FORTY YEARS ON
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Abstract. Since the 1960’s Ronald Dworkin has been arguing for a particular account of law that he believed was both explanatorily superior to the one offered by competing theories, and also the basis for normative arguments for producing “right” answers to legal questions. Justice in Robes collects Dworkin’s most recent essays on this subject and thus provides the appropriate opportunity for assessing the legal theory of one of the more influential legal philosophers. In this Review I seek to offer a clearer account than appears in the book itself of Dworkin’s project, and in this way offer a measured assessment of his work. My argument shows that there has been significant misunderstanding of Dworkin’s project and that once it is cleared we can see that Dworkin’s questions are not so far apart from those of other legal theorists. This approach has another benefit, as it ties together Dworkin’s disparate discussions in Justice in Robes into a more coherent whole. Once the structure of Dworkin’s argument is clarified, I move on to examine the details of his argument. Here, I argue, his arguments are often less convincing. Nevertheless, I argue, this need not lead us to wholesale rejection of his theory. I show how his ideas make more sense within a broader account of law that shows the limited but undeniable sense in which his arguments are correct, and inform our understanding of legal practice.

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I. INTO THE RING

... In the blue corner—always in the blue corner—we have Ronald “Hercules” Dworkin. He has fought many fights, probably too many to remember, won many, but never—this is how it is with academics—in a knock-out.1 Yes, that’s what’s so amazing about them, even when it looks like they will not have an answer to that last blow, they always come back with something, always with another trick up their sleeve.2 In the other corner, heavyweights Richard Posner, Antonin Scalia, Stanley Fish, Jules Coleman, Laurence Tribe, Cass Sunstein, Joseph Raz, and Richard Rorty line up, and they are all here to exchange some well-aimed punches. Dworkin, who hardly slowed down since the days of those legendary fights with H.L.A. Hart and Lon Fuller, has added the experience that comes with age to the agility of his youth, making him adept with all the tools of the academic boxer’s trade: drawing distinctions, exposing inconsistencies, using the reductio to show how absurd was his opponent’s view, and of course, that Dworkin trademark move, accusing his opponents of misrepresenting his own views (e.g., pp. 126, 216-222, 226, 266 n.3, 273 n.16).

But if the viewers, initially so impressed by the dexterity of the mind and firmness of the blows, appear now a little jaded, it is because—just like in real boxing—there is just so much one can take home from such displays, especially when, as is the case with many of the theorists before us, this is not the first or even the second time that they meet Dworkin. By now it seems that Dworkin and his rivals know the other’s maneuvers so well, that they can anticipate all of them. As a result, instead of dazzling performances what we get is a long series of calculated parries, interspersed by careful jabs: they may cause some pain, but neither side is going to be forced to give up their game. If necessary they could go on like this forever. Just like in the real thing, there is some thrill in seeing those displays, especially when performed by professionals of the highest order; but it is a rather cheap thrill and the excitement it gives is quickly forgotten without a trace. Indeed, even Dworkin himself probably felt that his readers might have hoped for something else, but true to form, he tells us at one point that not stepping into the ring for yet another round of verbal exchange would be “cowardly” (p. 43)!

What makes the spectacle even more frustrating is that we can see only one of the players. Exciting as it may sound, in reality it makes the match quite difficult to follow. We are forced to guess what Dworkin’s opponents say from his own returns. This often makes it quite difficult to tell whether Dworkin sticks to the rules of the game.3 And we don’t want this to happen.

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1 Is probably has something to do with the fact that “[p]eople in the boxing world share the concept of winning a round even though they often disagree about who has won a particular round and about what concrete criteria should be used in deciding that question?” (p. 10).

2 It helps that participants in academic boxing usually keep their shirts on.

3 For the accusation that Dworkin misrepresents others’ views see James Allan, Truth’s Empire—A Reply to Ronald Dworkin’s ‘Objectivity and Truth: You’d Better Believe it’, 26 AUSTL. J.
After all, we cannot “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”

Do not get me wrong: serious debate is conducted by advancing theses and ideas in public so others could read and challenge them, with the hope that some truth would survive the fight in the marketplace of ideas. But the problem with academic debates is that the law of diminishing marginal returns applies to them with special ferocity, with successive responses containing more rhetoric and less substance. Given that Justice in Robes contains so much of that, one might wonder whether it is a book worthy of an extended review, especially by an outsider to the original debates. Perhaps we should all just hang on by the ropes for the Big League players to come back for yet another round. Such is academic life that we can be certain that at some point they will.

That is why I hope to do something else in this Review. The polemical style of the book, and the fact that its chapters have all been independently published, make the topics discussed seem unrelated: a general defense of theory here, some criticism of legal positivism there, and remarks on equality everywhere. What I hope to do is connect these disparate strands into a more coherent whole. This will allow for a general assessment of the Dworkinian project of explaining and justifying law as it emerges from this book, instead of taking sides on individual points of disagreement between Dworkin and his opponents.

Inevitably, I will say more on some parts of the book than on others. My decision on which topics to focus was guided by an attempt to understand Dworkin’s approach and carry forward the debate his work has generated, a debate that, as I indicated already, seems to have degenerated to point scoring instead of illuminating the issues at hand. So I have decided to focus on Dworkin’s contributions to legal philosophy, first, because this is a topic to which Dworkin returns at some length in this book, and also because this is the field to which Dworkin’s contributions seem to me to

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LEGAL PHIL. 61, 87-88 (2001); Brian Leiter, The End of the Empire: Dworkin and Jurisprudence in the 21st Century, 36 RUTGERS L.J. 165, 171 (2004), and the text accompanying notes 5 and note 90, infra.


5 There is also a tendency to accuse the other of misrepresenting one’s views, which often serves as starting point for spin-off debates on the question whether the accusation of misrepresentation is true or not See, e.g., Richard A. Posner, Reply to Critics of The Problematics of Moral and Legal Theory, 111 HARV. L. REV. 1796, 1797-98 (1998) (arguing that Dworkin’s allegation that Posner misrepresented Dworkin’s views is untrue).

have been most significant. Even though my conclusions will ultimately be fairly critical of Dworkin’s arguments I will try to show that some of the issues he has raised are significant and deserve close attention.

This is less a trivial statement than it may first seem. Even though, as this book demonstrates, Dworkin still engages with other legal philosophers’ work, he has always been something of an outsider among them. At least in part this seems something has happily acknowledges, as he believes much of contemporary legal philosophy is misguided (pp. 33-34). In return other legal philosophers have repaid him by dismissing his work as completely wrong and of little lasting value.7 It has even been suggested by some of them that his work is concerned with questions so different from those of contemporary legal philosophy that he might not even properly belong among the ranks of jurisprudents.8 One purpose of this Review is to explain why, despite significant methodological differences between Dworkin and other legal philosophers, his concerns are not very different from theirs, and why, despite the deficiencies of his arguments, some of his claims are significant.

This requires some clarifying groundwork, which is the task of Part II. Prior to any disagreement about the content of legal positivists’ theories, Dworkin has always argued that they take the wrong approach to understanding their subject matter. The common approach among legal philosophers is that the first question one must settle is a “descriptive” matter of what law is. Only then, should one turn to normative questions like what would make for a good law, or justified law.9 But this “description-first” approach is exactly not Dworkin’s approach. His arguments often intentionally constantly straddle the line between what legal practice is like and what it should be like. In his view in order to understand what legal practice is, we must begin with attributing a point to it. This point then serves to explain what the practice is. Since this attribution of a point to the practice is a normative question legal theory is a thoroughly evaluative enterprise, but since it is one that depends on what the practice is it is also must relate to legal practice. So it is hard to have a clear-cut distinction between descriptive and normative analysis, but since working out a justification for the practice is conceptually prior to any attempt at describing the practice, because an explanation of the practice as well as the determination what belongs in the practice can only be made against a normative background of what would make the practice legitimate, for

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7 Like any other prominent theorist Dworkin had its fair share of criticism. But it has been argued recently that Dworkin’s writings have contributed close to nothing of lasting significance to jurisprudence. See Leiter, supra note 3, at 165-66, passim; Thom Brooks, Book Review, 69 MOD. L. REV. 140, 142 (2006) (reviewing DWORKIN AND HIS CRITICS (Justine Burley ed., 2004)).

8 See ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 27 (2d ed. 2005) (claiming that Dworkin’s theory is a “challenge to analytical jurisprudence”); JULIE DICKSON, EVALUATION AND LEGAL THEORY 22-23 & n.31 (2001); H.L.A. HART, THE CONCEPT OF LAW 240-41 (2d ed. 1994) (arguing that Dworkin’s theory is concerned with different issues).

9 See, e.g., DICKSON, supra note 8, at 135-36.
Dworkin the normative inquiry seems to take precedence. I believe this point is crucial to understanding Dworkin’s arguments and that many misunderstandings and misinterpretations of his view are the result of attempts to force his theory into the description-first model.

But if that’s the case, it seems that there is already an unbridgeable gap between Dworkin and his positivist opponents, even before we take the step. Part II shows how to create a bridge over this gap. My aim is to show there why despite this starkly different methodological starting point Dworkin’s substantive concerns are quite similar to those of other legal philosophers. Or so at least I will argue. Though Dworkin himself, to the best of my knowledge, never does that, I will present what I take to be the structure of his argument in such a way that will highlight this similarity. The conclusion of this Part will be that Dworkin presents a coherent structure to answering some of the most fundamental questions of jurisprudence. But this structure depends on the truth of certain substantive claims. In Part III I go on to examine whether those Dworkin’s arguments in defense of those claims are true. I pay there particular attention to Dworkin’s defense of the objectivity of morality and its centrality to his theory of law. In contrast with the positive conclusions of Part II, the conclusions of Part III are that the details Dworkin’s answers are unconvincing theoretically, and that his practical suggestions for changing legal practice in order to make it conform better to his theoretical construction are unappealing.

The failure of Dworkin’s normative argument should have disposed of his theory. But that is not the end of the matter. One of his most persistent observations is that besides its normative failures, legal positivism cannot explain some of the most familiar aspects of legal practice. This aspect of Dworkin’s critique of positivism, though related to some issues discussed in earlier Parts, can be severed from the rest of his arguments. Even if Dworkin’s theory of law is faulty, if these claims are successful, they show that legal positivism is faulty as well, and that we should look for some other alternative. I take up this matter in Part IV and argue that this indeed the case: both Dworkin’s theory and legal positivism do not give convincing accounts of law. I argue there that while Dworkin was right to emphasize the discursive aspect of law, and that legal positivists’ account of law as a set of rules is deficient, this does not totally undermine the positivist account. Rather it shows that law has what I call a “dual life,” that it is rule-based and discourse-based at the very same time. Once this point is understood it illuminates our understanding of law in a way that neither legal positivism nor Dworkin’s critique of it can. I show in the final Sections of Part IV how this account gives us better understanding of the way legal change is brought about, as well as how political differences can translate themselves to different legal systems.
II. HOW TO UNDERSTAND LAW

A. What Is the Question?

In 1964 Ronald Dworkin opened one of his earliest published works with the following words:

What, in general, is a good reason for decision by a court of law? This is the question of jurisprudence; it has been asked in an amazing number of forms, of which the classic “What is Law?” is only the briefest.10

As he explained, the question of jurisprudence is how to make sense of what the law requires and what judges should do in order to discover that. Twenty years later in a short paper in which he summarized his thinking on law, he made it clear that this had been his project all along. He said that he was concerned with the question of “the sense of propositions of law … [the question which] asks what these propositions of law should be understood to mean, and in what circumstances they should be taken to be true or false or neither.”11 Some forty years after his early essay Dworkin still maintains that his main concern is with understanding what law is “in what I shall call the doctrinal sense,” namely claims about “what the law requires or prohibits or permits or creates” (p. 2).

It is already at the very first lines of the article published in 1964 that others concerned with the question “what is law?” have begun to be puzzled by Dworkin’s approach. For on its face it seems odd to say that “what is law?” is only a shorter way of saying “what is a good reason for deciding a case?” or “how should a court decide this particular case?”12 Not only do these sentences seem to have an utterly different meaning, it does not even seem that answering the first question would be particularly helpful in answering the second. A natural answer to the question “what is law?” would presumably look something like this: “law is the set of rules in which a state determines certain permissions, prohibitions and other normative requirements that govern the lives of those under its jurisdiction.” This suggestion is, no doubt, incomplete and vague, but it does not seem that any elaboration or clarification of it would give us anything that is going to be particularly helpful in answering the question how cases should be decided. For this we need to know the content of the rules in a given jurisdiction. When these are known the theorist could offer a theory of adjudication or theory of interpretation, and though such theories are probably going to be related to a theory of law in some way, they do not look like the same thing at all. As one critic of Dworkin put it, Dworkin offered a theory of

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12 Compare with RONALD DWORINKIN, LAW’S EMPIRE 1 (1986), where Dworkin’s first chapter is entitled “What is Law?” immediately followed by the explanation that “[i]t matters how judges decide cases.” Id. (emphasis added).
adjudication, which he “regard[ed] ... willy-nilly and without further argument as a theory of law.”

One popular way of making this point is to say that Dworkin fails to distinguish between the question “what is law (in general)?” and the question “what is the law (applicable in a particular case)?” I believe much of the disagreement with, even incomprehension of, Dworkin’s views stems from failure to understand in what sense the question “what is law?” is similar to Dworkin’s question “how should judges decide cases?” To see how these two questions are related and why Dworkin might not be guilty of a misunderstanding so fundamental that it thwarts his theory right from the first step, we must look first at the view which takes this distinction very seriously and which Dworkin has always challenged—legal positivism.

### B. Two Kinds of Legal Positivism

When talking about law in the abstract legal philosophers often talk about three different things: the validity of legal norms, the normativity of law, and the content of legal norms. A legal norm is said to be valid if and only if it is a member of a class of norms that can be identified (in some yet unspecified way) as belonging to a certain legal system. The validity of a legal norm, in other words, is the “mark” that distinguishes it from other norms, that explains why it is a legal norm (as opposed to a social or moral norm). The content of a legal norm is what that norm requires us to do (e.g., pay a certain tax), what it prohibits us from doing (e.g., take someone else’s property without their consent), what powers it gives us (e.g., to make wills or contracts), or which immunities it grants us (e.g., a right against invasion of our privacy). In all cases, we can draw some kind of link between a certain set of facts that have to obtain (signing certain documents, earning certain amount of money) and a certain legal outcome (the creation of certain contractual rights and duties; the duty to pay a certain amount of tax). The normativity of a legal norm is the sense in which the legal responses just mentioned are in some sense “non-optional,” the way in which legal norms are demands from us that we take or refrain from taking certain actions.

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15 Hart, *supra* note 8, at 6. This definition fits criminal law prescriptions particularly well, but it is true of other norms as well. Contract law is non-optional in the sense that it defines a set of conditions under which one may use certain recognized legal mechanisms in order to create non-optional contractual rights and duties. Cf. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941). Beyond that, defining normativity would put me in controversial waters that I do not wish to enter here.

16 For more on the distinction between validity, content, and normativity, see Danny Priel, *Trouble for Legal Positivism?*, 12 LEGAL THEORY 225, 232-36 (2006).
Clarifying these concepts is important, because disagreements among legal philosophers are often best understood as resulting from different views on the relationship between these three concepts. At first this suggestion may sound strange: take the age-old debate between legal positivism and natural law. This debate is often taken to be about the relationship between law and morality, with legal positivism taken to be the thesis that there is no necessary connection between the two, and natural law (and Dworkin) taking the opposite view. But I believe this is a crude way of characterizing the difference between legal positivists and Dworkin. What really is at stake between positivists and Dworkin is more fundamental and touches on the relationship between validity, normativity, and content. This difference of opinion is more fundamental because it is of greater explanatory power: once these differences are understood, we can understand why Dworkin and his positivist adversaries’ views differ on the relationship between law and morality, as well as many other questions. I believe differences of opinion on such diverse questions as whether the law contains something like a rule of recognition, whether the law contains principles which are logically distinct from rules, whether knowing the content of law involves moral considerations, what the relationship between theory of law and theory of adjudication is, and as we shall see even the question why Dworkin thinks that the question “what is law?” is a brief way of asking “what count as good reasons for a judicial decision?,” ultimately derive from different views about the relationship between validity, normativity, and content.

Positivists disagree among themselves on many questions. As a first cut, however, we can say that what distinguishes the positivist account from Dworkin’s is that positivists treat the question of validity as distinct from the question of content, and these two as separate from the question of normativity; for Dworkin, as will be clarified below, the three questions are inseparable. Initially the positivist view that all three concepts are independent of each other seems quite plausible: to know how to decide a case we need first to identify the legal norm that governs the case; and to know that we need to know how to identify legal norms in general. How else are we to know what the law requires? The positivist answer seems appealing: identifying valid legal norms requires identifying a certain procedure by which legal norms are promulgated, not looking into the norm’s content.

\[17\] For positivist defenses of no necessary connection between the two see KRAMER, supra note 14, at 1, passim; Jules L. Coleman & Brian Leiter, Legal Positivism, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 241, 241 (Dennis Patterson ed., 1996) ("All legal positivists [believe] ... that there is no necessary connection between law and morality"). In contrast Dworkin has accepted the natural law position that such a connection does exist. See Ronald A. [sic] Dworkin, “Natural” Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982). That this is not what stands between the two camps can be attested by the fact that recently several positivists have argued that there are necessary connections between law and morality. See, e.g., John Gardner, Legal Positivism: 5½ Myths, 46 AM. J. JURIS. 199, 222-25 (2001) (calling this a “myth”); Leslie Green, Legal Positivism, at § 4.2, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at http://plato.stanford.edu/entries/legal-positivism/#4.
After all, there are many very different legal norms with very different content, but what is common to all of them, what makes them legal norms, is that they came into being by following a certain procedure. This is the positivist argument for separating a legal norm’s validity from its content. Many positivists have also argued that we can understand in what way a legal norm is binding (“non-optional”) independently of its content: it is not what the law requires that makes it binding; rather it is the fact that it is the law that explains why we are under an obligation.\(^\text{18}\) Taken together these arguments explain why positivists consider validity to be the most fundamental concept in identifying law: if we want to know what the law requires and how it is binding on us, we must first identify legal norms.

But for all the positivists’ emphasis on validity, they seem to vacillate between two theses. To see the difference between them think of legal norms as closed boxes. The content of the norm, that is, what the norm requires, is found inside the box. What the legal positivist argues is that there is a mark outside these boxes by which we can identify them as legal norms without having to look inside the box to examine its content. Now there are two ways of understanding the positivist claim: according to the first the mark identifies those things that are legal norms, but it cannot identify which norm is applicable to which case, since this is already a question of the norm’s content, and that is something that identifying the mark of legal norms cannot tell us. Thus, an English judge could know that in general things that have been enacted by the Queen in Parliament are laws,\(^\text{19}\) so she could identify some things as law, but this will not tell her what the law requires on any particular question. The second interpretation is that we can identify which norm applies to which case, that is, that the mark not only identifies legal norms in general but also tells us to which cases they apply. What it cannot tell us is what the legal norm requires in that particular case: that is the content of the norm and in order to know that we must look inside the box.

Positivists seem to vacillate between these two theses. At times we are told that legal positivism is a thesis for the identification of the “nature of law,” i.e. what distinguishes valid laws (in general) from other things in the world.\(^\text{20}\) According to this view the “rule of recognition,” the positivist term for what identifies valid legal norms, can only identify those marks that distinguish all laws from everything else. But at other times positivists argue


\(^{19}\) *Hart, supra* note 8, at 102.

\(^{20}\) *Id.* at 6–10; Joseph Raz, *Dworkin: A New Link in the Chain*, 74 *Cal. L. Rev.* 1103, 1107 (1986) (reviewing RONALD DWORIN, A MATTER OF PRINCIPLE (1985)) [hereinafter *Dworkin*] (“All [the rule of recognition] does, and all it is meant to do, is to identify which acts are acts of legislation and which are the rendering of binding judicial decisions, or more generally, which acts create law.”); Joseph Raz, *On the Nature of Law*, 82 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 1, 3-5 (1990); see also note 27, *infra*. 
that with the rule of recognition we can “identify[] [the] primary rules of obligation” in a particular jurisdiction.21

Let me begin with the second interpretation. The problem with it is that it is hard to see how a formal test like the rule of recognition could identify individual legal norms. It is grounded in the belief that once we have a test for recognizing what separates law from non-law, “the [content of] law can be simply understood and [the law] applied straightforwardly,”22 but this view is mistaken, because no formal test like the rule of recognition could alone tell us how to which individual cases particular legal norms apply: for this we must add an account that explains how to move from the identification of something as belonging to the group of legal norms to knowing its content.23 Understood this way legal positivism suffers from a fundamental error: it presents itself as an account for identifying what the law requires, but it does so only by falsely assuming that once one knows the features that identify valid legal norms in general one can know the norms applicable to a particular case.24

This suggests we should look instead at the first interpretation of the positivist project. According to this view the positivist account was never intended to give judges a procedure for deciding cases.25 The legal positivist on this account is a bit like a natural scientist: there are, no doubt, many contingent facts about law, many differences between laws in different times

21 HART, supra note 8, at 100. Andrei Marmor collapses the distinction between validity and content altogether when he says that legal positivism aims to explain what makes “statements of the form—‘According to the law in ___ X has a right/duty/etc. to ___.’” ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUE 135 (2001).

22 MARMOR, supra note 8, at 95. In the same vein Marmor also suggests that following a rule consists in understanding its “literal” meaning. Id. at 104.

23 See Priel, supra note 16, especially at 236–43.

Some legal positivists, so-called “inclusive” positivists, allow some content-based (and not merely formal) considerations to be part of the rule of recognition. See generally COLEMAN, supra note 14, at 103–48 (2001); MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET 17-140 (2004); WAlUCHOW, supra note 13, at 80–141 (1994). However, this does not solve the problem identified in the text, because their argument is that the tests for identifying valid legal norms can include substantive constraints (for instance, that a putative immoral norm cannot be a legal norm). But this presupposes that there is a prior and non-content based method for individuating legal norms and telling its content, which their theory does not supply. Even those (like Coleman) who believe that certain norms can become legal purely in virtue of their content have to explain how we are to know which of the myriad of possible content-based norms out there are legal and which are not.

24 On this reading of legal positivism its problem is more fundamental than the problem Dworkin believed undermines it. Dworkin challenge to legal positivism, what he called the “semantic sting,” is roughly that legal positivism cannot explain the existence of prevalent disagreements among lawyers on fundamental and central questions. For a discussion of this argument see text accompanying note 75, infra. But we now see that the problem is not so much the existence of fundamental disagreements among lawyers (something that many positivists have argued they can explain), but rather the identification of the content of legal norms in the first place. Even if there had been no disagreements among lawyers at all, this version of positivism says nothing on how what the law requires is to be identified.

25 See HART, supra note 8, at 240; H.L.A. Hart, Comment, in ISSUES, supra note 11, at 35, 36 (“there is a standing need for a form of legal theory … the perspective of which is not … what the law requires in particular cases.”).
and places, but underneath all of them there are (or at least there may be) some “law-making properties” in virtue of which some things in the world are laws, and the positivist aims to give an account of those properties.

By way of analogy consider the case of water: we are all familiar with many “superficial” features of water, for instance that it is colorless, odorless, liquid at room temperature, and that it quenches human thirst. Those features are all contingent: water could have been (and in some possible world is) blue, or solid at room temperature. But there is one necessary thing about water, namely being H2O. Conversely, something may have all the superficial features of water, and still be something else if it does not have the chemical structure H2O.26 The version of legal positivism under consideration purports to do the same for law, i.e. to distinguish the many different contingent facts about law from those features that something must necessarily possess in order to be law.27 Notice that on this version of legal positivism what drives the legal positivist’s distinction between law and morality is not so much a substantive claim about the separation between law and morality, but rather a methodological one: if one wishes to understand a certain phenomenon, the first step is to see the ways in which it is different from similar things.28

Dworkin has serious doubts that this project is tenable (pp. 215-16), and I share this view, although our reasons are somewhat different.29 These arguments are not directly related to our concerns, so I will not repeat them here. But even if they can be adequately answered, on this interpretation legal positivism turns out to be not false but seriously incomplete: this version


27 Over the past three decades this view has been most eloquently defended by Joseph Raz. See, e.g., Joseph Raz, Can There Be a Theory of Law?, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324, 328 (Martin P. Golding & William A. Edmundson eds., 2005) (“only necessary truths about the law reveal the nature of law”); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 104 (1979) (“Since a legal theory must be true of all legal systems … the identifying features … [of law] it characterizes … must of necessity be very general and abstract. … It must fasten only on those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. This is the difference between legal philosophy and sociology of law.”).

28 See John Austin, The Uses of the Study of Jurisprudence, in JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 365, 371 (H.L.A. Hart ed., 1954) (1832): “By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and divisions which relate to law exclusively.” It is evident from this quotation that Austin’s reason for separating law from morality here is methodological: “detaching” it from morals allows us to understand it better. This is different from (though consistent with) Austin’s famous substantive slogan that “the existence of law is one thing; its merit or demerit is another.” Id. at 184. See also Joseph Raz, Incorporation by Law, 10 LEGAL THEORY 1, 15-16 (2004).

of legal positivism is a theory of law that does not give us any clue as to how to move from identifying the group of things that are laws to knowing the content of individual norms. In other words it is a theory of law, that by its proponents’ own admission is silent on the question of identifying what most of those who come in contact with the law care most about, what it requires of them.  

C. The Relationship Between Content and Normativity

This failure of both versions of legal positivism suggests something important, and that is that the gap between the question “what is law?” and the questions Dworkin is interested in, “what is the law?” or “how should judges decide cases?,” may not be as wide as it seemed at first. These questions are separate only if we are interested in distinguishing those things that are laws from all other things in the world, and that is something which may be more difficult than legal positivists seem to assume. But if we are interested in identifying individual legal norms, then there may be no basis for the accusation: “Law” in the abstract is just the aggregate of “the laws” of particular cases (cf. p. 221). There may simply be nothing beyond that for us to look for. And since judges are required to decide cases by following “the law,” to identify what the law requires is also to identify how judges should decide cases.

This undermines the distinction between legal validity and the content of legal norms, but it still does not tell us how judges should identify what the law requires. This is where the third concept mentioned earlier—that of normativity—comes in. Again, it will be useful to contrast Dworkin’s position with that of the positivists. The statement “you have a moral obligation not to kill others,” is true, if it is true, in virtue of its content, and not in virtue of some mark of validity. Likewise, what makes a particular moral norm binding, i.e. what explains its normativity, is its content, not the fact that it was said by someone or was promulgated by some recognized procedure. As we have already seen, some positivists argue that one of the differences between law and morality is that unlike the case of morality, law’s normativity does not depend on the content of its norms. Hart offered an early defense of this view, when he tried to show that what makes legal norms binding was the fact that they were part of a certain social practice, and not because what they required was necessarily morally good.  

30 In addition, it leaves open the possibility that in order to identify individual legal norms we are required to take evaluative considerations into account, something that positivists have denied. See Priel, supra note 16, at 236-38.

31 See HART, supra note 8, at 55-59. This is but one reading of Hart’s view. It is also possible to read Hart as specifying the conditions under which people consider themselves to be under an obligation. For a critique of Hart which assumes the first interpretation see J OSEPH RAZ, PRACTICAL REASON AND NORMS 53-58 (2d ed. 1990); Ronald Dworkin, The Model of Rules II, in TAKING RIGHTS SERIOUSLY 46, 48-58 (rev. ed. 1978) [hereinafter RIGHTS].

It should be noted, however, that some philosophers have argued that the basis of moral obligation is also conventional. For a defense see G ILBERT HARMAN, THE NATURE OF
recent versions of the same approach tried to explain law’s normativity by developing the idea that law is a convention or a shared co-operative activity.32

But Dworkin objects to this too. Dworkin’s defense of law’s normativity goes all the way to law’s content. In an earlier book he wrote that “[j]urisprudence is the general part of adjudication, a silent prologue to any decision at law.”33 This passage puzzled—and was vigorously contested by—many a reader of Dworkin.34 It is usually interpreted by critics to suggest that in order “to know the law governing each case one must be making, explicitly or implicitly, assumptions about the nature of law.”35 But this, I believe, is a misunderstanding of Dworkin’s point; properly understood this passage fits Dworkin’s general account very well and is quite plausible. What Dworkin says here is that for law to create obligations it has to be legitimate; otherwise it only creates what has the appearance of obligation, but is in fact merely a demand backed by the threat of punishment. But since we believe that law is capable of being legitimate (and only when it is legitimate it creates obligations), then just like in the case of morality, we must look at law’s content in order to know whether it creates genuine obligations. If, for instance, the law of a state is illegitimate its demands for one’s tax money are no more legitimate (and thus no more capable of creating obligations) than those of the robber who demands for one’s wallet. After all, it was the positivist Hart who insisted, before Dworkin, that law is not the gunman situation writ large,36 and arguably the reason for that is that the gunman’s demand is illegitimate. To be sure, the way the money is demanded and the identity of the person (or body) who makes the demand will affect the question whether the demand is legitimate: a just demand for my tax money may not be legitimate if made by a government that got to power by force. Nevertheless, one crucial factor in determining whether the demand is legitimate is what is being demanded. In this way Dworkin links between what the law requires (its content) and what it means for law to make a requirement (its normativity).
Interpreted this way Dworkin’s account appears to be quite robust. There are six features of it that are worth emphasizing: First, to some degree the question of legitimacy depends on the question of the identification of law, or, to use the language used before, the validity, content, and normativity of law are closely tied. Second, Dworkin’s account explains his claim that jurisprudence is a branch of political morality (p. 241), for the examination of the moral desirability of a legal norm is an essential element in answering the question “what is (the) law?” Third, it explains why the question of legitimacy (and therefore the question of law’s normativity) is asked at the level of individual norms and not at the level of legal systems: whether some demand creates an obligation one should follow cannot be answered generally. Fourth, because the question of legitimacy can be raised with regard to every legal norms, we can understand Dworkin’s otherwise surprising claim that his theory of law “is equally at work in easy cases [as in hard cases], but since the answers to the questions it puts are … obvious [with regard to easy cases], or at least seem to be so, we are not aware that any theory is at work at all.” There are at least seven ways of drawing the line between easy and hard cases: as a distinction between cases involving simple facts and cases involving highly complex facts; between simple legal issues (parking in a no-parking area) and highly complex law (complex tax rules); between matters governed by law and matters on which there is a lacuna in the law; between cases in which there seems to be only one applicable legal norm and cases which seem to be governed by several, conflicting legal norms; between cases in which judges have little or no discretion and cases in which they are given wide discretion; between cases in which the law conforms with morality and cases in which what the law requires seems to be in conflict with our moral intuitions; and finally between cases that are socially uncontroversial and cases dealing with matters on which society is divided. But whichever way this distinction is drawn, understood as a question of normativity and legitimacy, Dworkin’s claim makes sense: the need to legitimate the use of force is equally pressing and goes “all the way down” in easy cases as in hard cases. Fifth, the particular decisions implicate our more general commitments as to what could count as obligation-creating practices: if we interpret a particular instance as one of obligation-creating law (as opposed to a mere demand backed by threat), then this has to figure in as part of a larger picture of what could count as law more generally. This way, again, the decision at the particular level cannot be separated from the more abstract and general level. Finally, this account explains why, if we are interested in the legitimacy of the use of force by the state, the fact that there exists a practice of paying attention to, say, certain pronouncements that come out of Congress, does not suffice. Rather, it is only because we can provide some normative account of the value or justification of paying attention to those pronouncements, that we can

37 DWORKIN, supra note 12, at 354; accord id. at 266 (“easy cases are … only special cases of hard ones”). This seems also to be the view in Justice in Robes too (pp. 55-56).
legitimate the use of force involved in those pronouncements of Congress we call statutes.

It would be a mistake, however, to think at this point that any of this implies that judges should consider questions of political morality in their judgments. Even we accept everything in this reconstruction of Dworkin’s argument we may still conclude that courts can be legitimate only if judges refrain as much as they can from relying on (overt) moral arguments. This conclusion in support of non-political courts may itself be based on moral and political considerations such as separation of powers, democracy, judicial competence and individual responsibility (cf. p. 174).38 This, however, is not Dworkin’s view. He believes that what makes a judicial decision legitimate, and ultimately what justifies the authority of law, is that it makes the correct moral demands; and since he also believes courts are capable of finding what the morally right answer to political question is (perhaps even more so than other branches of government), they ought to engage in moral deliberation. As this conclusion does not follow from Dworkin’s argument as outlined until now, he needs to offer a separate argument for this conclusion. He does. So the question to which we must turn now is what makes a judicial decision legitimate.

III. CAN THE DWORKINIAN MODEL BE JUSTIFIED?

It stands to reason that in order for judicial decisions to be legitimate judges should follow the law. But what exactly does it mean for judges to follow the law? How should judges approach their task of following the law in order to render their decisions legitimate? Dworkin’s answer is that judges’ decisions are correct as a matter of law, and hence legitimate, if judges consciously try to determine the moral rights and duties of the parties in question. The argument essentially is that the state must treat those subject to its laws as bearers of rights and most fundamentally the right to equal concern and respect. This demand applies to all branches of government, but it is especially true of courts, because courts are “forums of principle,”39 that is, unlike other branches of government they are places to which people come to claim what they are entitled to according to pre-existing moral principle. As Dworkin put it already in his first academic publication, those who come to court asking for redress, never come to court as supplicants hoping for the court’s compassion or mercy, they always come as litigants, demanding what’s theirs by right.40

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39 Dworkin, supra note 20, at 69-70.

40 See Ronald Dworkin, Judicial Discretion, 60 J. Phil. 624, 637 (1963).
Dworkin thus believes that what renders a judicial decision correct is that it complies with the way morality requires we treat the person in question. But this requirement could clash with another strongly held demand, namely that law be public and impartial, and that those who administer it will not rely on their personal moral views in deciding cases. An explicit call to judges to rely on moral considerations may result in biased decisions based on different judges’ personal views on what’s moral, even if the judges make a conscientious effort not to do that. It goes without saying that this hardly seems like a recipe for legitimate court decisions.

Dworkin of course recognizes that there may be an occasional judge who abuses her job, or even a corrupt legal system in which the judiciary as a whole routinely and pervasively does so, but this does not undermine his belief in his model according to which, despite the great controversies about morality, judges can discover the objective content of morality. Dworkin’s answer thus has two components. One, that a politically involved judiciary can rely on moral values and still follow the law, and second, that judges should do so. Dworkin does not distinguish between these two issues in this way in Justice in Robes, but his focus in the book is more on the first question than on the second. I will therefore follow him and dedicate most of my discussion, in Sections III.A and III.B, to this question. Section III.C will raise some doubts regarding Dworkin’s answer to the second question.

A. Right Answers Out of Disagreement

Dworkin’s argument rests on the assumption that there are objective moral values on which judges should anchor their decisions in their attempt to reach the right, legitimate, decisions. But the relativist offers all kinds of arguments that challenge this view. Each society, she says, perhaps even each person, has a different set of moral values which cannot be judged as correct or incorrect by the moral standards adopted by others. The second is an argument from democracy: according to this argument even if in some sense there is a right answer to moral questions, given the pervasive and seemingly irresolvable societal disagreements on such matters, the best decision procedure we have is to follow a majoritarian rule. Giving courts the power to rule on such matters is inconsistent with this decision procedure, because judges are unelected, unaccountable, and sometimes rule against unambiguous popular majorities.

For someone who believes that the legitimacy of judicial decisions depends on their moral correctness such challenges are crucial to answer, and it is no wonder that Dworkin indeed dedicates so much space to defending the objectivity of morality, not so much for its own sake, but as part of his argument about what law is (that is, how judges should decide cases). In Justice in Robes Dworkin does not discuss the challenge from democracy, although he did so in other writings. There he argued that in cases in which the law represents a societal choice, courts should follow that choice only if such choice does not flout fundamental rights. When fundamental rights are infringed, judges should ignore majoritarian preferences and rely on the
“trumping” power of rights over majorities. But this answer presupposes that there is a satisfactory answer to the first challenge, i.e. that despite the controversy about moral values, they have objective content which judges can find and rely on in their judgments. Though not stated in quite this way, this is the place that Dworkin’s arguments in favor of moral objectivity figure in his argument: explaining why morality is objective is a crucial aspect of his theory explaining why courts may be legitimate, and why on matters of rights and duties judges need not care much about what the majority thinks. For Dworkin to explain the objectivity of morality is ultimately to explain the legitimacy of courts.

B. Interpretive Concepts and Objectivity

(1) What Are Interpretive Concepts?

Dworkin does not aim to give a psychological, logical, or historical account of the fact of pervasive disagreement about values. He takes it pretty much for granted that such disagreements exist (pp. 77-78). He argues that these disagreements do not undermine his claim that moral propositions have determinate answer, and he elaborates a method he believes would lead judges (and others) to reach the correct (and hence legitimate) answer to legal disputes.

The key to Dworkin’s solution is what Dworkin calls “interpretive concepts.” Ever since Law’s Empire Dworkin has been arguing that law, along with many other concepts (including moral concepts) are best understood as interpretive concepts. Dworkin begins by contrasting interpretive concepts with criterial concepts and natural kind concepts: criterial concepts, such as book, are concepts whose extension is fixed by a set of necessary and sufficient criteria (pp. 9-10). Two people share a criterial concept only when they (at least roughly) share the criteria for their application. Natural kind concepts, such as water, are concepts whose extension is fixed by what certain things in the world turn out to be (even if this conflicts with societal attitudes on the matter), and therefore on whose content we defer to experts (p. 10). Two people share a natural kind concept if they are talking about the same thing, even if their beliefs on that thing are different.

Why does Dworkin think that we need another kind of concept to explain moral and legal discourse? It makes no sense, says Dworkin, to think of political concepts as natural kind concepts, because, as he is fond of saying, they have no DNA (pp. 3, 113, 152, 215). But in that case why not say that

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41 For a succinct account see Ronald Dworkin, *Rights as Trumps*, in *Theories of Rights* 153 (Jeremy Waldron ed., 1984). The underlying rationale is that majoritarian preferences are themselves defensible only because they guarantee that each person is treated with equal concern and respect. Therefore they have no force when they violate this demand. See also *Ronald Dworkin, Is Democracy Possible Here?: Principles for a New Political Debate* 140-41 (2006) [hereinafter *Dworkin, Democracy*]; *Dworkin, supra* note 39, at 23-28.

42 See *Dworkin, supra* note 12, at 42-46.
moral concepts are criterial? According to this view there are certain criteria that fix the meaning of, say, justice, and if there are disagreements between people about what constitutes justice it simply shows that though they use the same word, they in fact have different concepts of justice. Dworkin rejects this answer, because he believes it leads to absurd conclusions. He thinks that only if we share a concept we can make sense of disagreement. If, to take the well-worn example, I talk about “bank” thinking about the edge of a river and you talk about “bank” thinking of a financial institution, and we disagree over the question whether banks are often damp, then our disagreement is not real, because we are not talking about the same thing.43 But since “lawyers obviously do genuinely disagree about the content of the law of their jurisdiction” (p. 221, emphasis added), we must have a different explanation for disagreement in law. Interpretive concepts are supposed to provide the solution, for they are supposed to explain the possibility of concepts that have no DNA but have objective content despite the existence of persistent disagreement over their content. Thus interpretive concepts play a crucial role in Dworkin’s overall account, because only if such concepts exist there can be objective right answers to the question what the law requires, which as we have seen is an essential step for the legitimacy of what courts demand.

But in what sense can we say that two people that have radically different beliefs as to what justice demands share the concept of justice? Just inventing a new kind of concept and saying that people can share it despite substantial disagreement would be special pleading. We need a plausible account of what such concepts are. Oddly, despite the centrality of interpretive concepts to his overall argument, until Justice in Robes Dworkin never gave a clear definition of what he had meant when he first introduced these concepts. In Justice in Robes he tries to remedy this by giving the following explanation:

Some of our concepts function differently …: they function as interpretive concepts that encourage us to reflect on and contest what some practice we have constructed requires. People in the boxing world share the concept of winning a round even though they often disagree about who has won a particular round and about what concrete criteria should be used in deciding that question. Each of them understands that the answer to these questions turn on the best interpretation of the rules, conventions, expectations, and other phenomena of boxing and of how all these are best brought to bear in making that decision on a particular occasion. … Interpretive concepts … require that people share a practice: they must converge in actually treating the concept as interpretive. But that does not mean converging in the application of the concept. People can share such a concept even when they dramatically about its instances. So a useful theory of interpretive concept—a theory of justice or of winning a round—cannot simply report the criteria people use to identify instances or simply excavate the deep structure of what people mainly agree are instances. A useful theory

43 Incidentally, the two meanings of this favorite example of ambiguity (also used in DWORKIN, supra note 12, at 44) are cognates. See Bank, 1 OXFORD ENGLISH DICTIONARY 930, 931 (2d ed. 1989).
Dworkin does not demand much. As he says in a different place, people “share the concept [justice] because they participate in a social practice of judging acts and institutions just and unjust and because each has opinions, articulate or inarticulate, about what the right way to continue the practice on particular occasions: the right judgments to make and the right behavior in response to those judgments” (p. 224). Dworkin concedes that we can rule out some claims about interpretive concepts on semantic grounds alone, for instance the claim that “seven is the most unjust of the prime numbers” (p. 151), but he maintains that all the interesting debates, all the debates that political philosophers and lawyers seriously engage in, are not of this sort.

To understand Dworkin’s idea we need first to distinguish between two senses in which the word “concept” is used. It is used, especially in the literature of philosophy of mind, to refer to the basic constituent element of thought of a person. Call these I-concepts (“I” for internal). In this sense concepts cannot be “shared,” because each person has her own concepts, although different people may have similar or dissimilar concepts. There are moments that Dworkin seems to adopt this sense of the word, for example when he writes that people “must converge in actually treating the concept as interpretive” (p. 11, emphases added) in order for it to be interpretive. But concepts in this sense do not “encourage us to reflect” (p. 10, see also p. 224)

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44 Dworkin also equates interpretive concepts with “essentially contested” concepts (p. 221), thus alluding to a term coined in W.B. Galie, Essentially Contested Concepts, 56 Proc. Aristotelian Soc. 167 (1956), and which are in some sense similar to Dworkin’s. See id. at 169. Dworkin, however, does not mention Galie’s essay, so it remains unclear to what extent he subscribes to Galie’s arguments. See, however, Ronald Dworkin, Hard Cases, 88 Harv. L. Rev. 1057 (1975), reprinted in Dworkin, Rights, supra note 31, at 81, 103 n.1 [hereinafter Dworkin, Hard Cases] (referring to Galie’s article in support of similar ideas). Though it is by no means conclusive it is worth noting that Galie himself tended to the view that law is not an essentially contested concept. See W.B. Gallie, Philosophy and the Historical Understanding 190 (1964). For support of this view see Leslie Green, The Political Content of Legal Theory, 17 Phil. Soc. Sci. 1, 18-20 (1987).

It should be stressed that the concept of essentially contested concepts is itself contested, or at least quite murky. On the one hand it seems that Dworkin would accept MacIntyre’s take on the concept of essentially contested concepts. MacIntyre said that when dealing with social practices such as “politics, education, or science[, d]ebate within such a practice is inseparable from debate about the practice, and both form parts of each practice.” Alasdair MacIntyre, The Essential Contestability of Some Social Concepts, 84 Ethics 1, 6 (1973). On the other hand, some commentators understood such concepts to lack objective content of the kind Dworkin is interested in. As one scholar suggested, essential contestability of concepts leads to “an ambitious thesis of conceptual relativism.” John N. Gray, On the Contestability of Social and Political Concepts, 5 Pol. Theory 331, 341 (1977); see also Jeremy Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)?, 21 Law & Phil. 137, 148-53 (2002).

While conceptual relativism is consistent with some senses of objectivity, it is inconsistent with the sense Dworkin uses the word (pp. 37-38).

45 See Ray Jackendoff, What is a Concept, That a Person May Grasp It?, 4 Mind & Language 68 (1989), reprinted in Concepts: Core Readings 305, 305-06 (Stephen Laurence & Eric Margolis eds., 1999), whose distinction between I-concepts and E-concepts I follow. Whenever I use the word “concept” below with no identification, I mean E-concept.
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on them. They are merely elements of thought. So it makes more sense to say that Dworkin uses concepts in another sense, as something like “Idea,” that is, as a kind of abstract formulation of the fundamental aspects of a particular practice. Call these E-concepts (“E” for external), because these concepts do not necessarily represent the mental content of any particular person. It is evident that Dworkin has this sense in mind when he talks about the way such concepts “function” by encouraging people to think about certain practices. It is in this sense in mind that he says (in what seems like a contradiction to his words just quoted) that “[i]t is hardly a decisive objection that very few people would identify their own practice [of law] in that way [i.e., as an interpretive concept]: we are engaged in philosophical explanation, not vicarious semantic introspection” (p. 12, emphasis added). Certain concepts are interpretive concepts even if (some) people don’t treat them as such.

Even with these clarifications Dworkin’s idea is still quite vague. So I offer now a set of seven features which together capture what Dworkin means by interpretive concepts:

(a) They are (E-)concepts that refer to social practices.
(b) People share these concepts when they agree, roughly, about the importance of those concepts (p. 148), as well as about manifestations of the practice (e.g., the workings of courts are a manifestation of the interpretive concept law).
(c) Yet people who share these concepts disagree about the “best interpretation” of the practice, and consequently how the practice should be manifested in particular instances. Thus, when explaining the notion of interpretive value he says that for it to be interpretive “those who accept it as a value must … disagree about precisely what value it is” (p. 169, emphasis added).
(d) These disagreements are “interpretive,” not “conceptual,” meaning that they are evaluative all the way down. In other words, there is no way of distinguishing between what the practice is in the abstract and how it requires us to behave in particular circumstances (pp. 154-55). Hence, we cannot give a “neutral” definition of what counts as law. All such accounts will presuppose some, possibly unstated, normative assumptions. That’s why all contesting accounts are “interpretations” of the practice that aim to show it in its best light.
(e) There is no known way of resolving disagreements about what counts as the practice or for proving the correctness of one interpretation of the practice. Dworkin rejects the view that in ethics or law “nothing can count as a good argument … unless it is demonstrably persuasive, that is, unless no one who is rational can or will resist it” (p. 267 n.14). He argues that it is wrong to “import[] standards of good argument that are foreign to a practice into it from some external level of skepticism” (id.). As a result, the disagreements are persistent: “We argue for our

46 Dworkin denies the familiar distinction between first-order moral statements and meta-ethical, second order, statements about moral statements. He calls this distinction Archimedeanism and argues that it is false. For discussion see Subsection III.B(2), infra. But Dworkin’s claim about the undemonstrability of moral proposition is itself not a first-order
constitutional interpretations, knowing that others will inevitably reject our arguments, and that we cannot appeal to shared principles of either political morality or constitutional method to demonstrate that we are right” (p. 127, emphases added).

(f) Nonetheless, there are objective right answers to such disagreements, and these are answers that are not determined by (although they may be partly dependent upon) any existing opinion as to what counts as the best interpretation of the practice.

(g) Relatedly, an interpretation of the practice is always open for revision. Even if there is universal agreement on an interpretation of the practice, the agreement does not render the interpretation true, or make contesting it otiose. For instance, even if everyone were to believed that there is nothing wrong with slavery, that would not change the fact that slavery is wrong (p. 60).

This, I believe, is a clearer account than anything Dworkin has ever given of interpretive concepts. This does not yet answer the question whether there are any interpretive concepts.

(2) Are There Any Interpretive Concepts?

What reasons does Dworkin supply for thinking that the seven features enumerated above correctly describe political, moral, and legal concepts? Dworkin’s relies on two observations: one, that the content of political concepts is never exhausted by the discourse about those concepts; the other, that disagreements about political concepts cannot be resolved. Let us consider these claims and their implications.

If I point at a table and say “this is a sofa” I make an error, and if my error is not just the result of thoughtlessness or poor command of the English language, it is because I am mistaken about the content of the E-concept of sofa. What fixes the objective content of the concept is an implicitly accepted set of criteria by a community, i.e. it is the existence of some kind of societal (conventional) agreement “on semantic grounds” (p. 151) about the matter, and if I employ the concept sofa differently, then I am wrong. But an entire community cannot be wrong about sofas: the communal sense of what sofas are is fixed by what people believe sofas are. In contrast, in the case of interpretive concepts Dworkin believes it is always open for people to question the content of such concepts, and they can always offer novel “interpretations” of them that show these concepts in their “best light.” Thus what counts as the right answer to the question “what is the content of the concept of justice?” is never fully determined by people’s attitudes about the concept.

moral claim. Has Dworkin just shown by this that his rejection of Archimedeanism is “demonstrably” false?

47 This standard of correctness conforms to what Jules Coleman and Brian Leiter called “minimal objectivity,” according to which “what seems right to the majority of the community determines what is right.” See Jules L. Coleman & Brian Leiter, Determinacy, Objectivity, and Authority, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 203, 253 (Andrei Marmor ed., 1995).
But remember that Dworkin also does not want to reach the conclusion that there is something outside our lives that fixes the content of moral concepts in the same way that the chemical structure of water fixes what water is. If that were the case we could describe moral concepts without being engaged in moral argument; we would simply be describing the features of such concepts in the same way that we describe the features of natural kind concepts like water. But Dworkin vigorously rejects this view, which he calls Archimedeanism (pp. 142-43). Archimedeanism presupposes two levels of moral discourse, and Dworkin’s response is that “the external level that [Archimedean] hope[] to occupy does not exist” (pp. 38–39). So Dworkin must carve a space for a kind of concept whose referent is in some sense created by us (unlike discourse on the natural kind concept *water*), but whose content is nevertheless never exhausted by our attitudes, because disagreement over the application of the concept, and even challenges to universally accepted views, are possible even against a background of conventional agreement (unlike the discourse on the criterial concept *sofa*).

Let us begin by considering the case of sofas. We can imagine someone arguing that we have all been wrong in our understanding of what sofas are, and that in fact they are objects of ritual. We would, no doubt, initially tell

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48 Dworkin’s anti-Archimedean arguments are all over *Justice in Robes* (pp. 41, 77-78, 93–94, 105–16, 147–62), and they are essential for the conclusions he reaches. But he in fact has several anti-Archimedean claims:

1. Against the distinction between conceptual and normative accounts of political concepts (pp. 108–10).

2. Against the distinction between meta-ethics and normative ethics (and more generally against the distinction between claims within a practice and claims about claims within a practice) (Archimedean “distinguish the first-order discourse of the practice [the theorists] study... from their own second-order platform or ‘meta’ discourse, in which first-order concepts are defined and explored” (p. 141)).

3. Against a distinction of principle between general jurisprudence and doctrinal analysis of particular cases (see text accompanying note 33, *supra*).

4. Against the possibility of making non-perspectival statements (pp. 37–38).


49 Cf. Tyler Burge, *Intellectual Norms and Foundations of Mind*, 83 J. PHIL. 697, 707–10 (1986). Burge’s argument seeks to establish that communal agreement can never fix the content of concepts, because “the sort of agreement that fixes a communal meaning … is itself, in principle, open to challenge.” *Id.* at 707. This means that by Burge’s own lights either there are no criterial concepts, or every criterial concept has the potential to become an interpretive concept. We need not consider the former possibility here (as Dworkin evidently
such a person that he simply does not know what a sofa is. But with enough persuasive power and perhaps strong evidence, we might come to see his point and then a debate on the question would ensue. If that is true, then the only difference between the concept of equality and the concept of sofa is that in the former debate about what the concept refer to is real in the case of equality and merely hypothetical in the case of sofas. Can this be the basis for the distinction between criterial and interpretive concepts? This solution seems unappealing, because it suggests that if a vigorous debate were to emerge about sofas, this would change the concept sofa from a criterial to an interpretive one. More seriously it would suggest that what distinguishes between criterial and interpretive concepts is nothing more than the contingent fact about the existence of debate. If that is all, then it would turn out that Dworkin’s claims about the need for a new kind of concept to accommodate social practices were exaggerated.

But this seems to be exactly Dworkin’s view. Tucked away in one of the endnotes we find Dworkin’s offhand remark that “[p]erhaps some or all interpretive concepts began their conceptual lives as criterial.” He also adds “for example” that “[a]n imprecise criterial concept becomes interpretive when it is embedded in a rule or direction or principle on whose correct interpretation something important turns” (p. 264, n.7, emphasis added). Notice how Dworkin smuggles in the notion of “correct” interpretation, but whether such a “correct” interpretation (one that transcends the shared criteria of a particular linguistic community) exists is exactly the question at stake, and the account he gives leaves open less extravagant explanations, because they do not demand the invention of new concepts. Because now it seems that even by Dworkin’s lights interpretive concepts are either concepts about which it is implicitly accepted that their criteria of application are open for challenge, or alternatively that the disagreement emerges because different people use the same word while employing different (criterial) concepts. Both these possibilities explain how a criterial concept could become interpretive, but both explanations do so by making the notion of interpretive concepts explanatorily redundant. Moreover, because Dworkin says nothing about the “mechanics” of transformation from criterial to interpretive concept, his “historical” account of the emergence of interpretive concepts leaves it utterly mysterious how, once criterial concepts become interpretive, they somehow acquires objective content that may be different from what any user of them ever entertained.

Instead he supports his account of interpretive concepts by insisting that evidence that could support an alternative explanation about these concepts (e.g., that disagreement is the result of different people having conflicting interpretive concepts) is irrelevant. Thus, anyone who tries to use empirical findings about the moral views of different people at different times is believes there are criterial concepts). The latter possibility is one that Dworkin seems to hold. See text to note 50, infra.

50 Perhaps this explains why at one point Dworkin says that marriage is a criterial concept (p. 9), and at another that it is an interpretive concept (p. 153).
making a fundamental error. All this information belongs to different intellectual “domains” like sociology or anthropology, and as such they have no bearing whatsoever on morality proper, which seeks to discover the true content of moral concepts (pp. 76–78). But this claim is problematic in several respects. First, Dworkin simply asserts this view, without explaining on what basis he makes it. Second, this assertion is Archimedeanism par excellence. This claim by itself is not part of moral discourse but a claim about moral discourse, or more precisely, about what could belong within moral discourse. Third, Dworkin provides no standard for deciding which claims are internal moral claims and which are sociological observations that are not part of the moral “domain.” In fact, he often relies on some “sociological” observations about moral discourse as if they are part of morality, or at least as supporting his view about the objectivity of morality. But why should this claim not be interpreted as some sociological fact, which, as such is irrelevant for understanding the content of moral concepts? Why are such empirical observations (for which, by the way, Dworkin adduces no evidence) within the domain of morality?

Thus, by not providing a standard for distinguishing what belongs to the domain of moral discourse, Dworkin manages to immune his argument from criticism. Any suggestion that moral discourse might be mistaken is either interpreted “internally” and as such can only serve as further proof that moral discourse is interpretive, and (because of Dworkin’s definition of interpretive concepts) as further support for the claim that the concept has objective content; or it can be interpreted as belonging to a different “domain” and as such irrelevant to the debate about law’s objectivity!

Imagine a similar argument about another question: theologians of different religions have been arguing for centuries about the correct attributes of God. I believe not even the most devout would argue from the existence of a debate about God’s attributes to the existence of God. To be sure, it may show the existence of “God” within a certain discourse, but that God “exists” only within that discourse. This, however, would be little consolation for the theist who wants to know whether God exists, not whether “God” exists.

This reductio shows that something has gone wrong with Dworkin’s argument, and it also points to where the error is: like God, morality can be an independent domain only at a cost, and the cost is that as an independent domain it can make no demands upon human beings that do not wish to engage themselves with that domain. Thus, Dworkin, who presents his account as a defense of the common sense conception of morality, ends up instead offering of conception of morality that is fundamentally different from it, as something that makes claims upon us only if we “sign in” to it.

51 Here is a typical statement: “People who say that it is unjust to deny adequate medical care to the poor do not think that they are just expressing an attitude or accepting a rule or standard as a kind of personal commitment. They think they are calling attention to something that is already true independently of anyone’s attitude, including theirs….” Dworkin, supra note 48, at 109.
To understand the problem, consider the discourse of explaining and understanding Hamlet’s behavior that exists among literary theorists and Shakespeare aficionados. There exists a certain discourse with certain rules on the question what counts as “valid moves” within the discourse. For instance, that the text of *Hamlet* is important for assessing Hamlet’s behavior whereas the text of volume 1 of the *Harvard Law Review* is not. Suppose now someone comes and claims that it makes no sense to ascribe any beliefs, desires, or qualities to Hamlet, since he does not exist, and only past or present persons can have such attitudes. This skeptical “error theory” about Hamlet would strike us as odd, as a challenge that somehow misses the point of the debate about Hamlet for reasons that are very similar to those Dworkin advances against the skeptical critic of the objectivity of morality: from within the discourse that presupposes Hamlet’s existence (even if in a make believe way) it literally makes no sense to raise the skeptical claim that Hamlet does not exist. In contrast as an external claim, made from outside the discourse, this claim, while true, is irrelevant to the internal discourse, because the Hamlet discourse operates on a “separate domain” from that of the real, physical world.\(^{52}\)

But, crucially, in the same way that this discourse can disregard as irrelevant anything that happens outside its domain, other domains are unaffected by what happens within the “Hamlet discourse” domain. This is in fact the exact mirror image of the unintelligibility of the external skeptical claim from within the practice. And so any claim made within the discourse will not be *intelligible* outside the discourse. If one fails to join in the “make believe” game of Hamlet’s existence, all ascriptions of attitude to him would be false. This means that the discourse cannot “impose” itself on those who do not join it. Only once one joins a discourse, and only so long as one remains within the discourse, is one bound by the normative limits it sets.

But all this is exactly what common sense moral discourse that Dworkin purports to defend is not, for it claims universality that is not grounded in the existence of a discourse, and it rejects the possibility of joining or leaving morality. Moral discourse presents itself as making universal demands upon us, demands that are not part of a “game.” Dworkin might try to present this claim itself as within the discourse itself, but no matter how universally a discourse takes itself to be (or participants in the discourse believe it to be), the discourse cannot have any normative force beyond its boundaries. Since

\(^{52}\) A third type of claim is one that challenges what the discourse is, or what counts as an intelligible claim within the discourse. Dworkin would presumably deny that such a third type exists and that all such claims are reducible to claims within the practice. His argument would be that these are internal claims because they will affect our first-order judgments about Hamlet. (This is one type of his anti-Archimedeanism.) But this argument is unsuccessful: one can claim that in ascribing beliefs to Shakespeare’s Hamlet we should rely on the Danish legend of Hamlet (or Amleth), which served as source in writing the play. It is true, of course, that our view on this question is likely to affect our judgment on Shakespeare’s Hamlet, but one can decide on the question whether the legend is an acceptable source for discussing Shakespeare’s Hamlet without independently of (and even with little concern for) its implications for any “internal” question.
the claims to the universality of the discourse are themselves made within the discourse, they too are only intelligible from within the discourse.

The analogy with the discourse about Hamlet also helps us see why, contrary to Dworkin’s claims (p. 37), there is no inconsistency in making both internal claims within moral discourse and external, even skeptical, claims about the practice from outside: there is no contradiction in making certain “internal” claims about Hamlet’s character while recognizing that Hamlet does not exist, and that therefore all claims about him are in some sense false.

Thus, by insisting on the “independence” of moral concepts (pp. 76-78) Dworkin insulates his argument from criticism, but he does so in a question-begging fashion, for it is exactly the independence of moral discourse that his opponents challenge. It is exactly the claim of some moral anti-realists that even though moral discourse is conducted as if morality is independent of other discourses, its claim to independence can make sense only if certain, and highly implausible facts, are true. To answer by saying that this claim is false because moral discourse is conducted independently of other discourses is not to answer the challenge but to repeat the claim being challenged.

All this shows that Dworkin’s response to the moral skeptic who claims that morality makes no demands on him has no force. At this point Dworkin may revise his response by saying that though this imaginary objector is right, her claim is not interesting or important for real life debate: we may have some academic interest in the moral nihilist, but she is not someone we encounter in real life and his qualms are of little practical interest. Most professed moral skeptics live a moral life, and defend or criticize certain moral behaviors. Evidently then, in word and action they joined the moral discourse, and therefore their external challenges are just as interesting as skeptical comments about Hamlet’s real-life existence made in the course of a Shakespeare convention.

But even this construal of Dworkin’s argument does not lead to the conclusion he seeks. Dworkin relied on the fact of persistent disagreement about moral concepts to show that participants in the discourse are trying to offer the best account they can of a single, shared, concept. But if Dworkin endorses the fact that moral discourse is independent of other discourses and “answers” only to arguments from within, he must allow for the possibility of several moral discourses, that are by-and-large internally consistent but are incomprehensible to each other. That is one possible way of introducing the

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53 See J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 30-42 (1978). Critics of Mackie often erroneously claim that he sought to deny all senses of the objectivity of value. See, e.g., MARMOR, supra note 21, at 123. But this is a mistake. See MACKIE, supra, at 22, 25-27. His argument is that the kind of objectivity that moral discourse presents itself to have, i.e. objectivity that does not depend on the existence and acceptance of a certain discourse, is false. For a powerful defense of Mackie’s position see RICHARD JOYCE, THE MYTH OF MORALITY 1-52, passim (2001).

54 Though Dworkin never says that the external challenge is possible and makes sense, it often seems to be that he is less concerned with the moral nihilist who denies the intelligibility of all moral claims, and more with the moral skeptic who goes on to make “internal” moral claims (e.g., pp. 93-94). See also Dworkin, supra note 48, at 93-94.
evidence about different moral codes in different times and in different parts of the world, evidence that Dworkin did not contest but dismissed as irrelevant. This is a possible explanation for the existence of moral disagreement, and unlike Dworkin’s this explanation enjoys much evidential support and does not require any of the heavy-duty philosophical argument about interpretive concepts that Dworkin advances. On this account many of today’s moral clashes are the result of different moral traditions that developed with relative independence and internal coherence from each other until disappearing geographical or cultural barriers have brought them together, and quite often into clash. In fact, even within the “Western” moral tradition we can trace two distinct and until recently quite distinct moral discourses, one, Judeo-Christian, mainly concerned with ideas of duty, action, and individual responsibility, and more recently rights; and the other, Greco-Roman, which is founded on ideas of virtue, character, nature, and community. Many modern moral conflicts can be traced back to these two conflicting moral discourses.

How Dworkin would respond to this suggestion is not entirely clear. Sometimes he seems to hold a view that accepts the conclusion that there may be more than one objective truth to a particular moral or legal question. He says at one point that for a view to be objective all that is required is that it be supported by “[s]ubstantive reasons” (p. 260): “If we think that our reasons for thinking [that the manufacturers of a dangerous medicine are legally responsible for injuries in proportion to their market share], then we must also think that the proposition that the manufacturers are liable is objectively true” (id.). So for our legal responses to be objectively true, all that we need is to think (confidently?) that our reasons supporting this conclusion are convincing. In the end what counts are “any lawyer’s or judge’s … convictions of personal and political morality” (p. 32, cf. p. 42). But there are other people who are equally confident that there are no good reasons leading to this conclusion, and as Dworkin admits (in words that have already been quoted earlier), he does not think that his arguments would convince them. So we have two groups of people with strong convictions that their conclusions to legal questions are explained by good reasons, and thus both groups satisfy Dworkin’s requirements for objective truth. Needless to say, if that is all that Dworkin means by objectivity, then it is hardly objectionable. But if that counts as objective truth, what, by Dworkin’s lights could count as a discourse in which there is no objective truth? More crucially, it is hard to see how this sense of objectivity could legitimate any decision.

At other times Dworkin seems to say something else. In answering the claim that moral values conflict he says that anyone who wants to support

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55 The inconsistency of Christian and Greek moralities is the running theme in FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Douglas Smith trans., Oxford University Press 1996) (1887). Related ideas are developed also in ALADAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 51-61 (2d ed. 1984); BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1985), and G.E.M. Anscombe, Modern Moral Philosophy, 33 Phil. 1, 5-6 (1958).
this view must show “why the understanding of that value that produces the conflict is the most appropriate one” (p. 116, emphasis added), and that we must always try to articulate a “conception” (p. 114) of those values in which they do not conflict. Dworkin thus criticizes those theorists who seem to believe they are merely describing a fact about morality when they talk about value conflicts (pp. 109-10).\footnote{Dworkin’s similar argument against incommensurability is in Dworkin, supra note 48, at 136 (claiming that incommensurability “cannot be true by default” and requires “an ethical defense of the kind it almost never receives from philosophers who embrace it”).}

Dworkin’s suggestion, if I understand him correctly, is that while it might be possible to interpret the fact of disagreement as the result of several “internal” moral discourses, which may employ similar words but give them very different meaning, this is not the best interpretation of the facts. Since Dworkin believes that moral discourse is interpretive all the way down, he would contend that we should strive for the best interpretation of morality, the interpretation that presents morality itself in the best light. And the best interpretation of moral discourse is one that makes the debate among its participants meaningful. But if participants in the debate are using the same word for different concepts, then it would follow that they are wasting their time talking at cross-purposes. It therefore would present the debate in better light if we treated the participants as engaged in a single moral discourse which is independent from other domains.

At first this seems a plausible suggestion, but it leads Dworkin to a remarkable conclusion that the more disagreement there is on the content of a certain concept, the more this suggests that the dispute has a right answer, because interpreting it in this way presents it in better light. Ultimately, it does not even matter what participants in the debate themselves think of their dispute. Even if they themselves believe they are arguing over different yet inconsistent moral concepts (which by the way does not necessarily render their debates pointless), if it presents their debate in (what we believe is) better light, then we should interpret their debate differently from their understanding of it.

Suppose, however, we accept the idea that we should try to interpret morality so as to show it in its best light, is there any reason to think that Dworkin’s interpretation puts moral discourse in a better light? Consistent with his interpretivism, Dworkin seems to suggest, that the no-conflict conception of moral discourse is the most appropriate because it is morally superior. But such an argument is circular, for the interpretation it advances of the practice is based on Dworkin’s own ideal of what the practice should be like. As such it will leave cold anyone who has a different interpretation of what would make for a superior practice. Take, for instance, Dworkin’s claim that moral propositions are not demonstrable in the way that mathematical propositions are (p. 267 n.14). This may be seen as an undesirable result of Dworkin’s own interpretation or conception of morality. Someone who believes that the morally best conception of morality is one that would make morality as demonstrable as possible would be led to
a very different conception of morality. The problem is that since both interpretations would support themselves by their own understanding of what is morally superior (or what would make moral discourse appear in better light), neither will be able to undermine the other. Similarly, someone who argues that the morally best conception of morality is one in which some moral conflicts exist (because, for example, such a conception respects the people who have, or had, those moral views and their traditions) would not be in a position to challenge, or be challenged by, Dworkin’s conception. They will simply be two self-validating conceptions of morality, helpful and action-guiding for those already committed to them, but unconvincing to those who do not. Now, if Dworkin believes that two such conceptions can be put side by side and compared on moral grounds, then it must be on the basis of some (moral?) standard that is outside the two conceptions, thus undermining his rejection of Archimedeanism. If he does not believe such a standard exists, then because the validity of each conception is internal to itself, debate between them would be not be possible.

C. Dworkin’s Thesis in Practice

This has been a lengthy journey into questions of moral (and by implication legal) objectivity, and in the heat of the argument the relevance of some of the questions discussed to Dworkin’s overarching argument may have been lost. So it is time to tie the different threads together: we set out to examine these questions of objectivity because of Dworkin’s argument that tied the law’s legitimacy to judges’ finding the right (moral) answers to legal questions. And this argument seems to work only if there are right answers to moral questions.

But this is not merely a theoretical matter, a question that might only be of interest to philosophers with too much time on their hands. All of Dworkin’s arguments examined so far—his rejection of the positivist model of rules, the idea of interpretive concepts, his peculiar defense of the objectivity, one that makes objective value depend on the existence of disagreement—should all be seen as scaffolds to a single huge construction whose ultimate conclusion is “Therefore, courts should be actively engaged in political debate.” Even Dworkin’s tendency to use similar arguments to challenge theorists with utterly different views (like all the theorists Dworkin labels Archimedean, or his odd coupling of Sunstein and Hart, p. 65) makes more sense from this perspective: what matters to Dworkin is that these theorists challenged the ultimate conclusion about the role of the courts.

Although Hercules, Dworkin’s famous imaginary judge, who played a lead role in many of Dworkin’s central writings on the subject only makes a cameo appearance in Justice in Robes (pp. 53-57), his spirit still pervades Dworkin’s work. He still urges judges to confront the moral issues before them, and still urges other branches of government to become more like his

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57 Hercules first appeared in Dworkin, Hard Cases, supra note 44, at 105; see also DWORKIN, supra note 12, at 238-40, 258-66.
conception of the ideal judiciary, \(^{58}\) and not—as seems to be increasingly the case \(^{59}\)—the other way around.

The Herculean model manifests three aspects of Dworkin’s thought. First, the legal decision rendered by following it is (prima facie) legitimate, because the legitimacy of judicial decisions depends on finding the correct answer to legal questions. Thus Hercules is not just a good advice: significant degree of compliance with it is \textit{required} to guarantee the legitimacy of a legal system. Second, by definition Hercules cannot be mistaken; the results of the Herculean method \textit{constitute} the right answer. \(^{60}\) This implies that virtually all significant instances of disagreements among judges are the result of judicial failure to employ the Herculean method. \(^{61}\) In other words, if all judges were Herculean, there would no longer be disagreements about law (except, perhaps, with regard to the vague margins of concepts). This is of course a corollary of Dworkin’s rejection of Archimedeanism and belief that moral (and legal) correctness are set by the discourse, and not by anything external to it. Hercules is simply someone capable of taking in and “computing” the entire legal-moral discourse and thus \textit{guaranteeing} the correctness of his judgments. Third, the extension of the model to legislatures is closely tied to Dworkin’s conception of democracy that ignores the desires of majorities when those infringe rights, \(^{62}\) which may be just the flipside of the argument for Herculean method: the very reasons for trusting the judgment of Hercules are the reasons for not caring much for the plainly un-Herculean judgments of most members of society.

Modeling adjudication and Politics (with a capital P) after the philosopher-judge has an inspiring ring, but I will argue that Dworkin’s arguments in support of Herculean adjudication are unconvincing. Dworkin’s focus on the question of legitimacy and his view that connects legitimacy to moral correctness leads him to neglect what may be a far more pressing issue, and which is nicely captured by the maxim “justice delayed is justice denied.” My concern with Hercules is not that he is so unlike any real

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\(^{58}\) See \textit{id.} at 178-86, 217-18; \textit{cf.} DWORKIN, DEMOCRACY, \textit{supra} note 41, at 4-6.


\(^{60}\) This suggests that the only reason for theoretical disagreement among us is epistemic or cognitive failure on our part. This is what Coleman and Leiter called “modest objectivity.” See Coleman & Leiter, \textit{supra} note 47, at 263-64. They claim, correctly in my view, that Dworkin is a modest objectivist. \textit{Id.} at 274-76.

\(^{61}\) Dworkin’s more substantive writings on particular constitutional questions are dedicated to exposing exactly those errors, and to offering his Herculean helping hand. After all, even though “[t]he courts are the capitals of law’s empire, and judges are its princes, … [i]t falls to philosophers, if they are willing, to work out law’s ambitions for itself, the purer form of law within and beyond the law we have.” DWORKIN, \textit{supra} note 12, at 407.

\(^{62}\) See DWORKIN, DEMOCRACY, \textit{supra} note 39, at 139-47 (questioning majoritarian democracy and outlining a “partnership” conception of democracy instead); RONALD DWORKIN, \textit{FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION} 344 (1996) (“individual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts.”).
life judges, as many critics have suggested.\textsuperscript{63} It is the exact opposite: it is that when something reasonably close to the Herculean model is put in practice the results are quite different from those envisioned by Dworkin. The United States Supreme Court is as close an example of Herculean adjudication as one is likely to ever find, but it implies that the Court delivers full opinions on less than a hundred cases a year, instead of, say a thousand cases a year.\textsuperscript{64} A court that tries to decide one case according to the Herculean approach will not be able to decide on ten other cases at all. This of course does not yet suggest that the philosopher-judge model is wrong, but it shows that it comes with substantial costs, and these are not necessarily strictly monetary costs, but rather “moral costs” as well.

Ironically, this point can be illustrated by Sindell,\textsuperscript{65} Dworkin’s paradigmatic example in Justice in Robes of principled adjudication (pp. 7-8, 17-18, 22-23, 51, 143-44, 164-65, 208, 244, 260). This case introduced the notion of market share liability to allow plaintiffs to get compensation in mass torts involving multiple negligent defendants but that could not be identified as the injurers of individual plaintiffs. Dworkin uses this case as an example of how thinking on the rights and duties of the parties in question has led the court to the right decision. But even if we believe that the court reached the right result in this case, it is exactly the case that shows the limitations of the approach Dworkin advocates. Not only was market share liability rejected in numerous states for various reasons that have to do both with questioning the justice in imposing such liability and the possibility of defendants being required to pay more damages than the hard they caused, some courts were also concerned about the manageability of handling such claims in courts.\textsuperscript{66} Even in those jurisdictions that recognized it, it was subjected to limits, which were justified by the impossibility of guaranteeing a just or manageable process of decision-making.\textsuperscript{67} Dworkin could of course reply that these are all mistaken decisions. But even if we were convinced by this argument, such an answer would miss the point of the critique, which is that


\textsuperscript{64} For the “Herculization” of Supreme Court decisions see Peter L. Strauss, One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action, 87 COLUM. L. REV. 1093, 1103-04 (1987) (describing the increased length and expansiveness of Supreme Court decisions). The negative implications of this process are analyzed thoughtfully in Strauss’s essay. It should be noted that since 1987 the number of cases the Supreme Court hears has gone further down. See Linda Greenhouse, Case of the Dwindling Docket Mystifies Supreme Court, N.Y. TIMES, Dec. 7, 2006, at A1.

\textsuperscript{65} Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980).


\textsuperscript{67} In particular this refers to the requirement of “fungibility.” As a result the MSL doctrine has been rejected in various areas. See Mullen v. Armstrong World Indus. Inc., 246 Cal. Rptr. 32, 35-36 (Ct. App. 1988) (refusing to extend Market share liability to asbestos products); Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1067 (N.Y. 2001).
because of what courts are and because of the conditions under which they operate, the likelihood of such errors is significant. Dworkin cannot isolate Sindell as proof that his suggested approach can work and disregard the surrounding context that shows that it does not.

What I believe, however, is an even more significant problem with Dworkin’s model of Hercules is that this approach is ultimately self-defeating. The question, I must stress, is not whether courts can or cannot avoid making judgments without relying on some moral considerations. I believe that in some sense they do. But recognizing this fact does not imply that courts should engage in moral questions in the way Dworkin believes they should. There may be times when this may be required, but often it will be wiser for the court to refrain from doing this, because exactly those features that courts commonly have and because of which they seem the most appropriate forum for deliberation and moral argument, are the features that almost inevitably get lost when courts become increasingly engaged directly in political argument.

The Herculean model is premised on the existence of a legal system that pursues the value of legality, the value Dworkin now sees as the fundamental value for legal practice and thus central to understanding law (pp. 169-70). Chief among those is that judges are impartial and that they decide cases not according to their personal preferences but according to some impartial standards. What ideally makes courts a good place for deliberation is the fact that judges are (ideally) elected on the basis of expertise and not because of political affiliation, and they operate in an institutional environment that insulates them to some extent from political pressure, not least by the existence of certain traditions of appropriate behavior, as well as by more tangible means such as life (or long) tenure, and immunity from prosecution (or persecution) due to their judicial decisions. Judges are never totally politically disinterested (and in the United States probably less so than in other countries), but the Herculean model pressures them to act in ways that counter the value of legality and thus also undermines the distinction between law and politics.

Thus adjudication with a Herculean frame of mind when conducted in an environment saturated with politics leads to outcomes that Dworkin himself deplores: the appointment of judges in the United States has become one of the most volatile and openly partisan battlegrounds in this country, and when a prospective judge’s “judicial philosophy” (or sometimes just what they think should be the outcome of particular cases) is such a
prominent and central aspect of the nomination procedure, that successful candidates are right to assume that they are elected on a particular political (small “p”) ticket. This political engagement in the Supreme Court has often turned it from a forum of principle to a forum of personal. There is empirical evidence of increasing polarization and partisanship in the Supreme Court, supported by evidence that radical political groups are conscientiously trying to advance their cause by getting their favorites on the bench than through the more traditional methods of getting elected to the legislature or executive.

Dworkin would no doubt say that this is a fundamental misunderstanding of the Herculean model, which is exactly premised on limiting adjudication to the correct moral principles as discovered by moral reasoning. That may be true, but my point is that Dworkin’s model represents an ideal that cannot be implemented given realities of modern politics and perhaps also human nature without these outcomes becoming a reality. Perhaps Hercules could engage in principled argument while remaining impartial, but mere mortals are not so strong to resist the infiltration of politics.

There is an air of paradox to this argument: it suggests that exactly those features that make courts ideal for debate on political rights and duties will tend to wane once such debate is conducted in them. But this kind of self-defeating practices is not an unknown phenomenon. In the case of courts, even if we believe that the most important general goal for courts is to participate in the fashioning of the values the state should pursue (and in this way, as Dworkin believes, help create the requisite deliberative approach towards people’s rights), it may be that pursuing those goals directly may be the wrong strategy. If courts take a clear stand on moral values in particular questions, they are likely to go some way towards achieving that central goal, but at the same time they may undermine certain conditions that make the

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71 See Jeffrey Rosen, The Unregulated Offensive, N.Y. Times Mag., Apr. 17, 2005, at 42. In this piece Michael Greve, a libertarian affiliated with the conservative American Enterprise Institute is said to acknowledge that the deregulation he favors is not likely to be achieved even by a Republican Congress. In order to achieve his goals, “judicial activism will have to be deployed.” Id. Realizing that the more traditional ways of affecting policies are not likely to succeed in achieving these goals Greve is said to believe that “the movement should focus its energies on the appointment of sympathetic judges.” Id. Incidentally, among his favorites for appointment to the Supreme Court is John Roberts, the current Chief Justice. See id.

72 See Derek Parfit, Reasons and Persons 5 (1984) (defining a theory as indirectly self-defeating “when it is true that, if someone tries to achieve his . . . aims [given that theory], these aims will be, on the whole, worse achieved”). See id. 5-7, 24-28 (demonstrating how some well known ethical theories may be indirectly self-defeating). Cf. Guido Calabresi, About Law and Economics: A Letter to Ronald Dworkin, 8 Hofstra L. Rev. 535, 560 (1980) (questioning the assumption that “that the best way to get to a point is always to focus directly on it, rather than on some road signs that point toward it.”).
attainment of that goal possible to such a degree that it will make attempts to further attempts to attain the central goal less likely to succeed.

Dworkin has always resisted the simplistic assertion that law is just politics, and I believe that he was right about that. But even if false as a general proposition, it is important to bear in mind that law may become politics. When decrying the increasingly partisan Court (pp. 24, 104), as well as the fact that the appointment and confirmation process of judges, especially to the Supreme Court, has become an event in which nominees reveal as little of their substantive views as possible, Dworkin never stops to consider that this may be a direct outcome of the politically engaged court he advocates, that the more courts are engaged in Politics, the more politics is bound to filter in.

D. Legitimacy Without Objectivity?

We have walked along the path paved by Dworkin with the hope of having a convincing account of the legitimacy of law, but the conclusions we reached are disappointing. We have seen that Dworkin’s suggestion is fraught with both theoretical difficulties and practical problems. Because Dworkin’s account links the legitimacy of law with the objectivity of morality, once the latter falls, the former seems to fall with it. Of course, this does not yet imply, that law is illegitimate, for there may well be other arguments that establish this conclusion. We may, for example, adopt Dworkin’s general view about the relationship between law’s content and its legitimacy and be persuaded by other defenses of the objectivity of morality and the possibility of finding the right answers to legal questions. A different possibility, and a more promising one in my view, is that law may be legitimate if it provides those who are subject to it a right to participate and voice their opinion. If a decision-procedure is designed in a way that enables members of a community to express their views and affect the content of the laws that will govern them, then according to this view, laws may be legitimate even if we have no guarantee that they are morally right. Though as I said, I believe this is a more fruitful approach to law’s legitimacy, it is not Dworkin’s. Examining it would therefore have to wait for another occasion.

IV. THE LAW’S TWO BODIES

A. From Justification to Explanation

So far I argued that Dworkin’s argument for establishing the legitimacy of law, even though based on a sound structure, fails. But next to Dworkin’s justificatory argument, he has always advanced challenges to the adequacy of legal positivism on narrower grounds. One of Dworkin’s main arguments against positivism, the argument he called the “semantic sting,” is that legal positivism cannot explain the existence of fundamental disagreements about what the law requires (pp. 223-26). According to Dworkin, if positivism were right, then the only disagreements among lawyers would be about the margins of application of vague concepts, whereas in fact many disagreements between lawyers touch on their core and central meaning.

In Justice in Robes Dworkin revisits this challenge to the explanatory adequacy of legal positivism. These challenges are closely linked to Dworkin’s justificatory discussion we have just examined, because the idea of interpretive concepts is supposed to explain both the fact of disagreement and the existence of objective right answers to legal questions. Do my negative conclusions on the objectivity of interpretive concepts also undermine Dworkin’s critique of legal positivism? Not necessarily. The semantic sting argument aims to refute legal positivism while granting its proponents all the premises of their argument. Dworkin aims to show that even by these most favorable conditions for legal positivism the picture of law that emerges from it is significantly different from actual legal practice.

Separating those issues allows us to judge Dworkin’s claim about the explanatory failures of legal positivism even after rejecting Dworkin’s theory of the legitimacy of law, and indeed I will argue that Dworkin was right to insist on those aspects of law and that his challenge to the picture of law as rules as depicted by contemporary legal positivists is significant. However, contrary to Dworkin, in my view this does not wholly undermine the model of rules espoused by positivists. Rather it shows that law contains an irreducible duality between two competing components, one whose building blocks are rules, the other based on the language of reasons. If I am right about this, this has some interesting implications for legal theory, different from those drawn by both Dworkin and legal positivists, which are explored in Sections IV.C and IV.D.

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74 I borrow this expression from J.H. Baker, The Law’s Two Bodies: Some Evidential Problems in English Legal History (2001) (who himself paraphrased it from Ernst H. Kantorowicz, The King’s Two Bodies: A Study in Mediaeval Political Theology (1957)). However, Baker’s distinction, between “law as found in the books … and law as it operates in real situations,” Baker, supra, at 1, is not the one I am talking about.

75 Explicitly, this argument first appeared in Dworkin, supra note 12, at 42-46, although it can be traced to his earlier writings.
B. Understanding the Operation of Legal Rules

Dworkin’s elaborate answer to the question “what is law?” provides us with a method for discovering the “the law” applicable to particular situations. An important element of Dworkin’s view is that the right legal answer to particular judicial questions is not always exhausted by what the court, even a state’s highest court, said. For instance, Dworkin argued that a law banning assisted suicide would violate the Fourteenth Amendment whether or not the Supreme Court reached that conclusion or not (p. 50). Along similar lines, he has argued that the best interpretation of the United States constitution leads to the conclusion that capital punishment is unconstitutional for violating the Eighth Amendment. But there is a sense, perhaps the most obvious sense, in which “the law” in the United States currently holds that assisted suicide laws are unconstitutional and capital punishment is constitutional. And Dworkin must acknowledge that even if his prescribed method for deciding cases is indeed the best, it will not help someone interested in knowing “what the law is on these matters.” It is true that the question whether laws limiting abortions violate the constitution is controversial, it is true that many people, including some Supreme Court justices, think that Roe v. Wade was wrongly decided and therefore in some sense not the law, and it is also true that since this issue is controversial in American society, it is conceivable that if the question of the constitutionality of laws prohibiting abortion came before the Supreme Court again it would overturn Roe. Nevertheless, it is of course plainly true, and this is something all those who oppose abortion know full well (why would they bother so much otherwise? What are they fighting for?) that current “positive” law of this country is that abortions are permitted.

This seems so trivial not to be worth mentioning, but it is obvious that this “bottom line” sense of law is what positivists were always trying to describe. It may be that their particular explanations were unsuccessful, but this does not show that the phenomenon they were interested in does not exist. Now Dworkin is of course aware of this fact; he states, for example, that “[t]he rates of taxation in the United States are now manifestly unjust, but the propositions that describe these rates are nevertheless true” (p. 5). But given the interpretation of the relationship between legitimacy, normativity, and validity articulated above, he must then suggest that those laws are not merely “unjust,” but in some sense not laws at all: they do not make claims that people have an obligation to follow. Indeed, given Dworkin’s “moral reading” of the Constitution it would seem to follow (although to the best of my knowledge Dworkin actually never said so) that because the rates of

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77 Dworkin says that on his moral reading of the Eighth Amendment, death penalty “might well be thought to fail” the standard of cruelty set in it (p. 167). Elsewhere he said this with less reservation. See DWORKIN, supra note 41, at 39; DWORKIN, supra note 62, at 301.


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taxation in the United States are so unjust the Internal Revenue Code is unconstitutional for violating the Fourteenth Amendment. Yet if he acknowledges that the propositions that describe the rates of taxation in the United States are true, he faces several questions: what does it mean to say that these propositions are true, and how does this square with his account of the relationship between the normativity of law and its content? Does this mean that next to the legitimate, obligation-creating laws “properly so-called,” there are laws in another (“positivist?”) sense which “exist” even if they are unjust? If so, this raises the question what makes this the case? Plainly, it cannot be their content or legitimacy, because Dworkin believes these laws to be unjust and illegitimate.80

The problem is even more pressing for Dworkin because with regard to these cases his arguments against legal positivism based on the existence of pervasive disagreement are not wrong but simply irrelevant. The existence of disagreement on a legal question perhaps suggests a higher probability that the law on the matter will change, but it does not alter the fact that a faithful account of American law would say that abortion is currently constitutional, and is legally available throughout the United States.81 Such cases are problematic for Dworkin because they involve areas of law—often of substantial size—that at least some consider immoral within a by-and-large legitimate legal system. Unlike the thoroughly immoral legal system or the perfectly just legal system, he has to explain in what sense these demands are properly called legal demands. The existence of such pockets of immorality is a familiar phenomenon in many legal systems, and trying to explain it seems a perfectly reasonable project.

If we understand the positivist account in this light, that is, as the attempt to explain the sense in which these demands are laws, then the positivist project seems eminently plausible. Moreover, this characterization seems to suggest that there is no conflict between Dworkin and his positivist opponents. If that had been true, this explanation would have joined a long list of previous attempts to reach some kind of peaceful reconciliation between Dworkin and legal positivists: some suggested that legal positivism is a theory explaining easy cases and Dworkin’s is a theory for deciding hard cases;82 others argued that while Dworkin’s theory explains “much more accurately [than legal positivism]… appellate adjudication” it is not clear

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80 See DWORKIN, supra note 41, at 126.

81 South Dakota recently changed its law to make abortion illegal. See S.D. CODIFIED LAWS § 22-17-5.1 (2006). Even this statute, however, was qualified to take effect “on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy.” 2005 S.D. Sess. Laws 188 § 1. An attempt to enact a law that would directly challenge Roe v. Wade was rejected by referendum. See S.D. Codified Laws §§ 22-17-7 to 22-17-12 (2006). At the time of writing, it is still clear that abortion is legal in the United States.

82 This seems to be a reasonable reading of Dworkin’s own view in Dworkin, Hard Cases, supra note 44. Dworkin himself has later explicitly denied that there is any theoretical difference between easy and hard cases. See DWORKIN, supra note 12, at 266, 354. For discussion see text accompanying note 37, infra.
whether his theory “characterizes the idea of law itself”;\(^83\) or that Dworkin’s is a normative theory of adjudication true of one legal system whereas legal positivism is a descriptive theory true of law in general;\(^84\) or even that Dworkin’s theory presupposes something like legal positivism that judges should rely on in order to recognize the materials they need to use in order to adjudicate according to the method Dworkin prescribes,\(^85\) still others have argued that a positivist account explains statutory law, whereas Dworkin’s theory is the best account of the common law;\(^86\) or that Dworkin describes the value-rich style of legal reasoning found in American law, in contrast with Hart’s rule-centered account that is a better description of the more formalistic English law;\(^87\) finally, we might try to vindicate both views by distinguishing between reflective and unreflective adjudication,\(^88\) and thus perhaps as a distinction between law as directed at lay people (and judges outside their judicial capacity), and law as directed at judges when writing a legal decision and perhaps also lawyers arguing a case before an appellate court.

But if my account of what is at stake between Dworkin and positivists is correct, such an accommodating solution is not so easily available. To see the problem more concretely, consider again the case of abortion: the question of abortion is in some sense among the hardest cases in contemporary American law in the sense that it is highly controversial and if it came before a court there is some likelihood that it would change existing law. But at the same time it is a fairly easy case: within certain fairly clear limits a woman can currently have an abortion in the U.S. without fear of breaking the law. When people seek the advice of lawyers, this is the sense of law that they are usually looking for. This, in fact, is the problem with the competing theories: if we are interested in the question of the existence of settled law that can be applied with relative assurance to particular instances, then abortion cases are easy; if, however, we are interested in the question of the reasoning that underlies the legal decision, then abortion cases are hard. (The two questions, by the way, are not completely unrelated: the second question is relevant for

\(^{83}\) Frederick Schauer, *The Jurisprudence of Reasons*, 85 Mich. L. Rev. 847, 870 (1987) (reviewing Dworkin, supra note 12); cf. Kramer, supra note 14, at 137. This claim is based on Dworkin’s almost exclusive focus on appellate decisions, and usually particularly celebrated ones.

\(^{84}\) See Hart, supra note 8, at 240–41; Kramer, supra note 23, at 152.


\(^{88}\) This distinction is exemplified in Dworkin’s exchanges with Stanley Fish. For Dworkin’s replies see pp. 43–48, 268–71 n.19. For Fish’s side see, for example, Stanley Fish, *Doing What Comes Naturally: Changes, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 103–20, 356–98 (1989). Fish and Dworkin don’t see their views as consistent, although I believe they are more compatible than their authors are willing to admit. Fish focuses on the psychology of judges, Dworkin on political justification. It is not immediately clear that the two are in conflict.
determining how settled the case is, and thus its likelihood of being overturned or limited in the future.) And this means that if someone asks us what the law is regarding abortion in the United States we must give two accounts, which are both true, but appear to be inconsistent with each other.

The key to understanding this conflict is in seeing that the law has two “bodies,” or two “manifestations.” One is the notion of law as “bottom line” rules: it is a set of normative instructions, prohibitions, prescriptions etc. which must be fairly articulate in order to be authoritative. This is the sense in which death penalty is currently constitutional in the United States. No matter how much disagreement there may be “behind the scenes,” this is in a familiar sense what “the law is.” But at exactly the same time law has another “life” in which what counts as the law is a continuing and often vague discourse, one in which law’s boundaries with other social norms are blurry and in which the diffusion between legal and non-legal norms is constant in ways that are far more subtle than the explicit amendment of the law by the explicit procedures for changing the law in any legal system. In this sense the bottom line rules and particular decisions are deemed legally correct in virtue of their derivation from more general legal principles, along with social factors, political considerations, even the rhetoric of particular judicial decisions: a strongly argued judicial decision, a powerful lawyer’s argument in court, even an influential commentator’s article, can all affect what the law is, how it operates, and the paths of change it takes.

This dual aspect of law is perhaps most visible when we consider what it means for a judge to dissent. People trained in common law systems are so used to dissents that they hardly ever consider how strange they are. Dissent is an act that at once acknowledges that a majority of a court has laid down what is an authoritative statement of what the law requires in a particular situation (as well as an implicit endorsement of a rule of decision according to which a court’s majority settles the law), and at the very same time uses the same sources used by the majority, i.e. "the law," to show why the majority’s judgment is mistaken as a matter of what the law (if understood correctly) is. Indeed, it seems that this simultaneous endorsement of the majority’s decision as the law and its rejection as a matter of law is essential for something to be an act of dissent, and not, for instance, a rebellious act intended to undermine the law’s authority. By way of comparison think how strange the notion of dissent would be in mathematics: a mathematician can of course reject a proof offered by another, but in doing this she does not accept the authority of the other mathematician; in fact, she does the exact opposite: she asserts that the alleged proof is mistaken and therefore has no authority at all. Indeed, we need not look that far: in many civil law jurisdictions judicial opinions never contain dissents, with the very idea striking them as something close to a logical contradiction.89

What is true of the official dissent by minority judges is also true of the academic lawyer writing a critical comment on a case, the lawyer arguing

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before a court that an earlier decision was wrongly decided, or the protestors in front of the Supreme Court holding a sign saying abortions are unconstitutional. It is this aspect of the law that explains why, despite all the controversy, and despite the fact that many believe that Roe and Planned Parenthood are wrong as a matter of law, they accept that abortion is currently legal in the U.S.

Dworkin spent much time explaining what he called “theoretical disagreements,” and most of the cases he discussed over the years were cases that involved a vigorous dissent, and to the extent that he tried to explain these phenomena he was plainly offering more that just a theory of explaining how appellate judges think, or a theory of adjudication trying to tell them how to think. But his account fails to capture the sense in which majority and dissent do not stand on equal ground. Unlike the two friends who debate a moral issue and “agree to disagree,” something counts as dissent only when at the same breath voicing the disagreement the judge acknowledges that her view is not the law.

The second life of the law, that of the bottom-line rules explains the sense in which the majority is the law in exactly that sense, namely in the way law makes certain demands upon people which they can follow without thinking about the reasons that underlie them, without bothering to think for themselves whether the dissent makes more sense than the majority (or perhaps that a third view is superior to both). In this sense it is a fundamental aspect of law that it allows people to follow it without having to decide for themselves what the best course of action in the circumstances is. This is true both of fairly simple matters, like speed legislation that reduces the degree of deliberation required by drivers, as well as far more complex issues such as the rules that make up contract law, which facilitate people interested in exchanging goods and services.90

That is why understanding what law is, how it operates and how it changes necessitates taking into consideration the interaction between law as bottom-line rules and law as reasons: they are often congruent or complementary, but they can also come into conflict, and interact in various complex ways.91 The explanation of these two senses of law has two aspects.

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90 The most prominent expositor of this picture of law, explicitly tying law to the authority of an expert and unsurprisingly ardently positivistic, has been Joseph Raz. See, e.g., Raz, supra note 31, at 28-52; Joseph Raz, Authority, Law, and Morality, in Ethics, supra note 13, at 210. Dworkin attacks Raz’s arguments from authority (pp. 198-207), but he misrepresents Raz’s argument. I will not discuss this issue here. For a summary of Dworkin’s misstatements see Brian Leiter, Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence, 48 Am. J. Juris. 17, 26 n.32 (2003).

91 Schauer is, I think, the closest to articulating law’s duality correctly. See, e.g., Schauer, supra note 83, at 852-54, 859 n.37. Nevertheless, I believe Schauer misses the way in which rules and reasons interact in complex ways in the law. When considering the difference between positivists and Dworkin he says the former are interested in accounting for the “pedigreeable set of materials,” whereas Dworkin is concerned with the “unpedigreeable factors.” Id. at 860 (footnote omitted); see also Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 196-206 (1991). This makes it seem that what separates Dworkin and positivists are just different interests in different and fairly independent elements of law. But the contrast is not
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One is conceptual and it refers to the possibility of reconciling the two seemingly conflicting accounts. The other is political, and it has to do with what we want legal practice to be.

The conceptual challenge is that we can accept the explanatory utility of two theoretical perspectives only if they do not contradict each other; or if they appear to contradict each other, by providing an explanation that reconciles the apparent contradiction. Yet in describing law as a matter of bottom line rules we seem to undermine the possibility of law existing in the other sense: bottom lines rules do not seem to operate as mere rules of thumb, i.e. as epistemic proxies or shorthand summary for the right action that can be set aside whenever we find out that they conflict with their underlying reasons. Rather, they are perceived as replacement for those reasons. But if that’s true, then we must explain how they can be reconciled with the sense of law as underlying reasons which can have normative force only if we disregard the rules. The situation is somewhat analogous to that which exists in the case of the competing theories of light in terms of waves and in terms of particles: each theory on its own seems compelling, each explains well some aspects of light and has difficulty explaining others, but both together seem inconsistent. It would seem that to justify a legal decision by appealing to certain rules is ipso facto to not justify it by its reasons, and to justify a decision by invoking certain reasons is to deny the authority of existing legal rules governing the situation. How can the two accounts co-exist?

I believe the duality of legal rules is not an aspect of the logic of (legal) rules, but is the result of the fact that legal practice in certain legal systems requires that decisions be backed by explanation. This aspect of the practice is most evident in adjudication, but it can also be found sometimes when statutes contain statements of purpose, when statutes contain more or less official commentaries, in legislative reform reports etc. We are so used to the prevalence of reason-giving, that it becomes natural to think that explaining the decision is essential for its authority or justification, but in fact, many legal systems contain pockets in which reason giving is not the norm, most notably the decisions of juries.

In what way does the requirement to give reasons affect the practice? The prevalent view is that giving reasons compels the decision maker to decide according to the correct rules. Giving reasons forces the decision-maker to formulate a convincing argument in support of her decision, and

between pedigreable and unpedigreable sources (reasons could be found in earlier decisions and thus have pedigree too). The contrast is between the aspects of every legal rule, so one must understand law’s demands as rules and reasons at the same time.

93 Cf. J.J.C. Smart, Extreme and Restricted Utilitarianism, 6 Phil. Q. 344 (1956). For the notion of rules (including legal rules) as exclusionary reasons, i.e. as considerations that replace the underlying reasons, see RAZ, supra note 31, at 73-84.
94 Thus, for instance, Owen Fiss has argued that it is nothing short of a “failure of authority” for “[a] judge [to] exercise[ ] power without fully engaging in the dialogue that is the source of his authority—[by] leave[ing] it to others … to explain his decision.” Fiss, supra note 59, at 1455-56 (1983) (emphasis added).
because the process of writing is usually longer than the process of thinking, it increases the chance of discovering errors that might otherwise have remained hidden. Giving reasons also enables others to examine the decision and thus makes it more difficult for the decision maker to base her decision on irrelevant considerations such as personal preferences. Thus, according to this model, there is a correct answer (i.e., the right rule to be applied to the case), determined independently of the reason-giving process, and to the extent that giving reasons is supposed to affect one’s decisions, it is by increasing the likelihood of correct answers. In short, giving reasons strengthens the commitment of the decision-maker to her decision.95

I believe that this is not the whole story of the relationship between rules and reasons, in fact not the most important part of the story.96 If we want to understand law we have to take both of its aspects into account, and any plausible account of law will have to show how they interact and often conflict. The key to understanding this point is recognizing that in thinking of law’s authority, the reason why it is binding, we constantly shift between two sources we have already encountered as possible justification of law’s legitimacy: its procedure of promulgation and its content. Here we see how they operate for explaining how law operates and solving the puzzle of the “two lives” of the law. The first source of authority tends to give precedence to rules and the other to particularized reasons, and our shifting between the two sources of authority can explain how our understanding of what legal rules are and their relation to reasons shifts.

There are many ways of reconciling these two accounts: if we trust the legislature and judiciary, we are likely to conclude that the rules they adopted are the right ones; and democracy may be justified as a decision-procedure that contains several mechanisms (flow of information, majority rule, criticism etc.) that tend to generate the right answers. Even if we could not ultimately justify law’s authority on both grounds, any account that seeks to explain law must take heed of both, as it illuminates many puzzles of legal theory. In the following two Sections I will show this with relation to two questions that have always been hotly contested by Dworkin and his positivist challengers, one—a substantive question about law—is the explanation of legal change; the other—a methodological question about legal theory—is whether legal theory is politically neutral.

C. Understanding Legal Change

Clarifying the conceptual problem is of importance, because it shows that it is a mistake to think of law as either only a matter of following rules, or the

95 See Frederick Schauer, Giving Reasons, 47 STAN. L. REV. 633, 649 (1995) (“giving a reason creates a prima facie commitment on the part of the reason giver to decide subsequent cases in accordance with that reason”).

96 This is not to deny that the origins of the requirement may have been mostly epistemic. It stands to reason that the requirement to give reasons developed largely in order to facilitate better decisions. But a correct account of the requirement’s origins does not necessarily explain how it operates today. Cf. NIETZSCHE, supra note 55, at 58 (Second Essay § 12).
view that law is a matter of deliberation on particular cases through the constant consideration of the particular reasons that apply to the case. It shows that the complex and constant interaction between these two elements of law is crucial for understanding many of its features. It is done by expanding what counts as part of the law, and as such what counts as a relevant source for understanding what the law requires, and thus broadening the scope of what counts as relevant material for determining what the law requires. One of the particular benefits of this observation is that it helps us understand the mechanisms of legal change.

I think the significance of this point is often missed because the question of legal change in jurisprudential circles is discussed in the wrong context. Following Dworkin’s lead the debate usually focuses on pivotal, ground-breaking changes that Dworkin argues (pp. 144-45) positivists cannot explain. But because these cases are unusual, they are fairly easy for positivists to explain. The positivist story of legal change by the court is based on two rather firm dichotomies: first between cases governed by law and those on which there is no law; and second the dichotomy between following the law (where it exists) and disregarding it, and in this way (at least in legal systems that recognize precedent) in effect changing it. Thus a court can change the law in one of two ways: either when it is required to adjudicate on a matter on which there is no law; or when a court comes across a case in which there is significant disparity between what the legal rules are and what it perceives (on whichever grounds) the legal rules should be, and then uses its law-changing powers to bring the two closer together. It thus seems that those cases that Dworkin focused on are the ones about which Dworkin’s critique has least bite.

Be that as it may, despite their celebrity such cases are relatively rare. A more significant test case for a theory that purports to explain how the law operates is therefore not accounting for legal change in these unique cases. The real test is the ability to explain the subtle, gradual, changes of doctrine that result in the creation of a novel doctrine. This is a process that can often only be identified in hindsight, and that, at least in part, is also the result of the interaction of legal cases with the non-legal environment. I believe that

97 For the first dichotomy see MARMOR, supra note 8, at 95; RAZ, supra note 27, at 181 (calling the distinction between cases governed by law and those not governed by law “fundamental”). For the second dichotomy see RAZ, supra note 27, at 207-08 (finding it “surprising … that the courts do not take more trouble to identify the exact borderline between the parts of their judgements concerned with applying and creating law[ s]ince the two are radically different”); Gardner, supra note 17, at 213. According to this approach when the judge decides not follow the law, this can only be the result of a conflict between what the law requires and what is clearly not part of the law requires. Together with the assumption that the former should correspond to the latter, this justifies changing the law in (some) cases of conflict. For criticism of this way of presenting legal change in a different context see Danny Priel, Farewell to the Exclusive-Inclusive Debate, 25 OXFORD J. LEGAL STUD. 675, 682-83 (2005).

98 Of course, according to this picture there may be further conditions limiting the power of the judiciary to change the law. It may be, for example, that we will allow the judiciary to change the law only when the disparity between the legal rules and their rationale is significant. See RAZ, supra note 27, at 197-98.
no adequate account of these legal developments is possible without taking
the duality of law seriously.

It is these cases that pose, I believe, the real problem for legal positivism.
As positivist accounts of legal change concentrate only on explicit gaps in the
law and judicial changes of the law, they can only explain this kind of legal
change with considerable artificiality. Dworkin is more sensitive to the way
law changes. His account of law as integrity in *Law’s Empire* sought to
explain the way in which law develops in a narrative-like way.\(^99\) However,
with his metaphor of the chain novel he suggested a model of legal
development in which each case is (ideally) a conscious rethinking of the
whole law; even if the court follows past decisions it does so only after
concluding, each time afresh, that the decision is on the right path as
determined by the correct moral principles. This image is perhaps appropriate
for the few cases Dworkin focuses on, but it does not represent accurately the
way law changes. Dworkin stresses the effort by judges to rethink the law
constantly in order to put it in its best light, whereas oftentimes legal change
occurs without the judge being fully aware that he or she are contributing to
that change. Dworkin’s account stresses the importance of moral
considerations as the ultimate determinant of the right answer, whereas in
reality vague moral ideas have a role alongside numerous other considerations
like political pressures, the identity of the judges, the impact of recent events,
economic constraints, and of course doctrinal past. Dworkin, then, was right
to stress that much of what goes into judicial decision-making was not
merely the application of general rules to particular cases. But he was wrong
to suggest that the judicial function is captured by thinking of the judge as
heroically standing outside society and time in pursuit of principle.\(^100\) Of
course, he can answer that this conception would make for better law
(something that we have questioned earlier), but at least as far as the question
of understanding how legal change comes about, his theory is no better than
that of his rivals.

The dual sense of law helps us understand legal change better. When a
judge produces a decision she has to balance both publicly available reasons
(often articulated in past decisions, thus forming something that, though
perhaps not binding as *ratio decidendi*, deserves her close attention), and
certain outcomes of particular cases. Both are elements of the legal decision,
and more generally, both are part of the law; and it is the interaction of the
two that determines the future path of the law.

The existence of reasons as part of the decision allows judges to change
the law by claiming that the reasons given in support of a particular legal
conclusion in the past do not support that conclusion, thus turning the
previous decision against itself. Alternatively, those reasons enable a current
judge to limit the scope of an earlier rule by showing that certain reasons
supporting the conclusion of a previous decision no longer apply because

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\(^99\) See *Dworkin*, supra note 12, at 228-32.
\(^100\) For Dworkin’s minimalist conception of the place of history in adjudication see *id.* at
227-28.
they rest on facts that are no longer true. Still another way of changing a legal rule is by emphasizing some reasons found in the first decision while suppressing others. More than bottom line rules reasons are more malleable to changing environments: a contemporary judge who wishes to remain faithful to past decision may do so by relying on a reason given in a past case, but using the different circumstances and context to reach a conclusion different from the one that was found in the decision as it was first articulated.

The acknowledgement of the place of reasons as an independent element of law within the legal decision makes it easier to accept the space for greater acknowledgement of other reasons outside past decisions. When reasons make up part of the legitimate material that determines what the law is, then the contingent fact that a particular good reason was never mentioned in an earlier decision need not be detrimental for using it to resolve a current dispute. And so the arguments in The Federalist papers, social scientific research, and even law review articles may be used to explain, qualify, and amend the bottom line rules of cases written today. (The relationship is bidirectional: certain legal decisions made today make us see at The Federalist papers in a new light.)

This does not mean that in a world in which decisions are silent on their reasons there would have been no legal change. It only means that law would probably have developed in very different ways from the ways it does when reasons are an integral, even essential, part of the decision, and would have been something rather different from law as is familiar to us today. To some degree this point is illustrated by the difference between common law and civil law traditions. Giving reasons is part of both, but the way this reason-giving is practiced is quite different. The French legal system is usually mentioned as the antithesis to the judicial style in common law decisions, because its judgments are almost devoid of explanation and argumentation. They usually span no more than a page and the outcome is presented as if it the result of logical deduction from certain sections of the relevant code. The result is that the way people think about law, its relation to other societal factors, and the way it changes, is significantly different from the way it is in American law. Even if reality is probably more complex than meet the eye, the fact remains that how law, life and their relationship are perceived,

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101 The last two moves are familiar. The first (and somewhat less common) strategy is found in Planned Parenthood where the majority stated that Plessy was “wrong the day it was decided,” see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992), i.e. the arguments given in support of it not compelling and no other argument could be adduced.

102 See Pierre Legrand, Against a European Civil Code, 60 MOD. L. REV. 44, 47-51 (1997). I should note that some of the conclusions Legrand draws from these observations seem to me to be exaggerated.

103 See Mitchel de S.O.l'E. Lasser, Judicial (Self-)Portraits: Judicial Discourse in the French Legal System, 105 YALE L.J. 1325 (1995). Lasser argues that behind the “official” portrait of the brief, logically-deduced and devoid of dissent legal decision, there is an “unofficial” portrait in which policy considerations and detailed argumentation are discussed behind the scenes in a manner not very different from what is familiar to lawyers in common law systems. But this only emphasizes the point I make in the text: had reason-giving only served an epistemic role,
and as a result practiced, are different in French and American law. If there had been a legal system in which dispute resolution decisions where never explained, legal change—and thus law—would have been more different still.

D. The Political Aspect of Legal Theory

Recognizing the place of the conceptual question helped us understand legal practice: it helped us see in what way different legal systems differ in their “mix” of rules and reasons. We can now see how this observation opens up the way for an additional question, namely that of assessing different legal practices on political grounds: we can imagine different legal systems standing on a spectrum at one end of which legal decision-makers never explain their decisions and as a result law operates only a set of bottom-line rules that are supposed to be applied as “mechanically” as possible to individual cases, and at the other extreme there are no rules but only an analysis of the individual considerations that apply uniquely to the particular case without any suggestion that they apply (or how they apply) to other cases. Of course, the pure extremes are unattainable, but there are definitely different points along the spectrum that different legal systems can take, and the choice between them is based on political values. In a legal system that adheres as much as possible to the first model those subject to the law will not know of any reasons for the rules they follow, so as to guarantee they do not try to subvert the bottom lines rules by their judgments of reasons. At the other end of the spectrum those subject to the law will not know of any rules, not even as heuristics to action, because this might influence the purity of their particularistic judgment to particular events in life. Contemporary legal systems that contain both bottom line rules and reasons can exhibit this political choice in various contexts, for instance, in the degree of willingness to question existing rules when those are thought to be unsupported by good reasons.

I believe part of the question between Dworkin and positivists is exactly which model of law it would be good to adopt. Dworkin’s ideal of law is one in which his super-human judge Hercules goes over the entire legal history in order to discover the right answer to every case. But it is not only judges who are on Dworkin’s mind. He contemplates a society of Herculees, and indeed believes that one of the virtues of his approach is that it “encourage[s] citizens” to think of each other as bearers of rights and duties, and are “to frame and test hypotheses about what these rights.”§104 In such

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104 Ronald Dworkin, *A Reply to Critics*, in DWORKIN, RIGHTS, supra note 31, at 291, 338 (emphasis added). Dworkin is close here to the model of reciprocity of law developed earlier by Fuller. See LON L. FULLER, THE MORALITY OF LAW 139-40 (rev. ed. 1969). Fuller was, of course, a staunch anti-positivist.
a society there would be no need for precedent, perhaps even no need for rules.105 In this light, Dworkin’s view that even in hard cases judges “discover” pre-existing law and that there is a right answer to every legal decision (pp. 41-42, 266 n.3) seems much less mysterious: when all there is are the underlying reasons which the judge has to weigh afresh in order to resolve every case (and the weighing can potentially always change, because political history always changes from one case to the next), then it is extremely unlikely that the judge will ever encounter a real “gap” in the law. There will always be something in those materials that will direct the judge in a certain direction, even if it was never specified as “the rule” of a past case. If law is not bottom line rules but only underlying reasons (including moral reasons), then together with the controversial but not outlandish view that moral values are objective, the right answer thesis seems a plausible, indeed almost inevitable, conclusion.

Against this model of law that encourages those subject to it to constantly engage with political questions, the picture of law presented by positivists is radically different. It is one that is modeled after a legal system from the other end of the spectrum, one in which law without rules is a contradiction in terms.106 This is a picture of law in which the main, perhaps only, purpose that can be properly ascribed to all law in general is the guidance of conduct,107 in which law exists exactly in order to avoid the need to contemplate and deliberate on the question how one should act. One turns to the law under this image as one turns to an expert on a particular question, namely in order to learn from it what to do.108 Just like Dworkin’s model, this is a normative, political, choice.

In saying that positivists are committed to a political theory I am siding with Dworkin (pp. 164-68), and setting myself against the positivists’ description of their work as descriptive.109 Dworkin reaches this conclusion

105 I therefore don’t agree with Raz who has argued that Dworkin’s theory is conservative in giving complete weight to the precedent and analogy. See Joseph Raz, Professor Dworkin’s Theory of Rights, 26 POL. STUD. 123, 133-35 (1978) (reviewing DWORKIN, RIGHTS, supra note 31). Raz interprets Dworkin’s theory through the lens of the bottom line model, and as such he explains Dworkin’s view by the latter’s supposed “total faith in analogical argument.” RAZ, supra note 27, at 205 n.19. But if my interpretation is correct, Dworkin has no need for analogy at all. For Dworkin ideally every decision is arrived at based on the totality of relevant facts that bear on the case, and therefore there is no need for any such, highly fallible, mechanism. No wonder then that in Justice in Robes Dworkin is critical of analogical reasoning as a mode of finding the answer to legal disputes (pp. 69-70). See also Dworkin, Reply, supra note 6, at 455 (same).

106 See HART, supra note 8, at 3, 8.

107 Id. at 249. For similar views see COLEMAN, supra note 14, at 70; KRAMER, supra note 22, at 6; RAZ, supra note 27, at 214.

108 In following the authority of law we are relying on “the law’s superior knowledge.” In doing this “[t]he law . . . is [to us] like a knowledgeable friend.” Joseph Raz, The Obligation to Obey: Revision and Tradition, in ETHICS, supra note 13, at 341, 348.

109 Some legal positivists have acknowledged the political edge of their theory, and have advanced arguments for a particular model, one for example in which laws are adopted in such a way as to reduce the scope of possible moral deliberation by courts. This view has been called “ethical positivism,” and it has often been clearly distinguished from conceptual positivism. That the two are distinct has been defended by both “ethical positivists” and

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by identifying legal positivism as a version of Archimedeanism and his rejection of all such arguments. But we see now that we can reach a similar conclusion (as Dworkin himself occasionally does, pp. 166-67, 216) without endorsing Dworkin’s problematic thesis. The positivists’ theory could be a descriptive claim, only if legal positivists could show that as a matter of fact all legal systems adhere to the model of law that’s close to the rule side of the spectrum. But as the discussion above sought to show, this claim is not true as an empirical matter. This pushes the positivist to a tight corner: if he says his theory is descriptive, we will conclude that it is false for it fails to account for many things we normally consider legal systems; if he says his theory is an account of what law should be, he must abandon his claim that his theory is descriptive.

Once we see that there can be different conceptualizations of the values that law is trying to promote with different legal systems being placed in different places on an imaginary spectrum, we see that the decision between them is unavoidably a political one, and unsurprisingly, one that’s related to the question of legitimacy. A society which puts a premium on political participation will probably have a different conceptualization of law than a society interested mainly in guidance. Different views on values like initiative, responsibility, liberty, even equality will affect our judgment of the legitimacy of political authority and thus affect the kind of law we would have.

V. INTO THE WORLD

So how are we to assess Dworkin’s project as it emerges Justice in Robes? My view is that a measured assessment of Dworkin’s arguments, one that tries to take sides, shows that some parts of his work are worthy of careful consideration, whereas others are unconvincing. But Dworkin has always argued that his arguments are meant to change legal practice. And that’s why the test of his theory is how it fares in reality, and this is something that Dworkin, always sure of his power of reason, has hardly troubled himself with. To be sure, he “tested” his theory on a few famous cases, but he neglected the fact that the constraints judges face suggest that Dworkin’s theory might not work in a host of common circumstances.

In fact, even with the most celebrated cases, close examination reveals a story quite different from Dworkin’s account. The Warren Court is no doubt close to Dworkin’s ideal for how courts should perceive of their role and fulfill it, but when discussing its decisions (e.g., p. 123), Dworkin does not even spare a nod of recognition to the literature suggesting that that

Court had less influence than is popularly conceived, thus highlighting the limitations of principled politics through courts that Dworkin advocates. Furthermore, while arguably this approach had less actual impact than is commonly perceived on the issues the Court decided, adopting it had a significant effect on the way courts are being perceived, and this resulted in a backlash, still visible today, that looks like the exact opposite of Dworkin’s ideals. Instead of courts serving as the catalyst for spreading the notion of principled decision-making to other branches of government, courts’ decisions are increasingly described in terms of the party affiliation or the personal views of the judges. Dworkin is of course keenly aware of the current situation, but he never acknowledges—let alone discusses—the possibility that it is not because his approach has not been adopted, but because something resembling it has been, that all too often what the Supreme Court delivers is not justice, but politics in robes.