understanding the relationship between law and morality, while still assuming that they are distinct entities.) It is taken to be a universal truth about law that what marks it from nonlaw is some set of criteria that all laws in a given jurisdiction possess and all other things lack. Those criteria are, of course, different for every jurisdiction: The criteria for something being part of Brazilian law are different from the criteria for something being part of Canadian law. Still, in the basic picture the criteria themselves have some universal characteristics, and it is the role of legal philosophers to specify them. Doing so will reveal something about what law (in general) is. Thus, to those who accept the basic picture the mighty debate between legal positivism and natural law theory takes place entirely *within* point (6): Legal positivists think that it is a universal truth about the criteria of legality that they may be (or, if they are "exclusive" positivist, that the criteria necessarily are) purely social. By contrast, natural lawyers insist that these criteria include moral elements. This is why in contemporary jurisprudence, natural law theory is often reduced to the idea that a necessary criterion of legality in all legal systems is passing some moral threshold, hence the slogan associated with natural law theory: unjust law is not law. [11]

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[10] In presenting and challenging what I call "the basic picture," my argument bears some resemblance to what Mark Greenberg called "the standard picture." *See* Mark Greenberg, *The Standard Picture and Its Discontents*, 1 OXFORD STUD. PHIL. L. 39 (2011). Greenberg's standard picture is different from mine, but I share with him the view that there is a prevailing way of characterizing the terrain that legal philosophy has to explain. I also agree with him that there are certain basic assumptions that are assumed by most legal philosophers to be shared by everyone else, and so are wrongly attributed to Dworkin. *See id.* at 56.

[11] Point (1) may be thought to be rejected by some natural law theorists, and I suspect some think that Dworkin has dismissed it too. See note 18, *infra*, and accompanying text. But as many take point (1) to be so obviously correct—Leiter suggested that anyone who denied it should have

The basic picture also explains why many legal philosophers believe that legal philosophy is conceptual, descriptive, and morally neutral. What it aims to identify are universal, necessary features of law. They do not distinguish between good or bad law, just or unjust law. They merely identify what something must be in order to "count as" law. Even if it turns out that morality is one of the criteria of legality, this remains a descriptive, and universally true, claim about the "nature" of law.[12]

This is the backdrop against which Dworkin enters the scene. Because the basic picture is so widely accepted, it was naturally assumed that he subscribed to it and to read his works as if he did. In the standard reading, Dworkin participated in the "conceptual" or "analytical" search for the nature of law,[13] which in turn meant that he was interested in explicating the universal features of the criteria of legality. Since it was clear that Dworkin saw some kind of connection between law and morality, within the parameters of the basic picture this could only mean that he thought morality was a necessary criterion of "legal validity," thus making him a natural lawyer.[14]

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his head checked rather than argued with, *see* Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 30 OXFORD J. LEGAL STUD. 663, 666 (2010)—to have a meaningful debate with legal positivism, both natural law theory and Dworkin have been reconfigured as accepting the basic picture and merely disagreeing on the criteria of legal validity. How faithful this is to the work of natural lawyers (especially historical figures like Aquinas) is not an issue I can explore here.

[12] For reasons that go well beyond the scope of this Essay, I reject the basic picture and the whole enterprise of conceptual or descriptive jurisprudence. See Dan Priel, The Misguided Search for the Nature of Law (unpublished manuscript), http://ssrn.com/abstract=2642461 [hereinafter Priel, Misguided]; *see also* Dan Priel, *The Scientific Model of Jurisprudence*, *in* NEUTRALITY AND THEORY OF LAW 239 (Jordi Ferrer Beltrán et al. eds., 2013); Danny Priel, *Evaluating Descriptive Jurisprudence*, 52 AM. J. JURIS. 147 (2007) [hereinafter Priel, *Evaluating*].

[13] *See* John Oberdiek & Dennis Patterson, *Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology*, 10 CURRENT LEGAL ISSUES 60, 65 (2007); *see also* Allan C. Hutchinson, *"The Debate that Should Not Have Been": Dworkin, Hart, and the Analytic Project*, 51 U. BRIT. COLUM. L. REV. 801, 802, 812 (2018) (arguing that Dworkin was engaged in the "analytical project" and "sought to identify those elements and characteristics of law that are essential for law's nature as a separate and authoritative mode of social regulation").

[14] The view that Dworkin disagreed with legal positivists on the criteria of legal validity is shared by both critics of Dworkin and his defenders. For this view from critics see ANDREI MARMOR, PHILOSOPHY OF LAW 5 (2011) [hereinafter MARMOR, PHILOSOPHY]; ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 3 (2d ed. 2005) [hereinafter MARMOR, INTERPRETATION]; Brian Leiter, *Explaining Theoretical Disagreements*, 76 U. CHI. L. REV. 1215, 1216, 1220–22 (2009) [hereinafter Leiter, *Explaining*]; Brian Leiter, *Theoretical Disagreements in Law: Another Look*, *in* DIMENSIONS OF NORMATIVITY: NEW ESSAYS IN METAETHICS AND JURISPRUDENCE 249, 250 (David Plunkett et al. eds., 2017) [hereinafter Leiter, *Another Look*]; Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123, 133 (1978) (reviewing TRS) (ascribing to Dworkin the "Natural Law Thesis" according to which what is and isn't law "depends, in part, on what is moral and what is not"); *see also* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 103, 115 & n.17 (2001) (characterizing the disagreement with Dworkin in this way but acknowledging that at times he seems to deny it); *cf.* Matthew D. Adler,

Others, also accepting the basic picture, noticed something else in Dworkin's work: He was constantly engaged in normative argument about specific legal questions, often arguing about burning issues in American constitutional law (such as affirmative action and abortion). This made it difficult for some to see him as engaged in the jurisprudential debate at all. Since properly understood jurisprudence is morally neutral, descriptive, and concerned with law in general, some wondered openly whether Dworkin was even a legal philosopher. Hence Gardner's epithet quoted earlier that Dworkin was a mere "theoretically ambitious lawyer." For these readers, Dworkin's interests may have been worthy and some his ideas possibly interesting, but they did not really intersect with legal philosophers' concerns.[15] On this line of argument, not only does Dworkin's work not challenge any claim of conceptual legal philosophy, it, inevitably, presupposes it.[16] Gardner, who at least some times took this view, concluded that despite Dworkin's repeated criticisms of legal positivism, he was in fact a closeted positivist.[17]

I think both readings are mistaken. Dworkin clearly saw himself, correctly, as challenging the work of legal positivists. This puts me closer to the first camp, but I believe proponents of that reading fundamentally misunderstood Dworkin's views as well, because they domesticated his critique. To make sense of Dworkin's view we must understand that he rejected the basic picture. I will argue that Dworkin's disagreement with most legal philosophers was not limited to how he defined the criteria of legality (i.e., a disagreement within point (6)): Dworkin accepted point (1),[18] but thought points (2) to (6) to be false.[19] After we understand this, we can make sense of much else, including the

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Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?, 100 NW. U. L. REV. 719, 737, 738 (2006) (for Dworkin "'interpretation' [i]s a kind of constructed rule of recognition" whose "mater rule for any legal system necessarily reflects moral considerations"). This characterization of Dworkin is found also in works of scholars sympathetic to Dworkin's views. *See, e.g.*, Dale Smith, *Agreement and Disagreement in Law*, 28 CAN. J.L. & JURIS. 183, 183, 189–90 (2015) (arguing that Dworkin had a wider conception of legal validity, which led him to think that morality is "part of the law").

[15] *See* H.L.A. HART, THE CONCEPT OF LAW 241 (3d ed. 2012) (arguing that his own work did not conflict with Dworkin's because of their very different interests); BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 158, 162 (2007).

[16] *See* GARDNER, LEAP OF FAITH, *supra* note 9, at 184.

[17] *See* John Gardner, *Law's Aims in* Law's Empire, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 207, 220 (Scott Hershovitz ed., 2006).

[18] *Contra* Green, *Introduction* to HART, *supra* note 15, at xv, xviii (arguing that Dworkin rejected the idea that law was entirely a social construction); Leiter, *supra* note 8, at 882 (arguing that Dworkin thought that judges discover law, and hence not a human creation).

[19] This presentation helps explain why Hershovitz is mistaken when arguing that the Hart–Dworkin debate can be resolved by denying that there is any unique domain of legal normativity. *See* Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1174–86 (2015). Though there

relationship between Dworkin's jurisprudence and his theoretically ambitious (but supposedly not philosophical) work on American law, and why they two are closely connected.

Some of the points I have just made are quite explicit in Dworkin's last major book, *Justice in Hedgehogs*, where Dworkin unequivocally rejects the picture of law and morality as two separates domains (i.e., point (3) of the basic picture). Struggling to fit these remarks with the standard reading of Dworkin, including the assumption that Dworkin accepted the basic picture, some commentators have argued that the views in *Justice for Hedgehogs* (published in 2011) constitute a significant departure from Dworkin's earlier views.[20] For others, another big change occurred between *Taking Rights Seriously* (published in 1977, but collecting articles published over the previous decade) and *Law's Empire* (published in 1986).[21] Like Dworkin himself (JR 233),[22] I disagree. It is true that various concepts that were central in the earlier writings (such as the distinction

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are connections between Hershovitz's view and the one present here, I reject Hershovitz's argument for three reasons. First, it fails to explain the continuing disagreement between Dworkin and legal positivists. Hershovitz reduces the debate between legal positivism and Dworkin to a single point, which—once resolved—dissolves the Hart–Dworkin debate. But the view Hershovitz advances is *precisely* the view that legal positivist Joseph Raz has defended for decades. *See* J. Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 12–13, 15–17 (1984); *see also* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 158–59 (2d ed. 2009) (1978) [hereinafter RAZ, AUTHORITY]; JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 188 (2009) [hereinafter RAZ, BETWEEN]. Correctly, neither Raz nor Dworkin thought this ended their disagreements. This Essay explains why. Second, Hershovitz's view is unconvincing. His examples involve individuals faced with a practical decision. In that context one might argue that there is no distinct legal normativity. But there are other kinds of meaningful statements about legal or other institutional normative systems. Consider: "in chess, it is impermissible to move the rook diagonally"; "in Canada today, personal use of cannabis consumption is legal; it was not legal twenty years ago"; "you, the political anarchist, think that paying taxes is immoral; I, the liberal, think that taxes bring civilization. Yet we agree that you are required to pay $20,000 in taxes." At one point Hershovitz concedes in passing the intelligibility of such statements. *See* Hershovitz, *supra*, at 1184. This shows that he accepts the possibility of a distinct legal normativity. Moreover, if he is right, a sentence like "In standard English 'You was there' is incorrect" makes no sense, as it posits a separate domain of "English-language normativity." If such normativity is possible, it is unclear why chess normativity is not. Third, and most significant for present purposes, I think Hershovitz mischaracterizes Dworkin's view, for in thinking of law and morality as a single domain he made a much stronger claim than the existence of a single domain of normativity. The way he reads Dworkin ends up limiting the one-domain view only to the question of normativity, which means Hershovitz upholds the basic picture with its assumption that law and morality are two distinct entities. Dworkin rejected this view. *See* Part III.(e), *infra*.

[20] Jeremy Waldron, Jurisprudence for Hedgehogs 8 (N.Y.U. School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 13–45) (calling it a "new Dworkin position"); Hershovitz, *supra* note 19, at 1197–98. For an extended discussion on this point see note 58, *infra*.

[21] *See* ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES 2 (2001); Jules L. Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33, 50–51 (1995).

[22] *See also* Ronald Dworkin, *Hart's Posthumous Reply*, 130 HARV. L. REV. 2096, 2127 n.73 (2017) (written around 1994).

between rules, principles, and policy) largely disappeared in later writings while others (such as interpretive concepts) appeared and assumed prominence. But these changes strike me more like successive attempts to explain broadly the same view, one that Dworkin held fairly consistently from the early 1970s until his death.[23] Virtually all the key elements of the interpretive approach to law, supposedly a novel development in *Law's Empire*, appear, albeit in less detailed form, in Dworkin's first book.[24] The supposedly new view that law and morality belong to a single domain appeared explicitly in *Justice in Robes* (published in 2006) (JR 34–35), but was already endorsed and explained in 1973 (TRS 160–63).

All this may understandably elicit an exasperated response from the uninitiated: "So Dworkin did not change his mind around 2010. Why should we care about any of this now?" For one, the fact remains that the dominant understanding of Dworkin's work is so strong that, it seems to me, people try to fit the "new" Dworkin into the familiar one, thus continuing to misunderstand his views even today. And why does this matter? At the most basic level, this matters because, Dworkin's work remains widely read and discussed among legal philosophers, and his writings are still a staple of many textbooks on jurisprudence.[25] If my arguments in this Essay are correct, then commentators often attribute to Dworkin views that are very different from, at times the exact opposite of, the ones he actually held.

But it is not simply a concern with "getting Dworkin right" that motivates this Essay. As mentioned, I believe that for decades Dworkin presented a comprehensive critique of the basic picture. In doing so, he was among the first to challenge a central assumption of contemporary jurisprudence, namely that it is, first, a conceptual inquiry into the "nature of law."[26] To my mind, albeit for often

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[23] I do think that Dworkin changed his mind on some ideas found in his 1967 article *The Model of Rules* (reprinted as TRS ch. 2). Part of the misunderstanding of Dworkin's views is attributable to excessive attention given to that early article at the expense of what he wrote only a few years later, much of it is largely unread. It is striking that in presenting Dworkin's criticism of legal positivism how much attention is paid to distinctions like rules and principles, weak and strong discretion, and other ideas that appear in that early article, despite the fact that they are almost gone from later writings.

[24] For some examples: law as interpretation (TRS 125–29), rejection of any test of legal validity (TRS 44, 76), fit and justification (TRS 66, 342), and an internalist view of objectivity (TRS 283–84, 287–89).

[25] For a very rough estimate of the ongoing interest in Dworkin's work among legal academics I searched Heinonline for articles published since 2005 with the word "Dworkin" in their title. This yielded 145 results. In some respects, this is an overcount as these results include numerous tributes published after Dworkin's death in 2013. But it is almost certainly an undercount, as it excludes numerous articles dedicated to Dworkin's work which do not mention "Dworkin" in their title, as well as many discussions of his work by scholars from other disciplines (philosophy, politics) that are not well represented in Heinonline.

[26] Lon Fuller may have preceded him. Not surprisingly, he too was misread as engaged in conceptual jurisprudence, when in fact he criticized it. *See* Dan Priel, *Fuller's Political Jurisprudence of Freedom*, 10 JERUSALEM REV. LEGAL STUD. 18, 41–44 (2014).

independent reasons, there is no question that Dworkin was right to reject conceptual jurisprudence as a hopeless and pointless endeavor.[27] Since the basic picture remains dominant, I think there is value in understanding why it is so. Engaging in Dworkin's challenge to it can be a valuable in changing course.

I hope, however, that this Essay will be more than just a contribution to the inside baseball of "the small, hermetic—and rather incestuous universe of Anglophone legal philosophy."[28] Despite the increased insularity of legal philosophy, there are hints that some scholars have seen the relevance of these basic discussions to their work. For instance, one area where scholars have recently shown some interest in jurisprudential debates and their potential relevance is constitutional law and theory, and specifically a new brand of originalism whose proponents draw directly on legal positivism.[29] Dworkin himself engaged in earlier debates over originalism (e.g., FL 12–15; JR ch. 5), but I think his view on that question has been misunderstood partly due to misunderstanding his more general jurisprudential views. While this topic is beyond the scope of this Essay, I believe the arguments presented here are relevant for a better reframing these debates in constitutional theory.

The main bulk of this Essay is dedicated to explicating what I take to be Dworkin's views. Part of the reason why Dworkin has been misunderstood has to do with the hold of the basic picture and the tendency to read everyone in light of it. Another reason has to do with the fact his views have been explicated based on only a small part of his work. Part III relies on a more extensive reading of Dworkin's work than is usual to show just how deeply misunderstood he has been. Another way in which I hope to clarify Dworkin's views is by relating them to those that came before him. Because of a tendency to fit Dworkin's views into the basic picture, he was usually read as a kind of natural lawyer. Because he was not really a natural lawyer, rather than clarifying his views, it has led to greater confusion. In Part IV, I present Dworkin as belonging to different intellectual traditions, common law theory and legal realism, which I hope will help make his views less alien.

Since my presentation of Dworkin's views departs so much from standard readings of his views, it may lead some to object that the views presented here are not "really" Dworkin's. At some level, I disagree. For instance, I think that the view frequently attributed to Dworkin that he believed judges discover law,[30] is simply wrong. However, I must acknowledge that, like all reconstruc-

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[27] See sources cited in note 12, *supra*.

[28] LEITER, *supra* note 15, at 2.

[29] *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019); *but see* Charles L. Barzun, *Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin*, 105 VA. L. REV. ONLINE 124 (2019) (challenging these ideas).

[30] For attributions of this view to Dworkin see text accompanying notes 62–64, *infra*.

tions, this one reflects the views of the person doing the reconstruction: I emphasize certain aspects of Dworkin's work and downplay others. On purpose, my reconstruction avoids a lot of Dworkin's terminology, which I believe has often proven more distracting than helpful. I also acknowledge that the style of argumentation is decidedly not Dworkin's. I have attempted to be precise where Dworkin was typically impressionistic, and tried to not lose focus, as Dworkin sometimes does, with storytelling. (It is for others to judge whether I succeeded in these aims.) Finally, Dworkin's argument as I present it contains many moving parts, and those can be assembled in different ways. I am the one responsible to the structure of the argument as presented here, which is not clearly found in Dworkin's work.

This still leaves room for the possibility that though the views presented are built with Dworkinian building blocks, the result does not match Dworkin's views. On this all I can say is that I don't particularly care. Those left unconvinced that the argument I present is faithful to Dworkin's views, can call the view presented here a "Dworkin-inspired argument," or "Priel's argument," or any other name that fits their fancy. Though I definitely do not agree with everything Dworkin has ever said, I think that the argument presented here is worthy of consideration and makes a case to answer. On this matter, concerns over attribution are unimportant.

III. UNDERSTANDING DWORKIN

This Part presents a reconstruction of Dworkin's views. I will try to show how seemingly disparate elements of Dworkin's work that have often been treated in isolation are part of one long argument. I will largely not to interrupt the argument with potential criticisms that may be leveled against it. However, as one of my main claims is that Dworkin's work has been misunderstood by his critics, I will consider along the way what I consider to be misrepresentations and misunderstandings of his views.

(a) When Asking "What Is Law?" What Are We Asking?

I start my reconstruction at a seemingly odd place, by addressing points that appeared explicitly only quite late in Dworkin's work. I do so because I think it is a necessary preliminary for what comes afterwards. What most legal philosophers see themselves as doing when they debate the question "what is law?" they address a "conceptual" or "categorical" question about the necessary properties for all law anywhere and everywhere.[31] The debate seeks to identify those things in the world that are laws and distinguish them from those things that are

[31] *See, e.g.*, GARDNER, LEAP OF FAITH, *supra* note 9, at 276 & n.14; Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 RATIO JURIS 164, 178–79 (2016) ; Robert Alexy, *On the Concept and the Nature of Law*, 21 RATIO JURIS 281, 284, 290 (2008).

not. As the opening chapter of *Law's Empire* is entitled "What Is Law?" it is natural to think that Dworkin saw himself as part of the same enterprise. And yet the chapter, and the book, refuses to engage in this question in anything that resembles jurisprudential debates. Instead, Dworkin immediately turns to practical matters about how judges decide cases, a question that he tied to the overtly political question of the justification of the use of coercive power.

To some of Dworkin's critics the fact that he began his work with these political questions showed that he started his inquiry where they ended theirs. In their view, his work necessarily presupposed an answer to what counts as law. For them, it is only because Dworkin was "a man of narrow interests,"[32] that he dismissed as uninteresting the deep philosophical questions involved in identifying what counts as law. To these critics, Dworkin did more than just exhibit narrow interests, but committed a philosophical error, for one can only speak meaningfully about the political justification of law, after clarifying what it is that one is talking about.[33]

Far more frequently, however, when it comes to understanding Dworkin's arguments against legal positivism, people still try to fit him within the mold of the basic picture. This means that Dworkin is taken to have accepted the view that what distinguishes law from nonlaw is a matter of certain criteria that can be used to identify law. These are the "criteria of legal validity" or "criteria of legality," whose properties legal philosophers try to identify. Since Dworkin clearly thought law and morality are related, the prevailing view has been that he was a natural lawyer, in the sense that he took morality to be one of the criteria of legal validity.[34] This, in turn, allows us to understand Dworkin as someone engaged in the question of the nature of law as a distinct entity.

The misunderstanding of Dworkin starts here. It is already in his first book that Dworkin did not offer an alternative view of the criteria of legal validity, but rejected altogether the idea that what counts as law is determined by some kind of test (what Hart called a "rule of recognition"). Though he is not entirely clear on this in *The Model of Rules*, his first major critique of legal positivism, already there Dworkin writes that what makes legal principles "valid" is not any set of criteria, but "a sense of appropriateness developed in the profession and the public over time" (TRS 40); already there he cast doubt on the idea "that the law of a community is distinguished from other social standards by some test in the form of a master rule" (TRS 44). Shortly afterwards, he made it plain that he rejected the "social rule theory" altogether (TRS 59–60), namely the idea

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[32] GARDNER, LEAP OF FAITH, *supra* note 9, at 274. Or, putting it "less provocatively,…[Dworkin] has a narrow view of the interests that a philosopher should have." *Id.*

[33] This is an intuitively appealing view, but I argue it is mistaken in Dan Priel, *Law as a Social Construction and Conceptual Legal Positivism*, 38 LAW & PHIL. 267 (2019)

[34] *See* Scott J. Shapiro, *The Hart–Dworkin Debate: A Guide for the Perplexed*, *in* RONALD DWORKIN 22, 23, 40 (Arthur Ripstein ed., 2007) (Dworkin's view is that "legality is ultimately determined not by social facts alone, but by moral facts as well").

that in every legal system there is a social rule the content of which determines what counts as law. In saying this, Dworkin did not adopt the view that morality is necessarily one of the criteria of legality but rejected altogether the idea that law is distinguished from nonlaw by any such criteria. I say this with such confidence, because already in that book he described as "absurd" the view that "law is always morally sound or…that a morally bad law cannot be the law" (TRS 341).[35] He was even clearer some years later, when he described the view that "lawyers follow criteria that are not entirely factual, but at least to some extent moral, for deciding which propositions of law are true"—exactly the view that many readers ascribe to him—as "very implausible" (LE 35).

A corollary of the same point is that from his earliest writings Dworkin dismissed as misguided the idea that the law is made up of rules that in principle could be individuated. Again, Dworkin stated the matter unambiguously from early on. Already in 1972, he wrote: "My point [in *The Model of Rules*] was not that 'the law' contains a fixed number of standards, some of which are rules and other principles. *Indeed, I want to oppose the idea that 'the law' is a fixed set of standards of any sort*" (TRS 76, emphasis added; also, TRS 115–16). In the same decade Dworkin described a view according to which "the law of a community is a distinct collection of particular rules and principles (and heaven knows what else) such that it is a sensible question to ask whether, at any given moment, a particular rule or principle belongs to that collection" (TRS 343). He immediately made it clear that he rejected this whole picture: "There is no such thing as 'the law' as a collection of discrete propositions, each with its own canonical form" (TRS 344).

It is important to understand that the two claims—that there are no criteria of legality, and that law is not made up of a set of discrete rules (or rules and principles)—are essentially two ways of making the same point. The idea that there exist criteria of legality assumes that they identify *something*, and that something is the set of rules that together make up the distinct domain of law. Thus, in rejecting the latter, he also rejected the former. Dworkin made clear the connection between the two when he wrote: "Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behavior. Not by any roster of officials and their powers each over a

[35] Additional evidence in support of my claim is found in Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972). Raz defined there the thesis of the "limits of law" as "the position that there is a test which distinguishes what is law from what is not." *Id.* at 842. In another formulation, he defined it as the view that "there must be a criterion of identity which sets necessary and sufficient conditions, satisfaction of which is a mark that a standard is part of a legal system." *Id.* at 851. Raz correctly said that in *The Model of Rules* Dworkin is not entirely clear on this thesis, but he added that Dworkin "confirmed to [him] in conversation that [his] arguments are directed against the thesis of the limits of law *generally*," and added that Dworkin "has taken such a position in his lectures at Oxford University in 1971." *Id.* at 842 n.34 (emphasis added). As Raz's remarks makes clear, the idea of law as a limited domain is inseparable from the idea of legal validity. If the former goes, so does the latter.

part of our lives." (LE 413). And so, when more recently he stated that "[t]he idea of law as a set of discrete standards, which we might in principle individuate and count, seems to me a scholastic fiction" (JR 4), this did not mark a change in view, but the reiteration of a position Dworkin had held decades.

I have quoted Dworkin so extensively to show how early, how frequently, and how vehemently, he rejected the whole idea that there are *any* "criteria of legality" that can be identified, and that those can be used to distinguish law from nonlaw and to identify discrete legal rules. As we shall see, this has quite significant implications, for rejecting the idea of criteria of legality unravels a lot more of the basic picture. But the dominance of the basic picture led many to ignore all these statements and treat Dworkin as though he was engaged in the conceptual project of identifying the marks of legality. Thus, despite Dworkin's repeated disavowals, Leiter argued that Dworkin "affirm[ed] that morality was necessarily a criterion of legal validity."[36] Marmor went even further arguing that Dworkin accepted Hart's account of rules as correct, but merely thought it had to be supplemented by an account of principles.[37]

Why was Dworkin so badly misread? Part of the answer has to do with just how entrenched the basic picture is. This made it virtually inconceivable that anyone rejected it wholesale. The prevailing assumption has been that if one is engaged in jurisprudence one *must* start with the question of what distinguishes law from nonlaw, for that, quite simply, is what jurisprudence, at its most fundamental is about. But it must be acknowledged that Dworkin never really laid out the basic picture and explained the depth of his disagreement with it.

Moreover, as we seem to think of some things in the world as "legal rules" and distinguish them from other kinds of rules, there is a certain intuitive appeal to the basic picture, and it would have helped Dworkin's case if he had explained more clearly his alternative. Nevertheless, some remarks written late in his career indicate that Dworkin did not accept or presuppose the basic picture, also help clarify his proposed alternative.[38] In *Justice in Robes* Dworkin distinguished between three senses of the question "what is law?" (Confusingly, he called them three concepts of law.) The first sense may be called "categorical" or "conceptual" (Dworkin calls it "taxonomical"), and it aims to know what "counts as" law regardless of what people think about the matter. Those who

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[36] LEITER, *supra* note 15, at 162. For additional sources see notes 14 and 34, *supra*.

[37] *See* MARMOR, PHILOSOPHY, *supra* note 14, at 85; *cf.* Waldron, *supra* note 20, at 4. Marmor compounds this error with the mistaken claim that Dworkin's distinction between rules and principles is similar to the distinction between rules and standards (i.e., between precise and vague edicts). *See* MARMOR, PHILOSOPHY, *supra* note 14, at 86 & n.4. The two distinctions are different, and Dworkin has made it clear long ago that it is not the rules–standards distinction he is after (TRS 78, 79); *see also* Ronald Dworkin, *Replies to Endicott, Kamm and Altman*, 5 J. ETHICS 263, 264 (2001) ("almost all the standards that use terms like 'reasonable,' 'negligent,' or 'significant' are rules").

[38] Though the discussion in the text is based on *Justice in Robes*, there is a much earlier discussion that anticipates it already in TRS 350–52.

defend this inquiry present it as a matter of discovering true categorical boundaries and consider it a uniquely philosophical question.[39] This view is closely embedded in the basic picture: since all laws are laws in virtue of meeting the criteria of legality of their jurisdiction, identifying the necessary features of these criteria is on this view the key to understanding what is unique to the category law, and as such to understanding its nature.

This point is crucial for understanding Dworkin's view. For if one accepts the basic picture, one must think that this inquiry is in principle possible, and potentially worthwhile. Thus, even if Dworkin had not been personally interested in pursuing this question himself, he would have acknowledged it as a valid topic of inquiry. But Dworkin dismissed it as misguided. He likened it for the search for law's DNA and rejected by responding that law did not have one (JR, 3, 113, 152, 166, 215; *cf.* LE 91).[40] Since in this analogy the criteria of legality are the law's DNA—allowing us to distinguish law from nonlaw by looking at it under a conceptual microscope—in denying that law had the equivalent of DNA, Dworkin affirmed his rejection of the basic picture.[41]

If this is not a viable inquiry, what else is left? In what other way can we understand the question "what is law?" A second way of understanding the question is to try and find what people (or perhaps, what most people) take law to be. This is a sociological question. There are many indications that this is what Hart took himself to be doing, most clearly when he said that his book *The Concept of Law* could be read as an essay in "descriptive sociology."[42] Though such an inquiry is potentially valuable and interesting, it requires empirical evidence, something that neither Hart nor any of his followers ever attempted to gather in a systematic fashion (JR 166–68). Hart's empirical data for his conclusions relied on prevailing linguistic usage, but Hart relied on very limited empirical evidence (linguistic usage among educated Englishmen), and his treatment of this evidence was unsystematic and impressionistic. Even if Hart were accurate in his collection and analysis of his data, it would not warrant the universal conclusions Hart drew from them about law in all times and places. In the time since, there has been no more serious attempt to engage in data gathering

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[39] *See* GARDNER, LEAP OF FAITH, *supra* note 9, at 277–78; SCOTT J. SHAPIRO, LEGALITY 406–07 n.16 (2011); *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 J.L. & SOC'Y 267, 290, 291 (2005); Jules L. Coleman, *Methodology*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 311, 347 (Jules L. Coleman & Scott J. Shapiro eds., 2002) [hereinafter HANDBOOK]; Leslie Green, *Jurisprudence for Foxes*, 3 TRANS'L LEGAL THEORY 150, 158 (2012).

[40] Dworkin similarly dismissed the search for necessary and sufficient criteria for a principle counting as a legal principle as opposed to a moral principle (TRS 344). This is related to his views on the relationship between law and morality, on which see Part III.(e), *infra*.

[41] Although I think Dworkin is broadly correct, there is more to say about them than Dworkin does. For longer discussions on these issues see Danny Priel, *The Boundaries of Law and the Purpose of Legal Philosophy*, 27 LAW & PHIL. 643 (2008); Priel, Misguided, *supra* note 12.

[42] HART, *supra* note 15, at vii. This is a contested claim. I defend it in Priel, Misguided, *supra* note 12, at pt. III.

and analysis by those interested in the question "what is law?," making the sociological answer an unlikely explanation of what legal philosophers are doing.

After dismissing these two senses of the question "what is law?" it would seem that there are no remaining questions to answer. But Dworkin suggested a third way of answering it. Rather confusingly, he called it the "doctrinal concept of law." It is confusing because it suggests that he was only interested in answering concrete legal questions asked within a particular legal system. It can, however, be given a more general sense. Because law makes demands upon us and we need to know what those demands *are*. This looks like a question that requires knowing the law of a particular legal system, and as such not the kind of abstract general or philosophical question. Jurisprudence and the question "what is law?" matter if we show that the answer to concrete legal questions depends in some way on answers to general questions about law.

This is the key to understanding Dworkin's alternative: Law *demands* that we act in ways we otherwise might not want to act, it is coercive. As such, the law raises questions of political legitimacy. Answering these general questions *may* be relevant for knowing what the law demands of us, *if* it can be shown that the question of legitimacy will affect how we understand what the law demands of us. If such a link is established, then there is a sense in which we can show a link between the political question of legitimacy and the familiar jurisprudential question, "what is law?" (LE 1).

(b) Legitimacy and Legality

"The law of a community…is the scheme of rights and responsibilities that…license coercion because they flow from past decisions of the right sort" (LE 93). "[T]he most general point of law, if it has one at all, is to establish a justifying connection between past political decisions and present coercion" (LE 98). Statement such as these puzzled readers of Dworkin. Why start with the question of political legitimacy? Why indeed *assume* that law must be legitimate? We have now seen part of the answer. The inquiry did not in fact start with the question of legitimacy: Armchair-bound philosophers cannot contribute to sociological inquiries on what counts as law if that means what people take to count as law; the alternative—a priori search for what counts as law regardless of human attitudes—fares even worse. There remains, however, a meaningful question of what distinguishes law from sham law, what may have only the appearance of law, what is law "in name only." And this question is closely tied to questions of political legitimacy.[43]

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[43] *See generally* Dan Priel, *The Place of Legitimacy in Legal Theory*, 57 McGill L.J. 1 (2011). For those thinking I am cooking the books here, inventing a meaning that no-one else uses, consider the following words: "One who has been declared an outlaw, literally beyond the Constitution's protection, is less likely to ascribe legitimacy to decisions that condemn her. To us, *Hardwick* and the military exclusion cases are no more legitimate than *Dred Scott* was for pre-Civil War slaves or

This is not a novel idea. There is a long jurisprudential history to inquiring into questions of legitimacy, going back at least as far as Augustine, who sometime in the fifth century asked what it is that distinguishes law from armed robbery.[44] Taking this question seriously implies that there will be cases that look like law, but that we will judge to be an elaborate scam, an organized robbery. Understanding this point requires no resort to any strange metaphysics.

The question is familiar to most contemporary legal philosophers from Hart's discussion on what separates law from "the gunman situation writ large." Hart latched onto a linguistic distinction between "being obliged" and "being under an obligation," arguing that the difference between the two is that the latter involves following a rule.[45] This is a rather implausible claim, but it can be seen as part of Hart's agenda of eliminating any normative questions from legal philosophy. By contrast, Dworkin can be understood to have approached this distinction differently, one more akin to those of earlier philosophers. Specifically, I suggest he understood the distinction on the basis of considerations of legitimacy. What distinguishes the law's demands of that you pay taxes and the robber's is that the former is, at least potentially, legitimate. And while the legitimacy of state law is plausibly tied to the legitimacy of the state that enacts it, the two are not the same. Law is a particular use of state power, and it raises specific questions. Even in an otherwise legitimate state, questions may arise about the legitimacy of its laws, or some subset of them. Legal power is unique: for example, unlike individualized commands issued, law typically operates with general prescriptions, raising questions on how those prescriptions should be understood and applied to particular cases. One familiar aspect of the question of the legitimacy of law is knowing what they actually demand. Because laws are typically general, questions often arise as to their applicability to particular cases. These are questions about the content of law, but they are related to questions of political legitimacy. The content of some laws, or the way they are being interpreted may bear on their legitimacy. If, for example, laws are interpreted in a way that makes it impossible to follow them, or that discriminates some people, then it is at least arguable that the legitimacy of these law is impugned. In extreme cases, one might argue that the laws in questions are no different from robbery, and in this sense not laws.

Korematsu was for Japanese Americans. These decisions are not law because they deny us our citizenship and because they subject us to violence." William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 639 (1994) (citing Bowers v. Hardwick 478 U.S. 186 (1986); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); and Korematsu v. U.S., 323 U.S. 214 (1944)). Eskridge is not conceptually confused here. His words make sense as an endorsement of the idea that illegitimate law could be seen (in some sense) as nonlaw.

[44] *See* AUGUSTINE, THE CITY OF GOD 139 (Henry Bettenson trans., 2003) (426); *see also* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 175, 178 (Anders Wedberg trans., 1945); Max Radin, *The Permanent Questions of the Law*, 15 CORNELL L.Q. 1, 1–2 (1929).

[45] HART, *supra* note 15, at 20, 82, 85.

This is not the claim that thinking about an unjust law involves one in some kind of conceptual contradiction of the kind that may be involved in thinking about a married bachelor. Nor is it a metaphysical claim about how an immoral law somehow cannot exist. As presented, the claim is perfectly comprehensible without appeal to any extravagant metaphysics. It is the political claim that the question "what is law?" is related to questions about the kind of demands a state can legitimately make on those under its power.

Even if we end up concluding that a particular law, or a certain legal system, is so illegitimate that it is no different from armed robbery, and *in that sense* not law, this is not a claim about criteria of legal validity. Unlike the binary question of legal validity, the question of legitimacy is one of shades and grades. The conclusion that something that looks like law is in some sense not law is just one, extreme, way in which questions of legitimacy are relevant to law. What makes the point presented here more interesting is that it does not focus on the most extreme cases of a thoroughly illegitimate law; rather, it suggests that questions of legitimacy potentially affect the content of law in a much more pervasive way. As we shall see, questions of legitimacy are relevant for thinking about approaches to interpretation, which makes them relevant to a wide range of cases.

This point made so far does not presuppose that law must be legitimate, and it is a mistake to think that Dworkin thought so.[46] All he needs to argue is that for judicial decisions to be legitimate (i.e., for the distinction between law and robbery to be meaningful), *it had better be* that law could be legitimate. Dworkin does indeed offer an argument about the legitimacy of political coercion (LE 195–216), as well as a related but separate argument for the legitimacy of law and legal decisions (LE ch. 7). If his argument (or any other argument) is successful, it is successful on its merits, not because of an assumption that it has to be successful. And if no such argument can be made out, assuming otherwise will not make a difference.[47] If indeed law is never legitimate, then—as political

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[46] *Contra* Leiter, *supra* note 18, at 877 ("we need not derail our discussion [of deciding hard cases] into the justification of political authority, since the key point is that Dworkin is not entitled to his assumption that a theory of adjudication must show the exercise of coercive power by courts to be morally justified"); *see also* COLEMAN, *supra* note 14, at 176 ("a jurisprudential theory need not warrant the inference from legality to moral legitimacy….[A]ny other approach to analyzing the concept of law runs the risk of begging the question of the legitimacy of law…").

[47] Leiter himself thinks Dworkin's arguments about political legitimacy are unsuccessful, *see* Leiter, *supra* note 18, at 876, but he thinks so regardless of the assumption he attributes to Dworkin, so even if Dworkin *had made* the assumption, it would have been redundant. Moreover, in some places Leiter seems to think that no argument for political legitimacy can be made out. *See id.* at 877. Instead, Leiter is sympathetic to the "Hobbesian idea that the alternative to authoritative and final resolution of societal disputes by courts would be an intolerable war of all against all." *Id.* But for Hobbes the fact that the state (including the courts) could secure peace was part of an argument for the legitimacy of the state. Without such an argument the fact that the state *can* maintain peace does not establish that it *may* do so. (A benevolent gunman is still a gunman.)

anarchists believe—there is in fact no meaningful difference between law and armed robbery. To be sure, even if this is our conclusion there may remain interesting sociological questions—of identifying what people think law is and why they are deluded into thinking that law is different from robbery (when, if the anarchist is right, it is not). But we cannot expect the answer to these questions to be the result of philosophical inquiry, and it is extremely unlikely that they will be universal. But to anyone who holds this view, law is in fact a kind of scam. If that is the case, then, for all the law's pageantry, it is nothing more than the gunman situation writ large. If, however, there is a sense that law is different from armed robbery, it is arguable that the difference has to do with questions of legitimacy.

All this is meant to show that there is nothing idiosyncratic in tying law to legitimacy in this way. To further clarify this point I will argue that one can plausibly read the work of H.L.A. Hart, the foremost legal positivist of the last fifty years, in a way that shows that they too are implicitly basing his supposedly conceptual arguments on normative ideas of legitimacy. To see this, consider the following thought experiment: I write on a piece of paper that henceforth I am the legitimate ruler of my street and from this point forward I will have power to make laws for everyone living under my jurisdiction. If I went out waving the paper and shouting its contents to passersby, the best I could hope for would be pitying looks. Imagine now that by sheer physical force and some effective intimidation, I succeeded in turning these claims into reality. Does this mean that my edicts would be "laws"? John Austin would possibly say "yes"; Hart would say "no." But why? Read strictly, Hart's answer is that my decrees would not be law because any failure of legitimacy of my regime, but because my edicts were not part of a legal *system*, which requires, at a minimum, the existence of secondary rules of change and adjudication for something to count as a legal system.[48]

Why would the addition of these secondary rules be deemed so important? An enticing possibility is that the addition of secondary rules of change and adjudication is somehow relevant to law's legitimacy. The institutions constituted by Hart's secondary rules of change and adjudication—legislatures and courts—

In other words, the "Hobbesian idea" that Leiter endorses matters only if understood as (part of) an argument for the justification of political authority. *Cf.* Robert Ladenson, *In Defense of a Hobbesian Conception of Law*, 9 PHIL. & PUB. AFF. 134, 139–40 (1980). Moreover, if this is what Leiter thinks, why single out Dworkin for criticism for his "nonsense" jurisprudence? Isaiah Berlin once wrote that the most fundamental question of political theory is "Why should any man obey any other man or body of men?" ISAIAH BERLIN, POLITICAL IDEAS IN THE ROMANTIC AGE: THEIR RISE AND INFLUENCE ON MODERN THOUGHT 17 (Henry Hardy ed., 2006). By this measure, Leiter's target is political philosophy as a whole. Moreover, if he thinks that, then he should welcome Dworkin's project, for it is his account that explains why law is really no different from robbery. Hart, by contrast, effectively ruled out this possibility on the basis of a shallow linguistic distinction.

[48] HART, *supra* note 15, at 116.

do more than just solve problems of efficiency. They can be understood as at least the beginnings of conferring legitimacy on the use of coercion.[49] This can be seen in two ways. First, if we inquire as to *why* the addition of these secondary rules (and not any others) makes a difference, the answer will plausibly depend on some normative reasons. Courts, some might argue, give individuals a voice and a chance to heard in a way that confers legitimacy on the system. Second, for us to say that the secondary rules in question have been satisfied, i.e. that the system in question *actually* possesses secondary rules of change and adjudication, will be difficult to answer in purely descriptive terms, because the same kind of argument made with respect to law can be made with respect to courts: What counts as a court (and is not a "kangaroo court") is a normative question that arguably is also tied to questions of legitimacy.

The only response that would keep legitimacy out is to say that with the addition of these secondary rules we finally have something resembling our intuition of what counts law. But to say this is nothing more than to assume that law must look roughly like what one finds in a modern western democracy. Thus, rather than providing an argument for why this is what counts as law, it is to assume one. More significantly to take this way of distinguishing law from nonlaw at face is to ignore the possibility that the distinction is based on implicit ideas of legitimacy. Indeed, if the addition of secondary rules is not somehow related to questions of legitimacy, then the distinction looks rather shallow, forcing us to conclude that law in fact is not fundamentally different from the gunman situation, at least as long as the robbery is sufficiently elaborate.[50]

(c) The Connection Between "What Is Law?" and "What Is the Law?"

So far, I have begun outlining Dworkin's view by showing that it makes sense to think of the question of legality ("what is law?") in terms of legitimacy, and that doing so need not depend on an account of legal validity, "positivist" or otherwise. In a way, all I did so far is put Dworkin's perspective on the table. All this still looks quite far from Dworkin's well-known arguments, which were focused on law in the courts and often constructed around particular cases. I will

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[49] *Cf.* Dan Priel, *Reconstructing Fuller's Argument Against Legal Positivism*, 26 CAN. J.L. & JURIS. 399 (2013).

[50] If one accepts, as Hart did, that what separates law from nonlaw (either the addition of secondary rules or the addition of a certain "critical reflective attitude," or both), then clearly some instances of the gunman situation writ large will count as law by his standards. *See* Danny Priel, *Sanction and Obligation and Hart's Theory of Law*, 21 RATIO JURIS 404 (2008). Of course, legal positivists might bite the bullet and say that some cases of gunman-situation writ large *are* cases of law. *See* MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 99–108 (1999). But in that case the disagreement with Dworkin is not what best explain legal phenomena but over what counts as law *pretheoretically*, and in that case legal positivists' arguments are circular, for assuming the object they are describing is law. *Cf.* Priel, *Evaluating*, *supra* note 12, at 149–50. Dworkin is not guilty of the same sin because he does not claim his argument to be conceptual.

suggest that there is a strong connection between the two. In doing so, I will also respond to a challenge frequently leveled at Dworkin. Many of Dworkin's critics have argued that he was guilty of the grave error of confusing the question "what is law?" with the question "what is the law (governing a particular case)?" The former is a conceptual question that is part of a theory of law, whereas the latter is a normative question that belongs to the theory of adjudication.[51] Dworkin, these critics say, was always interested in the "lawyer's" question, which is why the concerns raised in his work is largely orthogonal to the "philosophical" efforts of answering the first question.[52]

Some of what I have already said explains why this is incorrect. The most basic of Dworkin's points are as general as law's coerciveness and the need for legitimating it. Here, I will expand the argument of the last Section to show why questions of legitimacy have bearing on specific legal questions. In other words, I will explain why although Dworkin elides the general and the concrete, he is not wrong to do so. To the extent that the question "what is law?" seeks to distinguish law from what has the semblance of law, a question tied to concerns over legitimacy of coercion, then the answer to the abstract question may well be relevant to answering specific questions about the content of law. For what makes law legitimate may depend on *what* it demands (the content of the demand), *how* it makes the demand (procedural requirements regarding the manner in which the demand is made), and *how* the demand came to be (procedural requirements regarding the promulgation of the demand). Answering such questions may be relevant to determining the content of law ("what the law is") in particular cases. Another way of making this point is to think of the idea that legitimacy may affect legality a special case of the influence of legitimacy on law. If one accepts that in the most extreme case illegitimacy may result in something that is not quite law (i.e., has no legitimate content), there is some basis for thinking that legitimacy considerations are relevant for determining the content of law in other cases.

Here is a more positive way of making this point: It is a familiar idea (even if not quite universally accepted), that for state officials' actions to be legitimate they should follow the law. While not sufficient for legitimacy, officials abuse their power if, for the sake of promoting their personal interests, or even their personal beliefs, they ignore law applicable to their actions. Thus, knowing the

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[51] *See, e.g.*, KRAMER, *supra* note 50, at 129, 161; Leiter, *supra* note 5, at 175–76; J. Raz, *The Problem about the Nature of Law*, 21 U.W. ONT. L. REV. 203, 211 (1983) (Dworkin "developed a theory of adjudication and regard[ed] it willy-nilly and without further argument as a theory of law"); *see also* COLEMAN, *supra* note 14, at 170 ("the theory of what law is cannot fall out of a theory of adjudicatory content, just because we first have to determine what are, if any, the conceptual truths about law").

[52] *See* GARDNER, LEAP OF FAITH, *supra* note 9, at 184 ("Dworkin had different concerns that only overlapped to a limited extent with Hart's. Dworkin was and remains much more of a lawyer than Hart. Lawyers are experts on *the* law….Hart, by contrast, aimed to study law without its definite article."); see also note 15, *supra*.

content of law raises questions of political legitimacy in countless contexts. From this perspective, judges are no different from other officials in that they too have to follow the law for their actions to be legitimate. The case of judges only looks different because many legal systems assign to judges the role of resolving for others (and occasionally themselves) doubts on what the law requires. This means that when performing *this* task, they are still bound by law and must perform it within the parameters it sets. Those parameters are often loose and give judges discretion, but if when performing this task judges pursue their personal interests or personal beliefs, this may render their actions illegitimate. An obvious case when this will happen is if a judge takes a bribe from a litigant. But it is plausible to think that judges also act illegitimately when they ignore the law and set a precedent that fits their personal beliefs. When judges do that, it is common to accuse them of "playing politics" and to worry about the legitimacy of their decisions. [53]

The question, then, is whether, and how, political questions of legitimacy affect the content of legal norms (*cf.* TRS 4–5). At this stage we have not yet considered Dworkin's answer as to how one should identify the law on particular legal questions, but we have sufficient resources to doubt something about the positivist answer. The essence of this answer is that in "easy cases"—cases governed by pre-existing law—following the law simply means finding out the applicable rule and applying it to the case.[54] This answer presupposes a general claim about law; the claim that law *in general* is made up of legal rules, and that these rules have content that can be read off of them once we identify them. We now see this is a contested claim, because it is not a simple brute fact about law, nor is it a claim about linguistic meaning: "[T]hough the question of whether judges follow rules may sound linguistic, it reveals concerns that are in the last degree practical" (TRS 5). This is because courts are part of a political structure that determines what the demands that people have to follow. As such, the role of courts, including when determining what the law requires, is deeply

[53] *See* RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 2 (2018); *cf.* LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 18, 422 (2019) (describing his project of justifying the Supreme Court's practice and distinguishing it from politics as "Dworkinian"). The matter is complicated by the fact that determining when a judge is faithful to her role depends on a particular polity's understanding of law, including what the law requires a judge to do in order to act according to law. Therefore what counts a judicial abuse of power is jurisdiction specific. It follows that a judge will be acting "according to law" in one jurisdiction but not in another, which again shows that the boundary between law and nonlaw is not a matter of conceptual analysis, but a matter that different jurisdictions will decide for themselves. *Cf.* Priel, *supra* note 41, at 686–87 (showing that when a court was asked to decide the matter, it did not look for legal philosophers' arguments for assistance, but decided the matter on the basis of domestic law).

[54] *See* MARMOR, INTERPRETATION, *supra* note 14, at 95 (in easy cases "the law can be simply understood and applied straightforwardly"); *see also* HART, *supra* note 15, at 134–36.

implicated by considerations relevant for determining what makes the laws' demands legitimate. This means that for courts "to follow the law," "to be faithful to the law," "to apply the law," depends on arguments of political theory.

It may be that by relying on considerations of legitimacy one will end up favoring something like the view that courts should follow the plain meaning of certain texts. But such an argument cannot be grounded in some purported metaphysical truths about law or a linguistic truth about certain legal texts. It is the *product* of a particular political theory. Dworkin did not accept the view of law's legitimacy that entails such a view of interpretation, but clearly recognized it as a possible normative stance. Whether or not one adopts Dworkin's view of legitimacy, the general point is that accepting the relevance of legitimacy to understanding law in general has downstream effects on determining the content of laws. This explains why the general question "what is law?" and the concrete one "what is the law?" in a particular case are connected.

(d) How Law Makes Morality

So far, we have seen that there is a connection between what law (in general) is and what the law (on a particular question) is, and that there is a further connection between both these questions and political legitimacy. But what makes law legitimate? To answer this question, we must tackle another bone of contention between Dworkin and his positivist detractors, the question of the relationship between law and morality. In examining this question, we will find perhaps the most significant misunderstanding of Dworkin's position. I will argue that the view generally attributed to Dworkin by almost all his critics is more-or-less the opposite of his actual view.

The basic picture assumes that law and morality are fundamentally different *kind* of things: Law is socially constructed, changing, local, and contingent; morality is none of these things. It is partly for this reason that one can, and should, try to investigate the relationship and differences between the two. One such relationship—point (4) in the basic picture—is what I call "the imitation view." According to this view, moral rules, principles, rights, duties pre-exist the law and cannot be changed by the law. Since these precepts are, on this view, imperatives that people should follow, the law ought to imitate those.[55] The imitation view allows that law may need to go beyond morality, because morality is not fully specified: In a standard example, the moral requirement that we not harm others, justifies laws limiting driving speed, but morality is silent on what the speed limit should be.[56] Nevertheless, morality is the fixed blueprint that law should strive to match. To tie the present discussion to what I said above, on this widely accepted view, law provides guidance to individuals on how they

[55] *See, e.g.*, JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 8 (2018); *cf.* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 112 (1983) (referring to the "argument that there are certain constant criteria for the evaluation of a legal system").

[56] *See* GARDNER, *supra* note 55, at 13.

should act, and is legitimate to the extent that, by matching morality, it gives them the right guidance.

The imitation view is often taken for granted, so it is naturally assumed that Dworkin accepted it. It is natural to attribute this view to Dworkin, because he is often said to be a moral realist,[57] who thought that morality was true independently of people's views about it. But I think this is a mistake; in fact, Dworkin has long rejected the imitation view.[58] If anything, Dworkin reverses the relationship between law and morality: he models morality after the law, in particular the common law.

Dworkin's earliest unambiguous and detailed explication of this alternative picture of the relationship between law and morality appears in a review of John Rawls's *Theory of Justice*, published in 1973 (TRS ch. 6). Dworkin contrasts there two views of morality, which he calls the "natural" and the "constructive" models. The natural model assumes that moral or political theories "describe an objective moral reality; they are not, that is, created by men or societies but are rather discovered by them, as they discover the laws of physics" (TRS 160). The other model, as its name suggests, is premised on the idea that in some sense morality is a human creation. This model "treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed, *as if a sculptor set himself to carve the animal that best fits a pile of bones he happened to find together*" (TRS 160, emphasis added). On this model, there is no assumption that

> principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way. It does not assume that the animal it matches to the bones actually exists. It makes the different, and in some ways more complex, assumption that men and women have a re-

[57] *See, e.g.*, JAMES ALLAN, A SCEPTICAL THEORY OF MORALITY AND LAW 159 (1998); Leiter, *supra* note 7, at 1191; Robert Westmoreland, *Dworkin and Legal Pragmatism*, 11 OXFORD J. LEGAL STUD. 174, 175 (1991). Close to it is the view that Dworkin believes "law is metaphysically objective" with respect to "nearly all cases." LEITER, *supra* note 15, at 265.

[58] The imitation view presupposes law and morality are separate domains. In arguing that law and morality constitute a single domain (JH 401–09), Dworkin must reject the imitation view. Some readers described this as a significant departure from Dworkin's earlier views. See sources cited in note 20, *supra*. But as I argue in detail in the text (and Dworkin agrees: JH 402) it is not. One cannot reconcile the claim that this was a new view Dworkin adopted only in *Justice for Hedgehogs*, because Dworkin explicitly rejected the "traditional understanding" of law and morality as two "departments of thought that are in principle distinct," and his endorsement instead of the view of "law not as separate from but as a department of morality" (JR 34). For further evidence, Priel, *supra* note 43, at 21–28 and Martin Stone, *Legal Positivism as a Moral Doctrine*, 61 U. TORONTO L.J. 313, 325–26 n.43 (2011), both written before the publication of *Justice for Hedgehogs* present Dworkin's views in a manner in line with Dworkin's supposedly novel view. In *Justice for Hedgehogs* Dworkin admits to assuming the two-domain view only with respect to *The Model of Rules* from 1967. He further says there that he discussion there "is meant to supplement" his ideas in *Law's Empire* and *Justice in Robes*, "not substitute them" (JH 485 n.1).

> sponsibility to fit the particular judgments of which they act into a coherent program of action, or, at least, that officials who exercise power over other men have that sort of responsibility.[59] [TRS, 160.]

He conceded that this made morality in some sense "relative," but he replied that this did not "embarrass the constructive model" (TRS 168):

> It does not undermine a particular theory [of a group's rights and duties] that a different group, or a different society, with different culture and experience, would produce a different one. It may call into question whether any group is entitled to treat its moral intuitions as in any way sense objective or transcendental, but not that a particular society, which does treat particular convictions in that way, is therefore required to follow them in a principled way.[60] [TRS 168.]

According to Dworkin, an advantage of the constructive model, one reason it is "appealing," is that "[i]t is well suited to group consideration of problems of justice, that is, to developing a theory that can be said to be the theory of a community rather than of particular individuals, and this is an enterprise that is important, for example, in adjudication" (TRS 163). Because such an approach is constructive, it allows for some flexibility in determining the scope of the relevant community. This, says Dworkin, would be "self-destructive" within the natural model, because "every individual would believe that [in determining the scope of the community] either false observations were being taken into account or accurate observations disregarded." This would lead to valid doubts on the reliability of the outcomes of the process. On the constructive model, by contrast, these concerns have no force because it aims to deliver "the program of justice that best accommodates the community's common convictions…with no claim to a description of an objective moral universe" (TRS 163). As such, this is a model that *presupposes* that a political community contains people with conflicting moral views but with no clear way for anyone to demonstrate to anyone else the error of their ways (AMP 168; also, JR 127). "[I]t is [thus] a model that someone might propose for the governance of a community each of whose members has strong convictions that differ, though not too greatly, from the convictions of others" (TRS 163).

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[59] Dworkin argues that Rawls's reflective equilibrium is best understood as an endorsement of the constructive model of morality. This claim has been disputed. *See* JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION: RAWLS' LINGUISTIC ANALOGY AND THE COGNITIVE SCIENCE OF MORAL AND LEGAL JUDGMENT 276–91 (2011). I take no sides on this question of Rawls exegesis. It is clear, however (e.g., from TRS 353), that Dworkin thought that the constructive model was the right way to think about morality.

[60] It is therefore a mistake to claim, as John Gardner did, that Dworkin "so blithely sidelined as uninteresting" the question "How can there be 'jurisdictions' with their own laws? How is it possible that one law ends at San Diego and another begins at Tijuana?" GARDNER, LEAP OF FAITH, *supra* note 9, at 280. Gardner's challenge presupposes that for Dworkin law was merely applied morality, and since morality is universal, he could not explain the existence of jurisdictions. But on the constructive model Dworkin has an answer: jurisdictions are a product of different political communities. Later in life Dworkin made this point explicitly (JH 171).

This is very far from any standard understanding of moral realism and the opposite of standard readings of Dworkin's views on morality, and by implication of law as well. Commentators assumed that for Dworkin morality consisted of unchanging metaphysical truths, and because it was assumed that for Dworkin morality was "part of the law," they read Dworkin to have similar views about law.[61] Accordingly, the standard view is that Dworkin thought that somewhere, in some mysterious plane, lie the answers to legal questions, waiting to be "found" or "discovered." Leiter, for instance, attributed to Dworkin the view that "the conclusion the judge declares…has a genuine preëxistence, that judgment is a process of discovery."[62] Hart similarly argued that Dworkin believed that for every legal question there is "a single correct answer awaiting discovery."[63]

Green drew out some of the implications of this view:

> On [Dworkin's] account the *things justified* by moral principles are socially constructed, but the justifications themselves are not….He says [law] consists of [socially] constructed stuff plus moral principles that *actually are* justifications for it. If you believe that it is sufficient for something to be law that it is, or follows from, the best moral justification for something else that is law then, just as much as Cicero did, you believe there is law that owes its status to the fact that it is a requirement of 'right reason'. Since nothing we do can turn a justification that is sound into one that is not, [if you accept Dworkin's view] you are also committed to the existence of law we cannot change. And since whether a moral principle justifies some arrangement does not depend on anyone knowing or believing that it does, there can be law—lots of law—that no one has ever heard of. Depending

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[61] ALLAN, *supra* note 57, at 160 [157 is better] (Dworkin "must opt for 'objective', 'higher', mind-independent moral values that can be reasoned to or some other way discovered or else his theory of judicial interpretation collapses"); *see also* Coleman, *supra* note 21, at 61 (in *Taking Rights Seriously* and *Law's Empire* Dworkin "adopts some form of metaphysical objectivity of the law"); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 632 n.160 (1993) (because he "believes that there are right answers to legal disputes[,]…despite his protestation to the contrary, Dworkin is certainly committed to metaphysically objective legal facts"); Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 269, 288 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) ("legal propositions just are, for Dworkin, what the balance of (mind-independent) reasons dictates"); *id.* at 290 (attributing to Dworkin the view that judges "*discover*[] law…[i.e., discover] what is already so").

[62] Leiter, *supra* note 18, at 882 (quoting BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 54 (1924)). Leiter claims that this is the view of adjudication that Cardozo rejected but that Dworkin endorsed. Leiter gets Dworkin wrong even with respect to Cardozo himself: Dworkin said that Cardozo had "changed the character of our law" (JR 55), not that he discovered what its character had always been. In fact, Dworkin's views on this very point are remarkably similar to Cardozo's. *Compare* CARDOZO, *supra*, at 96 ("The judge interprets the social conscience, and gives effect to it in law, but in so doing he helps to form and modify the conscience he interprets. Discovery and creation react upon each other") *with* LE 225 ("law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither"). For further discussion of the similarity between Cardozo and Dworkin see notes 120–123, *infra*, and accompanying text.

[63] HART, *supra* note 55, at 138, 140.

> on the prospects for moral knowledge, there can be law that is not even knowable.[64]

This was meant as a reductio of Dworkin's jurisprudential views: If Dworkin's views had such absurd implications, clearly they were wrong. This argument misses its target, however, because none of Green's claims resembles Dworkin's actual views. Early in his first book, Dworkin presented the following view: "when we speak of 'the law' we mean a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges." That sounds like the view commonly attributed to Dworkin, but rather than endorsing it, he stated that critics of this view were "right in ridiculing its practitioners" (TRS 15), although he doubted there were any (which at least indicates that he did not consider himself one). For good measure he added that even "[a] superficial examination of our practices is enough to show…[that] we speak of laws changing and evolving" (TRS 16).[65]

Elsewhere in the same book Dworkin dismissed the "picture of existing law," which assumes that "any rule or principles that already 'exists' provides [the] right" that is the basis for legal claims. He added that he considered it a "misleading question, whether judges find rules in the 'existing law' or make up rules not to be found there" (TRS 293). He also described the view that "there is a 'right answer' to a legal problem to be found in natural law or locked up in some transcendental strongbox" as "nonsense," and made it clear that he "intend[ed] no such metaphysics" (TRS 216). He made it clear that his views on moral rights did not depend on any "ontological assumptions" that rights are something people "have" in the same way they have tonsils. Rights, he said, are simply "a special…sort of judgment about what is right or wrong for governments to do" (TRS 139).

Dworkin warned against "speak[ing] of objective legal reality whose truth conditions are independent of human convention" (TRS 289). For this reason, it is simply wrong to say, as Green does, that Dworkin believed there was "law we cannot change." And contrary to the view that morality ("the justifications," in Green's terminology) is not socially constructed, Dworkin unambiguously

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[64] Green, *supra* note 18, at xviii; *accord* Leiter, *supra* note 14, at 1248.

[65] *See also* Ronald Dworkin, *Wasserstrom: The Judicial Decision*, 75 Ethics 47, 52 (1964) (book review) (affirming that "of course" judges are sometimes permitted or even required to "modify existing rules of law"). In a short paper written forty years later, Dworkin wrote unambiguously prior to Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889), there was no rule that people cannot inherit from those they murdered, but "that the New York Court of Appeal created one." If a contrary rule did exist before the decision, he added, "that rule did not survive the decision in the case." Dworkin, *supra* note 65, at 264.

said that his view implies that *moral* rights "may vary…from point to point in history" (TRS 139).[66]

Dworkin presents a remarkably similar account of law and morality, but not because he adopted in both the idea of timeless unchanging entities awaiting discovery. On the contrary, in both law and morality he rejected the natural model and embraced the idea that they are some kind of communal enterprise. Therefore in both law and morality right answers are *constructed*, although not in the sense that they are completely made up, but in the sense that those who engage in the debate construct competing answers to legal and moral questions by creatively interpreting past practice.

In explaining the constructive model Dworkin often relied on an analogy with the interpretation of literature (e.g., AMP 158–59), and it helps clarify his view. An interpretation of a novel gives us something that is in some sense is "in" the novel. At the same time, the interpretation aims to give us something new, to add to, or go beyond, what is in the novel. Similarly, in the law, interpretation draws from existing legal materials and seeks to tell us something about what is already in those materials. At the same time, any interpretation adds something to those materials, and in turn becomes, for future interpreters, part of the stock of materials to be interpreted.[67]

What Dworkin said about law is perfectly in line with this view: "[L]aw as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither" (LE 225). This sounds mysterious, but it is in fact quite straightforward. Since answers to legal questions are the product of interpreting past legal materials, we can understand how law is an attempt to find something that is already "in them," and yet in another it sense is novel, as it adds to our understanding of the object of interpretation. This is why, contrary to the view of law for him was a matter of discovery, Dworkin described constructive interpretation as "creative" (LE 51).[68]

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[66] *See also* LE 73 ("Justice is an institution we interpret…it has a history; we each join that history when we learn to take the interpretive attitude toward the demands, justifications, and excuses we find other people making in the name of justice.").

[67] It is not just law, morality, and novels to which Dworkin thought we could apply this method. The same method should be used for understanding society. *See* Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 6 (1977) ("interpretative judgments study society and its practices in the same way that ordinary judgments of adjudication—the kind of judgments judges make in hard cases all the time—study standard legal materials").

[68] This thoroughly unmysetrious explanation of constructive interpretation helps explain what Dworkin meant when he said that the point of constructive interpretation is to put its object "in its best light" (LE 47, 90). This unfortunate terminology has led critics to think that Dworkin conjured some new approach to jurisprudence or to interpretation. *See* GARDNER, LEAP OF FAITH, *supra* note 9, at 184; Leiter, *supra* note 5, at 173–74. In fact, constructive interpretation is a familiar practice. It is what a lawyer writing a legal memo or a judge writing a judicial opinion do when

We now see that when Dworkin wrote in *Justice for Hedgehogs* that "law is a branch…of political morality" (JH 405), when he rejected the view that law and morality constitute separate domains (JH 402), he was stating more explicitly a view he had held for decades.[69] His one-domain view was not that there is one notion of normativity, but that there is no such thing as morality independently of the moral discourse, and that law and legal discourse are one of the main locations of moral discourse. Already in his first book, he rejected the basic picture when he dismissed the idea that there are two collections of principles, one moral and one legal and the question is whether the two collections are "identical, or overlapping, or extensionally distinct" (TRS 344). And he embraced the same (one-system) view in *Law's Empire* when he said it was a misstatement of his view to say that one "has no legal right to win but has a [separate] moral right" (LE 262).

Flipping the imitation view, where morality is the model which human law attempts to copy it, for Dworkin engagement with the law is an act of *moral construction*: Morality is the product of interpreting moral practice, and law is a central ingredient of moral practice.[70] Law is thus one of the leading instantiations of a community constructing, debating, evaluating, interpreting, and also revising its political morality.[71]

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interpreting past cases for the sake of answering a legal question. Much of the confusion here could have been avoided if instead of the phrase he had used, Dworkin would had talked about "making best sense of past practice." (In one place, Dworkin was clearer when he spoke of constructive interpretation as something that "explains [its object] in a more satisfactory way" (AMP 136, 138).) When lawyers face a legal question, they try to find the answer to it by going over past cases and other materials searching for a unifying rationale for the cases. The lawyer will sift through the materials, try to find a way to make them "hang together" by identifying some rationale that makes sense of all of them and thereby organize them. Based on this understanding of the law, the lawyer will draw an answer to her specific legal question. A lot of legal scholarship takes this form as well.

[69] See also note 58, *supra*.

[70] Adopting the basic picture and the view that law and morality are separate domains Donnelly-Lazarov has argued for Dworkin erred when inferred from the fact that judges' actions "have moral *meaning*," that "morality must as a consequence be deemed part of the law itself." Bebhinn Donnelly-Lazarov, *Dworkin's Morality and Its Limited Implications for Law*, 25 CAN. J.L. & JURIS. 79, 84, 85 (2012). But Dworkin's point is different, and in a way, far stronger: Judges' actions are part of the construction of morality.

[71] Dworkin's commitment to this view explains some of his substantive views on morality. Here are two examples: Dworkin's writings on equality are premised on what Samuel Scheffler called an "*administrative conception* of equality." Samuel Scheffler, *What Is Egalitarianism*, 31 PHIL. & PUB. AFF. 5, 37 (2003), one in which "'officials' should make decisions about the distribution of resources among citizens." *Id.* at 35 (quoting RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 13 (2000)). This view, which Scheffler found puzzling, assumes that equality is something that emerges within the context of a political community, rather than forming a pre-political moral commitment. But this view is perfectly in line with the constructive model of morality. The constructive model also explains why Dworkin had so little to say about

One immediate payoff of the proposed reading is that it makes one of Dworkin's most controversial claims, the so-called "right answer thesis," far less mysterious. Within the basic picture, the claim is usually understood roughly as follows: Since Dworkin had a wide test for legality (because morality for him was "part of the law") and since morality never runs out, then there was a legal answer to every legal question. And since Dworkin was a moral realist who believed that morality could be different from what everyone thought it was, it follows that law could similarly be different from what all people believed.

We now see that Dworkin's claim is much simpler. It will help to consider this question with a concrete example. To see this, here is an example. Dworkin argued that American law prohibited capital punishment in all circumstances, as it violated in the Eighth Amendment to the Constitution (FL 300–02, JR 124–26).[72] To his critics, this claim sounded either wildly metaphysical or patently false, in all likelihood both. Either Dworkin believed that that there was "real" law existing independently of what everyone thought, but that Dworkin somehow had access to; if not that, the only way one could make sense of Dworkin's statement is that Dworkin *wants* capital punishment to be held unconstitutional. But as a statement about the state of the law, he was clearly, unambiguously, wrong.

Admittedly, Dworkin's explanation of his own view is not entirely helpful:

> If a jurisprudential scholar were to say that the law of several American states now permits capital punishment, then (unless he meant only to say that almost everyone *treats* the law as authorizing capital punishment) he is taking sides in a

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questions of justice and equality beyond the state. Political morality depends on associative obligations. Within this framework political rights only make sense in relation to a political community. I therefore think Dworkin's position is very similar to the one found in Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005), and it is a mistake, *contra* ALEXANDER BROWN, RONALD DWORKIN'S THEORY OF EQUALITY: DOMESTIC AND GLOBAL PERSPECTIVES (2009), to extend Dworkin's views on equality to the global sphere.

This general view about morality also explains Dworkin's views on international law. In a posthumously published essay Dworkin argued that "the true moral basis of international law" is "to help facilitate an international order in a way that would improve the legitimacy of [states'] own coercive government." Ronald Dworkin, *A New Philosophy of International Law*, 41 PHIL. & PUB. AFF. 2, 17, 22 (2013) [hereinafter Dworkin, *A New Philosophy*]. This view baffled some readers. *See* Thomas Christiano, *Ronald Dworkin, State Consent, and Progressive Cosmopolitanism*, *in* THE LEGACY OF RONALD DWORKIN 49, 58–60, *passim* (Wil Waluchow & Stefan Sciaraffa eds., 2016); Eric J. Scarffe, *"A New Philosophy for International Law" and Dworkin's Political Realism*, 29 CAN. J.L. & JURIS. 191, 198, 204 (2016). But within the framework presented here about the nature of morality as emerging from a particular community's discourse, it makes perfect sense. Dworkin's account is built on the only possible justification for international law one can give within the Dworkinian framework, one grounded in the question: "what justifies coercive political power?" Dworkin *A New Philosophy*, *supra*, at 16. Until the emergence of a global political community, *see id.* at 29, the only possible answer is the one Dworkin gives, the enhancement of *domestic* political communities' political legitimacy.

[72] U.S. Const. amend. VIII. It must be said that Dworkin never actually provided a detailed argument for this conclusion, but focused only on refuting certain originalist objections to it.

> legal argument. He declares that the majority interpretation of the Eighth Amendment is right, and mine wrong, and if, as I think, these competing interpretations each takes a position about which understanding of that Amendment best fits and justifies our constitutional text and tradition, so does his view.[73]

Based on what I have said so far, we can rephrase this idea in a less mysterious way: It is not in doubt, as a matter of empirical observation, that some states execute people, and that they do so on behalf of the law. To say that, however, does not require any philosophical or legal analysis. This is mere reportage. If, however, we accept the distinction between law and something that only the appearance of law as a meaningful distinction; and if we also accept that this distinction depends on notions of legitimacy; and if we accept, finally, that this distinction can be meaningfully asked at the level of particular legal propositions, then Dworkin's idea makes sense. For there is then no mystery in saying: What is treated as law by people and courts in the various states as the law is in fact illegitimate, a usurpation of power, because there is no way that use of state power in this way can be justified as following the law. To make such a claim does not require making any extravagant metaphysical claims; all it takes is to interpret the past legal and political materials of American community to show that there is no way that capital punishment is consistent with its past. Of course, it is open for someone else to offer a different interpretation of a community's legal and political history. But that too will be, perhaps implicitly, an argument based on some notion of law's legitimacy. All it takes to accept this argument is acknowledging that the fact that the Supreme Court's interpretation of a community's legal and political past may be mistaken.

(e) Theoretical Disagreements

What I said so far is already unsettles many prevailing jurisprudential assumptions. But I have yet to present Dworkin's most famous, and most contentious, challenge to legal positivism, the argument from "theoretical disagreements." It is a remarkably simple argument: In brief, it asserts that the law contains certain kinds of disagreements that positivist accounts of law cannot explain. Theoretical disagreements are very familiar: these are debates over methods of statutory interpretation, over originalism, over the considerations judges should be permitted to take into account when deciding a case, about the kind of questions that are appropriate for judges to decide on, and so on. These disagreements are sometimes debated openly, when judges present competing views on such questions. Even if such disagreements go unstated, they manifest themselves in cases where different judges reach a different outcome on what the law is; such disagreements are also often in view when different judges reach the same outcome but explain it differently.

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[73] Dworkin, *supra* note 22, at 2100.

The important point for understanding this argument is that it is *not* that positivist theories cannot explain the outcomes of some cases. The problem is that positivist theories cannot explain the fact of disagreement. To see why, it is helpful to start with Hart's account of adjudication, as it was his account that was the direct target of Dworkin's argument. According to Hart, since law is a matter of rules and in any given legal system there is only a finite number of legal rules, we can divide all possible events into those governed by a legal rule, and those that are not.[74] If a case falls under the former, then the case is (by definition) easy in the sense that the application of law to the case is typically straightforward. In this picture, Hart suggested that judicial disagreement can exist either when a case falls at the vague edges of a rule; or when the case falls outside the remit of any legal rule and the judges disagree on how the case should be decided in the absence of legal guidance.

Neither answer provides a plausible account of theoretical disagreements. The first explanation for disagreements assumes that judges will sometimes disagree on the extension of a vague term to a particular case. On this view all legal rules have a core of uncontroversial meaning and a "penumbra" of vague boundaries where the application of the rule to the case may be contested.[75] For instance, if a rule exempts "books" from sales tax, there may be some disagreement on whether a coloring book counts as book.

Though disagreements of this sort are possible, they provide a poor explanation of theoretical disagreements. If two people disagree on whether a coloring book is a book, there is not much that can be debated. Furthermore, this kind of "local" disagreement about interpreting a term relevant to the resolution of a single case has nothing to do with disagreement over whether originalism is an appropriate method of interpretation. In fact, even if a legal dispute over the meaning of "book" for tax purposes were to occur, judges will often not just stop at whether the word "book" covers coloring books or not. Even in such a case, judges are likely to turn to general considerations that do not pertain to the linguistic question. Some may look to the purpose of the exemption for books, while others prefer the aid of a dictionary; or they may rely on a general principle that favors individuals over government in disputes over unclear tax legislation. In other words, even in such a case, the specific debate may give rise to a theoretical debate on the appropriate way for tackling such questions in general.

The second explanation assumes that a case can fall unambiguously outside the purview of all legal rules. In such cases judges cannot follow the law, because there is nothing to follow. Since the judges still have to decide the case, they

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[74] This is not strictly speaking true. It is possible to have a "closure rule," according to which, for instance, any event not governed by any other legal rule, legal rights and duties are determined by (say) a toss of a coin. That will make all events governed by law, but with respect to most or all existing legal systems, the statement in the text is correct.

[75] *See* HART, *supra* note 55, at 63–64; HART, *supra* note 15, at 123, 134.

will have to resort to nonlegal normative considerations, on which they may disagree. This explanation presupposes a clear demarcation of the legal and the extralegal domains, which does not correspond to legal practice. It is very rare to find judges saying something like, "there is simply no law on the matter, so I am now free to decide the matter by looking for the best answer available, on the basis of my exploration of the demands of morality." Even in Supreme Court cases, the cases most likely to deal with "open" legal questions on which the law is unclear, judges are not on their own. Legal answers are constructed by analogy from existing cases, by inferences from general principles, by appeal to certain techniques of statutory interpretation, and so on.

It will help the discussion to illustrate it by considering *Riggs v. Palmer*,[76] a case made famous through Dworkin's criticism of legal positivism (TRS 23, LE 15–20). The case involved one Elmer Palmer, a young boy who knew that his grandfather had made a will in which he was the major beneficiary. After his grandfather started a new relationship, Palmer feared that his grandfather would make a new will that would leave him with a significantly smaller inheritance. He resorted to the one thing that absolutely guaranteed this would not happen: He killed his grandfather. Palmer actions were discovered, and he was convicted of second-degree murder. Other relatives of the deceased sued to prevent the will from being executed and from Palmer getting what was bequeathed to him in the will; Palmer responded that the will was validly made and never revoked, so it should be executed. A split New York Court of Appeal ruled against him.

Much of the jurisprudential discussion of the case has been clouded by distinctions like rules and principles, legal and moral principles, principles and policies, weak and strong discretion, and different kinds of criteria of legal validity. Before any of that, it is important to see why this case creates a problem for the positivist account, a problem that it is easy to state but difficult to resolve: The positivist picture makes it difficult to understand how there was a debate—a majority and a dissent—at all.[77] By any "positivist" measure the case had all the hallmarks of an easy case with a clear rule governing the case. As the court described it, Palmer argued that the "will was made in due form, and has been admitted to probate; and that therefore it must have effect according to the letter of the law."[78] This was correct, and if this had been the governing legal rule, the case would have been an easy one and should have been decided in favor of the defendant with little debate or discussion. Things are in no way helped by

[76] 22 N.E. 188 (N.Y. 1889).

[77] In an attempt to explain the case on positivist grounds, Leiter doubts there was any theoretical disagreement in the case, because the majority and the dissent did not address each other's arguments. *See* Leiter, *Explaining*, *supra* note 14, at 1232–33, 1235. This is irrelevant. The argument from theoretical disagreements is premised on the existence of different ways of determining what the law requires, not the existence of a back-and-forth exchange in the decision. In fact, as I will argue below, the argument from theoretical disagreements does not depend on the existence of any disagreements. See text accompanying notes 99–101, *infra*.

[78] 22 N.E. at 189.

thinking that there was a rule favoring the plaintiffs, for in that case too the outcome should have been straightforward and unanimous.

Thus, before looking at the content of the disagreement, the case is significant *for having one*. Going over the positivist explanations for disagreement considered above, the first one, that the case fell in the penumbra of rule, clearly does not fit the facts. This explanation might have been relevant if, say, a valid will required two witnesses present at the time of signing and it turned out that in this case one of the two witnesses left in the middle of the ceremony. The disagreement in *Riggs* was clearly not of this sort.

We do not do better if we think that this was a case not governed by law. One problem with this answer is that it is conveniently question begging, as it declares that in any case of judicial disagreement there was no law on the matter in order to explain the disagreement. (Would anyone have adopted this answer if all judges decided the case in favor of Palmer by declaring that the words of the statute were clear?) A more direct problem with this answer is that it still fails to explain *Riggs*: On the positivist picture, when the law "runs out" judges have to turn to morality, and so to account for the disagreement in the absence of law, it must be that the judges disagreed on the moral merits of the case. However, Judge Gray, writing for the dissenters, was explicit that if he had to decide the matter on the basis of morality alone, he would have held against Palmer.[79]

The inadequacy of these responses is sufficient to show that at the very least Dworkin's argument was successful in showing problems with Hart's account of adjudication. It is still possible that different arguments can do better. Some legal positivists have indeed attempted to provide other responses to Dworkin's challenge. The first response I will consider is that theoretical disagreements exist because judges are given the power to change the law, but individual judges may disagree over whether the law should be changed in a particular case.

This answer, just like the two considered above does not match what judges say they do. To address this issue, legal positivists have resorted to claims of massive judicial concealment. According to this argument, judges are making law or changing it, but they conceal what they are doing behind the language of interpretation or discovery. What looks like a theoretical disagreement over how to interpret the law is really a disagreement on whether to change it. Applied to *Riggs*, the argument is that there was law on the matter and the judges agreed it was bad. Some of the judges (in *Riggs*, the majority) decided to change the law; the others decided to stick to the existing law (which they thought was bad). The majority judges knew they were changing the law, but they hid this fact because judicial ethos did not permit them to admit what they were really doing.

Marmor offered this explication of this view:

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[79] *See id.* at 191.

> More often than not, we know what the law is, we just don't know whether the courts will enforce that law, or change it in one way or another. This simple point is often missed, because judges' decisions which change the law typically affect the change retrospectively, and this retrospective change may give the impression that we must have been wrong about the law when we had thought that we know what it is. Furthermore, since the retrospective aspect of changes in the law has a bad taste, as it seems to go against the ideal of the Rule of Law, judges have a particularly strong incentive to conceal the real nature of such decisions by presenting their decision in a law-application rhetoric. This pervasive tendency to speak the language of application when it is really a change that is being done is understandable and perhaps even politically justified; but we should not let ourselves to be confused by it.[80]

More recently, Leiter offered a close but slightly different response:

> According to positivists, either theoretical disagreements are *disingenuous*, in the sense that the parties, consciously or unconsciously, are really trying to *change* the law—parties to a theoretical disagreement about law are trying to say, as Dworkin puts it, "what it should be" not "what the law is." Or parties to theoretical disagreements are simply in *error*: they honestly think there is a fact of the matter about what the grounds of law are, and thus what the law is, in the context of their disagreement, but they are mistaken, because in truth there is no fact of the matter about the grounds of law in this instance precisely because there is no convergent practice of behavior among officials constituting a Rule of Recognition on this point.[81]

Leiter thus added to the concealment argument the possibility of massive self-delusion. Dworkin anticipated the concealment argument and responded that there is no evidence to support it (LE 39). This is a very incomplete answer. A more complete response shows that not only does this argument not vindicate the positivist view, it actually bolsters the Dworkinian view.

Legal positivism is, roughly, the view that what the law is is fixed by what certain members of the community ("legal officials") say it is. More abstractly, legal positivism stands for the idea that there is no higher authority beyond a community's shared attitudes that fix what the law is. For the concealment argument to work, it has to be that the theorist can determine independently of that community, or even contrary to that community, what the law is. It requires the scholar to be able to say, "I *know* what the law on the matter is, and it is not what judges say it is; and on the basis of this knowledge, I can say that the judges are concealing the real nature of their actions."

To say this, however, requires being able to say what the law is in a particular jurisdiction independently of what members of that community say. If this

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[80] ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES 80 (2001); *see also id.* at 68; *cf.* GARDNER, LEAP OF FAITH, *supra* note 9, at 36 (legal positivism only says what the law is, not when it should be changed).

[81] Leiter, *supra* note 14, at 1224 (footnote omitted) (quoting LE 7). A version of the concealment argument appears also in HART, *supra* note 15, at 274.

sounds like something that betrays the very point of legal positivism, it is.[82] The way both Leiter and Marmor do this is by smuggling certain normative claims into their legal positivism. They do so by suggesting that the law (everywhere?) is fixed by the plain meaning of certain legal texts. And so, when judges depart from the plain meaning, they are changing the law, or making law, even when they deny this.

There are problems with the idea that texts have a plain meaning regardless of the law,[83] as well as further difficulties in applying this idea to the many contexts where the law is not organized in rules (e.g., all the common law, and possibly much of the rest of law). In such cases, one must reconstruct legal rules before finding their plain meaning, a reconstruction which subjects plain meaning to a prior act of construction. Even assuming such problems are surmountable, it is not a conceptual truth that plain meaning (and not any other) is just what the law is.[84] To see this all one needs to do is think of a legal system where everyone uniformly rejects plain meaning as the basis for determining what the law in favor of, say, purposive interpretation. To argue that as a matter of conceptual truth what the law is is fixed by the plain meaning of legal texts implies that in such a legal system where everyone rejects plain meaning, everyone consistently flouts the law. (There is a delicious irony in the fact that to refute Dworkin, legal positivists have resorted to arguments that depend on being able to tell what the law of a given community really is independently of what that community says.)

This shows why the idea that in easy cases the law is fixed by plain meaning involves smuggling political consideration into the determination of what the law is. The argument, "plain meaning should be preferred over any other approach, because the law is directed to the people, who should be able to understand it on their own, without consulting a lawyer," may be a winning argument, but it is still a political argument about legitimacy, not a linguistic claim about the meaning of words. The same is true of the argument, "it is only by sticking to plain meaning that Supreme Court justices can avoid imposing their personal convictions upon the law, which they should not as they are not democratically elected." The mistake is in thinking that because the "natural," "literal," "plain," or "ordinary" meaning of words is free of a political theory, it follows

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[82] Here is what Marmor himself wrote: "[L]et us presume that a certain norm, *P*, was recognized by the Roman lawyers of the time as part and parcel of their legal system. Does it make sense to say that this community of lawyers has made a mistake, since according to the 'real nature' of law, *P*, did not lie within the extension of their legal system even then, despite their inability to recognize this? I take it that the negative answer to this question is self-evident; such an extensive misidentification in law would seem profoundly mysterious." MARMOR, INTERPRETATION, *supra* note 14, at 74.

[83] *See* John R. Searle, *Literal Meaning*, 13 ERKENNTNIS 207 (1978).

[84] *See* Danny Priel, *Were the Legal Realists Legal Positivists?*, 27 LAW & PHIL. 309, 344–45 (2008); Greenberg, *supra* note 10, at 74–77; Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, 30 OXFORD J. LEGAL STUD. 255 (2010).

that choosing such a meaning as the legal meaning of legal materials is free from politics.

It will not do to say that the theorist need not appeal to any such justification for plain meaning as long as this is the interpretive method conventionally adopted by the judges, because to say this would make the argument self-defeating. Recall the context: to explain theoretical disagreements, legal positivists argue that they are in a position to say, "the law on this question is one thing, even though the judges say something else." To now support this argument by invoking a method of interpretation accepted by the judges is self-contradictory. If the judges used it, there would not be a gap between what they say and what they do.

Therefore, the only way a legal positivist can challenge judges' characterization of what the law is is by showing that the rest of the relevant community rejects judges' characterization of what they are doing: The judges conceal what they are doing as interpreting existing law, but the theorist observes that the relevant legal community sees through judges' obfuscations. One problem with this argument is that it is, and must be, an empirical argument about what the relevant legal community thinks. Empirical arguments require evidence, which is, at best, unclear.[85] And since different legal systems may be different on the matter, it is wrong to extrapolate from evidence, however convincing, about one jurisdiction to any general claim about law. But the problem with this argument goes deeper. The rely on the relevant community to make such a concealment argument implies that the effort does not fool the one group it is intended to fool, making the continuing charade rather odd. Indeed, given that legal positivists have so easily seen through this pathetic ploy and broke the news to the world, it is odd that the judges keep it going. The delusion argument—the suggestion that the judges themselves are fooled into thinking they are following the law when in fact they are making or changing it—is even less plausible. Once again, the theorist can be in a position to make this claim only by following the relevant legal community. To sustain this argument requires accepting that the entire legal community knows what judges are up to, but somehow keep this secret from the judges, who alone remain in the dark about their actions. (When experienced lawyers get appointed to the bench, they are somehow made to forget what they knew before.) Both the concealment and the delusion arguments also do not contend with the reality that virtually all judges who ever bothered to write on the matter, have openly said they make law. To be convincing, we are owed an answer as to why judges would say such things and then go to all the trouble of writing decisions concealing that.

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[85] *See, e.g.*, Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2475 (2014) (book review) (arguing that the attitudinal model fares worse than Dworkin on some matters). Leiter too expressed skepticism about the attitudinal model. *See* LEITER, *supra* note 15, at 192.

All this makes this positivist response looks contrived, an attempt to force reality to fit a theory, rather than the other way around (*cf.* LE 351–52; JR 199). And even after all that, the concealment argument fails to address the global nature of theoretical disagreements, the fact that theoretical disagreements tend to arise in a fairly similar way across a whole range of legal issues.

What looks like the only way of accounting for this global nature of theoretical disagreements within the positivist framework is to argue that judges follow different yet individually consistent rules of recognition:[86] If one judge is an originalist and another is not, this means they follow different rules of recognition and we can expect their judgments to differ across a wide range of legal questions. Nevertheless, it is not easy to reconcile this response with the rest of a positivist account of law. One of the unfortunate implications of the term "rule of recognition" is that it is often thought of as a statutory provision, with clauses and subclauses. But in Hart's account, the rule of recognition is nothing but a social practice, a label for a certain pattern of *shared* behavior. (It would have been more accurate to call it "the shared practice of recognition.") Consequently, to say, as Leiter does, that theoretical disagreements are "disputes about the content of the rule of recognition,"[87] can only mean that different people behave differently in similar circumstances, that they follow different practices. But that simply means that there is no shared practice, which is precisely what the rule of recognition is supposed to be. One might still try to salvage the idea of a rule of recognition as a shared practice if there is considerable overlap over behavior and the disagreement pertains only to a small number of cases. But if different interpretive techniques are all part of the rule of recognition, the difference in practice may be quite profound: When this is the case, one may end with a shared practice only with respect to the *sources* of legal rules, i.e. where to look for the law. This is positivism in name only.[88]

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[86] *See* Matthew D. Adler, *supra* note 14, at 746–48; Danny Priel, *Trouble for Legal Positivism?*, 12 LEGAL THEORY 225, 253–61 (2006). I was more sympathetic to the idea of revising legal positivism along these lines when I wrote this article, but already then I noted that this will imply abandoning central tenets of standard legal positivism. *See id.* at 261–62.

[87] *See* Leiter, *Another Look*, *supra* note 14, at 255. Leiter also said that in cases of delusion, "there is no convergent practice of behavior among officials constituting a Rule of Recognition *on this point*." Leiter, *Explaining*, *supra* note 14 at 1224 (emphasis added). But that makes Leiter's claim even more problematic. If we understand the rule of recognition as a shared practice, then there is no different rule of recognition constructed separately for every legal question. If there were, in what way would it differ from the applicable legal rule?

[88] *See* Priel, *supra* note 84, at 342–43. Leiter agrees. *See* Leiter, *Another Look*, *supra* note 14, at 251 n.1. Essentially the same problem also undermines a slightly different positivist attempt to explain theoretical disagreements. Coleman argued that agreement on the content of the rule of recognition is consistent with disagreement over application. *See* COLEMAN, *supra* note 14, at 116–17 ("Judges may agree about what the rule [of recognition] *is* but disagree with one another over what the rule *requires*"). This will not do. The rule of recognition is not a text; it is simply a practice, a pattern of behavior. "Agreement" over the rule is a similar practice; disagreement over application is a different way of saying different practice, or in other words, no shared practice.

In the hope of defending legal positivism, Leiter advances an even more extreme view, but which ends up undermining legal positivism even further. It is not just that different judges follow different but consistent practices on how to identify legal rules. Leiter argues that "the jurists may simply be motivated subconsciously by their moral view of the merits, such that they convince themselves of the legal propriety of their preferred outcome."[89] Leiter further claims that judges pick off the shelf of available judicial justifications whatever doctrinal technique provides the legal cover for their desired outcome without caring about coherence over time. Judges, he says, are "interpretive opportunis[ts]":[90] A judge who is a strict textualist today when it supports the outcome she favors, will unflinchingly turn to legislative intent tomorrow if that's what it takes to justify her desired outcome for a different case tomorrow.

Whether this is, in fact, the case is an empirical claim; and as such, it is perfectly possible that it will turn out to be true in some jurisdictions, courts, or times, and false in others. The limited evidence Leiter marshals in support of it is questionable,[91] but I am willing to grant that interpretive opportunism is true

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[89] Leiter, *Explaining*, *supra* note 14, at 1247.

[90] *Id.* at 1244.

[91] Leiter argues that Judge Gray, who refused to question the clear language of a statute in *Riggs*, adopted a much more liberal interpretive approach in other cases. *See id.* at 1242–43. Leiter quotes Judge Gray writing that, "[i]t is only where the literal acceptation of the words used [in a statute] will work a mischief, or some absurd result, or where some obscurity in the sense compels it, that we need resort to extrinsic aids of interpretation." People *ex rel.* Bockes v. Wemple, 22 N.E. 272, 273 (N.Y. 1889). This indeed seems different from Gray's view in *Riggs*, but this is because Leiter ends the quotation here. The sentence immediately following the words just quoted changes the picture quite dramatically: "The intent of the legislature is to be sought primarily in the words used, and, if they are free from ambiguity, there is no occasion to search elsewhere for their meaning." *Id.* In support of this point, Judge Gray quoted from an earlier case: "It is not allowable to interpret what has no need of interpretation, and, when the words have a definite and precise meaning, to go elsewhere in search of conjecture, in order to restrict or extend the meaning." *Id.* (quoting McCluskey v. Cromwell, 11 N.Y. 593, 601 (1854)) (internal quotations omitted). This view is entirely consistent with his *Riggs* dissent.

Leiter's other examples are also unpersuasive. He quotes Judge Gray stating in another case that "[m]ere words should not be…deemed sufficient to constitute a condition" in a contract. Post v. Weil, 22 N.E. 145, 145 (N.Y. 1889), quoted in Leiter, *Explaining*, *supra* note 14, at 1243. To see why this is not a departure from Judge Gray's view in *Riggs* we must look into the facts of the case. It involved a contract for the sale of property which prohibited its use "as a tavern." The question was whether this was a "covenant running with the land." Gray concluded that it was, affirming the plain language of the covenant. The point he was making in the quote was that there was no specific linguistic formula required for creating such a covenant, as "covenants and conditions may be created by the same words." *Id.* at 146. Read as a whole, this case is reasonably construed as consistent with Judge Gray's general view that interpretation aims to uncover speaker's intention, but that clear language constitutes irrefutable evidence of that intention. In any event, Judge Gray spoke here about the interpretation of a contract, not the words of a statute. Some considerations applicable to latter (legislative supremacy, separation of powers) have no bearing on the former.

In a third case, Leiter quotes Judge Gray criticizing a lower court judge for interpreting a certain statutory provision "too literally." Warner v. Fourth Nat'l Bank, 22 N.E. 172, 173 (N.Y.

in some times and places. However, if true, this undermines the positivist picture Leiter purports to defend. If interpretive method is part of the rule of recognition, this view denies not only the existence of a social practice of recognition, but even of an individual one. Even more than the view that different judges consistently follow different rules of recognition, it amounts to the claim that the rule of recognition is not really an observable social rule, but an ex post reconstruction. From a positivist perspective this means there is simply no law in the sense of certain non-optional rules that judges follow. Unsurprisingly, Hart recognized the inconsistency of such a view with his brand of legal positivism and explicitly rejected it.[92]

Not only does this view undermine Hartian positivism, it provides supports to the view advanced in this Essay that ties legality to legitimacy. If judges unconstrained by law simply use legal techniques to give a legal appearance to decisions motivated by their moral intuitions or political goals, then arguably their actions are illegitimate. It is a very specific kind of illegitimacy, one that can be recognized even by someone who agrees with the outcomes of these decisions. And indeed, it is not implausible to argue that such decisions—even if otherwise admirable—are for this reason not law.

Here is a concrete illustration: In *Closed Chambers*, Edward Lazarus looked into the internal workings of one year in the life of the United States Supreme Court, and concluded that all the justices were interpretive opportunists, since they all used "legal arguments in which they themselves did not believe or methods of interpretation they had uniformly rejected in the past" for the sake of promoting their personal political agenda.[93] This is a clear statement of interpretive opportunism, and it has not gone unchallenged,[94] but if true, it provides a clear illustration of my point. If the justices were merely using legal language as a cover for their personal political views, if indeed they employed inconsistent

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1889), quoted in Leiter, *Explaining*, *supra* note 14, at 1243. Again, context matters. The dispute in question involved certain negotiable instruments used as a security for a loan, and the court was asked to decide on the conditions for a successful assignment to a third party of a surplus of the value of these instruments that exceeded the sum of the original loan. The parties' rival views depended on the question of which of two statutory provisions applied to the case. This already makes the case very different from *Riggs*, as the court was not asked to override clear statutory language, but to decide which of two possible provisions applied. Moreover, reading the decision carefully affirms that Judge Gray followed the statutory language. In the statute in question, one provision required that the sheriff take "actual custody" of the property in question, while the other permitted leaving a copy of the warrant with the assignee. After quoting the statue in question, which distinguished between the two cases on the basis of whether the property in question was tangible or intangible, Judge Gray concluded that since the commercial paper in question was an intangible, it was "naturally incapable of manual delivery" to the sheriff. *Id.* at 173. None of this is inconsistent with the *Riggs* dissent.

[92] *See* HART, *supra* note 15, at 140–41.

[93] EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 8 (updated ed. 2005).

[94] *See* Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 836, 858–65 (1999) (reviewing LAZARUS, *supra* note 93).

interpretive techniques for the sake of producing outcomes aligned with their moral or political preferences, many would consider their practice as undermining the Court's (and the law's) legitimacy.[95] To round off the argument, the most plausible reason why such behavior undermines the court's legitimacy is because what the judges were doing was not law, but something else: politics masquerading as law. One can make sense of such a view even when supporting the outcomes reached, if such actions constitute an abuse of the judicial role.[96]

There is more to say about these defenses of legal positivism, but I have said enough for present purposes. My main point has been to show that the argument is self-defeating. We can now step back from the details and look at the bigger picture. To understand the core of the positivist picture of law it helps to analogize law—as many legal positivists did—to a game.[97] To be a lawyer is on this view like the decision to participate in a game whose rules are set for you. The most foundational rule of the legal game is the rule of recognition. Central to the game analogy is that it does not matter whether one plays the game for fun or glory:[98] The rules of the game stay the same regardless of why decides to play it. One may accept the rule of recognition, or one may reject it; but whoever does, commits herself to playing the same game.

There are two fundamental problems with this picture. The first one we already encountered: Unlike a game whose rules are binding on those who choose to play it, law is binding also on others. This raises the problem of legitimacy in a way that does not arise in the context of a game. It is one thing to complain about rules imposed on me, when I chose to have them imposed on me; it is quite another, when others impose rules on me without my choice. This leads directly to the second sense in which the game analogy is misleading. Because law is coercively imposed on others, beliefs about why we are justified in forcing the "game" on others, have downstream effects on how the game is to be played. One way of understanding theoretical disagreements traces them

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[95] That was Lazarus's own view. *See* LAZARUS, *supra* note 93, at 9, 517–18; *cf.* FALLON, *supra* note 53, at 11–12, 126–27, 130, 144 (arguing judges should exhibit good faith and proposing "provisional" judicial commitment to consistency in interpretive methods but qualified by willingness to depart from it on occasion). See generally the sources cited in note 53, *supra*.

[96] To be sure, one may challenge this view of legitimacy. *See, e.g.*, Erwin Chemerinsky, *Opening* Closed Chambers, 108 YALE L.J. 1087, 1120–21 (1999) (reviewing LAZARUS, *supra* note 93). Dworkin has indeed rejected the idea that the legitimacy of judicial action depends on separating their decisions from politics, something he argued was impossible. But he did insist that judicial legitimacy depends on the separation of law from partisan politics.

[97] For examples of positivist accounts analogizing law to a game see HART, *supra* note 15, at 84–85, 89; MARMOR, PHILOSOPHY, *supra* note 14, at __.

[98] Hart made both points explicitly. He argued that what it means to be a judge is simply to accept a certain rule-following practice. *See* H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 158 (1982). He also argued that people may accept the rule of recognition for whatever reason. *See id.* at 159; HART, *supra* note 15, at 203.

precisely to this connection: Attitudes on *why* the game can be imposed on others *influence* the way the game should be played.[99] And that is what theoretical disagreements are about: They are disagreements on what to do with the legal materials in order to turn them to judgments in particular cases, they are disagreements on the proper way to do that so that the resulting decision would be legitimate.

We are now in a position to see that theoretical disagreements and "hard cases" are merely presentational devices, and that Dworkin's point would be equally true even in a community where everyone has the same views on these matters and there are therefore no theoretical disagreements. For even in such a place, there will be something to tell about how legal materials produce outcomes to legal cases, and whether the approach adopted in that jurisdiction makes legal demands legitimate. Instances of theoretical disagreements are valuable because they bring these issues to light, but the questions they presuppose are there even in the absence of such disagreements.

Understanding this point helps answer another familiar misconception about Dworkin's view. It is often said that Dworkin inflated a small number of hard cases out of all proportion. According to this familiar critique, cases of agreement vastly outnumber cases of disagreement. The critique goes on to accuse Dworkin of constructing a theory of law on the basis of a few highly unrepresentative cases.[100] Dworkin himself rejected this objection, saying that his account was equally true of easy and hard cases (LE 266, 354).[101] We now see why this is correct. Though questions of legitimacy are usually silent in cases perceived as "easy," what I have just said implies that it is possible to raise the underlying political questions even in such cases. This is why Dworkin was cor-

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[99] Leiter argues *in fact* judges do not have any views on why we play the game of law. Leiter stated that if the chief justice of the Supreme Court were asked why he declared some statutes unconstitutional he would reply "Because that is what I have an obligation to do as a federal judge." *See* Leiter, *Explaining*, *supra* note 14, at 1222 (internal quotations omitted). But judges do not simply say, "judicial review is just one of the rules of the game we play here at the Supreme Court club." Judges explain why and under what circumstances they think judicial review is legitimate, and these arguments have downstream practical implications on the scope of the practice. *Compare* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 1–12, 73–74 (2010) (rejecting originalism) *with* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (defending originalism by arguing that "[t]he principal theoretical defect of nonoriginalism…is its incompatibility with the very principle that legitimizes judicial review of constitutionality").

[100] *See, e.g.*, Leiter, *supra* note 14, at 1227; *cf.* KRAMER, *supra* note 50, at 136, 174–75. It has even been suggested that we should understand Dworkin's on hard cases as a guide to judges on how they should decide such cases. *See* Raz, *supra* note 14, at 136.

[101] It must be acknowledged that in earlier writings Dworkin did draw a distinction between easy and hard cases (TRS 4, 81). However, even there one can see hints of what is later said explicitly, as when Dworkin says that his approach ideally "provides a coherent justification for all common law precedents and, so far as those are to be justified on principle, constitutional and statutory provisions as well" (TRS 116–17).

rect to say, in another sentence that irritated many of his jurisprudential adversaries, that "[j]urisprudence is the general part of adjudication, silent prologue to any decision at law" (LE 90).[102]

In fact, I am tempted to suggest that it is easy cases (and their hidden complexity) that provide the strongest support for Dworkin's position. Cases of disagreement elicit all kinds of divergent explanations (including the one we are considering now, viz. that they are rare). The problem with the positivist explanation is that it makes easy cases too easy: To resolve easy cases, all one needs to do—in fact all one *can* do—is locate the relevant rule and apply it. Consider the super-easy case of a parking violation. If one were to ask why the parking ticket found on your windshield is not just a piece of paper, the legal positivist will direct you to the relevant section in the relevant code. The positivist suggests that trying to probe a little deeper would be met with a blank stare: "this is how we do things around here, this is how we play the law game." To continue with the game analogy, to ask for a further explanation would be akin to asking why the bishop in chess only moves diagonally. The answer is, "it just does, these are the rules."[103]

The more plausible alternative is that easy cases are those where competing views on the legitimacy of law lead to the same outcome, which in such cases, they are left undiscussed. Originalism is not a theory of hard cases, one that kicks in only when a case is (somehow) determined to be hard, but irrelevant for easy cases.[104] To its proponents originalism is equally applicable to parking violations as it is to First Amendment cases argued before the Supreme Court. A committed originalist, if asked to explain the constitutionality of parking legislation, could (or at least should) be able to do so. And the same is true of her nonoriginalist interlocutor. If, as I suggest, theoretical disagreements are disagreements about the legitimacy of law (and, relatedly, the legitimacy of the judicial role in determining the law), they are relevant for all law, whether or not there is disagreement in a given community over these questions.

What, then, is the alternative? Much of the answer has already been spelled out in the foregoing discussion, so I can be brief here. When faced with virtually any legal question, a person is ultimately required to answer a thoroughly political one: what gives the state the right to force someone to do something she may not wish to do. This question is there even when dealing with an easy case such as a fine for a parking violation. It will not do to say that the answer can be found in the cleat text of a statute, for a statute, without more, is just a piece of text. For this statute to justify the coercive requirement to pay a fine for a "parking violation," one must be able to reconstruct an answer which could justify

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[102] *Accord* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897) ("Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence").

[103] This is Leiter's view, as discussed in note 99, *supra*.

[104] This seems to be Leiter's view. *See* Leiter, *Explaining*, *supra* note 14, at 1230–32.

such an action. There are no answers in the sky to such questions, but there *may* be ones in the practices of the community where this question is asked. Sometimes, this question is openly asked: This is what happens when there are political debates over, for example, government-mandated healthcare. At other times, invoking somewhat different considerations, these debates take place in courts. The disagreements we see there—about the proper way to interpret statutes, the right interpretation of a certain statutory or constitutional provision, and many others—can ultimately be traced to different understanding of the terms and limits of legitimate government coercion. As such, these disagreements are just a window to a all-pervasive question. Even if we don't provide an answer, even if we don't recognize that there is a question, it is there. If it turns out, there is no good answer to it, then what we call "law" is nothing but organized theft.

IV. SITUATING DWORKIN

A longstanding view seems to be that at the highest level of abstraction, theories of law fall into one of two camps, legal positivism and natural law, so Dworkin has to be one or the other. Most decided that since he affirmed some very strong connections between law and morality he must be a natural lawyer; a few suggested that, for all his protestations, Dworkin really was a legal positivist.[105] Dworkin himself refused to participate in the game. While he clearly distanced himself from legal positivism, his few remarks on natural law theory were not overly enthusiastic (e.g., LE 35–36).[106] Either out of a conceited attempt to present his ideas as more original than they were, or out of ignorance, Dworkin contributed to the impression that his views represented a strange new beast on the jurisprudential scene, a truly original invention, what John Mackie called, "the third theory of law."[107]

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[105] For the latter suggestion see Gardner, *supra* note 17, at 220. He stated that what unified various theorists "as legal positivists" is the view that

> the law is made by legal officials, such that if one wants to know what the law says on a given subject in a given jurisdiction one needs to investigate what those officials did or said, not what they ought to have done or said. The law is made up exclusively of norms that have been announced, practised, invoked, enforced, or otherwise engaged with by human beings acting on law's behalf.

Id. By this measure, as should be plain by now, Dworkin was definitely not a legal positivist.

[106] One essay Dworkin wrote is ostensibly about natural law theory. *See* Ronald A. [*sic*] Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165 (1982). But the essay contains an idiosyncratic definition of natural law, does not engage with any natural law scholars, and is mostly dedicated to explicating Dworkin's own views.

[107] *See* John Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3 (1977). Berman, *supra* note 61, suggests a fourth theory of law. It is a variant of common law theory, and as such, in my view, belongs to the same category as Dworkin's.

With his views reassessed, it is possible to see that Dworkin's views are not so strange and not so idiosyncratic. It is also possible now to see their intellectual ancestors.[108] I will argue that Dworkin did belong to a distinct third theory of law. However, this theory is not a late-twentieth century invention, but one with a history that stretches centuries. If this has not been sufficiently noticed, it is because it is a theory that remains jurisprudentially neglected.[109] This characterization will also help us further situate Dworkin's ideas in relation to a particular understanding of democracy and the role of law in it. In a final surprising twist, I will argue that Dworkin was a legal realist, of sorts.

In situating Dworkin's ideas in this way, I help explain his influence beyond the narrow field of analytic jurisprudence. Against legal philosophers' tendency to separate Dworkin's jurisprudence from his other ideas,[110] I aim to show in this Part both the connections between Dworkin's jurisprudence and his political theory, but also how Dworkin's ideas and engagement in traditional debates in jurisprudence (including his decades-long sparring with legal positivist) relate to, and can perhaps be seen as trying to unify, several strands of American legal and political thought. Beyond this, this Part may serve another purpose. Dworkin remains part of the canon of contemporary legal philosophy. Like many others, I believe the field has grown marginal because lost sight of the bigger picture. Showing the broader intellectual connections of Dworkin's work may help reconnect legal philosophy with wider questions.

(a) Common Law Theory

In the standard understanding, natural law theory and legal positivism compete on the question of criteria of legal validity, with the former affirming that morality is one of these criteria, and the latter denying it. I argued that Dworkin rejected the whole notion of legal validity, which is why it is difficult to classify him as either. In any event, the classification of these two views as concerned

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[108] I confine myself here to legal and political theory rather than Dworkin's broader philosophical outlook. On the latter see Priel, *supra* note 4.

[109] Not entirely. For important works on common law theory see A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW ch. 15 (1987) [hereinafter SIMPSON, LEGAL THEORY]; GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION chs. 1–2 (2d ed. 2019). For some jurisprudential consequences of neglecting the common law and common-law theory see Dan Priel, *Not All Law Is an Artifact: Jurisprudence Meets the Common Law*, *in* LAW AS AN ARTIFACT 239 (Luka Burazin et al. eds., 2018).

[110] *See, e.g.*, Coleman, *supra* note 21, at 50, 54 (arguing that Dworkin's views about the objectivity of morality and his views about communal foundation of political obligation are, and should be, separated from his jurisprudential views). Even more surprisingly, Kramer, who is extremely critical of Dworkin's ideas on jurisprudence embraced Dworkin's views about morality. *See* Matthew H. Kramer, *Coming to Grips with the Law: In Defense of Positive Legal Positivism*, 5 LEGAL THEORY 175, 193–94 (1999). If the view presenting in this Essay is correct, these views convey a fundamental misunderstanding of Dworkin's views. OR Kramer, 73 Analysis 118 (2013).

with the question of legal validity is of fairly recent vintage, and makes central an issue that is, at best, marginal. I propose thinking about legal positivism and natural law theory as competing views on a different question, that of law's authority. On this characterization, "legal positivism" is a label for a host of theories that ground law's authority in acts of will of certain individuals or institutions. "Natural law" is a label for a host of theories that ground law's authority in reason. Seeing the two views in this way (i.e., not as the negation of each other), makes room for other possible accounts of law's authority. One such alternative is common law theory, which offers a third foundation for law's authority: community.

Common law theory is a composite construct derived from the work of several scholars as well as from remarks of many common lawyers throughout the ages. Not everyone who wrote on the common law accepted these ideas; in fact, some of the most famous writers on the common law (some of them also notable judges) rejected it.[111] It is also true that (just like with legal positivism and natural law theory), the label covers a range of views, and that different thinkers classified under it did not agree on everything. Even with these caveats, common law theory is a useful category for various attempts to provide a justification for some of the familiar features of the common law, and perhaps law more generally. The most basic idea of common law theory is that the law is in some sense continuous with community standards, and that its authority derives from its acceptance by that community. Describing classical common-law theory, Gerald Postema said that for its proponents, "law lived in and evolved from the practical interactions of daily life as they surfaced in the common law courts."[112]

Though the basic idea is not difficult to grasp, concretizing it raises many difficult questions: What is the relevant "community" whose values need to be shared: is it a contemporary community or a historical one? Does "community" refer to the entire population, or some subset of it? How are lawyers to know the community's shared values? Are there shared values in any community of even moderate complexity? How do vague shared values translate into concrete legal standards? These are difficult questions, and different common-law theorists offered different answers to them.[113] Whether any of them is satisfying is an interesting question, but not one I will pursue here. What matters for this Essay is

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[111] For example, I count Oliver Wendell Holmes among those who rejected it. *See* Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divide*, 65 AM. J. COMP. L. 609, 634–37 (2017).

[112] Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 1), 2 OXFORD U. COMMONWEALTH L.J. 155, 167 (2002). Interestingly, Hart recognized something like this as the "noble dream" of American law, and, significantly for the discussion in Part IV.(c) *infra*, recognized Karl Llewellyn as a proponent of it. *See* HART, *supra* note 55, at 133–34.

[113] There are numerous versions of legal positivism and natural law theory, with intrafamilial disputes often more heated than disagreements between the two camps. We should similarly not expect common law theorists to agree on everything. One can distinguish, for example, between

that to understand Dworkin's views, we must see him as a modern exponent of this view.[114]

When he presented his constructive model of *morality*, Dworkin said of that it "is not unfamiliar to lawyers. It is analogous to one model of common law adjudication" (TRS 160). But the attribution depends on much more than this remark. It is also evident from his remark that in his account the judge "identifies a particular conception of community morality as decisive in legal issues," as it is "the political morality presupposed by the laws and institutions" (TRS 126). Beyond this, Dworkin's affinity to the common law is evident in his focus on common law cases like *Riggs v. Palmer*, or on American constitutional law (which, despite a constitutional text, is to a considerable degree judge made). There is little discussion in Dworkin's work—and this is without question a major weakness of his views—of the mark of modern law: statutes. Even when he did talk of legislation, he subsumed its explanation under his account of judge-made law (e.g., TRS 112, ch. 9).[115]

To go beyond these impressionistic remarks, I spell out some of the central features of common law theory and show how well they fit Dworkin's ideas.

Community standards and the rejection of clear boundaries between law and nonlaw. In the basic picture, morality exists outside the law, it is largely unchanging and unaffected by human views about it. In this view, there is a complete separation between positive law and what law ought to be: "No amount of information about what standards (rules, principles) legal officials *do* apply in the resolution of legal disputes can tell us what standards they *should* apply."[116] This view so dominates jurisprudential thinking that those who deny it are sometimes depicted as simpletons who wish out of existence the laws they find morally disagreeable by declaring that they are not really laws.[117]

Common law theorists' view is different. To see this, it is interesting to see how classical common lawyers thought about natural law. In their jurisprudential writings, common law theorists occasionally made reference to natural law as a foundation of law, but in using this term they did not mean to refer to a set

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more "elitist" and "populist" as well as between more "historical" and "presentist" versions of common law theory. *See* Priel, *supra* note 111, at 624–34.

[114] Postema at one point argued that Dworkin's view is different from common law theory. *See* POSTEMA, *supra* note 109, at 38 & n.83. I think the similarities are more significant than the differences, and in later writings Postema himself seems to agree. *See* Gerald J. Postema, *Philosophy of the Common Law*, *in* HANDBOOK, *supra* note 39, at 588, 608. *Cf.* Stephen R. Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 240–41, 252 (1987) (explaining the common law's binding nature in Dworkinian rather than positivist terms).

[115] It is therefore baffling that Gardner argued that Dworkin treated all lawmakers as legislators. *See* GARDNER, LEAP OF FAITH, *supra* note 9, at 54, 86. The truth is the exact opposite.

[116] Charlie Webb, *The Double Lives of Property*, 2 JURIS. 205, 206 (2011) (book review); *cf.* Morris R. Cohen, *History* Versus *Value*, 11 J. PHIL. PSYCHOL. & SCI. METHODS 701, 706–07 (1914) (challenging the idea that knowledge of legal history can help in advancing legal reform).

[117] *See, e.g.*, HART, *supra* note 75, at 76–77, 111.

of rational principles discovered by reason and applicable to all of humanity regardless of time and place.[118] What they had in mind was "common reason," learned not from tracts in moral philosophy, and even less so from pondering indubitable first principles. It was the reason derived from the wisdom accumulated in a practice.[119] It was, as is familiar to common lawyers to this day, derived from past legal materials.

Cardozo was a clear exponent of this view. He rejected natural law understood as "pre-existing laws which judges found, but did not make,"[120] or reflecting "something static and eternal."[121] But he did speak of "[t]he law of nature" that was "woven" into positive law.[122] In words very similar to Dworkin's one-domain view, he stated that "there is only *one* law, the positive law, but it seeks its ideal side, and its enduring idea."[123]

With this we can go back to what Dworkin, who already when he spoke of "law beyond law" (LE 400),[124] did not mean by it a separate domain of morality. As shown above, Dworkin consistently dismissed the idea of natural law as some kind of brooding omnipresence in the sky, and denied "the assumption that non-positivists must believe in something called natural law, which is taken to be the contents of celestial secret books" (TRS 337, also 216). Instead, he defended the constructive model of morality, which he himself likened to the common law. As shown above, this view is premised not on the existence of eternal right answers to practical questions, but on right answers derived from a particular community's engagement with its own practices.[125] This is the sense in which Dworkin has consistently been a one-domain theorist. The blurred boundary between law and shared values allows for a bidirectional influence, where legal decisions influence and shape community values. Within such a view of law, as Benjamin Cardozo put it, "[l]ife casts the moulds of conduct,

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[118] *See* POSTEMA, *supra* note 109, at 36–37; DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 168 (1990).

[119] *See* Postema, *supra* note 112, at 176–79.

[120] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 131 (1921).

[121] *Id.* at 132; *see also id.* at 22–23 ("[t]he common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively").

[122] *Id.* at 132.

[123] *Id.* at 133 (quoting Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 1), 24 HARV. L. REV. 591, 607 n.57 (1911) (quoting 2 FRITZ BEROLZHEIMER, SYSTEM DER RECHTS- UND WIRTSCHAFTPHILOSOPHIE 17 (1905))); *see also* BENJAMIN N. CARDOZO, PARADOXES OF LEGAL SCIENCE 29 (1928) ("We must not think of the just law, when it prevails, as something distinct from the positive law, or in antagonism to it. It is itself a phase, a subdivision, a compartment, of positive law.").

[124] *Accord* CARDOZO, *supra* note 62, at 54–55 (criticizing the view of Austin or "his successors" that "[there is no law behind [the judgment] or apart from it."). For a recent endorsement of this view by one of Austin's successors see GARDNER, LEAP OF FAITH, *supra* note 9, at 86 ("there is no such thing as non-positive law. There are no legal norms that come into existence without being brought into existence by someone").

[125] Dworkin, *supra* note 67, at 6 ("Interpretative judgments…must be framed in the critical vocabulary of the community in question").

which will some day become fixed as law. Law preserves the moulds, which have taken form and shape from life."[126]

Since there is only one domain, since law's ideals are derived from "within," this view inevitably blurs the distinction between law-as-it-is and law-as-it-ought-to-be. Cardozo expressed this view when he said that "[w]here there is such a degree of probability as to lead to a reasonable assurance that a given conclusion ought to be and will be embodied in a judgment, we speak of the conclusion as law, though the judgment has not yet been rendered."[127] But this is not just a matter of prediction, it is also that our judgment of what the law ought to be blends into our reading of what it is.[128]

All this fits nicely with Dworkin's view, who complained that "the flat distinction between description and evaluation…has enfeebled legal theory" (AMP 148; also, LE 116). In his one essay ostensibly dedicated to natural law, Dworkin defined natural law as the view that "insists that what the law is depends in some way on what the law ought to be."[129] This is a rather idiosyncratic definition of natural law, but it is a good summary of common law theory, and it is to this view that Dworkin subscribed.

Internal justification and critique. Community does not just shape the content of law, it is also the basis of law's authority. The reason why law is binding is because it is in a deep sense the law *of* the community and *by* the community. Understood in this way, the law's authority does not derive from its greater wisdom or moral correctness; rather, the law's authority is derived from articulating and embodying the normative commitments shared by—and as such implicitly accepted by—the community. Here is how Matthew Hale put this point:

> [W]hen I call [the common law] *Leges non Scriptæ* [unwritten law], I do not mean as if all those Laws were only Oral….For all those Laws have their several Monuments in Writing….I…stile those Parts of the Law, *Leges non Sciptæ*, because their Authoritative and Original Institutions are not set down in Writing in that Manner, or with that Authority that Acts of Parliament are, but they are grown into Use, and have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the Strength and Custom and Reception in this

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[126] CARDOZO, *supra* note 120, at 64; *see also id.* at 135 ("'It is the function of our courts,' says an acute critic, 'to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new content'") (quoting A.L.C. [Arthur L. Corbin], *The Offer of an Act of Promise*, 29 YALE L.J. 767, 771 (1920)). On the role of community in Cardozo's conception of the common law see John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324 (1990); Joshua P. Davis, Note, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777, 795 & n.100, 807–16 (1993) (relying on Cardozo and Dworkin to argue for the relevance of the legal community in determining the content of law). The latter article is cited approvingly in Dworkin, *supra* note 22, at 2128 n.74.

[127] CARDOZO, *supra* note 62, at 33–34.

[128] *See id.* at 52.

[129] Dworkin, *supra* note 106, at 165. This is quite different from standard natural law theory, which insists on the strict separation of the two. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 33–36 (2d ed. 2011).

> Kingdom. The Matters indeed, and the Substance of those Laws, are in Writing, but the form and obliging Force and Power of them grows by long Custom and Use….[130]

This idea not only explains the basis of law's authority, it also explains the way we should think about critique and development of the law. The other side of the rejection of the idea that there are clear boundaries between law and nonlaw is that critique of the common law is "internal." It is not by appeal to some external standard like a priori reason that the law is critiqued, but by a constant reworking of a community's moral commitments as expressed in its legal materials, that the law develops. And so, when classic exponents of the common law said that individual legal decisions are just evidence of the law,[131] they did not mean that the common law is "out there" for lawyers to find and imitate; rather, they meant that the law is constructed from the sum total of legal decisions, even if no particular decision creates a "valid" legal rule. In this respect true legal propositions (and if you wish, "the law") is "inside" those legal materials without (necessarily) being found in any of them; it is derived from them in some sense, but it is also goes beyond them in another. The common law can be seen as a manifestation of Dworkin's one domain view.[132]

One can imagine a more "open" version of this idea, where lawyers look beyond legal materials, and a more "closed" version, where the construction of law is built from legal materials alone. Different jurisdictions may differ about the scope of the appropriate domain (and within a jurisdiction the domain may change from time to time), but however the domain is defined, generally legal argument and critique are to be made from "within" the domain. Either way, this approach urges lawyers and judges to interpret the relevant source material (which is the evidence of the common law) and to construct from it the law itself. This is exactly Dworkin's approach.

In explicating this idea Dworkin resorted to the metaphor sometimes known as Neurath's boat, the boat repaired while at sea, one plank at a time (JR 161).[133] This metaphor highlights the idea of the continuity of law, the need to explain change as emerging from what is already "in" the law. In the legal context, however, this metaphor is of very old provenance. Matthew Hale, one of the classic exponents of the common law, used it centuries earlier:

> Use and Custom, and Judicial Decisions and resolutions, and Acts of Parliament, tho' not now extant, might introduce some *New* Laws, and alter some *Old*, which

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[130] MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND 16, 17 (Charles M. Gray ed., 1971) (3d ed. 1739) (1713).

[131] *See, e.g.*, *id.* at 45; WILLIAM BLACKSTONE; COKE.

[132] An English judge once wrote: "We are not trying to do justice, if you mean by justice some moral standard which is not the law of England." T.E. Scrutton, *The Work of the Commercial Courts*, 1 CAMBRIDGE L.J. 6, 8 (1921).

[133] Dworkin's inspiration here is almost certainly Quine. Dworkin writes: "In value as in science we rebuild our boat one plank at a time, at sea" (JR 161). Quine used this metaphor in relation to science. *See* WILLARD VAN ORMAN QUINE, WORD AND OBJECT 3 (1960).

> we now take to be the very Common Law itself, tho' the Times and precise Periods of such Alterations are not explicitely or clearly known[.] but tho' those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials….[134]

Though not identical, the metaphor and the idea behind it is clearly similar to Dworkin's: law is constantly being revised and keeps changing, yet in some sense remain the same. It also explains without mystery or strange metaphysics the sense in which judges discover or find the common law.[135]

The (common) law as a seamless web. Dworkin made various references to some well-known metaphors used to described the common law. He spoke of the law as a "seamless web" (TRS 115–16), he made reference to the law "working itself pure" (TRS 112, LE 400). In the vast commentary on Dworkin's work, these remarks are generally ignored, but they are important for understanding his view, especially if we recognize common law theory as a distinct theory of law's authority. One may think about Dworkin's work is to give content to these metaphors.

For legal positivists, this idea that law is a set of discrete rules seems so obvious that it is sometimes treated as a conceptual truth that no-one could possibly reject.[136] And so, in an essay dedicated to explicating Dworkin's views Shapiro wrote that "no one disputes that the law contains principles as well as rules."[137] That, in fact, is precisely what the idea of law as a seamless web disputes.[138] I already mentioned that, writing in 2006, Dworkin "[t]he idea of law

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[134] HALE, *supra* note 130, at 40.

[135] *See* Dan Priel, *Not All Law Is an Artifact: Jurisprudence Meets the Common Law*, SSRN, at 27–28. (This is a longer version of Priel, *supra* note 109, which does not include this passage.). The idea that judges find law has recently seen some revival. See Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019); Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. ___ (2020). Sachs thinks it is consistent with Hartian positivism. *See* Sachs, *supra*, at 556–57. As this Essay shows, his view is far better defended in terms of common law theory, of which Dworkin—Hart's intellectual archenemy—is the best-known contemporary exponent.

[136] *See* GARDNER, LEAP OF FAITH, *supra* note 9, at 251 ("It is in the nature of all laws to be rules"); HART, *supra* note 15, at 8; see also note 137, *infra*, and accompanying text.

[137] Shapiro, *supra* note 34, at 52 n.31; *see also id.* at 26 ("After all, what else does the law consist in if not *rules*?").

[138] *See* SIMPSON, *supra* note 109, at 361–62 (rejecting the view of the common law as a "system of rules" in favor of the view of it "as a body of traditional ideas received within a caste of experts"); Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 2), 3 OXFORD U. COMMONWEALTH L.J. 1, 14 (2003) (in common law jurisprudence law "is not a set of rules or laws, but a practised framework of practical reasoning and this practised framework constitutes a form of social ordering."); *see also* Perry, *supra* note 109, at 234–35, 243 (the common law does not contain rules, if those are understood as exclusionary reasons and judges "characteristically speak of being bound by cases rather than by propositions (or by 'rules')").

as a set of discrete standards [i.e., rules or principles], which we might in principle individuate and count" a "scholastic fiction" (JR 4). In the same year, he also wrote that "[i]t…does not matter, to any argument I have made, whether or not there are any rules in any particular legal system, or how many there are."[139] This may sound both arcane and implausible. What does it even *mean* to say that legal rules do not exist? How can they not exist when people constantly talk about them?

The common law alternative is that law consists of a mass of materials, ideas, traditions from which we derive answers to novel cases. But the derivation is not in the form of a deduction of a general rule to a case. We can speak of common law rules, but it makes more sense to think of them as conclusions of legal deliberations, rather than premises in them: as Dworkin put it, in law "the argument *for* a particular rule may be more important than the argument *from* that rule to a particular case" (TRS 112). The rules are, in short, interpretations. Though Dworkin stated there that he thought legal rules existed, he understood them in a way no positivist could accept: "Whether a particular standard *functions as a rule* is…a matter of interpretation."[140]

I mentioned two distinctions that both Dworkin and common law theorists blur, between law and nonlaw and between law-as-it-is and law-as-it-ought-to-be. A third distinction, related to these two and which also gets blurred, is between cases governed by law and cases not governed by law. In the basic picture, there in principle a distinction between cases that fall within the purview of a rule (easy cases), and those that do not fall within any rule (hard cases). The law fixes the outcome in cases of the first type and is silent on what is to be done in cases of the second type. The alternative picture looks very different. There are answers to legal questions in the common law, but they are not (typically) found in any particular decision. Rather, these many decisions are "data points" from which we derive legal principles, from which in turn we derive the right answer to later cases. Instead of a sharp and categorical distinction between cases governed by law and those not governed by law, one uses existing legal materials to resolve all cases. When the interpretation and application of past decisions to a new case is uncontroversial, we call the case "easy"; when different interpretations of past common-law decisions lead to different outcomes, we call the case

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[139] Dworkin, *supra* note 37, at 263–64.

[140] *Id.* at 264 (emphasis added). It is thus wrong to attribute to Dworkin the view (as Gardner does) that "judges should improve the law by constructively interpreting it." Gardner, *supra* note 17, at 221. Gardner's mistake is assuming that "[t]here must be an object—a legal norm—to which [constructive interpretation] is applied." *Id.* There must be an object of interpretation, but the object need not be a legal norm. Dworkin claims that judges should determine what the law is by constructively interpreting it. Put differently, interpretation is not applied to legal norms; legal norms are the product of interpretation.

"hard."[141] In this picture, a case is not inherently easy or hard, but it will be perceived one way or the other by evaluating past legal decisions, prevailing methods of interpretation, the political environment, and changing social attitudes. Change in any of these could turn a formerly easy case into a contested one, or vice versa.

Despite all this, the suggestion that Dworkin was a common law theorist may seem odd for a different reason. It is not uncommon to think of the common law as inherently conservative. Many of the attributes of the common law (the accumulation of answer from the combined wisdom of the past, slow and incremental change, the lack of an overarching theory) resemble "Burkean" conservatism.[142] And indeed, at least one commentator has argued that Dworkin's approach is conservative for its reliance on the common-law model.[143]

There is something to the charge, since Dworkin undoubtedly emphasized the significance of a community's past to its present and future normative commitments. Dworkin, however, gave this idea a critical twist, when he said that, "it is part of our common political life, if anything is, that justice is our critic not our mirror, that any decision about the distribution of any good…may be reopened, no matter how firm the traditions that are then challenged" (AMP 219; also, JR 176).

This may be the most significant issue on which Dworkin departed from classical common law theory, by tying it to ideas of democratic self-government. For Dworkin, the law was not something for a small cadre of elite lawyers and judges to determine for the rest of the community. What he described as a "protestant" conception of law (LE 413), "encourage[es citizens] to suppose that each has rights and duties against other citizens, and against their common government, even though these rights and duties are not all set out in black-letter codes" (TRS 338). This is an active conception of law that "encourage[s citizens] to frame and test hypotheses about what these rights are" (TRS 338). Common-law courts are central to this exercise—they are "the capitals of law's empire" (LE 407)—"providing an occasional forum for publication deliberations" (TRS 338), but such deliberation happens everywhere. Indeed, a significant part of the judicial function is to stimulate exactly this kind of deliberation outside of the courts. This, said Dworkin, is precisely what happens, with court

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[141] *Cf.* CARDOZO, *supra* note 62, at 43–44 (in all cases, including controversial cases, judges never "will not roam at large," but draw on a "stock of principles and rules which will be treated as invested with legal obligation," and we speak of law as existing when there is "high degree of certainty" in the prediction of what courts will do).

[142] *See* Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 642–56, 688–97 (1994); Priel, *supra* note 111, 625–30.

[143] *See* Raz, *supra* note 14, at 133–35.

decisions generating a "national debate…in "newspapers,…in public meetings and around dinner tables" (FL 345).[144]

When writing about democracy, Dworkin emphasized self-government as far more significant than majoritarianism as a justification for democracy. The participatory version of common law theory described here is of a piece.[145] It is one that sees communal deliberation on questions of law (which is a form of moral deliberation) together with the potential revisability of every accepted legal idea as a way of reconciling a community's desire to live in continuity with its past while allowing for the possibility of radically revising it.

(b) Legal Realism

So far I suggested that Dworkin followed, perhaps without fully realizing it, ideas of several seventeenth- and eighteenth-century English lawyers onto which he grafted, perhaps without fully realizing it, eighteenth- and nineteenth-century American ideas of democratic self-government. In doing this he followed, perhaps without fully realizing it, on the footsteps of a well-known group of early twentieth-century legal scholars. I am talking about legal realism; or more precisely, a significant strand within it. Elsewhere, I have argued that there are two distinct groups of legal realists, that I designated "traditional" and "scientific." I argued that on many issues they held almost opposite views.[146] Many of the traditional legal realists, including Karl Llewellyn, the most famous of them, were common law theorists.

To suggest that Dworkin was any kind of legal realist is where even those sympathetic to much that I have said so far may think I have gone too far. (In plainer English, they will think I'm nuts.)[147] In the standard understanding of the legal realists, they are skeptics, who believed that judges manipulate legal materials to reach almost any conclusion they want. They thus believed the law is inherently indeterminate, the exact opposite of Dworkin's right answer thesis. Hart famously divided the American jurisprudential scene into two extreme visions, one that sees law as a "nightmare," the other as a "noble dream." He cast the realists are an example of the former and Dworkin as the epitome of the

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[144] In such a conception of law, unlike the positivist one, guidance may not be the main goal of the law. *Cf.* Seanna Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010). Dworkin, however, suggested that such deliberation could actually provide better guidance (JR 219).

[145] *See* Dan Priel, *Are Jurisprudential Debates Conceptual? Some Lessons from Democratic Theory*, 50 OSGOODE HALL L.J. 359, 375–77 (2015).

[146] *See* Dan Priel, *The Return of Legal Realism*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 457, 466–69 (Markus D. Dubber & Christopher Tomlins eds., 2018).

[147] I am not entirely alone in this suggestion. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 423 n.91 (2d ed. 2012); *cf.* HANOCH DAGAN, RECONSTRUCTING LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 65–67 (2013) (arguing for some similarities but many differences between Dworkin and the legal realists). I am, I think, alone in the explanation offered here.

latter.[148] In similar fashion, Leiter's article *In Praise of Realism (and Against Nonsense Jurisprudence)*, as its title indicates, places Dworkin's "nonsense jurisprudence" at the polar opposite of legal realism. In another essay, he classified Dworkin as a "sophisticated formalist," thereby contrasting him with the legal realists.[149]

For once, on this matter Leiter seems to be in apparent agreement with Dworkin. Dworkin never discussed the realists in any detail, but his few references were invariably critical (e.g., LE 36, 153).[150] In one place, for example, he ascribed to the realists the view that "there is no such thing as law,…or law is only what the courts will do or only a matter of what the judge ate for breakfast" (LE 153).[151] Dworkin had no time for such nonsense. His model judge never suffered from indigestion but did have perfect mastery of his country's past legal and political decisions.

Despite all this, I think the intellectual links between Dworkin and some of the legal realists are far stronger than usually assumed. The reason why this suggestion sounds so bizarre is because of a widespread mischaracterization of both Dworkin's views and the realists'. Much of this Essay has been dedicated to showing that Dworkin's actual views about law and morality are not nearly as outlandish as typically presented; completing my argument calls for a similar correction of the realists' view.

I have already begun laying the groundwork for such a corrective when I showed the deep similarities between the views of Dworkin and Cardozo. One reason I did so was in order to show that Dworkin's views bear close resemblance to those as mainstream a judge as Cardozo. Another reason was to set the stage for the present discussion, as Cardozo is a classic exponent of the traditional version of legal realism. If the discussion above convinced you that there are significant similarities between Dworkin and Cardozo, you are halfway to the conclusion that Dworkin was kind of legal realist.

For a start, consider the following: I mentioned earlier Dworkin's view that in an important sense law did not consist of rules. This view is taken to be so

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[148] *See* HART, *supra* note 75, at 128, 131. He did, however, correctly, treat Llewellyn as a noble dreamer. *See id.* at 133, 136–37.

[149] *See* Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 112, 129 (2010) (book review); *see also* David Cohen & Allan C. Hutchinson, *Of Persons and Property: The Politics of Legal Taxonomy*, 13 DALHOUSIE L.J. 20, 21 (1990); Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 762 (2012). This characterization is based on attributing to Dworkin the view that judges discover pre-existing law. See Part III.(d), *supra*, for an explanation why it is a mistake. Other characterizations of legal formalism also clearly place Dworkin on the realist side. If one thinks of formalism as the belief of the possibility of arriving at legal conclusions by "the careful reading of texts to find the rules in them," *see* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 40 (1990), then Dworkin was clearly not a formalist.

[150] *See also* Ronald Dworkin, *Dissent on Douglas*, N.Y. REV. BOOKS., Feb. 19, 1981, at 4.

[151] While it is true that the realists spoke about judges and their indigestion, Dworkin's claims here are either patently false or wild exaggerations. *See* Dan Priel, *Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Subject*, 68 BUFF. L. REV. 899 (2020).

implausible that it was denied that Dworkin, or anyone else, could have held it.[152] I have shown that rather than being a radical claim, this view is fairly standard among common law theorists, none of whom was a legal skeptic of any sort. That is also how we should also think about what the legal realists said of legal rules. Using words virtually identical to Dworkin, Jerome Frank wrote that "[t]here never was and there never will be a body of fixed and predetermined rules alike for all."[153] Arthur Corbin, hailed by Karl Llewellyn for authoring one of the first realist writings,[154] wrote: "The common law is not a body of rules; it is a method. It is the creation of law by the inductive process….From an increasingly large number of states of facts and individual decisions, we are constantly striving to arrive at a general doctrine, a universal rule. But we never arrive."[155] Llewellyn himself said that "in a case law system, one cannot simply assume" "the existence of a 'fixed' and 'established' legal rule."[156]

Just like Dworkin's work, these statements can be (and often have been) misread.[157] To those who consider it a conceptual truth that law consists of rules, such comments inevitably lead to the conclusion that the realists were skeptics about law. If the only way to conceive of law is as consisting of rules, then to say that there are no legal rules is akin to denying the existence of law. Consequently, quoting statements like those above out of context has proven an easy way—for both the defenders and detractors—to establish the realists' credentials as radical nihilists who considered the law an elaborate confidence trick, a technique judges learn to cover the real reasons for their decisions.

Traditional legal realists, however, accepted the reality of law and acknowledged its power guide.[158] In the words of Llewellyn, "[a]s human events go, modern appellate judicial decision is already among the more predictable."[159] What they rejected, just like Dworkin and other common law theorists, is the idea that the only way to understand this reality of law is in terms of legal rules from which one deduces the outcome to cases. While traditional realists were generally quite unphilosophical, they clearly did not accept the philosophical

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[152] *See* note 137, *supra* and accompanying text.

[153] JEROME FRANK, LAW AND THE MODERN MIND 120 (6th prtg. 1949) (1930).

[154] *See* Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226–27 n.18 (1931); *see also* TWINING, *supra* note 147, at 30–32.

[155] Arthur L. Corbin, *What Is the Common Law?*, 3 AM. L. SCH. REV. 73, 75 (1912).

[156] KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA § 8b at 12 (Michael Ansaldi trans., Paul Gewirtz ed., 1989) (1933); *cf.* CARDOZO, *supra* note 120, at 161 ("there are few rules: there are chiefly standards and degrees").

[157] See HART, *supra* note 15, at 139, for one of the most culpable misreadings.

[158] *See, e.g.*, Karl N. Llewellyn, *One "Realist's" View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3, 7–8 (1938). Jerome Frank wrote: "I don't say that 'most law is bunk'….I think 'law' is damned real. But I do not believe that it works the way it appears, on the surface, to work." Letter from Jerome Frank to Felix Frankfurter, Dec. 9, 1935, *quoted in* ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 89 (1985).

[159] K.N. Llewellyn, *American Common Law Tradition, and American Democracy*, J. LEGAL & POL. SOC., Oct. 1941, at 14, 40.

corollary of this view, that law had clearly defined limits: "[W]hat [Roscoe] Pound calls law and what he calls non-legal cannot be separated. They are so thoroughly intermingled that it is impossible to divide them."[160]

The legal realists' target was a conception of law encapsulated in Langdell's notorious claim that everything a lawyer needed was to be found in the law library, which he likened to the lawyer's lab.[161] Traditional legal realists' challenge to this picture was not to claim that these materials did not matter, nor was it to say that these materials were just rationalization and obfuscation. Their point was that *on their own*, these materials could not constrain judges, but to the extent that law is constraining and guiding, this is because law is more than these materials.

Traditional realists' point was that in addition to the materials we normally think of as legal (statutes, cases)—what we find in the law library—law consists of much else: "[T]he going institution of our law contains an ideology and a body of pervasive and powerful ideals which are largely unspoken, largely implicit, and which passed almost unmentioned in the books."[162] As this sentence makes clear, this is not a call for a wider test for legal validity, but a claim that finding such a test is impossible because there is no clear division between law and life.

This is a controversial reading of the realists' views, which I cannot fully defend here.[163] I will illustrate it here with just one example, but it comes from one of the best known pieces of legal realist scholarship, and one invariably cited for demonstrating the realists' belief in the deep indeterminacy of law. In that essay, Llewellyn listed thirteen pairs of conflicting canons of interpreting statutes.[164] For example, Llewellyn contrasted giving effect to plain language with the canon of departing from plain language when it leads to absurd results.[165] The essay is thus often read as a devastating realist demonstration of the indeterminacy of law: Since the law does not tell the judge which of these contrasting

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[160] *Id.* at 141; *see also id.* at 269–71. Frank's view seems to be that law consists of more than just rules, *see id.* at 131 ("it is surely mistaken to deem law *merely* the equivalent of rules and principles") (emphasis added), and that those rules should not be understood as what decides cases by deduction, but as aids for thought "in tentatively testing and formulating conclusions" or "in bending his mind towards wise or unwise solutions of the problem before him." *Id.* This is not very different from Dworkin's view.

[161] *See* C.C. Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123, 124 (1887).

[162] K.N. Llewellyn, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN SCHOLARS 183, 184 (1941).

[163] *See* Dan Priel, *supra* note 146.

[164] *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

[165] *See id.* at 403.

canons to choose from, she is free to choose and thus reach any conclusion desired by constructing an argument that looks legally sound.[166]

In fact, the essay's point is almost the opposite. Yes, the different interpretive techniques are always available, and therefore legal rules *alone* cannot constrain the judge. The remarkable thing, however, is that we do not witness endless variety in the law, but that in a given period there is fairly stable uniformity. In fact, Llewellyn said, "the selection [of a canon of interpretation] is frequently almost automatic," because choosing a certain canon "which is always *technically* available may be psychologically or sociologically unavailable."[167] The reason is because beyond legal materials and legal techniques there is a legal tradition and "temper." Those may change from time to time—Llewellyn believed that American law has changed its temper several times throughout its history—but in any given period, one could expect relative stability. This article can be read as a reductio of view that law is made up of a distinct set of legal rules, for such a view entails the thorough indeterminacy of law. That we do not in fact see this is explained by the fact that the model of law as rules is false.

Along similar lines Cardozo wrote that "the natural and spontaneous evolutions of habit fix the limits of right and wrong. A slight extension of habit identifies it with customary morality, the prevailing standard of right conduct, the *mores* of the time."[168] It was part of the judge's role, he added, to "interpret the *mores* of their day," even if we had no guarantee that they would get it right (*cf.* TRS 130).[169] Thus, the role of the judge requires much more than mastery of legal materials. In a remarkably Dworkinian formulation, Cardozo wrote that to determine the law, the judge

> must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales….After the wearisome process of analysis has been finished, there must be for every judge a new synthesis which he will have to make for himself.[170]

The most important normative point in all this is that the law belongs to a particular community, and it is this community's values that give the law its overall content and its predictability. This was the view of most traditional legal realists, and it was especially prominent in the work of Llewellyn.[171] In fact, Llewellyn occasionally used the term "natural law" to explain this idea, but (just

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[166] *See, e.g.*, Leiter, *Explaining*, *supra* note 14, at 1229–30. This is also how this article is read by those who have challenged Llewellyn's arguments. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION __ (1997); Sith N.Y.L. SCH. L. REV. If I am right, both have misunderstood Llewellyn's point.

[167] Llewellyn, *supra* note 164, at 396.

[168] CARDOZO, *supra* note 120, at 63.

[169] *Id.* at 135.

[170] *Id.* at 162, 163.

[171] *See* Llewellyn, *supra* note 158, at 6 ("Guidance for a particular society must plant its feet in that society").

like the common law theorists), he made it clear that this was not the "philosopher's" natural law, but a much more earthly affair, one embedded in the traditions of a particular community and changes with it.[172] In this conception of natural law, there is inevitably a blending of is and ought: When studying law, Llewellyn said, one has to pay attention to the "ideals elements" of law, which are relevant even "for purely descriptive study" of law.[173] As we have seen, all these ideas, including using the term "natural law" to refer to the foundational values accepted by a community, are found in the work of common law theorists; and while he generally eschewed the term "natural law," we find all these ideas in Dworkin's conception of law and morality as well.

As since these values were not fixed stars in the sky, they were the subject of constant debate and deliberation in, among other places, the courts. And so, contrary to the view of the legal realists as cynics who reduced law to personal politics, Llewellyn gave an account of constitutional deliberation in the courts that, but for the anachronism, could be described as remarkably Dworkinian:

> [T]here is no quarrel to be had with judges *merely* because they disregard or twist Documentary language, or "interpret" it to the despair of original intent, in the service of what those judges conceive to be the inherent nature of our institutions. To my mind, such action is their duty. To my mind, the judge who builds his decision to conform with his conception of what our institutions must be if we are to continue, roots in the deepest wisdom. I may differ with him in his choice of an ideal….But I cannot simultaneously defend the dissents in those cases and deny the implicit premise common to majority and to dissent: to wit, that certain fundamental features of our institutions need expression in the rulings of the Supreme Court of the United States, whatever be the language of the Document.[174]

And just like Dworkin, Llewellyn did not confine these ideas to attention-grabbing constitutional cases. He saw the American conception of the common law as connected constantly drawing on "living reason…[as] determined from

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[172] *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 122 (1960); Llewellyn, *supra* note 158, at 6–7; *see also* Arthur L. Corbin, *Conditional Rights and the Functions of an Arbitrator*, 44 LAW Q. REV. 24, 29 (1928). It was precisely for this view that Hart, who otherwise placed the legal realists among the nightmare vision of law, gave Llewellyn as a prime example of the noble dream vision. *See* HART, *supra* note 55, at 133–34. For an extended discussion of Llewellyn's conception of natural law see Dan Priel & Charles Barzun, *Legal Realism and Natural Law*, *in* LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE 167, 171–77 (Makymilian Del Mar & Michael Lobban eds., 2016).

[173] K.N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 583, 602 (1940); *see also* EDWIN N. GARLAN, LEGAL REALISM AND JUSTICE 117–19 (1941).

[174] K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 33 (1934). In another article Llewellyn rejected the suggestion, nowadays regularly attributed to the realists, that Lochner v. New York, 198 U.S. 45 (1905) and its progeny are to be explained in terms of the judges' personal politics. Instead, he preferred an "internal" explanation based on the judges' different judicial philosophies. *See* K.N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 240 (1942).

current life and from without."[175] Rather than being concerned about the anti-democratic nature of courts, Llewellyn saw common law courts "in the grand tradition" as a *model* for democracy, in part because they communicated and sought to "persuad[e] not only the bar, but the general public." This emphasis on the reciprocal nature of democracy while minimizing its majoritarian one, bears obvious relationship to Dworkin's view.

CONCLUSION: PUTTING IT ALL TOGETHER

> What is law?...Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behavior. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process. We studied that attitude mainly in appellate courts, where it is dressed for inspection, but it must be pervasive in our ordinary lives if it is to serve us well even in court. It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances. The protestant character of law is confirmed, and the creative role of private decisions acknowledged, by the backward-looking judgmental nature of judicial decisions, and also by the regulative assumption that though judges must have the last word, their word is not for that reason the best word. Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith in the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have. [LE 413.]

This is the peroration of *Law's Empire*, and it is tempting to dismiss it as a bit of purple prose that would not be out of place in a politician's stump speech on the campaign trail in order to end a book on an uplifting note. Style aside, the content seems utterly baffling to anyone familiar with most jurisprudential debates on the question "what is law?" Either Dworkin is utterly confused, or he is simply addressing himself to a completely different question; probably both.

Except now we can go over this passage, sentence by sentence, and make sense of it. First, the rejection of the idea of law as rules or that law is some distinct part of reality that has some unique properties. Second, the view that law is a *political* idea about how life in a political community is to be organized, and as such one that is going to be contested on the basis of different political ideals. This explains why for Dworkin what distinguishes law from nonlaw is inevitably a political question, although not at all in the sense that morality is one of the criteria of legality. Third, the particular ideals that drives Dworkin's

[175] *See* Llewellyn, *supra* note 159, at 37.

view of what law is is derived from ideas of democratic self-government. And finally, that these underlying political ideals, though "principled" involve a "creative" (*not* discovery) process of a community's rethinking its history and applying it to new circumstances.

These are definitely contested ideas, and, though this may come as a surprise, I do not agree with many of them, but as this Essay is already long, this is not the place to discuss them. Why, despite my disagreements did I engage with them? First, like it or not, Dworkin is much discussed, and so I think there is value in discussing his actual views. Second, as I tried to show, Dworkin's views exemplify and elaborate on ideas with a long history, which legal philosophers should know better. I attempted to show that by better understanding Dworkin we also have a better sense of common law theory and the legal realists. These ideas remain powerful today. In particular, the idea of law as a domain of political contestation, and even as a forum of democratic participation, has deep roots in the United States and it manifests itself in rather unexpected places. There is, for example, a strand of tort scholarship that sees tort litigation as a form of democratic participation.[176] These ideas are, I think, directly connected to Dworkin's conception of law, morality, and democracy. Third, Dworkin captured the fundamental flaw in the basic picture that so dominates jurisprudence. The rejection of conceptual jurisprudence, the views on the continuity between jurisprudence and legal practice, the connection between jurisprudence and political philosophy—on all these issues, Dworkin was right, and his many critics wrong. Those who think that the conceptual approach that still dominates contemporary legal philosophy has been a mistake, and who question the obsession with demarcating law from nonlaw, should not read Dworkin as a participant in that failed project, but—as he clearly was—as someone who presented an important alternative to it.

[176] *See, e.g.*, ALEXANDRA LAHAV, IN PRAISE OF LITIGATION chs. 1, 3 (2017); Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533 (2000)