
October 2012

Are Jurisprudential Debates Conceptual?: Some Lessons from Democratic Theory

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Citation Information

Priel, Dan. "Are Jurisprudential Debates Conceptual?: Some Lessons from Democratic Theory." *Osgoode Hall Law Journal* 50.2 (2012) : 359-402.

DOI: <https://doi.org/10.60082/2817-5069.1024>

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Are Jurisprudential Debates Conceptual?: Some Lessons from Democratic Theory

Abstract

The dominant view among legal philosophers is that jurisprudential debates about the nature of law are conceptual. In this article I challenge this view. I do so by comparing these debates to debates about the justification of democracy and showing that the arguments found in both are often very similar. I demonstrate that in both domains, there are arguments on one side that explain an institution (either law or democracy) in terms of its ability to help people lead a better life, and there are arguments on the other side that highlight the value of these institutions in promoting political participation. The arguments for democracy are unquestionably normative, and I argue this suggests that the jurisprudential arguments are normative as well. Based on this conclusion, I then offer some tentative suggestions for rethinking familiar jurisprudential terrains—now usually understood as dealing with conceptual questions—in normative terms.

Keywords

Law--Philosophy; Democracy

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DAN PRIEL *

The dominant view among legal philosophers is that jurisprudential debates about the nature of law are conceptual. In this article I challenge this view. I do so by comparing these debates to debates about the justification of democracy and showing that the arguments found in both are often very similar. I demonstrate that in both domains, there are arguments on one side that explain an institution (either law or democracy) in terms of its ability to help people lead a better life, and there are arguments on the other side that highlight the value of these institutions in promoting political participation. The arguments for democracy are unquestionably normative, and I argue this suggests that the jurisprudential arguments are normative as well. Based on this conclusion, I then offer some tentative suggestions for rethinking familiar jurisprudential terrains—now usually understood as dealing with conceptual questions—in normative terms.

L'opinion dominante chez les théoriciens du droit est que les débats jurisprudentiels sur la nature du droit sont de nature conceptuelle. Dans cet article, je conteste ce point de vue. Pour ce faire, je compare ces débats à ceux sur la justification de la démocratie et je démontre que les arguments sont souvent dans les deux cas fort semblables. Je démontre que, dans les deux cas, il y a d'une part des arguments qui définissent une institution (soit le droit ou la démocratie) en termes de sa capacité de permettre aux gens de mener une meilleure vie et, d'autre part, il y a des arguments qui mettent en relief les valeurs de ces

* Assistant Professor, Osgoode Hall Law School. This article started its life as part of an essay that I presented to audiences in the universities of Oxford, Illinois, Warwick, and Yale. Audiences there helped me realize that a separation was required, so that the three beasts imprisoned in the essay would be able to breathe more freely on their own. An earlier version of this article was presented in Edinburgh University and University of Texas School of Law. I thank participants on all occasions for their comments. In particular I wish to thank Larry Sager, John Ferejohn, and Mitch Berman for many questions that forced me to clarify my argument. I also thank Charles Barzun and three anonymous referees for the Osgoode Hall Law Journal for their detailed written comments. I also wish to thank the editors of the Osgoode Hall Law Journal for their excellent editorial assistance.

institutions dans la promotion de la participation politique. Dans le cas de la démocratie, les arguments sont indéniablement normatifs et je fais valoir qu'il en découle que les arguments qui définissent la jurisprudence sont également normatifs. En me fondant sur cette conclusion, je propose ensuite des pistes de solution permettant de redéfinir des terrains familiers de la jurisprudence – que l'on considère actuellement de manière générale comme étant de nature conceptuelle – en termes normatifs.

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THESE DAYS A WIDE GULF exists between legal and political philosophy. The main reason for this is the orthodox view among legal philosophers that the primary task of jurisprudence is to give a morally and politically neutral account of the nature of law—that is, an account of what law in general is. This is presented as an inquiry that is fundamentally different from an investigation into the law in any particular jurisdiction or in any particular area of law. According to this prevailing view, offering an account of that nature is believed to be the primary, and distinct, task of jurisprudence.¹ Consequently, proponents of this view (mostly

1. See e.g. Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2d ed (Oxford: Oxford University Press, 2009) at 104-05 [Raz, *Authority of Law*]; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) at 91-92 [Raz, *Between Authority*]; Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart, 2001) at 17; Leslie Green, "General Jurisprudence: A 25th Anniversary Essay" (2005) 25:4 *Oxford J Legal Stud* 565 at 567; Leslie Green, "Positivism and the Inseparability of Law and Morals" (2008) 83:4 *NYUL Rev* 1035 at 1036; Andrei Marmor, "The Nature of Law" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, online: <<http://plato.stanford.edu/archives/win2011/entries/lawphil-natures>>; Kenneth Einar Himma, "Situating Dworkin: The Logical Space between Legal Positivism and Natural Law Theory" (2002) 27:1 *Okla City UL Rev* 41 at 43; cf. Jeremy Waldron, "Legal and Political Philosophy" in Jules Coleman &

but not exclusively legal positivists) insist that their account of law is “conceptual” and “normatively inert,” that it is merely a “descriptive” and “morally neutral” explication of what law is.² I will call this view conceptualism. At first the conceptualist divide seems compelling: It is natural to think that law exists in democracies and dictatorships, and that it is found in liberal societies as well as in socially conservative ones. It thus seems natural to seek to know what it is that makes something into law regardless of the political environment in which it is found.

Nonetheless, this view has been challenged, most prominently by Ronald Dworkin, who over the years has argued that the conceptualist understanding of jurisprudence is fundamentally misguided. Jurisprudence, he argues, should be conceived of as a branch of political or moral philosophy, and, as such, as thoroughly political. According to Dworkin, the error conceptualists commit is a special case of a broader philosophical error he calls Archimedeanism.³ Archimedeanism is the view that one can give a neutral description of moral and political concepts and that one can separate inquiry into the nature of moral and political concepts from substantive moral and political discourse. In a series of writings, Dworkin has argued that Archimedeanism is mistaken. He has then applied his view to a number of contexts including jurisprudence, an area in which Dworkin argues most scholars continue to write under the Archimedean spell.⁴

Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 352 at 376 (describing and criticizing this approach).

2. See e.g. HLA Hart, *The Concept of Law*, 2d ed (Oxford: Oxford University Press, 1994) at 239 [Hart, *Concept of Law*]; Michael S Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2000) at 308-09 (describing his enterprise as “descriptive general jurisprudence” and contrasting it with normative jurisprudence); Michael Bayles, “Hart vs. Dworkin,” (1991) 10:4 *Law & Phil* 349 at 380; Jules L Coleman, “Negative and Positive Positivism” (1982) 11:1 *J Legal Stud* 139 at 147 (contrasting normative and conceptual inquiries); John Gardner, “Legal Positivism: 5½ Myths” (2001) 46 *Am J Juris* 199 at 203; Andrei Marmor, *Philosophy of Law* (Princeton: Princeton University Press, 2011) at 10, 109-35 [Marmor, *Philosophy of Law*]; Michael Giudice, “Analytical Jurisprudence and Contingency” in Maksymilian Del Mar, ed, *New Waves in Philosophy of Law* (Basingstoke, Hampshire: Palgrave Macmillan, 2011) 58 at 59, 65 (“Hartian conceptual analysis is not normative or political philosophy ...”); G Marshall, “Positivism, Adjudication, and Democracy” in PMS Hacker & J Raz, eds, *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977) 132 at 144.
3. See Ronald Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006) at 33-34, 162-83 [Dworkin, *Justice in Robes*].
4. See generally Ronald Dworkin, “Objectivity and Truth: You’d Better Believe It” (1996) 25:2 *Phil & Pub Aff* 87; Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University

Several jurisprudential conceptualists responded by rejecting Dworkin's attack on Archimedeanism.⁵ Fortunately, we need not enter into these debates here, because I believe we can reach conclusions that are similar to Dworkin's by going through what may be his different line of argument, and that is by examining the actual arguments used by legal positivists and showing that they are not really conceptual.⁶

In the past I have advanced various theoretical arguments that do not depend on Dworkin's anti-Archimedeanism and purport to show the claims of conceptualists are false.⁷ Those arguments challenged the possibility of conceptual inquiry about the nature of law. Though I still think these arguments are successful, I employ a different strategy in this article. I compare some of the debates between legal positivists and Dworkin to debates among theorists of democracy, and I show that there is remarkable similarity between them. This lends credence to the claim that jurisprudential disagreements are not conceptual. More precisely, I develop the following argument:

1. Most legal positivists claim that many jurisprudential debates are conceptual;
2. Debates about the justification of democracy are normative, not conceptual;

Press, 2011) at 23-96 [Dworkin, *Hedgehogs*].

5. See Raz, *Between Authority*, *supra* note 1 at 67-76 (developing an alternative account of theoretical disagreement); James Allan, "Truth's Empire – A Reply to Ronald Dworkin's 'Objectivity and Truth: You'd Better Believe It'" (2001) 26 *Austl J Legal Phil* 61; Kenneth M Ehrenberg, "Archimedean Metaethics Defended" (2008) 39:4-5 *Metaphilosophy* 508. Though making many valid points, these arguments have not fully understood Dworkin's position, in particular the significance of the relationship between law and morality to his view. These ideas can be found in many of his earlier works, but this view has been most explicit in his last book. See *ibid* at 400-09.
6. There are occasions in which Dworkin seems to reach this conclusion without the anti-Archimedean baggage. See Dworkin, *Justice in Robes*, *supra* note 3 at 166-67, 216. Whether these two strands of argument really are different is unclear. Many of Dworkin's early arguments against legal positivism seem to me to be merely less choate forms of the later argument against Archimedeanism. Dworkin himself suggests so (*ibid* at 234). As this exegetical point has no bearing on this paper, we can set it aside. There are others challenging conceptual jurisprudence in somewhat similar terms. See Gerald J Postema, "Jurisprudence as Practical Philosophy" (1998) 4:3 *Legal Theory* 329; Stephen R Perry, "Hart's Methodological Positivism" in Jules Coleman, ed, *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) 311 at 347-53. None of them, however, has put forth the challenge found in this article.
7. See Danny Priel, "Evaluating Descriptive Jurisprudence" (2007) 52 *Am J Juris* 139; Dan Priel, "Description and Evaluation in Jurisprudence" (2010) 29:6 *Law & Phil* 633.

3. The debates between legal positivists and Dworkin in jurisprudence are very similar in structure and content to debates on the justification of democracy; and hence
4. It is very likely that, contrary to (1), debates between legal positivists and Dworkin are really normative.

It is clear that even if all premises of this argument are true, this argument is clearly not one of deductive entailment; and of course, one of its premises may be false. The burden of this article is to show why this is a good argument. What this outline demonstrates is that, on its own, this article's argument is rather limited. Alone, it does not show that conceptual jurisprudence is impossible; rather, it seeks to show that even if conceptual jurisprudence is possible, much of what is nowadays taken to belong to the conceptual part of jurisprudence is not conceptual. Though limited in this way, I think the argument, if successful, is of great significance. The conceptualist view dominates contemporary jurisprudence. Therefore, showing that a significant part of what is supposedly conceptual is actually not can help move debates in what I hope is a more fruitful direction. For this reason I tentatively develop ideas for new avenues for jurisprudential inquiry, which I think are opened once we see that some central contemporary jurisprudential debates are not conceptual.

I set out to do this as follows: In Part I, I begin by looking in some detail at jurisprudential debates that conceptualists claim to be politically neutral disagreements about the nature of law. I focus on debates between legal positivists and Dworkin, and I demonstrate how similar these debates are to two competing views about the value and justification of democracy. I distinguish between two goals, that of guidance and that of participation in the political process, and I show that we find justification for both law and democracy in these terms. I then argue that there is a good correlation between the views legal positivists express about law and their more explicitly political justifications of democracy, and that a similar correlation exists between Dworkin's views on law and his views on democracy. Then, in Part II, I turn back to the law to show how these competing justifications can help us understand jurisprudential arguments about the rule of law, legal interpretation, and judicial dissent. Finally, in Part III, I make some tentative suggestions as to the direction jurisprudence should take once its political foundations are brought to light. Specifically, I propose a new way of thinking about the debates between positivists and anti-positivists, a new perspective on law and democracy, and a better way of understanding competing jurisprudential theories.

I. JURISPRUDENCE AND DEMOCRACY

A. TWO CONCEPTIONS OF LAW AND DEMOCRACY

What is the point of having laws? What is it that they do to us? You might think that these questions, if they make sense at all, have many answers: laws prohibit and permit; they empower and give immunity; they suggest and they demand; they create social meanings and work to change existing ones; they try to strengthen some social norms and eradicate others; they help create wealth, and they are used to redistribute it. The list could go on and on. Perhaps, however, there is a more general question we can ask about all this, and it is *how* does law go about doing all that? To this question, legal positivists and Dworkin give radically different answers.

Legal positivists provide the simpler answer. In their picture, the main, and perhaps only, general purpose that can be properly ascribed to all law is the guidance of conduct.⁸ This guidance function exists in order to *avoid* the need to contemplate and deliberate on the question of how one should act and precisely to relieve people from the need to think about their rights and duties and the rights and duties of others.⁹ The most influential version of this argument, developed in numerous works by Joseph Raz, highlights this point by calling it “the service conception” of

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8. Hart, *Concept of Law*, *supra* note 2 at 249 (“I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.”). For similar views, see Marmor, *Philosophy of Law*, *supra* note 2 at 134 (discussing law’s “pivotal function of guiding human conduct”); Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, revised ed (Oxford: Clarendon Press, 1995) at 215-17, 230-31 [Raz, *Ethics*] (“what cannot communicate with people cannot have authority over them,” at 217); Matthew H Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004) at 6; Raz, *Authority of Law*, *supra* note 1 at 214; Scott J Shapiro, “On Hart’s Way Out” in Jules Coleman, ed, *Hart’s Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001) 149 at 169-182; Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) at 70, 101 (“Whatever ends it serves, however, the distinctive feature of law according to most positivists is that it serves these ends through rules that purport to guide conduct. Law guides conduct by offering reasons for action,” at 101); *cf.* Hart, *Concept of Law*, *supra* note 2 at 94-95.
 9. See Raz, *Ethics*, *supra* note 8 at 207; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Oxford: Clarendon Press, 1991) at 146; PS Atiyah, “Form and Substance in Contract Law” in *Essays on Contract* (Oxford: Clarendon Press, 1986) 93 at 93-96, 99-101 (“... [rules save] us from having to worry about reasons and arguments ...”); Neil MacCormick, “The Concept of Law and ‘The Concept of Law’” (1994) 14:1 Oxford J Legal Stud 1 at 6-7; Scott J Shapiro, *Legality* (Cambridge: Harvard University Press, 2011) at 138, 152-53, 173, 195 [Shapiro, *Legality*].

authority, according to which the “role and primary normal function [of authority] is to serve the governed.”¹⁰ On this view one turns to the law, *i.e.*, one relies on law’s authority, in the same way one turns to an expert on a particular question, namely in order to learn from it what to do.¹¹ Under this approach, the justification for following the law, and the limits of law’s authority, are straightforward: One is normally justified in following the law because, and to the extent that, by doing so one is more likely to comply with the reasons one has than by trying to work out those reasons on one’s own.¹² All this is presented as a conceptual truth about the nature of law.¹³

Against this model of law, the picture of law Dworkin presents is radically different. He asserts that law is not there to guide people or to instruct them how to act. Rather, law is an endeavour in which a community engages in order to articulate for itself the right principles to govern it. Dworkin presents the positivist account of law as one according to which “law provides a settled, public and dependable set of standards for private and official conduct, standards whose force cannot be called into question by some individual official’s perception of policy or morality.”¹⁴ He is explicit in rejecting this account in favour of

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10. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 56 [Raz, *Morality of Freedom*]. For Raz’s most recent thoughts on the service conception of authority, see Raz, *Between Authority*, *supra* note 1 at 134-42.
 11. In following the authority of law we are relying on the “law’s superior knowledge,” and in doing this “[t]he law ... is [to us] like a knowledgeable friend.” Raz, *Ethics*, *supra* note 8 at 348. Raz considers another possibility: that law is there to coordinate action. But the distinction between the two is less clear than it seems. Even the coordination function is premised on the idea that a coordinated solution will be better than a non-coordinated one, and that the costs of generating coordination through law (including moral costs) will be lower than the benefits of coordination. (This is why we leave many aspects of life uncoordinated.) In other words, the justification of generating coordination through law must presuppose something very much like the idea of law as a “knowledgeable friend.” Indeed, just like in the former case, where an expert has, according to Raz, no obligation to obey the law because of his or her superior knowledge, in the case of coordination “[a] person who understand the situation will often have reason to go beyond the law, and to do more than the law requires in pursuit of the same co-ordinating goal” (*ibid* at 349).
 12. See Raz, *Morality of Freedom*, *supra* note 10 at 53; Raz, *Between Authority*, *supra* note 1 at 136-37.
 13. See *e.g.* Jules L. Coleman, “Methodology,” in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 311 at 341 (“[T]he function of guiding conduct ... [is not a] moral argument about law’s proper function,” but rather a “kind of functional explanation of law. ... [It] is part of the explanation of its existence and persistence, as well as the shape law takes in its mature forms.”).
 14. Ronald Dworkin, *Taking Rights Seriously*, revised ed (Cambridge: Harvard University Press,

“a different and more ambitious” one,¹⁵ in which “[c]itizens are encouraged to suppose that each has rights and duties against other citizens, and against their common government”¹⁶ In this way the law “encourage[s them] to frame and test hypotheses about what these rights are”¹⁷ Law, in other words, is not a set of rules to which we turn for guidance and which provides this guidance exactly by mediating between us and the normative considerations about how we should live. Rather, law is there to perform the exact opposite function, to get us to engage in those moral and political considerations.¹⁸ We discover what we ought to do according to law at the end of a *moral* inquiry, not through a classificatory inquiry of identifying from a whole range of available legal norms the one norm that is applicable to our situation, and then following it.

Another way of making this point is by considering the place of rules in Dworkin’s account. Positivists view rules and guidance as inseparable: Law consists of rules because rules provide guidance, and guidance is the point of law. Dworkin, however, denies the existence of legal rules (in this sense); his emphasis on the idea that law is made up of principles (or later, of reasons), is a rejection of the view that law can ever provide guidance in the form of a rule to be identified and followed. As he puts it, “There is no such thing as ‘the law’ as a collection of discrete propositions, each with its own canonical form.”¹⁹

Dworkin draws on these ideas to develop his conception of the rule of law “that does not distinguish . . . between the rule of law and substantive justice.”²⁰ The rule of law, says Dworkin, is not satisfied when answers to political questions

1978) at 347 [Dworkin, *Taking Rights Seriously*].

15. *Ibid.*

16. *Ibid.* at 338.

17. *Ibid.* What Dworkin says here is close to the model of reciprocal law developed earlier by Fuller. See Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 139-40. Fuller was an anti-positivist. By contrast, though Raz talks of a right to political participation, he nowhere considers it a goal of law to encourage political participation. See Raz, *Authority of Law*, *supra* note 1 at 271-72.

18. Dworkin draws a similar contrast between the view (which he attributes to Raz) according to which people accept “moral rules [such as the rule that one must always keep his promises] for the guidance of [their] conduct,” and his own view, according to which “moral argument or decision is a matter of giving reasons for or against the morality of a certain course of conduct, rather than appealing to rules set down in advance whether by *social* or individual decision.” Dworkin, *Taking Rights Seriously*, *supra* note 14 at 72 [emphasis added]. Though he refers to moral rules, Dworkin’s views on the relationship between legal and moral reasoning, as well as the italicized word, make this contrast applicable to law as well.

19. *Ibid.* at 344.

20. Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 12 [Dworkin, *Principle*].

are “drawn from a public book,” where we find previously prepared answers to practical problems; Dworkin dismissively calls this “the rule of legal texts.”²¹ The rule of law is satisfied when political bodies (courts, legislatures, the executive) and citizens engage in this moral inquiry, and in particular when they succeed, through their joint endeavours to provide the correct interpretation of what the law demands. This view of law is thus deeply tied to a particular “republican” conception of self-government.²²

How do these abstract ideas translate into something (more or less) recognizable as reality? Dworkin’s ideal lawyer is his super-human judge Hercules, who reviews the entire legal history in order to discover the right answer to every case.²³ Though well known, the significance of this idea has not been adequately recognized. If Dworkin had been interested in philosopher-kings in the form of judges, he would have made his Hercules morally omniscient—one who simply knows what to do at any given moment. But such a figure, while perhaps satisfying the positivist model of law with its superior knowledge, would not match the ideal of self-government. Morality by its nature is a communal enterprise of discussion and debate; moral right and wrong are matters that are not “out there” to discover but that emerge from interpretation of the attitudes of different members of a community in an effort to make them as coherent as possible. In describing this view, Dworkin once wrote that one of its “appealing” aspects is that “[i]t is well suited to group consideration of problems of justice, that is, to *developing a theory that can be said to be the theory of a community* rather than of particular individuals”²⁴

21. Dworkin, *Taking Rights Seriously*, *supra* note 14 at 338.

22. See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) at 111 [Dworkin, *Freedom’s Law*] (“our government shall be republican rather than despotic”). Scott Shapiro has argued that republican ideals that motivated the founders of the United States undermine Dworkin’s view of law. See Shapiro, *Legality*, *supra* note 9 at 324–30. But Dworkin’s views are definitely in line with some republican thought. See Michael J Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge: Harvard University Press, 1996) at 4–7, 317–21. Sandel’s version of “republican politics” that is “more clamorous than consensual,” in which “public institutions” such as “townships, schools, religions, and virtue-sustaining occupations” “gather people together in various capacities” (*ibid* at 320–21) bears strong similarities to Dworkin’s views. This will be discussed later in this Part. Furthermore, even if Shapiro is correct in his historical account of American law, it is not clear how this can challenge Dworkin’s view on *conceptual* grounds. See text following note 62.

23. See Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986) at 239–54 [Dworkin, *Law’s Empire*].

24. Dworkin, *Taking Rights Seriously*, *supra* note 14 at 163 [emphasis added]. When directly charged with the claim that his theory cannot explain the conceptual truth that something can be law only if it guides conduct, Dworkin replied that his theory can do that, if guidance

Judges are not observers in this community of principle; rather, they are active participants and even leaders in these political debates.²⁵ A crucial but unappreciated aspect of Dworkin's emphasis on judges, however, is that Hercules is not only a model for the judge. Dworkin contemplates a society of Herculese, and sees law as central in creating such a society. True citizenship for him is something that people earn by engaging in political debate.²⁶ It is important to understand that, for Dworkin, it is not just that there is value in engaging in this moral inquiry (alongside the value in finding out the right thing to do). It is more accurate to say that, according to Dworkin, there is no moral truth for that community without such an inquiry. Self-government is not merely valuable alongside the guidance of conduct law provides; in a way, it makes no sense to talk about legal guidance outside the context of self-government. Similarly, it makes no sense to talk about legitimate law if it is imposed from above, no matter how wise Hercules is.

With this characterization in mind, what separates legal positivists and Dworkin is not the conditions of validity, but a different issue altogether: the question of what makes law *potentially* justified. Both accounts are part of a broader answer to the question of what could, in principle, give law authority—what gives it the right to tell people what to do. According to the positivist answer, law has *de facto* authority to the extent that it is taken to guide people to what they ought to do, and it has legitimate authority (*i.e.*, it is justified) to the extent that it in fact fulfills this task.²⁷ It is true that on this view a law normally lacks justification when it provides the wrong guidance. This, however, is a specific judgment applied to individual cases; it does not undermine the general underlying point that law

is understood in the sense that “it is possible for people to form the opinion, on the basis of arguments available to them, that [a proposition of law] is true.” Ronald Dworkin, “Thirty Years On,” Book Review of *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* by Jules L Coleman, (2002) 115:6 Harv L Rev 1655 at 1685. Even here, then, law guides not by giving instructions that release one from thinking about moral argument, but by forcing people to engage in “arguments available to them.”

25. See Dworkin, *Taking Rights Seriously*, *supra* note 14 at 338 (“The courts participate in this process, by providing an occasional forum for public considerations of these controversial issues of justice, and by providing leadership whose power is rightly qualified by the force of the arguments it can command.”).
26. See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000) at 372 [Dworkin, *Sovereign Virtue*].
27. See Raz, *Authority of Law*, *supra* note 1 at 28-29. “A person has effective or *de facto* authority only if the people over whom he has that authority regard him as a legitimate authority. ... A common factor in all kinds of effective authority is that they involve a belief by some that the person concerned has legitimate authority. ... [T]he explanation of effective authority presupposes that of legitimate authority” (*ibid*) [footnotes omitted].

is *potentially* legitimate to the extent that it provides guidance on how to act, which frees agents from engaging in weighing any normative issues themselves. It is the combination of these two ideas—on what gives law de facto authority and what gives it legitimate authority—that explains why legal positivists have no difficulty with unjust law still being considered law, yet at the same time also think that the gunman situation writ large is not one of law.²⁸ The gunman situation is not one that could be potentially legitimate.

This is not a purely conceptual claim. It is a controversial political claim about what can give government the right, even in principle, to tell people what to do. That this is a normative claim becomes clearer when we contrast it with Dworkin's view. On this view law is justified to the extent that it is a product of a community's acts of self-government, and self-government is achieved only when its members engage in the normative considerations applied to them. Since law making in this sense is a constant enterprise of thinking and rethinking of our rights and obligations towards each other, what makes law potentially legitimate is that it is structured in such a way that it gets people to constantly engage with the normative considerations that apply to them. When juxtaposed, it is clear that these are more than slightly different views on law; they are in a certain sense diametrically opposed, and these conflicting views go to the heart of the conflict between legal positivists and Dworkin.²⁹

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28. Hart claimed that a legal system is not “the gunman situation writ large,” i.e., that it is not simply in the business of issuing threats, like a gunman, only on a large scale. See Hart, *Concept of Law*, *supra* note 2 at 7, 82-85 (distinguishing between “the gunman situation writ large” and a legal system).
29. The discussion in the text helps understand why it is wrong to think that Dworkin's rejection of legal positivism was based on his different view on law's conditions of validity. See e.g. Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001) at 49-50 [Marmor, *Positive Law*]; Mitchell N Berman, “Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law” in Matthew D Adler & Kenneth Einar Himma, eds, *The Rule of Recognition and the U.S. Constitution* (New York: Oxford University Press, 2009) 269 at 287-88. I should add that despite this mistaken reading of Dworkin, Berman advances cogent criticisms of Hart's legal positivism in his essay. In fact, I believe his view is closer to Dworkin's than he imagines. Dworkin rejects the entire positivist edifice according to which we first identify valid norms and then their content, and therefore validity has no role in his account: “I do want to reject ... the picture of ‘existing law,’” according to which “the law of a community is a distinct collection of particular rules and principles ... such that it is a sensible question to ask whether, at any given moment, a particular rule or principle belongs to that collection. ... I did not mean, in rejecting the idea that law is a system of rules, to replace that idea with the theory that law is a system of rules and principles.” Dworkin, *Taking Rights Seriously*, *supra* note 14 at 343-44; see also Dworkin, *Taking Rights Seriously*, *supra* note 14 at 44, 76. Dworkin thinks that law's authority is exercised by directing us to engage in moral issues in order to determine the *content* of legal

How is all this related to democracy? One central question discussed among theorists of democracy is, naturally, what justifies democracy. Even though for most people living now in the West democracy appears natural and quite possibly the only legitimate form of government, it is actually a relative newcomer on the political scene,³⁰ one that met considerable resistance in its early days.³¹ Of the many available arguments for democracy, I wish to focus here on two general approaches. One type of justification, often known as “epistemic,” is premised on the view that “the aim of democracy is to ‘track the truth.’ ... [D]emocracy is more desirable than alternative forms of decision-making because, and insofar as, it does that.”³² At its most extreme, one may believe that whenever the democratic process operates well, one may take the majority’s view as irrefutable proof of the correct decisions. Jean-Jacques Rousseau seems to have held this view when he stated, “When ... the opinion contrary to my own prevails, this proves only that I have made a mistake, and that what I believed to be the general will was not so.”³³ On some interpretations of this view, then, the majority’s view constitutes the right course of action. Less strongly, someone may hold that democracy is justified because it is a decision-making procedure that tends to produce right answers.³⁴ Why might we think that? The best-known argument for this view is based on an idea first developed by the French Enlightenment thinker Nicolas de Condorcet. He proved mathematically that when a sizable group of people is collectively required to answer a question, if each member knows the correct answer with a probability higher than 0.5, then the likelihood of their combined answer being right approaches 1 as the size of the group increases.³⁵ This so-called

norms. I explain what is at stake between legal positivists and their opponents. See Dan Priel, “The Place of Legitimacy in Legal Theory” (2011) 57:1 McGill LJ 1.

30. The ancient democratic city states were very different from modern democracy, so much so that by today’s standards they would probably not count as true democracies. Indeed, to those who first experimented in what we now call democracy, the Athenian model was one that had to be avoided. See John Keane, *The Life and Death of Democracy* (New York: WW Norton & Company, 2009) at 275-79.
31. See John Dunn, *Democracy: A History* (New York: Atlantic Monthly Press, 2005) at 13-15.
32. Christian List & Robert E Goodin, “Epistemic Democracy: Generalizing the Condorcet Jury Theorem” (2001) 9:3 J Pol Phil 277 at 277; accord Joshua Cohen, “An Epistemic Conception of Democracy” (1986) 97:1 Ethics 26 at 29.
33. Jean-Jacques Rousseau, *The Social Contract*, translated by Maurice Cranston (Harmondsworth: Penguin, 1968) at 153.
34. For an interpretation of Rousseau as holding this weaker view, see Bernard Grofman & Scott L Feld, “Rousseau’s General Will: A Condorcetian Perspective” (1988) 82:2 Am Pol Sci Rev 567; BM Barry, “The Public Interest” (1964) 38 Proc Aristotelian Soc’y Supp 1 at 12-13.
35. See “Essay on the Application of Mathematics to the Theory of Decision-Making” in Keith Michael Baker, ed, *Condorcet: Selected Writings* 33 at 48-50 (Indianapolis: Bobbs-Merrill,

Condorcet Jury Theorem has been exploited recently to defend majoritarian decision making.³⁶

This conception of democracy has implications not only for the justification of majority rule, but also for the other component usually associated with democracy, namely the protection of certain rights and freedoms. Perhaps because democracies, more than other forms of government, depend on the aggregation of dispersed information, they need to allow more freedom to their subjects. So on this view freedom of speech is largely justified by its informational value; the promotion of a culture of vigorous discussion and the protection of unpopular views are defensible because they lead to better decision making.

Interestingly, if we look at the work of legal positivists who have written about democracy we see that many of them embrace similar ideas. Jeremy Bentham had a tortuous relationship with democracy, arguing for and against it at different times of his life.³⁷ But he ultimately settled on support for virtually universal suffrage, including women. Bentham's justification for democracy was instrumental: As his fundamental moral principle was the greatest happiness for the greatest number of people, he believed that "general consent" is "the surest visible sign and

1976). (This is a translation of excerpts from the introduction to a book that summarizes informally what is proven mathematically later in the book. See Nicolas de Condorcet, *Essai sur l'application de l'analyse à la probabilité des décisions rendues à la pluralité des voix* (Paris: L'Imprimerie Royale, 1785). Interestingly Condorcet himself considered this an argument against democracy as he thought most people were insufficiently knowledgeable (*ibid* at 50-51). Francis Galton made one of the first explicit attempts of justifying the ability of democracy to aggregate dispersed information held by members of society. See Francis Galton, "Vox Populi" (1907) 75:1949 *Nature* 450; Francis Galton, "The Ballot-Box" (1907) 75:1952 *Nature* 509.

36. See *e.g.* List & Goodin, *supra* note 32; Grofman & Feld, *supra* note 34; David Estlund, "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority" in James Bohman & William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass: MIT Press, 1997) 173. For a slightly different argument about the relationship between democracy and truth, see Ian Shapiro, *The Moral Foundations of Politics* (New Haven: Yale University Press, 2003) at 202 (emphasizing how democracy "giv[es] political aspirants incentives to shine light in dark corners and expose one another's failures and dissembling"). This is close to Bentham's utilitarian arguments related to democracy's ability to better control potentially corrupt rulers. See HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) at 68-69; cf Jacob Viner, "Bentham and J.S. Mill: The Utilitarian Background" (1949) 39:2 *Am Econ Rev* 360 at 364 ("the standard line of the Benthamites" was "that only by democratic voting could there be an adequate guarantee that legislators would *always* or predominantly serve the general interest ..." [emphasis in original]).
37. See Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press, 2006) at 78-108, 137-70.

immediate evidence of general utility.”³⁸ Thus, democracy for Bentham was justified by providing the sort of information required for knowing which courses of action are more likely to be conducive to general utility.³⁹ While I believe Bentham was in many respects very different from contemporary legal positivists, like them he saw law as being primarily concerned with the guidance of conduct.⁴⁰

Similar views are found in the work of contemporary legal positivists, even those who are not utilitarians. Raz developed the very influential account of authority we encountered above, and its application to law is familiar. It is less well-known that Raz extended this argument to democracy. He wrote that “[d]emocracy is justified inasmuch as it is necessary to serve the well-being of people. It shares the general structure of authority and relies, for its legitimacy, on its ability to deliver sound decisions.”⁴¹

Perhaps the best illustration of my point comes, surprisingly, from examining an argument for democracy offered by a legal positivist who seems at first like a counterexample to my suggestion of a link between positivists’ view of the authority of law and democracy. Andrei Marmor is a legal positivist who has argued that democracy can be justified not only to the extent that it promotes right answers, but also because of considerations of “fairness.”⁴² Closer inspection, however, reveals that even when talking about fairness his argument remains squarely within an instrumental, “service” justification for democracy. Marmor explicitly follows Raz’s views on authority and, like him, thinks that they apply both to law and to democracy.⁴³ Nonetheless, he considers the question of whether we would have reason to follow a mistaken democratic decision that has been arrived at by fair procedures (however we define those) and offers two reasons why we might sometimes answer this question affirmatively. The first is that in addition to adopting the correct outcome to particular cases, we have an interest

38. Jeremy Bentham Manuscripts, University College London, Box 127, sheet 3, cited in Ross Harrison, *Bentham* (London, UK: Routledge & Kegan Paul, 1983) at 214. See *supra* note 36 for some of Bentham’s other utilitarian arguments.

39. See Ross Harrison, *Democracy* (London, UK: Routledge, 1993) at 110-11.

40. See Phillip Schofield, *Bentham: A Guide for the Perplexed* (London, UK: Continuum, 2009) at 139. On the difference between Bentham and contemporary legal positivism, see Dan Priel, “Towards Classical Legal Positivism” (Osgoode Hall Law School CLPE Research Paper Series, No 20, 2011), online: <<http://ssrn.com/abstract=1886517>>.

41. Raz, *Ethics*, *supra* note 8 at 102; see also Raz, *Ethics*, *supra* note 8 at 115-16; Raz, *Between Authority*, *supra* note 1 at 153, n 21.

42. See Andrei Marmor, “Authority, Equality and Democracy” (2005) 18:3 *Ratio Juris* 315 at 316 [Marmor, “Democracy”]. For his defense of legal positivism see Marmor, *Positive Law*, *supra* note 29 at 49-88.

43. Marmor, “Democracy,” *ibid* at 317-18, 344.

in maintaining just institutions. These institutions, Marmor explains, may be justified when they are “instrumentally conducive to supporting an otherwise legitimate and well functioning authority,” and in such instances “the duty to obey mistaken decisions can be derived from the duty to support just institutions.”⁴⁴

This argument is explicitly instrumental, but contrary to Marmor’s claims it fails to show that fairness plays any distinct role in justifying democracy. Marmor presumably thinks that we have a duty to support just institutions because such institutions tend to produce just (*i.e.*, correct) decisions. (What else makes them just? Why else would we have a duty to support them?) But this shows that we should not care about democratic procedures because fairness matters, but because in the long run they tend to produce better decisions. More precisely, on this view one would be justified in following a mistaken decision of a democratic institution only if the harm to the just institution from non-compliance with a mistaken decision is greater than the harm caused by following it. In those instances in which the harm to the institution from non-compliance is smaller than the harm caused by following the mistaken decision, this argument does not support following the mistaken decision. Even in those cases in which maintaining fair procedures is thought to be relevant in this way, the connection between the decision to follow the democratic outcome and considerations of fairness is only contingent. For according to this line of reasoning, if we found out that there were unfair ways (*e.g.*, manipulation or deceit) of maintaining the democratic institutions that normally provide us with correct guidance, Marmor’s view would favour adopting these ways over fair ones.⁴⁵

Marmor’s second argument is that there are instances in which the right decisions “are not knowable, or extremely difficult to ascertain, or not supported by enough available evidence,” and that in such cases “it may become more important ... to have a fair decision procedure than a sound result.”⁴⁶ Fairness is justified on these occasions, says Marmor, because it is more respectful of

44. *Ibid* at 342-43 [citations omitted]. It is questionable whether anyone adopting Raz’s views on authority need to appeal to fairness as justification for following mistaken decisions. A central feature of following authority according to Raz is that one ought to follow it even when its edicts are mistaken. See Raz, *Morality of Freedom*, *supra* note 10 at 47. Properly understood, following mistaken decisions can be justified within Raz’s general account for the justification of authority.

45. This is not a fanciful idea. A long line of theorists, beginning at least with Plato, have argued that the ruler is permitted, at times even required, to manipulate and deceive for the sake of maintaining order and justice. See Plato, *The Republic*, translated by Desmond Lee (Harmondsworth: Penguin, 1987) at 180-82, nn 414a-415d.

46. Marmor, “Democracy,” *supra* note 42 at 343.

autonomy. There are several problems with this argument. First, if autonomy is important, it does not cease to be important when there is no epistemic deficiency, and it should always be taken into account. This implies that if autonomy is a valuable goal, its value should be incorporated into the assessment of the extent to which the authority in question is justified; to then rely on it when we are unsure about the guidance provided by the authority is to count it twice. Further, if we are faced with cases of epistemic deficiency, it is not at all clear why such cases call for democratic decision making. We may agree for the sake of argument that autonomy implies equal power in decision making if opting for a collective decision procedure, but Marmor still needs to explain why adopting such a collective decision procedure is the best way to promote individuals' autonomy. After all, in these circumstances those in the minority are forced to comply with a law they think is wrong in circumstances in which *ex hypothesi* we do not know whether the law is right or wrong. In such cases there is an obvious alternative to collective decision making, namely leaving the matter to different people to decide on their own. At least prima facie this possibility should be more appealing to anyone concerned with autonomy. Marmor might reply that there are instances in which order or support for just institutions justifies adopting one answer because leaving matters for individual choice would lead to chaos. That, however, is a controversial claim that would be rejected by those who are wary of the dangers of collective action. At the very least, it is hard to see why collective action would be superior to individual action as a general matter. More importantly, if that is the reason for opting for collective action rather than leaving it for individual choice, then we are back in the familiar territory that justifies democratic procedures on instrumental grounds and not for reasons of fairness. For in such cases, the reason we opt for collective decision procedures is the chaos that would result from leaving matters to individual choice.

Whatever one makes of Marmor's position and its modest concession to considerations of fairness, it is entirely different from the way Dworkin understands the idea of democracy and how he defends it. One way of putting the difference is that while Marmor is (ostensibly, at least) concerned with fairness, Dworkin is concerned with participation;⁴⁷ for Dworkin, as we have seen in the case of law, political engagement is crucial for there to be moral imperatives. This helps us understand why majority rule plays such a marginal role in Dworkin's idea of

47. On the difference between the two see generally Robert S Summers, "Evaluating and Improving Legal Processes – A Plea for 'Process Values'" (1974) 60:1 Cornell L Rev 1 at 20-21, 24-25.

democracy.⁴⁸ He allows that majorities may be useful in what he calls “choice-sensitive” matters,⁴⁹ namely (roughly) those matters of taste on which there is no right or wrong answer. But on other matters the mere aggregation of individuals’ views lacks what it takes to get to the right answers to questions of political morality. At one point Dworkin considers the Condorcetian argument for epistemic democracy and dismisses it in a single sentence: in fundamental moral matters “we have absolutely no right” to assume that a majority of the population is closer to the right answer, and therefore the aggregation of their opinion is not likely to lead to discovering the right course of action.⁵⁰

Dworkin contrasts majoritarian democracy with what he calls “partnership democracy”—a conception of democracy that demands citizens “participate as equals,”⁵¹ in a “democratic discourse ... that makes each citizen a partner in the political enterprise.”⁵² This conception of democracy is justified to the extent that it “allow[s] citizens to govern themselves collectively through a partnership in which each is an active and equal partner.”⁵³ The similarity between this justification of democracy and his views on law is obvious. But we can say more: In such a society there would presumably be less of a need for courts’ deliberations. Democracy, when understood correctly and functioning properly, is a means for turning the whole of society into a large deliberative body. It is

48. See Dworkin, *Sovereign Virtue*, *supra* note 26 at 363 (“Majority rule is not fair or valuable in itself”); see also Stephen Macedo, “Against Majoritarianism: Democratic Values and Institutional Design” (2010) 90:2 BUL Rev 1029 at 1030; Michael W McConnell, “The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s Moral Reading of the Constitution” (1997) 65:4 Fordham L Rev 1269 at 1274 (“Dworkin assigns *no weight whatsoever* to the decision of the representative branches of government in deciding the case.” [emphasis in the original]).

49. Dworkin, *Sovereign Virtue*, *supra* note 26 at 204.

50. Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton: Princeton University Press, 2006) at 140. Dworkin has also argued that the low level of political discourse is antithetical to democracy (*ibid* at 4-6); Dworkin, *Sovereign Virtue*, *supra* note 26 at 369 (expressing concern that contemporary American politics is “the most degraded and negative political discourse in the democratic world” and that it has “sunk below the level at which we can claim, with a straight face, to be governing ourselves”).

51. *Ibid* at 364 (“citizens [should] be equal not only as judges of the political process but as participants in it as well”).

52. *Ibid*; see also Dworkin, *Freedom’s Law*, *supra* note 22 at 344 (stating that on matters of principle, “self-respect requires that people participate, as partners in a joint venture, in the moral argument over the rules under which they live”).

53. Dworkin, *Sovereign Virtue*, *supra* note 26 at 363; see also Dworkin, *Freedom’s Law*, *supra* note 22 at 17.

therefore legitimate and valuable only when (and only because) it creates the conditions for genuine moral discourse.

The connection between law and democracy is drawn even more clearly when Dworkin explains how in his conception of democracy “individual citizens can ... exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.”⁵⁴ This outcome may seem paradoxical at first: Dworkin says here that citizens exercise their moral responsibilities by having the power to decide certain matters pertaining to their lives taken from them. It becomes less paradoxical when we remember Dworkin’s view of law, which seeks to encourage people to participate in the (moral) evaluation of their and their fellow citizens’ rights.⁵⁵ As he puts it, in rather romantic (not to say unrealistic) terms:

When a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed, by future decisions, a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables. That debate better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce.⁵⁶

Dworkin ties the two issues together when he connects his conception of law to that of democracy, saying that

the critical judgment of a populace is sharpened not diminished by a “protestant” understanding of law that allows it to disagree, in part on moral grounds, with official declarations of what the law requires, and that democracy means not just majority rule but majority rule subject to the conditions, which are moral conditions, that make majority rule fair.⁵⁷

54. Dworkin, *Freedom’s Law*, *supra* note 22 at 344.

55. This approach is thus “protestant” (this will be discussed in Part III, below); in awarding those who decide to engage in law more political influence, it can thus result in great inequality of political power between citizens. But it seems to fit Dworkin’s view (made in the context of inequalities of wealth) between “[o]ption luck” and “[b]rute luck,” according to which inequalities are justified if they are the result of choice. See Dworkin, *Sovereign Virtue*, *supra* note 26 at 73-75.

56. See Dworkin, *Freedom’s Law*, *supra* note 22 at 345; a similar description is found in Dworkin, *Taking Rights Seriously*, *supra* note 14 at 216.

57. Dworkin, *Justice in Robes*, *supra* note 3 at 176.

Thus, the seeming conflict between law and democracy is resolved: They are both means for getting people to engage in moral and political questions, *i.e.*, to govern themselves. Beyond that, the remaining question is the empirical one: Which institutional mechanism does it better?⁵⁸ Surprising as it may sound, he thinks that a “citizen’s role as a moral agent participating in his own governance ... is sometimes better protected if the mechanisms of decision are not ultimately majoritarian.”⁵⁹

B. CAN CONCEPTUAL JURISPRUDENCE BE SALVAGED?

My argument so far has sought to show that what seems to be at stake between proponents of competing justifications of democracy is similar to what is at stake between legal positivists and Dworkin when writing on law. I presented two competing accounts of what could make authority potentially legitimate—that is, what in principle could justify one person telling another what to do. On one view both law and democracy are justified in primarily epistemic terms. According to this view, individuals are insufficiently informed about what they should do, and law and democracy are therefore conceived as mechanisms for providing them with relevant information. Law and democracy are therefore justified to the extent that they succeed in correctly guiding people. Dworkin, on the other hand, sees the problem that both law and democracy address and the solution they seek to provide in very different terms. His answer is effectively to deny that legitimate authority, properly understood, really does involve one person telling another what to do. Rather, it involves people creating law for themselves. The problem that law and democracy face on this view is therefore completely different, and is best described as primarily motivational. Efforts at self-government require that people be engaged in politics, and so the primary task of law is to encourage political participation.⁶⁰

58. It is in this sense (and in this sense only) that Dworkin’s account is consequentialist. See Dworkin, *Sovereign Virtue*, *supra* note 26 at 187-90. Dworkin does not support his claims with any empirical evidence, and the data available on the level of public familiarity with Supreme Court decisions do not seem to support his views. See Thomas R Marshall, *Public Opinion and the Supreme Court* (Boston: Unwin Hyman, 1989) at 142-45; Herbert M Kritzer, “The Impact of *Bush v. Gore* on Public Perceptions and Knowledge of the Supreme Court” (2001) 85:1 *Judicature* 32; Nathaniel Persily, “Introduction” in Nathaniel Persily, Jack Citrin & Patrick J Egan, eds, *Public Opinion and Constitutional Controversy* (New York: Oxford University Press, 2008) 3 at 8 (summarizing empirical findings suggesting “that in the vast majority of the cases reviewed here, Supreme Court decisions had no effect on the overall distribution of public opinion”).

59. Dworkin, *Freedom’s Law*, *supra* note 22 at 344 [emphasis omitted]; see also Dworkin, *Hedgehogs*, *supra* note 4 at 398-99.

60. Against this background it is not difficult to understand why Bentham had a very negative

Notice that my argument points to similarity in the arguments used in both domains; it is not that if one is a legal positivist then one is logically committed to the epistemic conception of democracy. Therefore, while the similarity of views on law and democracy in the work of the legal positivists considered above is not surprising, it is not a challenge to my view to show that some legal positivists have embraced other justifications for democracy. Notice also that the argument here need not presuppose global doubts about conceptual jurisprudence. Even assuming there are valid conceptual questions in jurisprudence, if my analogical argument is convincing, it shows that the debates between legal positivists (or more precisely, the legal positivists whose views I considered) and Dworkin do not belong to the conceptual part of jurisprudence.

How can a defender of conceptual jurisprudence avoid this challenge? Recall the argument outline presented at the outset:

1. Most legal positivists claim that many jurisprudential debates are conceptual;
2. Debates about the justification of democracy are normative, not conceptual;
3. The debates between legal positivists and Dworkin in jurisprudence are very similar in structure and content to debates on the justification of democracy; and hence
4. It is very likely that, contrary to (1), debates between legal positivists and Dworkin are really normative.

To reject the argument, a defender of conceptual jurisprudence could either challenge any of the premises or argue that the conclusion does not follow even if all premises are true. Let us consider these possibilities briefly. Is (1) true? It might be argued that many conceptualists allow for some epistemic values in their account of jurisprudence. That is indeed true,⁶¹ but it is irrelevant for present purposes, since virtually all these theorists insist that such questions are required for the sake of *conceptual* jurisprudence.⁶² I have little to say about (2).

attitude towards common law courts (they provide poor guidance) while, especially late in his life, having a very favourable view of majoritarian institutions (they are good means for gathering information and at conveying it clearly through legislation). Likewise, it is not surprising that Dworkin holds the exact opposite views (courts are good at getting people engaged; political institutions, at least as currently structured in the United States, much less so).

61. For a list of defenders of this view, see Danny Priel, "Trouble for Legal Positivism?" (2006) 12:3 *Legal Theory* 225 at 226, n 1. That article shows that this puts legal positivists in a bind.
62. See the sources cited in *supra* notes 1-2.

Without getting into the question of whether there are any significant conceptual questions about the nature of democracy, notice that the debates I consider are not meant to answer the question “what is democracy?” Rather, they are competing answers to the question of democracy’s *justification*. I cannot see how this is not a normative question. Premise (3) is, of course, the core of my argument, so I cannot here do more than refer readers to my argument in Part I(A), above, which aimed to show the similarity between the two debates.

By far the most important challenge is that the conclusion does not follow from the premises. One version of this response, one that is logically correct but insignificant in this context, is to abandon (2) instead of (1), that is to adopt the view that arguments on democracy are also conceptual. While possible, I find this possibility as unlikely as the rejection of (2) in the first place, because the arguments in the context of democracy are so concerned with the question of justification. I think a more convincing version of the claim that (4) does not follow from the premises is one that offers a positive explanation why, despite appearances, jurisprudential debates are conceptual, and democracy debates are normative.

Admittedly, this possibility cannot be ruled out, but the analogical argument presented above is meant to shift the burden to defenders of conceptual jurisprudence to explain why they insist, despite this similarity, that the jurisprudential debate is conceptual. I am not familiar with an argument to that effect. The only challenge I can think of is that unlike in the debate on democracy, the jurisprudential debate is one in which we are presented with two conceptual stories on the nature of law, one of which happens to be true while the other is false. Though possible, there are several reasons to doubt this claim. First and least important, the claim would be more convincing if positivists were able to show that one side (presumably theirs) is correct and the other is not. It is true that legal positivists sometimes triumphantly speak as though legal positivism is the only game in town,⁶³ but reality is rather different. Debates between legal positivists and their many critics are ongoing. As I see it, whatever victory legal positivists have managed to declare has only been by reducing their theory to triviality. The more dramatic, and arguably more important, failure of legal positivism lies not with fellow legal philosophers, but—especially—with non-philosophers. For it is a fact (sometimes admitted

63. See e.g. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007) at 2 [Leiter, *Naturalizing Jurisprudence*] (“legal positivism stands as victorious as any research program in post-World War II philosophy”).

in hushed tones and explained as the result of misunderstanding)⁶⁴ that outside the insular world of legal philosophy, legal positivism is not a widely-held view.

Second, even if it is proven to everyone's satisfaction that, for example, Dworkin's theory of law does not reflect what law actually is in the world today, this does not show that he does not offer a conceptually possible model of law. Imagine that we created a new society and made its political institutions conform as closely as possible to Dworkinian ideas.⁶⁵ Would the result be a system of law? Legal positivists would argue that the answer is no, but Dworkin would insist, of course, that it is yes. Is there anything either side could argue to convince the other it is wrong? Not without circularity. Imagine, for example, that legal positivists assert that these Dworkin-inspired institutions, whatever they are, are not law because they do not claim authority by offering exclusionary reasons for action; that is, because they don't have the structure of law as defended by legal positivists. Dworkin's obvious response would be to argue that this shows only that this supposed feature of law is mistaken, because here we have an instance of law—the one created in our imaginary society—that does not conform to the positivist characterization. To both present an articulation of what law is and then rely on it when considering a contested case is the fallacy of assuming the consequent.⁶⁶ To avoid arguing in this circular fashion, one would have to appeal to normative considerations that explain why the form of potential legitimacy it presupposes is the only justified one.

A third way to challenge my argument is to insist that Dworkin's account, if realized, would yield something that is not law, because the result does not correspond to what we mean when we talk about law.⁶⁷ That, however, would be an empirical claim about linguistic usage (only without empirical evidence to support it). And making such claims will turn these challengers'

64. See e.g. Anthony J Sebok, "Misunderstanding Positivism" (1995) 93:7 Mich L Rev 2054; Gardner, *supra* note 2 at 202-04; cf Brian Leiter, "The End of Empire: Dworkin and Jurisprudence in the 21st Century" (2004) 36:1 Rutgers LJ 165 at 166.

65. If you think no human society could exist with such laws, we can imagine a society made by non-humans; after all, conceptualists have insisted that a conceptual theory of law should be applicable for humans and non-humans alike. See e.g. Joseph Raz, *Practical Reason and Norms*, 2d ed (Princeton: Princeton University Press, 1990) at 159-60; Shapiro, *Legality*, *supra* note 9 at 416-17, n 16. This is very different from the critique that Dworkin's account cannot be realized in human societies, because people actually do not take much interest in the courts. See *supra* note 56. Somewhat surprisingly given his views on conceptual jurisprudence, this seems to be Shapiro's critique of Dworkin. See *supra* note 22.

66. I have previously developed this argument in more detail. See Danny Priel, "Jurisprudence and Necessity" (2007) 20:1 Can JL & Jur 173 [Priel, "Jurisprudence"].

67. Cf Shapiro, *Legality*, *supra* note 9, at 330-31.

conceptual claims into linguistic ones; this is exactly what legal philosophers insist they are not doing.

II. THE CONTINUITY OF GENERAL JURISPRUDENCE AND LEGAL PRACTICE

In Part I, above, I have argued that the positivist account of the nature of law assumes that law's function is guidance. This view assumes that law is justified either when it provides information that most humans do not possess or when it aids individuals in dealing with coordination problems, and that this presupposes a more general claim about what *potentially* makes law legitimate. At a deeper level, this view is grounded in an interpretation of the relationship between individual citizens and the law. I have shown that this view is not properly understood as a conceptual claim but rather as a controversial normative claim about the way the law works to help people solve problems in their lives. I have contrasted this view with the one defended by Dworkin, one that sees the law as primarily aimed not at providing solutions to private individuals but rather as providing them with the means for finding those solutions on their own, or at least as a joint effort of a political community. I have supported the claim that this disagreement is not a conceptual debate on the question of what law is, one in which one side is right and the other wrong, by analogizing this debate to debates on democratic theory.

Does any of this matter? The purpose of this Part is to explain why this finding may have relevance beyond the narrow confines of analytic jurisprudence. One corollary of the conceptualist view of jurisprudence is a strong divide between accounts of the nature of law and most normative debates within law, from the narrowest disagreements on the appropriate scope of particular doctrines to broader questions such as competing views on interpretation, the level of deference of the judiciary to the executive, and so on.⁶⁸ At the foundation of this view

68. See *e.g.* Marmor, *Philosophy of Law*, *supra* note 2 at 10. Marmor states:

[I]t would be presumptuous to claim that a philosophical understanding of the nature of law must be a prologue to any philosophical inquiry into the nature of particular legal domains. Many issues that interest philosophers in such domains as criminal law ... are mostly moral issues As such, they do not really depend on any particular understanding of the general nature of law.

See also HLA Hart, "Comment" in Ruth Gavison, ed, *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1987) 35 at 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").

is a distinction between observers and participants in legal practice, with legal philosophers limiting themselves to the observer's perspective.⁶⁹ Part I(B), above, provided some reasons for doubting this view. The purpose of this section is to elucidate this view with the aid of several examples. Not all these examples have a strong connection with the debates over democracy mentioned earlier; all of them, however, show the blurred boundaries between conceptual jurisprudence and legal practice, between ideas as to what law, supposedly as a conceptual matter, is, and certain views as to what legal practice should look like.

A. THE RULE OF LAW

In the vast academic literature on the rule of law, there is often discussion of what, if anything, "rule of law" actually means.⁷⁰ Conceptual legal philosophers typically insist on the importance of keeping discussions of the rule of law separate from discussions of the rule of good law.⁷¹ From this perspective, thinkers as far apart as Hayek and Dworkin are thought to have committed the same error: Hayek was a libertarian, and so he argued that the rule of law is inconsistent with welfare provision; Dworkin is an egalitarian and so his discussion of the rule of law contains references to equality. By contrast, positivist accounts of the rule of law—Raz's oft-cited account is a paradigmatic example—are conceptually purer and more informative, precisely because they keep law and good law apart.⁷²

This concern translates into a distinction between "thin" or "formal" conceptions of the rule of law and "thick" or "substantive" ones,⁷³ with conceptual

69. See Raz, *Between Authority*, *supra* note 1 at 81-82, 85 (contrasting the view that "assumes that legal philosophy creates the concept of law" with the "fact [that] it merely explains the concept that exists independently of it."); cf Marmor, *Philosophy of Law*, *supra* note 2 at 55 ("[Hart's] point is to show that there is nothing amiss about explaining the normativity of a system of rules from the outside").

70. Cf Judith Shklar, "Political Theory and the Rule of Law" in Allan C Hutchinson & Patrick Monahan, eds, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 1 at 1 ("the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use"). Shklar attempts to resurrect the expression by rescuing it from the "political vacuum" in which it is found by recovering the "political objectives" it had once stood for (*ibid.*).

71. See Raz, *Authority of Law*, *supra* note 1 at 211.

72. See *ibid.* In fairness, when discussing those who confuse the rule of law with the rule of good law, Raz does not mention Dworkin. (Dworkin's essay on the rule of law cited in *supra* note 20 was written after Raz's piece.) However, Dworkin's view has been challenged on these grounds. See Margaret Jane Radin, "Reconsidering the Rule of Law" (1989) 69:4 BUL Rev 781 at 783-84, n 10.

73. See e.g. Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, UK: Cambridge University Press, 2004) at 91-113; Paul Craig, "Formal and Substantive

legal positivists invariably residing on the thinner edge of this divide. Our earlier discussion, however, helps to show why this is an inaccurate characterization of the debate and helps us better understand Raz's assertions. Raz claims to be engaged in conceptual analysis of the rule of law and seeks to offer an account of the rule of law based on what he takes to be a conceptual claim about law and guidance. Remove law's capacity to guide and you no longer have law. As Raz puts it, "[T]he law must be capable of being obeyed. ... Therefore, if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*."⁷⁴ It is for this reason that a putative law that simply tells one to behave morally is *ipso facto* not law, because it does not provide additional guidance beyond that provided by morality itself. And yet, here and there Raz concedes that these ideas of guidance are tied to moral values, in particular that of autonomy, and that the sort of features we typically associate with the rule of law are a guarantee of people's autonomy, which he claims "depends on the existence of stable, secure frameworks for one's life and actions."⁷⁵ These frameworks, in turn, can be promoted by maintaining the rule of law because of its capacity to help make the law "a stable and safe basis for individual planning."⁷⁶ This view is grounded in a particular (not uncontroversial) version of autonomy, a view that Raz developed later in much greater detail in a work he admitted was not primarily concerned with conceptual analysis.⁷⁷ One implication of this view, already alluded to above, is that to the extent that morality is kept out of the law, this is so for moral reasons.

While positivist accounts of the rule of law often ignore its normative foundations, so-called substantive theories of the rule of law are sometimes thought to suffer from the opposite problem. Such accounts, we are told, confuse the rule of law with the substantive aims of the law, thus blurring the distinction between the rule of law and the rule of good law. At least as far as Dworkin is concerned, this accusation is unfounded. Though Dworkin does not present it in

Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467; Mark Ellis, "Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice" (2010) 72:2 U Pitt L Rev 191 at 192-99.

74. *Authority of Law*, *supra* note 1 at 213-14 [emphasis in original].

75. *Ibid* at 220.

76. *Ibid*. It is true that Raz argues that this link does not establish a necessary connection between law and morality. See *ibid* at 223-25. But this claim, whether true or not, bears little on the issue considered here.

77. See Raz, *Morality of Freedom*, *supra* note 10 at 16. This liberal conception of freedom is very different from the more republican notion of freedom that motivates Dworkin's work. See Dworkin, *Hedgehogs*, *supra* note 4 at 365 (arguing in favour of a view of liberty according to which "people must be permitted to play a role in their own coercive governance: that government must in some sense or another be *self-government*" [emphasis in original]).

exactly this way, the fundamental issue that concerns him in his discussion of the rule of law is its very *possibility*—the possibility of law that rules in the sense that it imposes binding obligations on those subject to it—especially against the claim that judges engage in moral and political reasoning when determining what the law requires. This is not a serious concern for those who deny this last point, but Dworkin, who accepts it, must offer a different response. Specifically, he must demonstrate two things: The first is that law has determinate “objective” content, and the second is that this content is “objectively” right. It is for this reason that Dworkin invokes political values in his account of the rule of law. To know what the law is, to know what it requires, calls for engagement in political argument, and especially equal concern and respect. Whether or not one accepts his substantive arguments, Dworkin’s appeal to political values as part of his account of the rule of law is not the result of his failure to understand the distinction between law and good law.

B. LEGAL INTERPRETATION

A similar analysis to the one in Part II(A), above, shows that parallel political concerns underlie competing theories of legal interpretation. Law for Dworkin is thoroughly interpretive because deciding legal questions is a political act; one generates the right answers to political questions through a process of what he calls “constructive interpretation,”⁷⁸ with courts of law being the paradigmatic forum for generating those answers.

Much can be said about constructive interpretation, but here I will stress only a few points that bear directly on my argument about the relationship between Dworkin’s opinion on the fundamental point of law—the encouragement of political participation and the inculcation of the view of individuals as bearers of rights and duties—and his approach to interpretation. The connection is difficult to miss. For Dworkin, true legal propositions are the conclusion of engagement with the entire political history of a given jurisdiction. One could consider that this approach to legal interpretation encourages lawyers to see themselves as participants in a conversation. This conversation involves other members of their polity, past and present (and perhaps also future), and is about the right way of dealing with a legal problem. In such a view, the original intentions of those who enacted the laws are part of that discussion but in no way control what the law requires. The fundamental difficulty with the view that gives primacy to original

78. Dworkin, *Law’s Empire*, *supra* note 23 at 52.

intentions is not merely the epistemic problems of ascertaining with sufficient certainty the intentions of a multi-member body (although this is certainly a problem that Dworkin discusses at some length); it is that an approach that gives authority to original interpretations is at its core non-participatory, even anti-participatory. It encourages the view that laws are edicts that some create for others to follow, rather than the view that laws constitute an endless process of rediscovery and recreation of values by the entire political community, which, as we have seen, Dworkin takes to be the fundamental point of democracy.⁷⁹

All this has been rejected by legal positivists, and yet to the extent that they do write on interpretation, one finds in some positivists' work ideas that tie what law is with what interpretation should look like. My example comes from the work of Marmor, who has written extensively on interpretation and adjudication from a positivist standpoint. I focus here on his claim that certain views about what law is have particular normative implications about the appropriate approach to statutory interpretation. Marmor bases his argument on the view that "the justification of deference to legislative intent must be derived from the conditions which can be taken to establish that one person should be acknowledged to have authority over another."⁸⁰ What this means in practice, says Marmor, is that judges should attempt to identify and follow legislative intention.

Marmor's position is a rather weak one, for he clearly thinks that some laws cannot be justified by the notion of expertise. Nonetheless, to the extent this is possible, this implies that judges should try to identify the intention of the lawmakers. Marmor's view is thus a clear illustration of a positivist linkage between the justification for law (law is justified by being a kind of knowledgeable service provider), a "conceptual" claim about the nature of law (guidance of conduct as a fundamental feature of law), and a normative claim about the right approach to the interpretation of legal texts (intentionalism). But if I am right in my argument so far, then the allegedly conceptual step in this linkage is in fact a particular characterization of law that is grounded in highlighting certain political values (above all a particular view of autonomy and its relationship to guidance) over others (especially one that ties freedom to political participation).

79. See Dworkin, *Sovereign Virtue*, *supra* note 26 at 364-65, 372; see also Dworkin, *Freedom's Law*, *supra* note 22 at 15-31.

80. Andrei Marmor, *Interpretation and Legal Theory*, 2d ed (Oxford: Hart, 2005) at 134. For an endorsement of this view see Raz, *Between Authority*, *supra* note 1 at 291, nn 26-27. There is an obvious connection between this view and the one mentioned in text accompanying *supra* note 41.

C. DISSENT, CIVIL AND JUDICIAL

The examples in Part II(A-B), above, were closely tied to questions that often figure in jurisprudential debates. My intention there has been to show that we can make better sense of the works of theorists on both sides of the positivist/anti-positivist divide by recognizing their approaches' political underpinnings. In this section I make a slightly different point. I wish to show that the similarity between debates in jurisprudence and among political theorists about the justification of democracy help us better understand other familiar aspects of law. My chosen example is dissent, a phenomenon found in somewhat different forms in both law and democracy.⁸¹ I will argue that there are two very different ways of understanding the role of dissent that correspond to the two competing models of law and democracy described in Part I, above. On one understanding, the purpose of dissent is to provide information about a different possible legal analysis; on the other, the point of dissent is to give the dissenting judge a chance to participate and express an opinion on a public matter.

The more interesting point to note is how the two models of law and democracy described above lead to different understandings of dissent. Consider first political dissent. When legal positivist Raz explains why there is no general obligation to obey the law, his explanation is, at bottom, closely tied to his view about the centrality of guidance towards right action, which gives law its authority in the first place. There is no obligation to obey the law if, for whatever reason, the edict provided by the law fails in fact to guide to the correct action,⁸² or when the person subject to the law is an expert on the matter, and thus cannot be guided by the law.⁸³ The basis for civil dissent here, then, is fundamentally epistemic: The law

81. It is not uncommon to draw links between judicial and political dissent. See *e.g.* Dworkin, *Taking Rights Seriously*, *supra* note 14 at 210-12; William O Douglas, "The Dissent: A Safeguard of Democracy" (1948) 32:4 J Am Judicature Soc'y 104 at 105. Douglas observes:

One cannot imagine the courts of Hitler engaged in a public debate over the principles of Der Fuehrer [*sic*], with a minority of one or four deploring or denouncing the principles themselves. One cannot imagine a judge of a Communist court dissenting against the decrees of the Kremlin.

See also Cass R Sunstein, *Why Societies Need Dissent* (Cambridge: Harvard University Press, 2003) at 66, 176-78.

82. Raz, *Authority of Law*, *supra* note 1 at 247-48.

83. Raz, *Ethics*, *supra* note 8 at 348 ("if I am the greatest living expert on pharmaceuticals, then the law has no authority over me regarding the safety of pharmaceuticals"); but see Dworkin, *Principle*, *supra* note 20 at 105-06.

does not have authority over me when in a given situation I know better than the law (or the lawmakers) what the right course of action is.

Dworkin's explanation is very different. For him, the justification for civil disobedience comes from recognizing that the fundamental point of law is the obligation of every citizen to decide what she has to do: "A citizen's allegiance is to the law, not to any particular person's view of what the law is" ⁸⁴ Consequently, at least when the law is uncertain, citizens fulfill their obligation to the law by following what they themselves think is the correct interpretation of the law. In this way "the development and testing of the law through experimentation by citizens ... [is] pursue[d] ... by inviting citizens to decide the strengths and weaknesses of legal arguments for themselves ... and to act on these judgments" ⁸⁵ Civil disobedience is just a special case of Dworkin's concern with participation and engagement with the law.

How do these views relate to judicial dissent? Interestingly, when we look closely at the practice of judicial dissent, we can identify different attitudes to it that reflect the different conceptions of law and democracy and the role of civil disobedience in them. Yet because of the institutional differences between individuals and judges, these conceptions play out somewhat differently. The notion of dissent that is parallel to the epistemic model of democracy is what we might call "informational dissent." The justification for this dissent is that it provides a different opinion as to what the correct reading of the law should be. Its aim is to point out and leave a record for what the dissenter thinks is a mistake in the hope that in the future this information will lead to a change in the law. In the extreme case, this informational dissent would not really be a dissent at all: Judges would voice their disagreement with the majority's view in internal discussion with their colleagues in the hope of persuading them to change their mind. But once the information has been provided and it becomes evident that it has failed to convince, the judges would withdraw their dissent and join the court. We are told, for example, that Justice Oliver Wendell Holmes was reluctant "to express his dissent, once he's 'had his say' on a given subject" ⁸⁶

84. Dworkin, *Taking Rights Seriously*, *supra* note 14 at 214.

85. *Ibid* at 216-17; cf Dworkin, *Principle*, *supra* note 20 at 111 (preferring "persuasive strategies" of civil disobedience as more consistent with democracy).

86. Melvin I Urofsky, "The Brandeis-Frankfurter Conversations" [1985] *Sup Ct Rev* 299 at 330. Holmes was known as the Great Dissenter, but in fact he did not dissent often. See Thomas C Grey, "Molecular Motions: The Holmesian Judge in Theory and Practice" (1995) 37 *Wm & Mary L Rev* 19 at 27-28. As Holmes once put it, "[I]t [is] useless and undesirable, as a rule, to express dissent" *Northern Securities Co v United States*, 193 US 197 at 400 (1904), 24 S Ct 436 (Holmes J, dissenting). Holmes was by no means alone in this view. In

Informational dissent of this kind might be understood along the Rousseauian lines described above, as judges concluding from their dissenting position that they had been mistaken. Perhaps belonging to this group are also cases in which judges indicate they were unsure about the outcome, but decided to follow the opinion of other members of the court they considered more knowledgeable in the area of law in question.⁸⁷ Though such open admissions are less common today, they may still exist where a judge's expertise in a particular area of law influences other judges into concurrence.⁸⁸ Slightly less pure cases are those in which judges make it clear in their decision that they still disagreed with the court's conclusion, but considered it pointless to actually dissent once they expressed their view to their colleagues and realized it was not shared by a majority.⁸⁹ A rather similar compromise is found in cases of bare, unreasoned dissent, which, though less common today than in the past, can still occasionally be found.⁹⁰

A feature of these cases is that they in fact do not provide information to the general public, or even to the smaller audience of lawyers. This reflects a starkly non-participatory view of law. Law, on this view, is not something for people to engage in, but is rather a matter for a wise elite to decide in closed chambers.

fact, such practices were prevalent in the United States Supreme Court in the past. See Lee Epstein, Jeffrey A Segal & Harold J Spaeth, "The Norm of Consensus on the U.S. Supreme Court" (2001) 45:2 Am J Pol Sci 362; Robert Post, "The Supreme Court as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court" (2001) 85:5 Minn L Rev 1267 at 1331-50.

87. This, no doubt, is a phenomenon that occurs more frequently than we have evidence for, as judges can simply silently concur to the view of a judge considered an expert in a particular area. But at times judges reveal their reservations about the outcome for which they voted and admit that they were persuaded to follow the view of a judge whom they considered an expert on the topic. See *e.g.* Alan Paterson, *The Law Lords* (London, UK: Macmillan, 1982) at 120-21 (members of the House of Lords admitting, in interviews, deference to other judges they considered experts).
88. There is empirical evidence suggesting that judges tend to develop expertise areas and that others are more likely to follow them in areas in which they are considered experts. See Saul Brenner, "Issue Specialization as a Variable in Opinion Assignment on the U.S. Supreme Court" (1984) 46:4 J Pol 1217 (providing empirical evidence for issue specialization in the civil rights cases of the Warren Court); see also Edward K Cheng, "The Myth of the Generalist Judge" (2008) 61:3 Stan L Rev 519 at 543, 549, *passim* (providing empirical evidence of specialization among circuit judges, often in areas in which they have recognized previous experience).
89. Such practice exists in both the US Supreme Court and the House of Lords. For examples, see Louis Blom-Cooper & Gavin Drewry, *Final Appeal: A Study of the House of Lords in Its Judicial Capacity* (Oxford: Clarendon Press, 1972) at 86, n 1.
90. See *e.g.* *Minnesota v Olson*, 495 US 91 (1990), 110 S Ct 1684 (Rehnquist CJ and Blackmun J, dissenting).

What is also important is that such secret (or even non-existent) dissents may be preferable from the perspective of law's guidance function, as they minimize the fragmentation and uncertainty that dissents often introduce into the law.⁹¹

The most revealing examples of informational dissent are found in published and reasoned one-time dissents. In these instances, a judge who disagrees with a majority on the correct outcome of the case dissents to explain why the majority's decision is mistaken, hoping in this way to convince a future court, or the legislature, to change the legal rule the majority establishes.⁹² In this form of dissent, when a similar case comes before the court again, the dissenter joins the majority. A clear example of this approach is found in the following passage from *Knüller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions*.⁹³ In the course of concurring with the majority, Lord Reid discussed his dissent in an earlier decision, *Shaw v Director of Public Prosecutions*:⁹⁴

I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act.⁹⁵

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91. See Blom-Cooper & Drewry, *supra* note 89 at 87. For comparison, consider the French judicial habit of having unpublished detailed discussion of the relevant issues alongside the brief and dissent-free published opinion. See Mitchel de S-O-l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (New York: Oxford University Press, 2004) at 47-60; Michael Wells, "French and American Judicial Opinions" (1994) 19:1 Yale J Int'l L 81 at 113-14. Relatedly, a court may try to reduce the number of concurring judgments to a single opinion of the court. Chief Justice Marshall innovated this practice in the US Supreme Court, which has managed to maintain judicial decisions with little or no dissents. See Del Dickson, ed, *The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* (New York: Oxford University Press, 2001) at 28, 32-33, 39-40; cf Sonja R West, "Concurring in Part & Concurring in the Confusion" (2006) 104:8 Mich L Rev 1951 (demonstrating the doctrinal difficulties emerging from multiple concurring opinions).
92. See Benjamin N Cardozo, *Law and Literature and Other Essays and Addresses* (New York: Harcourt Brace, 1931) at 36 ("The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years").
93. [1973] AC 435, [1972] 2 All ER 898 (HL) [*Knüller*].
94. [1962] AC 220, [1961] 2 All ER 446 (HL).
95. *Knüller*, *supra* note 93 at 455. It must be mentioned in this context that Reid recognized the informational value of separate opinions and dissents. He has, in fact, criticized the practice of publishing a single joint opinion and argued that it tends to produce "inferior" decisions.

Justice Holmes acted in a similar fashion in *State of Washington v WC Dawson & Co*, where he filed a brief concurring opinion only to note that

[t]he reasoning of *Southern Pacific Co. v Jensen* ... , and cases following it, never has satisfied me and therefore I should have been glad to see a limit set to the principle. But I must leave it to those who think the principle right to say how far it extends.⁹⁶

On the informational view of dissent, once the information has been provided, there is no point in dissenting again and repeating the reasons given in the earlier decisions. While no doubt there may be some value in repeating a view in order to make sure it is disseminated, competing considerations militate against repeated dissents. Repeated dissents have the potential for greater animosity among members of a court and may harm both the working environment in the court and public perceptions of the law.⁹⁷ More important for our purposes, considerations of clarity, certainty, and efficiency clearly discourage dissent:⁹⁸ Dissents usually lead to longer and more convoluted judicial decisions, ones that are addled by qualifications, responses, and rejoinders. They tend to encourage the view that the law is a matter of personal opinion and depends merely on the identity of those who hear the case (a particularly acute problem in courts sitting

See Lord Reid, "The Judge as Law Maker" (1972) 12:1 J Soc'y Pub Tchrs L (ns) 22 at 29. This is a clear indication that he understood the value of dissent in epistemic terms.

96. 264 US 219 at 228 (1924), 44 S Ct 302 [citation omitted] (Holmes J, concurring). Holmes dissented in *Southern Pacific Co v Jensen*, 244 US 205 (1917), 37 S Ct 524. Holmes has behaved similarly elsewhere. For examples see Post, *supra* note 86, at 1349-50, nn 254-56. To the extent that the informational dissent reflects a view of law that is more prevalent in Britain, it is interesting that Post comments that Holmes was "the Justice most influenced by English conceptions of the nature of opinion-writing" (*ibid* at 1289); cf Neil Duxbury, "When Trying is Failing: Holmes's 'Englishness'" (1997) 63:1 Brook L Rev 145 at 151, 154-55. However, Holmes is not alone in taking such a stance to dissent. See e.g. *Georgia v McCollum*, 505 US 42 at 59-60 (1992), 112 S Ct 2348 (Rehnquist CJ, concurring) ("I was in dissent in *Edmonson v Leesville Concrete Co.* ... and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe that it controls the disposition of this case ..." citing *Edmonson v Leesville Concrete Co*, 500 US 614 (1991), 111 S Ct 2077); *Baze v Rees*, 553 US 35 at 87 (2008), 128 S Ct 1520 (Stevens J, concurring in the judgment). Additional examples are mentioned in Allison Orr Larsen, "Perpetual Dissents" (2008) 15:2 Geo Mason L Rev 447 at 452-53.
97. This was denied in Antonin Scalia, "Dissenting Opinions" (1994) 19:1 J Sup Ct Hist 33 at 40-41. Others, however, have suggested that Scalia's acerbic dissents have alienated some of his colleagues and may have weakened the conservative bloc on the Supreme Court. See Mark V Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: WW Norton & Company, 2005) at 65.
98. Cf Wells, *supra* note 91 at 110-13 (arguing that the short French judicial decisions may be no worse than discursive common law decisions that contain numerous and often conflicting opinions); Lasser, *supra* note 91 at 328-30.

in panels), and, especially if the dissent is powerful, they leave open the possibility that the law will be modified in the future, thus undermining its certainty. To anyone who thinks that the most fundamental point of the law is its ability to guide conduct, repeated and frequent dissents are clearly undesirable.

It is not difficult to see the similarity between this view of judicial dissent and epistemic models of democracy, as well as the connection between such ideas and a particular view on the value of free speech. Dissent, both political and judicial, is valuable because it challenges received opinions and can in this way improve the quality of decisions.⁹⁹ Both legal and democratic dissents provide information and thus contribute to a more robust “marketplace of ideas.”¹⁰⁰ To be sure, even on this view, there may be some benefit in repeating an idea, but this benefit significantly declines once it is clear the idea is known.¹⁰¹

A completely different attitude to dissent is revealed in what may be termed persistent or repeated dissents. During their tenure on the United States Supreme

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99. Cf. John Stuart Mill, “On Liberty” in John Gray, ed., *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 1 at 59 (explaining the value of false speech in “vigorously and earnestly contest[ing]” the truth and thus preventing it from being “held in a manner of a prejudice” and that there is value for truth to come to contest with falsehood). On the salutary effects of dissent, see generally Sunstein, *supra* note 81. Among other things, Sunstein summarizes empirical studies showing how dissent can break herd thinking. See Sunstein, *supra* note 81 at 66-72; see also Krishna K. Ladha, “The Condorcet Jury Theorem, Free Speech, and Correlated Votes” (1992) 36:3 *Am J Pol Sci* 617.
100. See *Abrams et al v US*, 250 US 616 at 630 (1919), 40 S Ct 17 (Holmes J, dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”). This is, ironically, one of the few areas in which Holmes repeated his dissent. See *Gitlow v People of the State of New York*, 268 US 652 at 673 (1925), 45 S Ct 625 (Holmes J, dissenting) (“If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way”). Given what I have said here, it should not come as a surprise that in illustrating his view on civil disobedience Dworkin mentions *this* case of repeated judicial dissent by Justice Holmes, which fits his view of law. See Dworkin, *Taking Rights Seriously*, *supra* note 14 at 211. Dworkin does not mention the more numerous cases in which Holmes did not repeat a dissent. For more on such cases, see *supra* note 86.
101. Does Raz’s view not show that when judges consider themselves legal experts on an issue, they should continue dissenting, because law does not have authority over them? I think not. In addition to the reasons discussed in the text about the value of clarity for the guidance function of law, there is the point that judges are not required to act on their view of the law; they are offering an interpretation of what the law is. Leaving aside institutional constraints, Raz’s view would suggest not so much continued dissent, but that judges should disregard the law in their private capacity.

Court, Justices Brennan and Marshall have repeatedly dissented from decisions not to grant certiorari on appeals relating to the constitutionality of the death penalty. The reason was their view “that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments”¹⁰² Brennan and Marshall are perhaps extreme but by no means alone in this respect.¹⁰³ As I said earlier, there may be a limited justification for repeated dissents even on the informational model of dissent. But such dissents often reflect a completely different attitude, one that the informational model completely fails to capture.¹⁰⁴ On this view the purpose of dissent is to provide “a legitimate means of protest against opinions which are, at the moment, in the majority. It helps to reflect the diversity of contemporary society, of which a diverse judiciary is but a muted reflection.”¹⁰⁵ Such a view would challenge the idea that dissents provide information or are likely to convince anyone: The opposing view is almost always there anyway, and the incidents in which a powerful dissent can be said to have led to an eventual change in the law are rare. Under this approach, dissents are expressions of the dissenter’s understanding of what the law requires and their point is (self-)expression rather than persuasion.

These considerations are not eroded by repeated dissents; in fact, quite the opposite may be the case. The dissent on this view is not justified by its beneficial consequences but on its own terms, as an expression of one’s *personal* attempt at coming to terms with what the law requires. Even when repeated dissent is discussed in more consequentialist terms, the focus is on the value of debate

102. See *e.g.* *Pyles v Texas*, 488 US 986 at 986 (1988), 109 S Ct 543. See also Michael Mello, *Against the Death Penalty: The Relentless Dissents of Justices Brennan and Marshall* (Boston: Northeastern University Press, 1996) at 4 (“Brennan and Marshall issued such dissents in more than twenty-five hundred cases ...”).

103. See Larsen, *supra* note 96 at 449, 453 (arguing that perpetual dissents are “more the norm these days, rather than the exception” and that this is the case for “every member of the Rehnquist Court”).

104. See William J Brennan, Jr, “In Defense of Dissents” (1986) 37:3 *Hastings LJ* 427 at 437 (explaining that he had been concerned with “simply offer[ing] an alternative analysis – that could [have] be[en] done in a single dissent,” and that the repeated dissent “constitutes a statement by the judge as an individual”).

105. The Hon Justice Michael Kirby, “On the Writing of Judgments” (1990) 64:11 *Austl L J* 691 at 707 [footnotes omitted]; accord J Louis Campbell III, “The Spirit of Dissent” (1983) 66:7 *Judicature* 305 at 306 (“Dissenting opinions function analogously to acts of civil disobedience in offering protest and securing systemic change”); see also Mello, *supra* note 102 at 155-56 (suggesting that repeated dissent is like an act of conscientious objection); cf Lani Guinier, “The Supreme Court 2007 Term – Foreword: Demosprudence Through Dissent” (2008) 122:1 *Harv L Rev* 4 at 47-52 (arguing for the role of dissenting opinions within democratic deliberation).

itself, not on the idea that additional dissents will get us closer to the truth. As repeated dissenter William Brennan put it, in terms very similar to Dworkin's view of democracy, "We are a free and vital people because we not only allow, we encourage debate, and because we do not shut down communication as soon as a decision is reached. ... So we debate and discuss and contend and always we argue. ... The *process* enriches all of us" ¹⁰⁶

These views exhibit a completely different attitude to the role of dissent and the significance of free speech in a democracy, and more generally to the role of expressing one's opinion on political matters. It is not, or not primarily, the hope of convincing others, but rather the hope of forming a polity where people's rights are the subject of an ongoing political debate. Dworkin has claimed that "[w]e argue for our constitutional interpretations ... knowing that others will inevitably reject our arguments" ¹⁰⁷ Nonetheless, he thinks that free speech is justified as an affirmation of the idea of self-government, and for the sake of protecting people's equality and ultimately the legitimacy of government. ¹⁰⁸ In this environment, political argument in courts and participatory "partnership" democracy are important for fostering this kind of debate.

III. NEW DIRECTIONS FOR JURISPRUDENCE

So far my argument has sought to establish two points: first, that what is presented as conceptual jurisprudence depends on political argument; and second, that this point has implications not just for competing arguments on the "nature" of law, but also for lower-level debates among lawyers, a finding that challenges the claim that there is a strict divide between general jurisprudence and various aspects of legal practice that are of interest to practicing lawyers. The purpose of this Part is to outline some potential implications of this view for the shape jurisprudence should take. The first of its three sections addresses the relatively local question of the debate between legal positivists and anti-positivists and suggests in what way it might be reconceived in light of what I have said so far. The next section turns to the more general question of the relationship between law and democracy, and the final section concludes with an even more general

106. Brennan, *supra* note 104 at 437 [emphasis added].

107. Dworkin, *Justice in Robes*, *supra* note 3 at 127; accord Dworkin, *Taking Rights Seriously*, *supra* note 14 at 186.

108. Dworkin, *Sovereign Virtue*, *supra* note 26 at 365-66. Contrast this with his description of free speech in a majoritarian conception of democracy in which the purpose of free speech is to "inform" individuals "about their choices" (*ibid* at 358).

proposal on the right way of thinking about competing jurisprudential theories. Inevitably, in the context of the present article, I present these ideas in fairly general and tentative terms.

A. THE BUILDING BLOCKS OF LAW

The narrowest sense in which the discussion of Part I, above, helps us understand jurisprudence is that it helps us see what is at stake in the debates between legal positivists and anti-positivists, or, more precisely, between Hart's version of legal positivism and Dworkin's version of anti-positivism. There is no shortage of suggested solutions to this dispute, but most of them seek to confine the debate to the law itself. Some claim legal positivism is a theory for explaining easy cases whereas Dworkin's is a theory for deciding hard cases;¹⁰⁹ others argue that while Dworkin's theory explains "much more accurately [than legal positivism] ... appellate adjudication," it is not clear whether his theory "characterizes the idea of law itself";¹¹⁰ still others suggest that Dworkin's account is a normative theory of adjudication true of one legal system whereas legal positivism is a descriptive theory true of law in general;¹¹¹ another suggestion is that a positivist account explains statutory law, whereas Dworkin's theory is a better account of the common law;¹¹² finally, it has been suggested that we can vindicate both views by distinguishing between the perspective of the citizen and that of the judge.¹¹³

109. This may be a plausible reading of some of Dworkin's own remarks. See Dworkin, *Taking Rights Seriously*, *supra* note 14 at 28. He states:

After [a difficult lawsuit like *Riggs v Palmer*] is decided, we may say that the case stands for a particular rule But the rule does not exist before the case is decided; the court cites principles as its justification for adopting and applying a new rule.

Dworkin describes a hard case as a case in which "no settled rule dictates a decision either way" (*ibid* at 83). See E Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute" (1977) 75:3 Mich L Rev 473 at 487-88 (arguing along these lines). But a careful reading shows that even in his earliest writings Dworkin rejected the view that the law is made up of both rules (dealing with easy cases) and principles (means for resolving hard cases). For an explicit discussion, see Dworkin, *Law's Empire*, *supra* note 23 at 266, 354. It is clear even in Dworkin, *Taking Rights Seriously*, *supra* note 14 at 38, 44, 76, 343-44. See also Timothy Endicott, "Are There Any Rules?" (2001) 5:3 J Ethics 199 at 202-03 (providing textual support for this reading).

110. Frederick Schauer, "The Jurisprudence of Reasons," Book Review of *Law's Empire* by Ronald Dworkin, (1987) 85:5-6 Mich L Rev 847 at 870.

111. See Hart, *Concept of Law*, *supra* note 2 at 240-41; Kramer, *supra* note 8 at 152; Bayles, *supra* note 2 at 380.

112. Stephen R Perry, "Judicial Obligation, Precedent and the Common Law" (1987) 7:2 Oxford J Legal Stud 215 at 240-41, 256.

113. See John Eekelaar, "Judges and Citizens: Two Conceptions of Law" (2002) 22:3 Oxford J

The discussion in Part I, above, suggests that the ultimate explanation for the difference lies outside the law. In this section, however, I seek to point out one of this explanation's implications for legal theory. For Hart, the building blocks of law are rules: "At first sight it might seem that the statement that a legal system consists ... of *rules* could hardly be doubted or found difficult to understand."¹¹⁴ He goes on to show that this statement needs further explanation, but at no point does he ever challenge it. Indeed, when he presents his own view of law, he presents the essence of law as "the union of primary and secondary rules."¹¹⁵

Many legal positivists find the idea that law is a matter of rules so obvious that they have been tempted to assume that Dworkin adopts something like this view with some modifications, specifically that he thinks of law as made up of rules understood in more or less the way positivists understand them, only coupled with principles.¹¹⁶ Surprising as it may sound—what else is law made up of, if not rules?—Dworkin rejects this view. He pretty much says this, at least with regard to judicial decisions, when he states that judges "cite reasons, in the form of precedents and principles, to justify a decision, but it is the decision, not some new and stated rule of law, that these precedents and principles are taken to justify."¹¹⁷ Elsewhere he explains it somewhat differently when he says that "[l]aw

Legal Stud 497 at 508-13.

114. Hart, *Concept of Law*, *supra* note 2 at 8 [emphasis in original].

115. *Ibid* at 79.

116. Two examples: (1) Marmor writes that "[l]egal rules, Dworkin claims, typically gain their validity by an act of enactment, more or less along the lines presumed by Hart and other positivists." Marmor, *Philosophy of Law*, *supra* note 2 at 87. This has *never* been Dworkin's view. See Dworkin, *Taking Rights Seriously*, *supra* note 14 at 38; see also Endicott, *supra* note 109. (2) Raz has argued that Dworkin's theory is conservative in that it assigns too much weight to precedent and analogy. See Joseph Raz, "Professor Dworkin's Theory of Rights," Book Review of *Taking Rights Seriously* by Ronald Dworkin, (1978) 26:1 Pol Stud 123 at 133-35. Similarly, Raz has criticized Dworkin for his "total faith in analogical arguments" and their supposed ability to find right answers from earlier cases. See Raz, *Authority of Law*, *supra* note 1 at 205, n 19. Quite the contrary: Dworkin has no need for analogy, and does not give much weight to precedent. For Dworkin, every decision is ideally arrived at based on the totality of relevant facts that bear on the case, and past decisions are not treated as rules from which we find the answer to new cases through analogy, but as sources for generating reasons that are balanced afresh in every new case. No wonder then that Dworkin is highly critical of analogical reasoning as a means for finding the right answer to legal or moral questions. See Dworkin, *Justice in Robes*, *supra* note 3 at 69-70; Ronald Dworkin, "Reply" (1997) 29:2 Ariz St LJ 431 at 455. Raz's error stems from interpreting Dworkin's theory through the lens of the Hartian model of rules. As such, he takes Dworkin to think that the right answer to every legal question can be found by looking at rules created by past precedents or by analogy from them. This, however, is the exact opposite of Dworkin's view.

117. Dworkin, *Taking Rights Seriously*, *supra* note 14 at 111; cf Arthur L Corbin, "The Law and

is not exhausted by any catalogue of rules or principles,” but rather is “defined by attitude ... [that] must be pervasive in our ordinary lives It is a protestant attitude that makes each citizen responsible for imagining what his society’s public commitments to principle are”¹¹⁸ This is a task that every individual has to accomplish, because “[a] citizen’s allegiance is to the law, not to any particular person’s view of what the law is,”¹¹⁹ including the particular view of the judge.

On this view, we can talk of law consisting of rules, but these rules have a completely different meaning from their meaning in Hart’s account. Whenever a judge mentions a rule, it is equally an act of creation and declaration because such instances are always acts of making sense of (and giving sense to) the past. And thus, a declaration of a legal rule is always the conclusion of an argument, not a premise in it. Moreover, once a decision has been rendered, this rule will not become a premise in a future argument; it, too, will only serve as another fact that adds to the political history that is relevant for a novel creation of a legal rule that in some sense is true for one decision only.¹²⁰

These views of Hart and Dworkin directly conflict,¹²¹ and they cannot be easily reconciled. Understood as conceptual claims, one of them necessarily must be false. Their fundamental differences become much less mysterious once we take into account the different goals Hart and Dworkin assign to law, and the political theories that underlie them. Their different views are competing *interpretations* of legal phenomena that are made in light of certain political theories, and they point to different possibilities open to different instantiations of law. There is an obvious link between Hart’s view that law is about guidance and his view that

the Judges” (1914) 3:2 Yale Rev (ns) 234 at 235-36, 246 (arguing that what one finds in the law reports are not rules but “arguments of learned and experienced men on both sides of vast numbers of questions”); Wells, *supra* note 91 at 109-10.

118. Dworkin, *Law’s Empire*, *supra* note 23 at 413. See also Dworkin, *Taking Rights Seriously*, *supra* note 14 at 76 (“I want to oppose the idea that ‘the law’ is a fixed set of standards of any sort”).

119. *Ibid.* at 214. Contrast this with Hart’s description of “the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone.” Hart, *Concept of Law*, *supra* note 2 at 117.

120. In his report on his impressions of the United States, Hart comes close to articulating this view of the law. See HLA Hart, “A View of America” (1958) 59:1501 *The Listener* 89 at 90. He states:

[M]any [Americans] have a passionate conviction that if you could throw off the shackles of words and of legal rules and leave honest men to think out what on the whole was the best thing to do at every juncture of life, you would find both great agreement and the best decision.

121. Compare Endicott, *supra* note 109 at 214-18, with Ronald Dworkin, “Replies to Endicott, Kamm, and Altman” (2001) 5:3 *J Ethics* 263 at 263-64.

rules are there to preclude argument on the one hand, and between Dworkin's view that law is about political participation and his view that rules are conclusions of argument on the other. One aspect in which legal systems may differ is the degree to which they are concerned with guidance as opposed to participation.

The moment we understand the debate in this way, it takes a different form: whether law is made up of rules—when asked not as an empirical question about a particular legal system but as an abstract general question—depends on what, at the most abstract level, we want law to do. This is not, primarily, a conceptual question. It is a question that depends to some extent on the particular legal and political tradition of a particular jurisdiction. As a philosophical question, it is primarily one of normative political theory.

B. THE RELATIONSHIP BETWEEN DEMOCRATIC AND LEGAL INSTITUTIONS AS A JURISPRUDENTIAL QUESTION

Apart from understanding existing debates and where they have gone astray, the argument I develop in this article should help us see how to move beyond them. In the current climate of contemporary legal philosophy, with its focus on conceptual inquiry, I believe the argument's potential implications are significant. Because these implications are of much greater scope than I can address in this article, I will limit my discussion in this section to the context in which I opened this article: the relationship between law and democracy.

Let me begin by clarifying what my argument does not seek to show. First, I hope it is clear that I do not argue that if one holds a particular view on the justification of democracy one has to be, at pain of inconsistency, a legal positivist, and that if one holds another, one must reject legal positivism. Suffice it to say that similar political considerations affect one's view on the appropriate understanding of what law and democracy are, based on certain political assumptions of what could justify them.

Second, my argument is also not that either legal positivism or Dworkin's view is better or worse suited to democracy. My argument is that we can understand the two competing normative approaches to both law and democracy as offering two different responses to the fundamental problems that law and democracy seek to solve, and perhaps more fundamentally, as offering different perspectives on the appropriate way of solving these problems. As I state earlier, one view perceives the primary problem that law and democracy strive to solve as primarily epistemic; the other perceives it as primarily motivational. Which kind of problem is more serious and what kinds of solutions are acceptable are questions that involve both empirical and normative elements. Abstractly, it is

perfectly possible to think that contemporary polities suffer, or potentially suffer, from both epistemic and motivational problems and to try to design political institutions with both problems in mind. One may wish to have, for example, a guidance conception of law as counterpoint to a participation conception of democracy, or vice versa. The dominance of the conceptual approach to jurisprudence has obscured all that and more: To the extent that law and democracy reflect, among other things, institutions put in place to address social problems, the decision about which problems to allocate to each (and, no less importantly, which to neither) are matters that different communities will decide differently on the basis of their unique factual environment as well as their political tradition. This suggests that the question that occupies—even defines—contemporary analytic jurisprudence—“what is law?”—cannot be answered in isolation from an account of the space other institutions within the polity have left for law. That space is likely to be different in different times and places.

C. MODEL-BASED VERSUS NATURE-BASED JURISPRUDENCE

If one thing should be clear from this article, it is that I believe it is impossible to understand the major jurisprudential debates of the last decades in isolation from political arguments about the role law should play in bringing out certain goals and the way law does that. It is also clear, I hope, that my argument does not depend on some kind of general skepticism about meaning or conceptual content. There are limits, conceptual if you wish, to what meaning the term “law” could bear. Determining what those limits are is, I think, largely an empirical question, not a philosophical one, and it does not become less empirical when the investigation is conducted by introspection. One way of understanding the challenge posed to conceptualist accounts of jurisprudence in this article is that such accounts assume that once legal philosophers apply their tools to the concept of law, we could have a single reasonably precise account of what law is, of its “nature.”¹²² This approach thus equates the identification of a set of necessary and sufficient conditions for something being law with law’s nature. This is sometimes presented as though that is the only natural way, indeed the only possible way, for engaging in this inquiry. As Raz put it recently, “A theory [of law] consists of necessary truths, for only necessary truths about the law reveal the nature of the law.”¹²³ In

122. See e.g. Raz, *Between Authority*, *supra* note 1 at 17-18; Shapiro, *Legality*, *supra* note 9 at 1-10; see also the sources cited in *supra* notes 1-2.

123. *Between Authority*, *supra* note 1 at 24; for an earlier statement to the same effect see Raz, *Authority of Law*, *supra* note 1 at 104-05; see also Robert Alexy, “On the Concept and the Nature of Law” (2008) 21:3 Ratio Juris 281 at 290 (“Enquiring into the nature of something

line with this view, all those engaged in general jurisprudence accept this understanding of what the debate is about, but disagree over what the best account of the nature of law is.

What is hardly ever defended, and indeed what is sometimes dismissed without argument, is that at bottom there could be more than a single account.¹²⁴ This dismissal represents a huge assumption, but surprisingly not one for which it is easy to find a defence.¹²⁵ This article can be understood as a stab at this assumption, on the basis of the idea that part of what makes something law involves competing normative attitudes. If that is the case, the best way to develop this idea further is by understanding different accounts of law as reflecting competing models of law.

Here we can once again benefit from existing discussions in democratic theory. These discussions are hardly ever presented as conflicting attempts at capturing what democracy or the nature of democracy is. What one does find in the literature are discussions of different models of democracy. These different models are “theoretical construction[s] designed to reveal and explain the chief elements of a democratic form and its underlying structure of relations.”¹²⁶ The model approach entails some vague ideas—some more structural, others more overtly normative—that have more or less clear ties to democracy such as majority rule, self-government, individual rights, and limited government. One may debate the value of the various divisions, or the classification of a certain instance of democracy in one category or another, but, to the best of my knowledge, the different models are treated as analytical aids for discussing normative questions, not as ends in themselves.

The same, I contend, could and should be the shape of general jurisprudence. Models of law are possible ways of realizing competing normative possibilities with the law. This approach takes as its object of inquiry a fairly well recognized

is to enquire into its necessary properties. Thus, for the question ‘What is the nature of law?’ one may substitute the question ‘What are the necessary properties of law?’”).

124. In a recent book, Shapiro mentions this possibility but does not even bother responding to it, proceeding immediately to consider other “more plausible possibilit[ies].” *Legality*, *supra* note 9 at 17.

125. It is, in fact, an assumption that I have argued elsewhere is false. See Priel, “Jurisprudence,” *supra* note 66; Danny Priel, “The Boundaries of Law and the Purpose of Legal Philosophy” (2008) 27:6 *Law & Phil* 643.

126. David Held, *Models of Democracy*, 3d ed (Stanford: Stanford University Press, 2006) at 6; see also CB Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977) at 2-3 (using the term “model” ... to mean a theoretical construction intended to exhibit and explain the real relations, underlying the appearances, between or within the phenomena under study”).

set of phenomena, and while it takes some care to demarcate them, it considers this task both preliminary to the real inquiry and intrinsically unimportant. Indeed, for the sake of the more central question that is to follow, the answer to the question “what is law?” has to remain quite loose. The focus on models aims to shift attention from that question to this one: In what ways can different possible versions (or articulations) of this phenomenon be used? Or, somewhat more weakly, what implications and effects does the adoption of different versions (articulations) have?

Some comments on the model conception of jurisprudence are in order. First, it may be that different models will see different cases of law as paradigmatic, marginal, and in some cases outside the boundary of what counts as law. This is an obvious but important point because it shows that the models conception and the nature conception of jurisprudence are not complementary. It would be a mistake to assume that all different models must presuppose a single underlying nature. Second, the model conception recognizes the fact that law is a human product, and therefore that the answer to the question “what is law?” will depend, to a degree at least, on ideas about the way in which law is being used. Third, this approach will be cognizant of political theory, as different models of law develop within an environment of political ideas.¹²⁷ Finally, and most importantly, models are designed to leave something out, because “[l]eaving something out is not a feature of failed explanations, but of successful explanations.”¹²⁸ This means that being a necessary or even prevalent feature of the explained phenomenon is not necessarily a condition for inclusion in a model. Quite the contrary: The very possibility of having different models of law presupposes that they will highlight different aspects of law in order to demonstrate different possible manifestations of it. It is thus appropriate to exaggerate (or caricature) a certain feature of the explained phenomenon to bring it to attention or to argue for its greater normative significance.

With this perspective in mind, we can turn back to the competing approaches I discuss earlier in this article. I think it is fair to say that both the competing guidance-positivist story of Hart and others and the participation anti-positivist story of Dworkin are obviously inadequate as descriptions of the nature or

127. Cf. Held, *supra* note 126 at 6. Held states:

An aspect of public life or set of institutions can be properly understood only in terms of its connections with other social phenomena. Models are, accordingly, complex ‘networks’ of concepts and generalizations about aspects of the political realm and its key conditions of entrenchment, including economic and social conditions.

128. Daniel C. Dennett, *Consciousness Explained* (Boston: Little, Brown and Company, 1991) at 454.

essence of law. Their inadequacy is apparent the moment one takes a step a back and compares them to the diversity and complexity of legal phenomena that exist even in the world today, let alone those that existed in ancient times. It is tempting to say that the fact such accounts are even considered candidates for describing the nature of law tells us something about how little interest legal philosophers take in actual, real-world law. By contrast, if such accounts are treated as models, then they seem much less problematic. They are not supposed to be short descriptions of what makes something law, but rather accounts that seek to highlight an important feature of law, and as such they are more successful. That lighter descriptive burden also makes these accounts more valuable in dealing with other questions: these accounts can be debated and there is an obvious point to the debate; they can potentially be refined or even combined with each other or with other models; they can help explain historical events, economic developments and so on; they can be compared or aligned with different models of democracy, political ideologies, approaches to economic organization, and so on; and they can be used to explain the differences among various legal systems that go beyond their diverse substantive rules.

IV. CONCLUSION

This article poses two challenges to mainstream analytic jurisprudence. First, by focusing on democracy and comparing it to law, I seek to challenge the view that contemporary debates between legal positivists and their main anti-positivist contender, Ronald Dworkin, are conceptual. In saying this, I am siding with Dworkin, who has argued that legal positivists' theories are grounded in normative theory, and I am rejecting the positivists' own description of their work as purely conceptual.¹²⁹ The second point I seek to demonstrate is the philosophical significance of institutional design. Seemingly technical questions that do not receive much attention in the writings of legal philosophers, such as the way legal change is brought about, are more important to the foundational questions of

129. See the sources in *supra* note 2. 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 "conceptual positivists." See Tom D Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth, 1996) at 69-73 (defence of the distinction by an ethical positivist); Marmor, *Philosophy of Law*, *supra* note 2 at 115 (defence of the distinction by a conceptual positivist).

jurisprudence than most legal philosophers allow. Most jurisprudential work is highly abstract, assuming that it is only by keeping their distance from legal practice that philosophers could have a sufficiently general view of the law. What I seek to show is that for an illuminating account of law such theories must pay closer attention to actual legal practice. Matters like judicial nomination procedure, judicial salary, length of judicial tenure, the scope of the right to appeal, and so on may all tell us significant things about what law is. The design of social institutions—including law—is affected by (and in return affects) political ideology, and it is impossible to separate the question of nature from the question of particular design. The point is true, of course, with regard to the internal design of the institution of law—the way its courts perceive their role, the way they justify their decisions—but also to the question of design from a broader perspective, namely law’s external interaction with other institutions: bureaucracy, markets, democracy, and so on.

On this point Dworkin has been just as guilty as the legal positivists. Highlighting the similarity in arguments that both positivists and Dworkin employ to justify law reveals a shortcoming in their positions exactly because of their insufficient attention to the significance of questions of institutional design to questions of legitimacy. It is at least arguable that different institutions within the state do not just deal with different problems, but also have varying legitimation mechanisms. More generally, this view provides the groundwork for a more conscious discussion of the relationship between law, other institutions, and legitimacy.

A final benefit of this argument is to show the way for reconnecting analytic jurisprudence with political theory and the work of other legal academics. Even among analytic jurists there is a sense that the subject matter has grown isolated, and that it deals with questions that strike even those engaged with them as pointless.¹³⁰ I suspect the main reason for this is the jurisprudential obsession with the question “what is law?” and the assumption—often made without argument—that this question can (and must) be answered without appeal to political or moral considerations. I believe one key to ending this isolation of jurisprudence is recognizing the inseparability of jurisprudence from political theory.

130. See *e.g.* Leiter, *Naturalizing Jurisprudence*, *supra* note 63 at 2 (describing the world of contemporary jurisprudence as “small, hermetic—and rather incestuous”); Shapiro, *Legality*, *supra* note 9 at 32 (admitting that “jurisprudence as it is currently practiced is too removed from the everyday activity of lawyers and judges”); Marmor, *Philosophy of Law*, *supra* note 2 at 95 (admitting that some contemporary jurisprudential debates have “degenerated to hair-splitting arguments about something that makes very little difference to begin with”).