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Book Review: Justice in Robes by Ronald Dworkin (2006)

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FORTY YEARS ON

Danny Priel*

Ronald Dworkin, *Justice in Robes* (Cambridge Mass.: Harvard University Press, 2006). x+308pp.

I. INTO THE RING

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

But if the viewers, initially so impressed by the dexterity of the mind and firmness of the blows, now look a little jaded it is because—just like in real boxing—there is just so much one can take home from such displays, especially when, as is the case here, this is not the first or even the second time that Dworkin meets these opponents. By now it seems that Dworkin and his rivals know the other’s maneuvers so well, that they can anticipate all of them. As a result, instead of dazzling performances what we get is a long series of calculated parries, interspersed by careful jabs: they may cause some

* Assistant Professor, University of Warwick School of Law. For helpful comments and suggestions on earlier, much longer drafts, I thank audiences at the Universities of Oxford, Illinois, Yale, and Warwick, and in particular Sebastian Elias, John Finnis, Chad Flanders, Heidi Hurd, Maris Köpke-Tinturé, Larry Solum, and Ekow Yankah.

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

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

pain, but neither side is going to be forced to give up their game. If necessary they could go on like this forever.

Just like in the real thing, there is some thrill in seeing those displays, especially when performed by professionals of the highest order; but it is a rather cheap thrill and the excitement it gives is quickly forgotten without a trace. Indeed, even Dworkin himself probably felt that his readers might have hoped for something else, but true to form, he tells us at one point that not stepping into the ring for yet another round of verbal exchange would be “cowardly” (p. 43)!

What makes the spectacle even more frustrating is that we can see only one of the players. Exciting as it may sound, in reality it makes the match quite difficult to follow. We are forced to guess what Dworkin’s opponents say from his own returns. And this often makes it quite difficult to tell whether Dworkin sticks to the rules of the game.³ After all, we cannot “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”⁴

Do not get me wrong: serious debate is conducted by advancing arguments and ideas in public so others could read and challenge them, with the hope that something—perhaps even truth—would emerge. But the problem with academic debates is that the law of diminishing marginal returns applies to them with special ferocity with successive responses containing more rhetoric and less substance.⁵ Given that *Justice in Robes* contains so much of that, one might wonder whether it is a book worthy of an extended review, especially by an outsider to the original debates. Perhaps we should all just hang on by the ropes for the Big League players to come back for yet another round. Such is academic life that we can be certain that at some point they will.⁶

³ For the accusation that Dworkin misrepresents others’ views see James Allan, *Truth’s Empire—A Reply to Ronald Dworkin’s ‘Objectivity and Truth: You’d Better Believe it’*, 26 AUSTL. J. LEGAL PHIL. 61, 87-88 (2001); Brian Leiter, *The End of the Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 171 (2004), and the text accompanying note 5, *infra*.

⁴ R.A.V. v. St. Paul, 505 U.S. 377, 392 (1992).

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

⁶ In fact, in some cases they already have. Since *Justice in Robes* collects essays published over a period of fifteen years, in some cases there have been subsequent additions to the debate following the piece published in the book. See e.g., Posner, *supra* note 5 (replying to Ronald Dworkin, *Darwin’s New Bulldog*, 111 HARV. L. REV. 1718 (1998), *reprinted at* pp. 49-74); Richard A. Posner, *Conceptions of Legal Theory: A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377 (1997) (replying to Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997), *reprinted at* pp. 75-104). Dworkin has already added yet another

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

But what is the Dworkinian project? In commenting on Dworkin's work there are usually three Dworkins being discussed: first, there is Dworkin the legal philosopher of *The Model of Rules*, the one who is still best known for his critique of legal positivism; then there is Dworkin the constitutional scholar of *The New York Review of Books* and *Freedom's Law*, who argues for a "moral reading" of understanding the United States Constitution and has argued in favor of a particular ("liberal") answer to many controversial political issues; the third Dworkin is the moral philosopher of *Objectivity and Truth: You'd Better Believe It*, who has argued with great conviction against any kind of relativism or skepticism about morality. While all three Dworkins figure in *Justice in Robes* most treatments of Dworkin's work (including most reviews of *Justice in Robes*) focus on one aspect of his work while neglecting the others. Inevitably, I too will say more on some parts of the book than on others, but one thing that I hope will emerge from this essay is that the three Dworkins are (unsurprisingly) one: that is, one cannot understand Dworkin's legal philosophy without understanding his views on the objectivity of morality and the active role he assigns to judges in deciding constitutional disputes. I decided to show this by focusing on Dworkin's contributions to legal philosophy, because this is a topic to which Dworkin returns at some length in this book, and also because this is the field to which Dworkin's contributions seem to me to have been most significant. Even though my conclusions will often be fairly critical of Dworkin's arguments, I will try to show that some of the issues he has raised are significant and deserve close attention.

Given Dworkin's prominence this statement may seem odd, but it is not as trivial as it may first seem. Some legal philosophers, even those who acknowledge the importance of his contribution to other areas, have recently dismissed Dworkin's work in legal philosophy as fundamentally mistaken and

response Posner, one not reprinted in *Justice in Robes*. See Ronald Dworkin, *Reply*, 29 ARIZ. ST. L.J. 431, 432-45 (1997) [hereinafter Dworkin, *Reply*]. See also Cass R. Sunstein, *Virtues and Verdicts*, NEW REPUBLIC, May 22, 2006, at 32, 34, 37 (reviewing *Justice in Robes* and responding to Dworkin).

of little lasting value.⁷ Others have suggested that his work is concerned with questions so different from those of other legal philosophers that he might not even properly belong among the ranks of jurists.⁸ At least in part this seems like something Dworkin happily acknowledges, as he believes much of contemporary legal philosophy is misguided (pp. 33-34). Another aim of this Review, therefore, is to explain why, despite significant methodological differences between Dworkin and other legal philosophers, his concerns are not very different from theirs, and why, despite deficiencies in his arguments, his claims cannot be rejected out of hand.

II. HOW TO UNDERSTAND LAW

A. *What Is the Question?*

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

What, in general, is a good reason for decision by a court of law? This is *the* question of jurisprudence; it has been asked in an amazing number of forms, of which the classic “What is Law?” is only the briefest.⁹

As he explained, *the* question of jurisprudence is how to make sense of what the law requires and what judges should do in order to discover that. Twenty years later in a short paper in which he summarized his thinking on law, he made it clear that this had been his project all along. He said there that he was concerned with the question of “the *sense* of propositions of law ... [the question which] asks what these propositions of law should be understood to mean, and in what circumstances they should be taken to be true or false or neither.”¹⁰ Some forty years after his early essay Dworkin still maintains that his main

⁷ Like any other prominent theorist Dworkin had its fair share of criticism. But it has been argued recently that Dworkin’s writings have contributed close to nothing of lasting significance to jurisprudence. See Thom Brooks, Book Review, 69 MOD. L. REV. 140, 142 (2006) (reviewing DWORKIN AND HIS CRITICS (Justine Burley ed., 2004)); Leiter, *supra* note 3, at 165-66 (Dworkin’s jurisprudence is “largely without philosophical merit”).

⁸ See ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 27 (2d ed. 2005) (claiming that Dworkin’s theory aims not just to undermine legal positivism but is a “challenge to analytical jurisprudence”); JULIE DICKSON, EVALUATION AND LEGAL THEORY 22-23 & n.31 (2001); cf. H.L.A. HART, THE CONCEPT OF LAW 240-41 (2d ed. 1994) (arguing that Dworkin’s theory is concerned with different issues than his); MICHAEL S. MOORE, EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE 104, 306 (2000) (same).

⁹ Ronald Dworkin, *Wasserstrom: The Judicial Decision*, 75 ETHICS 47, 47 (1964) (book review).

¹⁰ Ronald Dworkin, *Legal Theory and the Problem of Sense*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 9, 9 (Ruth Gavison ed., 1987) [hereinafter ISSUES].

concern is with understanding what law is “in what I shall call the *doctrinal* sense,” namely in “what the law requires or prohibits or permits or creates” (p. 2).

It is already at the very first lines of the article published in 1964 that others concerned with the question “what is law?” have begun to be puzzled by Dworkin’s approach. For on its face it seems odd to say that “what is law?” is only a shorter way of saying “what is a good reason for deciding a case?” or “how should a court decide *this* particular case?”¹¹ Not only do these sentences seem to have an utterly different meaning, it does not even seem that answering the first question is particularly helpful for answering the second. A natural answer to the question “what is law?” would presumably look something like this: “law is the set of rules in which a state determines certain permissions, prohibitions and other normative requirements that govern the lives of those under its jurisdiction.” This suggestion is, no doubt, incomplete and vague, but it does not seem that any elaboration or clarification would give us anything that is going to be helpful in answering the question how cases should be decided. For this we need to know the content of the rules in a given jurisdiction, which could be supplemented with a theory of *adjudication* or theory of *interpretation*. And though such theories are probably going to be related in some way to a theory of law, they do not look like the same thing at all. As one critic of Dworkin put it, Dworkin offered a theory of adjudication, which he “regard[ed] ... willy-nilly and without further argument as a theory of law.”¹²

One popular way of making this point is to say that Dworkin fails to distinguish between the question “what is law (in general)?” and the question “what is *the* law (applicable in a particular case)?”¹³ I believe much of the disagreement with, even incomprehension of, Dworkin’s views stems from failure to understand in what sense the question “what is law?” is similar to Dworkin’s question “how should judges decide cases?” To see how these two questions are related and why Dworkin might not be guilty of a misunderstanding so fundamental that it thwarts his theory right from the start we must look first at

¹¹ Compare with RONALD DWORKIN, *LAW’S EMPIRE* 1 (1986), where Dworkin’s first chapter is entitled “What is Law?” immediately followed by the explanation that “[i]t matters *how judges decide cases*.” *Id.* (emphasis added).

¹² Joseph Raz, *The Problem about the Nature of Law*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 195, 202-03 (rev. ed. 1994) [hereinafter *ETHICS*]; see also MARMOR, *supra* note 8, at 43-44; W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* 3 (1994).

¹³ For a critique of Dworkin along those lines see, for example, JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 180 (2001); MATTHEW H. KRAMER, *IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS* 129 (1999); MOORE, *supra* note 8, at 94-95; Leiter, *supra* note 3, at 175-76. Using different terminology this is also the critique in Green, *supra* note 7.

the view which takes this distinction very seriously and which Dworkin has always challenged—legal positivism.

B. *Two Kinds of Legal Positivism*

When talking about law in the abstract legal philosophers talk about three different things and often without clearly distinguishing among them: the validity of legal norms, the normativity of law, and the content of legal norms. A legal norm is said to be valid if and only if it is a member of a class of norms that can be identified (in some yet unspecified way) as belonging to a certain legal system. The validity of a legal norm, in other words, is the “mark” that distinguishes it from other norms, that explains why it is a *legal* norm (as opposed to a social or moral norm). The content of a legal norm is what that norm requires us to do (e.g., pay a certain tax), what it prohibits us from doing (e.g., take someone else’s property without their consent), what powers it gives us (e.g., to make wills or contracts), or which immunities it grants us (e.g., a right against invasion of our privacy). In all cases, we can draw some kind of link between a certain set of facts that have to obtain (signing certain documents, earning certain amount of money) and a certain legal outcome (the creation of certain contractual rights and duties; the duty to pay a certain amount of tax). The normativity of a legal norm is the sense in which the legal responses just mentioned are in some sense “non-optional,”¹⁴ the way in which legal norms create (or purport to create) obligations that people take or refrain from taking certain actions.¹⁵

Clarifying these concepts is important, because disagreements among legal philosophers are often best understood as resulting from different views on the relationship between these three concepts. At first this suggestion may sound strange: the debate between legal positivism and natural law is usually said to be about the relationship between law and morality, with legal positivism taken to be the thesis that there is no necessary connection between the two, and natural law (and Dworkin) taking the opposite view.¹⁶ But I believe this is a crude way of characterizing the difference between legal

¹⁴ HART, *supra* note 8, at 6. This definition fits criminal law prescriptions particularly well, but it is true of other norms as well. Contract law is non-optional in the sense that it defines a set of conditions under which one may use certain recognized legal mechanisms in order to *create* non-optional contractual rights and duties. Cf. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941). Saying more about normativity beyond that would put me in controversial waters that I do not wish to enter here.

¹⁵ For more on the distinction between validity, content, and normativity, see Danny Priel, *Trouble for Legal Positivism?*, 12 LEGAL THEORY 225, 232-36 (2006).

¹⁶ For positivist claiming no necessary connection between the two see KRAMER, *supra* note 13, at 1, *passim*; Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 241, 241 (Dennis

positivists and Dworkin. What really is at stake between positivists and Dworkin is the relationship between validity, normativity, and content. The difference of opinion on this issue is more fundamental because it is of greater explanatory power: once these concepts and their relationships are understood, we can understand *why* Dworkin and his positivist adversaries' views differ on the relationship between law and morality, as well as on many other questions. I believe their differences on such diverse questions as whether the law contains something like a rule of recognition, whether the law contains principles which are logically distinct from rules, whether there is one right answer to virtually all legal questions, whether knowing the content of law involves moral considerations, what kind of relationship is there between theory of law and theory of adjudication, and as we shall see even the question why Dworkin thinks that the question "what is law?" is a brief way of asking "what count as good reasons for a judicial decision?," ultimately derive from different views about the relationship between validity, normativity, and content.

Positivists disagree among themselves on many questions. As a first cut, however, we can say that what unites all of them and distinguishes their account from Dworkin's is that they treat the question of validity as prior to and distinct from the question of content; and some positivists believe that these two concepts are also separate from the question of normativity. For Dworkin, as we shall see, the three questions are inseparable, and validity, if it plays any role in his account at all, is the least important of the three. Initially the positivist view that all three concepts are independent of each other seems quite plausible: to know how to decide a case we need first to identify the legal norm that governs the case; and to know *that* we need to know how to identify legal norms in general. And the answer positivists give to this question seems natural and appealing: identifying valid legal norms requires identifying a certain *procedure* by which legal norms are promulgated, not looking into the norm's content. After all, there are many very different legal norms with very different content, but what is common to all of them, what *makes* them *legal* norms, is that they came in a particular manner by which they can be identified. Thus, the "nature" of law on this picture is that norms come into being if they adhere to a

Patterson ed., 1996) ("All legal positivists [believe] ... that there is no necessary connection between law and morality"). In contrast Dworkin has accepted the natural law position that such a connection does exist. See Ronald A. [sic] Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982). That this is not what stands between the two camps can perhaps be attested by the fact that recently several positivists have argued that there are necessary connections between law and morality. See, e.g., John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 222-25 (2001) (calling this a "myth"); Leslie Green, *Legal Positivism*, at § 4.2, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/legal-positivism/#4>.

certain formal test by which we can distinguish legal norms from other things in the world. Following Hart, the name commonly used for this formal test is “rule of recognition.”

This is the positivist argument for separating a legal norm’s validity from its content. Many positivists have also argued that we can understand in what way a legal norm is binding (“non-optional”) independently of its content: it is not *what* the law requires that makes it binding; rather it is the fact that *it is the law* that that makes it binding.¹⁷ Taken together these arguments explain why at least some positivists consider all three concepts to be independent of each other, and why validity is the most fundamental concept in identifying law: to know what the law requires and how it is binding on us, we must first *identify* legal norms.

The problem with this suggestion is that it is ambiguous. To see the difference between the two claims they make think of legal norms as closed boxes. The content of the norm, that is, what the norm requires, is found inside the box. What the legal positivist argues is that there is a mark outside these boxes by which we can identify them as legal norms without having to look inside the box to examine their content. Now there are two ways of understanding the positivist claim: according to the first, the mark identifies those things that are legal norms, but it cannot identify which norm is applicable to which case, since this is already a question of the norm’s content, and that is something that identifying the mark of legal norms cannot tell us. Thus, an English judge could know that in general things that have been enacted by the Queen in Parliament are laws,¹⁸ so she could identify some things as law, but this would not tell her what the law requires on any particular question. The second interpretation of the positivist claim is that we can identify individual legal norms and so what they require. What it cannot tell us is to which particular cases it applies; or perhaps it can tell us that too, but not whether it will be “controlling” in that case or whether it could be defeated by other norms.

Different positivists, sometimes even the same theorist in different places, seem to vacillate between these two theses. At times we are told that legal positivism is a thesis for the identification of the “nature of law,” i.e. what distinguishes the set of all valid laws from other things in the world. According to this view the “rule of recognition” can only identify those marks that distinguish all laws from everything else.¹⁹ But at other times positivists argue for something much stronger, namely that

¹⁷ See H.L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82, 84 (A.I. Melden ed., 1958) (arguing that legal rules create content-independent obligation).

¹⁸ HART, *supra* note 8, at 102.

¹⁹ *Id.* at 6-10; Joseph Raz, *Dworkin: A New Link in the Chain*, 74 *CAL. L. REV.* 1103, 1107 (1986) (reviewing RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985)) [hereinafter Raz, *Dworkin*] (“All [the rule of recognition] does, and all it is meant

with the rule of recognition we can “identify[] [the] primary rules of obligation” in a particular jurisdiction.²⁰

Let me begin with the second interpretation. The problem with it is that it is hard to see how a formal test like the rule of recognition could identify individual legal norms. At times it seems that this point has just not been noticed, although it is hard to see how the identification of what makes something belong to the set of legal norms can tell us anything about what individual norms require and thus how one should behave in individual cases. No single formal test like the rule of recognition (even if a highly complex one) could alone tell us how to identify the individual cases to which particular legal norms apply: for this we must add an account that explains how to move from the identification of something as belonging to the group of legal norms to knowing the content of individual legal norms.²¹

The only attempt I am familiar with to answer this challenge is the claim that once we have a test for recognizing what separates law from non-law, and then “the law can be simply understood and applied straightforwardly,”²² according to the “literal”²³ meaning of its words. That is to say, according to this view the rule of recognition allows us to identify *individual* legal norms, and once we have identified them we can immediately know the content of individual legal norms. But this view is mistaken, because this “literal” meaning is either a tautological reference to whatever is accepted as the

to do, is to identify which acts are acts of legislation and which are the rendering of binding judicial decisions, or more generally, which acts create law.”); Joseph Raz, *On the Nature of Law*, 82 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 1, 3-5 (1996); see also note 26, *infra*.

²⁰ HART, *supra* note 8, at 100. Contrast this view with Hart’s much weaker claim that all the rule of recognition “identify[ies is] the authoritative *sources* of law.” HART, *supra* note 8, at 266 (emphasis added). Andrei Marmor is probably most extreme when he suggests that positivism aims to explain what makes “statements of the form—‘According to the law in ___ X has a right/duty/etc. to ___.’” ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUE 135 (2001). Marmor seems to suggest here that the formal test of the rule of recognition can identify *conclusive* legal propositions.

²¹ See Priel, *supra* note 15, especially at 236-43. Some legal positivists, so-called “inclusive” positivists, allow some content-based (and not merely formal) considerations to be part of the rule of recognition. See generally COLEMAN, *supra* note 13, at 103-48 (2001); MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET 17-140 (2004); WALUCHOW, *supra* note 12, at 80-141 (1994). However, this does not solve the problem identified in the text, because their argument is that the tests for identifying valid legal norms can include substantive constraints (for instance, that a putative immoral norm cannot be a legal norm). But this presupposes that there is a prior and non-content based method for individuating legal norms and telling its content, which their theory does not supply. Even those (like Coleman) who believe that certain norms can become legal purely in virtue of their content have to explain how we are to know which of the myriad of possible content-based norms out there are legal and which are not.

²² MARMOR, *supra* note 8, at 95.

²³ *Id.* at 104.

right interpretation of what the law requires in particular cases, or a false claim that in all times and places what the law requires is determined by a single test. Understood this way legal positivism suffers from a fundamental error: it presents itself as an account for identifying what the law requires, but it does so only by falsely assuming that once one knows the features that identify valid legal norms in general one can also know the content of each one of them.²⁴

This suggests we should look instead at the first interpretation of the positivist project. According to this view the positivist account was never intended to give judges a procedure for deciding cases,²⁵ in fact not even an account on how to identify legal norms. The role of the rule of recognition is not to be used as a guide of individual legal norms. It only plays a role in an account of the “law-making properties.” Whatever else one may say about a legal system it must have a rule of recognition, and however we determine the content of its norms, it is because the rule of recognition provides us with some guidance on how to do this.

The legal positivist on this account is a bit like a natural scientist: there are, no doubt, many contingent facts about law, many differences between laws in different times and places, but underneath all of them there are (or at least there may be) some properties in virtue of which some things in the world are laws, and the positivist aims to give an account of those properties.²⁶ Notice that on this version of legal positivism what drives the legal positivist’s distinction between law and morality is not

²⁴ On this reading of legal positivism its problem is more fundamental than the problem Dworkin believed undermines it. Dworkin’s challenge to legal positivism, what he called the “semantic sting,” is roughly that legal positivism cannot explain the existence of prevalent disagreements among lawyers on fundamental and central questions. But we now see that the problem is not so much the existence of fundamental disagreements among lawyers (something that many positivists have argued they can explain), but rather how to identify the content of legal norms in the first place. Even if there had been no disagreements among lawyers at all, this version of positivism provides a false account on how to identify what the law requires.

²⁵ See HART, *supra* note 8, at 240; H.L.A. Hart, *Comment*, in ISSUES, *supra* note 10, at 35, 36 (“there is a standing need for a form of legal theory ... the perspective of which is not ... what the law requires in particular cases.”).

²⁶ Over the past three decades this view has been most eloquently defended by Joseph Raz. See, e.g., Joseph Raz, *Can There Be a Theory of Law?*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324, 328 (Martin P. Golding & William A. Edmundson eds., 2005) (“only necessary truths about the law reveal the nature of law”); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 104 (1979) [hereinafter RAZ, AUTHORITY] (“Since a legal theory must be true of all legal systems ... the identifying features ... [of law] it characterizes ... must of necessity be very general and abstract. ... It must fasten only on those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. This is the difference between legal philosophy and sociology of law.”).

so much a substantive claim about the separation between law and morality, but rather a *methodological* one: if one wishes to understand a certain phenomenon, the first step is to see the ways in which it is different from similar things.²⁷

Dworkin has serious doubts that this project is tenable (pp. 215-16), and I share this view, although for somewhat different reasons.²⁸ These arguments are not directly related to our concerns, so I will not discuss them here. But even if they can be adequately answered, on this interpretation legal positivism turns out to be not false but seriously incomplete: this version of legal positivism is a theory of law that does not give us any clue as to how to move from identifying the group of things that are laws to knowing the content of individual norms. In other words it is a theory of law, that by its proponents' own admission is silent on the question of identifying what most of those who come in contact with the law care most about, what it requires of them.²⁹

C. *The Relationship Between Content and Normativity*

Whatever are the merits of this kind of legal positivism, clarifying what positivism was about suggests something interesting, namely that the gap between the question “what is law?” and the questions Dworkin is interested in, “what is *the* law?” or “how should judges decide cases?,” may not be as wide as it seemed at first. These questions are separate only if we are interested in distinguishing those things that are laws from all other things in the world. But this is not at all Dworkin's concern. If we are interested in identifying individual legal norms, then there may be no basis for the accusation: “Law” in this sense is just the aggregate of “the laws” of particular cases (*cf.* p. 221). There may simply be nothing beyond that for us to look for. And since judges are required to decide cases by following “the law,” to identify what the law requires is also to identify how judges should decide cases.

²⁷ See John Austin, *The Uses of the Study of Jurisprudence*, in JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 365, 371 (H.L.A. Hart ed., 1954) (1832): “By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and divisions which relate to law exclusively.” It is evident from this passage that Austin's reason for separating law from morality is *methodological*: “detaching” it from morals allows us to understand it better. This is different from (though consistent with) Austin's famous *substantive* slogan that “the existence of law is one thing; its merit or demerit is another.” *Id.* at 184. See also Joseph Raz, *Incorporation by Law*, 10 *LEGAL THEORY* 1, 15-16 (2004).

²⁸ See Danny Priel, *Jurisprudence and Necessity*, 20 *CAN. J.L. & JURIS.* 173, 178-84 (2007); Danny Priel, *Evaluating Descriptive Jurisprudence*, 52 *AM. J. JURIS.* 139 (2007).

²⁹ In addition, it turns out that any attempt to reinterpret the rule of recognition in a way that makes it *one* element that figures in identifying individual legal norms forces the theorist to recognize that identifying those requires taking evaluative considerations into account, something legal positivists have denied. See Priel, *supra* note 15, at 236-38, 250-61.

This point undermines the distinction between legal validity and the content of legal norms, but it still does not tell us how judges should identify what the law requires. This is where the third concept mentioned earlier—that of normativity—comes in. Again, it will be useful to contrast Dworkin’s position with that of the positivists. The statement “you have a moral obligation not to kill others,” is true, if it is true, *in virtue of its content*, and not in virtue of some mark of validity. Likewise, what makes a particular moral norm binding, i.e. what explains its normativity, is its content, not the fact that it was said by someone or was promulgated by some recognized procedure. As we have already seen, some positivists argue that one of the differences between law and morality is that unlike the case of morality, law’s normativity does not depend on the content of its norms. Hart offered an early defense of this view when he tried to show that what makes legal norms binding was the fact that they were part of a certain social practice, and not because what they required was necessarily morally good.³⁰ More recent versions of the same approach tried to explain law’s normativity by developing the idea that law is a convention or a shared co-operative activity.³¹

But Dworkin objects to this too. Dworkin’s defense of law’s normativity goes all the way to law’s content. In an earlier book he wrote that “[j]urisprudence is the general part of adjudication, a silent prologue to any decision at law.”³² This passage puzzled—and was vigorously contested by—many a reader of Dworkin.³³ It is usually interpreted by critics to suggest that in order “to know the law governing each case one must be making, explicitly or implicitly, assumptions about the nature of

³⁰ See HART, *supra* note 8, at 55-59. This is but one reading of Hart’s view. It is also possible to read Hart as specifying the conditions under which people *consider themselves* to be under an obligation. For a critique of Hart which assumes the first interpretation see JOSEPH RAZ, PRACTICAL REASON AND NORMS 53-58 (2d ed. 1990); Ronald Dworkin, *The Model of Rules II*, in TAKING RIGHTS SERIOUSLY 46, 48-58 (rev. ed. 1978) [hereinafter RIGHTS].

It should be noted, however, that some philosophers have argued that the basis of *moral* obligation is also conventional. See, e.g., GILBERT HARMAN, THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS 103-14 (1977). Hart himself offered some remarks in a similar vein. See HART, *supra* note 8, at 193-200.

³¹ See Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982). For the idea of law as a shared co-operative idea see COLEMAN, *supra* note 7, at 97-100, 157-60; Scott J. Shapiro, *Law, Plans, and Practical Reasoning*, 8 LEGAL THEORY 387 (2002). Dworkin criticizes this view (pp. 195-96).

³² DWORKIN, *supra* note 11, at 90. Shortly afterwards he adds to the same effect that “[t]he law of a community ... is the scheme of rights and responsibilities that ... license coercion.” *Id.* at 93.

³³ See, e.g., HART, *supra* note 8, at 241-43; KRAMER, *supra* note 13, at 164-73; WALUCHOW, *supra* note 12, at 24-27; Joseph Raz, *Two Views about the Nature of Law: A Partial Comparison*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 1, 32-36 (Jules Coleman ed., 2001); see also Larry Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin’s Theory of Law*, 6 LAW & PHIL. 419, 419-20 (1987).

law.”³⁴ But this, I believe, is a misunderstanding of Dworkin’s point. Properly understood this passage fits Dworkin’s general account very well and is in fact quite plausible. What Dworkin says here is that for law to create obligations it has to be legitimate; otherwise it only creates what has the appearance of obligation, but is in fact merely a demand backed by the threat of punishment. But since we believe that law is capable of being legitimate (and only when it is legitimate it creates obligations), then just like in the case of morality, we must look at law’s content in order to know whether it creates genuine obligations. If, for instance, the law of a state is illegitimate its demands for one’s tax money are no more legitimate (and thus no more capable of creating obligations) than those of the robber who demands one’s wallet. (It was after all Hart, the positivist, who insisted that law is not the gunman situation writ large.³⁵) To be sure, the way the money is demanded and the identity of the person (or body) who makes the demand may affect the determination whether the demand is legitimate: a just demand for my tax money may not be legitimate if made by a government that got to power by force. Nevertheless, one crucial factor in determining whether the demand is legitimate is *what* is being demanded. From the other direction, we rely on the fact that law is capable of creating obligations to determine what the law requires. In this bidirectional way we link between what the law requires (its content) and what it means for law to make a requirement (its normativity).

Interpreted this way Dworkin’s account appears to be quite robust. There are six features of it that are worth emphasizing: First, to some degree the question of legitimacy depends on the question of the identification of law, or, to use the language used before, the validity, content, and normativity of law are closely tied. Second, Dworkin’s account explains his claim that jurisprudence is a branch of political morality (p. 241), for answering the question “what is (the) law?” turns, at least in part, on the question whether the law is legitimate, and this requires us to consider questions of political morality. Third, it explains why the question of legitimacy (and therefore the question of law’s normativity) is asked at the level of individual norms and not at the level of legal systems: even though we could make some general claims on the matter, in the end whether some demand creates an obligation one should follow has to be answered on a case by case basis, based on the content of the demand. This is the sense in which

³⁴ Raz, *supra* note 33, at 34. Raz later offers a somewhat different interpretation of this passage according to which judges’ decision ought to “conform . . . with the correct theory of the nature of law.” *Id.* at 35. I believe this is also a mistaken reading of Dworkin’s idea. The misunderstanding is the result of trying to understand Dworkin’s work from the perspective of the legal positivist approach that identifies the nature of law with the necessary features of law and ties those to legal validity.

³⁵ HART, *supra* note 8, at 22-23, 82-83.

jurisprudence and political philosophy are presupposed by every legal decision.³⁶ Fourth, because the question of legitimacy can be raised with regard to every legal norm, we can understand Dworkin's otherwise surprising claim that his theory of law "is equally at work in easy cases [as in hard cases], but since the answers to the questions it puts are ... obvious [with regard to easy cases], or at least seem to be so, we are not aware that any theory is at work at all."³⁷ There are at least seven ways of drawing the line between easy and hard cases: as a distinction between cases involving simple facts and cases involving highly complex facts; between simple legal issues (parking in a no-parking area) and highly complex law (complex tax rules); between matters governed by law and matters on which there is a lacuna in the law; between cases in which there seems to be only one applicable legal norm and cases which seem to be governed by several, conflicting legal norms; between cases in which judges have little or no discretion and cases in which they are given wide discretion; between cases in which the law conforms with morality and cases in which what the law requires seems to be in conflict with our moral intuitions; and finally between cases that are socially uncontroversial and cases dealing with matters on which society is divided. But whichever way this distinction is drawn, understood as a question of normativity and legitimacy, Dworkin's claim makes sense: the need to legitimate the use of force is equally pressing and goes "all the way down" in easy cases as in hard cases. Fifth, the particular decisions implicate our more general commitments as to what *could count* as obligation-creating practices: if we interpret a particular instance as one of obligation-creating law (as opposed to a mere demand backed by threat), then this has to figure in as part of a larger picture of what could count as law more generally. This way, again, the decision at the particular level cannot be separated from the more abstract and general level. Finally, this account explains why, if we are interested in the legitimacy of the use of force by the state, the *fact* that there exists a *practice* of paying attention to, say, certain pronouncements that come out of Congress, does not suffice. Rather, it is only because we can provide some normative account that justifies paying attention to those pronouncements we call statutes, that explains why they are laws.

³⁶ This is why I disagree with Leiter when he says that "while Dworkin often writes as if his arguments about affirmative action, free speech, judicial confirmations, the rights of defendants, and so on, depended on his jurisprudential claims, the good news is that they are almost all detachable from them." Leiter, *supra* note 3, at 177. It may be true that Dworkin's theory of law does not *entail* his views on these matters, but this is not the same thing as to say that the two aspects of Dworkin's work are not related.

³⁷ DWORKIN, *supra* note 11, at 354; *accord id.* at 266 ("easy cases are ... only special cases of hard ones"). This seems also to be the view in *Justice in Robes* too (pp. 55-56).

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

III. CAN THE DWORKINIAN MODEL BE JUSTIFIED?

It stands to reason that in order for judicial decisions to be legitimate judges should follow the law. But what exactly does it mean for judges to follow the law? How should judges approach their task of following the law in order to render their decisions legitimate? Dworkin's answer is that judges' decisions are correct as a matter of law, and hence legitimate, if judges consciously try to determine the moral rights and duties of the parties in question and use this data to interpret the relevant legal materials. The argument essentially is that the state must treat those subject to its laws as bearers of rights and most fundamentally the right to equal concern and respect. This demand applies to all branches of government, but it is especially true of courts, because courts are "forums of principle,"³⁹ that is, unlike other branches of government courts are places to which people come to claim what they are entitled to according to pre-existing moral principle. As Dworkin put it already in his first academic

³⁸ For moral arguments in support of exactly this view see TOM D. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* 85-87 (1996); GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 405-06, 425-26 (1986) (discussing Bentham's arguments). Similar arguments have also been invoked against judicial review. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006).

³⁹ DWORKIN, *supra* note 19, at 69-70.

publication, those who come to court asking for redress, never come to court as supplicants hoping for the court's compassion or mercy, they come as litigants, demanding what's theirs by right.⁴⁰

Dworkin thus believes that what renders a judicial decision correct is that it complies with the way morality requires we treat the person in question. But this requirement could clash with another strongly held demand, namely that the law be public and impartial and that those who administer it will not rely on their personal views in applying and enforcing it. An explicit call for judges to rely on moral considerations may result in biased decisions based on different judges' personal views on what's moral, even if the judges make a conscientious effort not to do that. And it goes without saying that this hardly seems like a recipe for legitimate court decisions.

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

A. *Right Answers Out of Disagreement*

Dworkin's argument rests on the assumption that there are objective moral values on which judges should anchor their decisions in their attempt to reach the right, legitimate, decisions. But a relativist can challenge this view in at least two different ways. First, she will say, each society, perhaps even each person, has a different set of moral values which cannot be judged as correct or incorrect by the moral standards adopted by others. The second challenge is epistemic: according to this argument even if in some sense there is a right answer to moral questions, given the pervasive and seemingly irresolvable societal disagreements on such matters, we cannot know what the right answer is. When those questions are raised in the political domain, the best decision procedure we have is to follow a majoritarian rule. Giving courts the power to rule on such matters is inconsistent with this decision

⁴⁰ See Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 637 (1963).

procedure, because judges are unelected, unaccountable, and sometimes rule against unambiguous popular majorities.

For someone who believes that the legitimacy of judicial decisions depends on their moral correctness such challenges are crucial to answer, and it is no wonder that Dworkin indeed dedicates so much space to defending the objectivity of morality, not so much for its own sake, but as part of his argument about how judges should decide cases. In *Justice in Robes* Dworkin does not discuss the challenge from democracy, although he did so in other writings. There he argued that in cases in which the law represents a societal choice, courts should follow that choice only if such choice does not flout fundamental rights. When fundamental rights are infringed, judges should ignore majoritarian preferences and rely on the “trumping” power of rights over majorities.⁴¹ But this answer presupposes that there is a satisfactory answer to the first challenge, i.e. that despite the controversy about moral values, they have objective content which judges can find and rely on in their judgments. Though not stated in quite this way, this is, I believe, the place of Dworkin’s arguments in favor of moral objectivity within the larger structure of his overall account: explaining why morality is objective is a crucial aspect of his theory explaining why courts may be legitimate, and why on matters of rights and duties judges need not care much about what the majority thinks. For Dworkin to explain the objectivity of morality is ultimately to explain the legitimacy of courts and in this way answer the question “what is law?”

But do Dworkin’s argument for the objectivity of morality despite pervasive disagreement hold up?

B. *Interpretive Concepts and Objectivity*

(1) **What Are Interpretive Concepts?**

Dworkin does not aim to give a psychological, logical, or historical account of the fact of pervasive disagreement about values. He takes it for granted that such disagreements exist (pp. 77-78). He argues that these disagreements do not undermine his claim that moral propositions have determinate answer,

⁴¹ For a succinct account see Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984). The underlying rationale is that majoritarian preferences are themselves defensible only because they guarantee that each person is treated with equal concern and respect. Therefore they have no force when they violate this demand. See also RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 140-41 (2006) [hereinafter DWORKIN, DEMOCRACY]; DWORKIN, *supra* note 19, at 23-28. Similar ideas are found in DAVID A.J. RICHARDS, THE MORAL CRITICISM OF LAW 50-51 (1977).

and he elaborates a method he believes would lead judges (and others) to reach the correct answer to legal disputes.

The key to Dworkin's solution is what he calls "interpretive concepts," a notion he introduced in *Law's Empire*⁴² and that has been central to his thinking ever since. In *Justice in Robes* Dworkin begins by contrasting interpretive concepts with criterial concepts and natural kind concepts: criterial concepts such as *book* are concepts whose extension is fixed by a set of necessary and sufficient criteria (pp. 9-10). Two people share a criterial concept only when they (at least roughly) share the criteria for their application. Natural kind concepts such as *water* are concepts whose extension is fixed by what certain things in the world turn out to be (even if this conflicts with societal attitudes on the matter), and therefore on whose content we defer to experts (p. 10). Two people share a natural kind concept if they are talking about the same substance, even if their beliefs on that substance are different and even if their beliefs on that substance are largely false.

Why does Dworkin think that we need another kind of concept to explain moral and legal discourse? It makes no sense, says Dworkin, to think of political concepts as natural kind concepts, because, as he is fond of saying, they have no DNA (pp. 3, 113, 152, 215). But in that case why not say that moral concepts are criterial? According to this view there are certain criteria that fix the meaning of, say, justice, and if there are disagreements between people about what constitutes justice it simply shows that though they use the same word, they in fact have different concepts of justice. Dworkin rejects this answer, because he believes it leads to absurd conclusions. He thinks that only if we share a concept we can make sense of disagreement. If, to take the well-worn example, I talk about "bank" thinking about the edge of a river and you talk about "bank" thinking of a financial institution, and we disagree over the question whether banks are often damp, then our disagreement is not real, because we are not talking about the same thing.⁴³ But since "lawyers obviously do *genuinely* disagree about the content of the law of their jurisdiction" (p. 221, emphasis added), we must have a different explanation for disagreement in law. Interpretive concepts are supposed to provide the solution, for they are supposed to explain the possibility of concepts that have no DNA but have objective content despite the existence of persistent disagreement over their content. Thus interpretive concepts play a crucial role in Dworkin's overall account, because only if such concepts exist can there be objective right answers to

⁴² See DWORKIN, *supra* note 11, at 42-46.

⁴³ Incidentally, the two meanings of this favorite example of ambiguity (also used in DWORKIN, *supra* note 11, at 44) are cognates. See *Bank*, 1 OXFORD ENGLISH DICTIONARY 930, 931 (2d ed. 1989).

the question what the law requires, which as we have seen, is an essential step for establishing the legitimacy of the demands courts make.

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

Some of our concepts *function* differently . . . : they *function* as interpretive concepts that *encourage* us to reflect on and contest what some practice we have constructed requires. People in the boxing world share the concept of winning a round even though they often disagree about who has won a particular round and about what concrete criteria should be used in deciding that question. Each of them understands that the answer to these questions turn on the best interpretation of the rules, conventions, expectations, and other phenomena of boxing and of how all these are best brought to bear in making that decision on a particular occasion. . . .

Interpretive concepts . . . require that people share a practice: they must converge in actually treating the concept as interpretive. But that does not mean converging in the application of the concept. People can share such a concept even when they dramatically about its instances. So a useful theory of interpretive concept—a theory of justice or of winning a round—cannot simply report the criteria people use to identify instances or simply excavate the deep structure of what people mainly agree are instances. A useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures. [Pp. 10-12, emphases added.]

Dworkin does not demand much. As he says in a different place, people “share the concept [justice] because they participate in a social practice of judging acts and institutions just and unjust and because each has opinions, articulate or inarticulate, about what the right way to continue the practice on particular occasions: the right judgments to make and the right behavior in response to those judgments” (p. 224).⁴⁴ Dworkin concedes that we can rule out some claims about interpretive concepts

⁴⁴ Dworkin also equates interpretive concepts with “essentially contested” concepts (p. 221), alluding to a term coined in W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC. 167 (1956), and which bears some similarity to Dworkin’s ideas. See *id.* at 169. Dworkin, however, does not mention Gallie’s essay, so it remains unclear to what extent he subscribes to Gallie’s specific arguments. But see Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), reprinted in DWORKIN, RIGHTS, *supra* note 30, at 81, 103 n.1 [hereinafter Dworkin, *Hard Cases*] (referring to Gallie’s article in support of similar ideas). Though it is by no means conclusive it is worth noting that Gallie himself tended to the view that law is *not* an essentially contested concept. See W.B. GALLIE, PHILOSOPHY AND THE HISTORICAL UNDERSTANDING 190 (1964). For support of this view see Leslie Green, *The Political Content of Legal Theory*, 17 PHIL. SOC. SCI. 1, 18-20 (1987).

on semantic grounds alone, for instance the claim that “seven is the most unjust of the prime numbers” (p. 151), but he maintains that all the interesting debates, all the debates that political philosophers and lawyers seriously engage in, are not of this sort.

To understand Dworkin’s idea we need first to distinguish between two senses in which the word “concept” is used. It is used, especially in the literature of philosophy of mind, to refer to the basic constituent element of thought of a person.⁴⁵ Call these I-concepts (“I” for internal). There are moments that Dworkin seems to adopt this sense of the word, for example when he writes that people “*must converge in actually treating the concept as interpretive*” (p. 11, emphases added) in order for it to be interpretive. But concepts in this sense do not “encourage us to reflect” (p. 10, see also p. 224) on them. They are merely elements of thought. So it makes more sense to say that Dworkin uses concepts in another sense, as something like “Idea,” that is, as a kind of abstract formulation of the fundamental features of an object. Call these E-concepts (“E” for external), because these concepts do not necessarily represent the mental content of any particular person. It is evident that Dworkin has this sense in mind when he talks about the way such concepts “function” by encouraging people to think about certain practices. It is in this sense in mind that he says (in what seems like a contradiction with his words just quoted) that “[i]t is hardly a decisive objection that very few people would identify their own practice [of law] in that way [i.e., as an interpretive concept]: we are engaged in *philosophical explanation*, not vicarious semantic introspection” (p. 12, emphasis added). Certain concepts are interpretive concepts even if (some) people don’t treat them as such.

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

Why does this matter? It matters because the concept of essentially contested concepts is itself contested, or at least quite murky. On the one hand it seems that Dworkin would accept MacIntyre’s take on the concept of essentially contested concepts. MacIntyre said that when dealing with social practices such as “politics, education, or science[, d]ebate within such a practice is inseparable from debate about the practice, and both form parts of each practice.” Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1, 6 (1973). On the other hand, some commentators understood such concepts to lack objective content of the kind Dworkin is interested in. As one scholar suggested, essential contestability of concepts leads to “an ambitious thesis of conceptual relativism.” John N. Gray, *On the Contestability of Social and Political Concepts*, 5 POL. THEORY 331, 341 (1977); see also Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 148-53 (2002). While conceptual relativism is consistent with some senses of objectivity, it is inconsistent with the sense Dworkin uses the word (pp. 37-38).

⁴⁵ See Ray Jackendoff, *What is a Concept, That a Person May Grasp It?*, 4 MIND & LANGUAGE 68 (1989), reprinted in CONCEPTS: CORE READINGS 305, 305-06 (Stephen Laurence & Eric Margolis eds., 1999), whose distinction between I-concepts and E-concepts I follow. Whenever I use the word “concept” below with no identification, I mean E-concept.

- (a) They are (E-)concepts that refer to social practices.
- (b) People share these concepts when they *agree*, roughly, about the importance of those concepts (p. 148), as well as about manifestations of the practice (e.g., the workings of courts are a manifestation of the interpretive concept *law*).
- (c) Yet people who share these concepts disagree about the “best interpretation” of the practice, and consequently how the practice should be manifested in particular instances. Thus, when explaining the notion of interpretive value he says that for it to be interpretive “those who accept it as a value *must* ... disagree about precisely what value it is” (p. 169, emphasis added).
- (d) These disagreements are “interpretive,” not “conceptual,” meaning that they are evaluative all the way down. In other words, there is no way of distinguishing between what the practice is in the abstract and how it requires us to behave in particular circumstances (pp. 154-55). Hence, we cannot give a “neutral” definition of what counts as law or justice. All such accounts will presuppose some, possibly unstated, normative assumptions. That’s why all contesting accounts are “interpretations” of the practice, all aiming to show it in its best light.
- (e) There is no known way of resolving disagreements about what counts as the practice or for proving the correctness of one interpretation of the practice. Dworkin rejects the view that in ethics or law “nothing can count as a good argument ... unless it is demonstrably persuasive, that is, unless no one who is rational can or will resist it” (p. 267 n.14). He argues that it is wrong to “import[] standards of good argument that are foreign to a practice into it from some external level of skepticism” (*id.*).⁴⁶ As a result, the disagreements are persistent: “We argue for our constitutional interpretations, *knowing* that others *will inevitably reject* our arguments, and that we cannot appeal to shared principles of either political morality or constitutional method to demonstrate that we are right” (p. 127, emphases added).
- (f) Nonetheless, there are objective right answers to such disagreements, and these are answers that are not determined by (although they may be partly dependent upon) existing opinion as to what counts as the best interpretation of the practice.
- (g) Relatedly, an interpretation of the practice is always open for revision. Even if there is universal agreement on an interpretation of the practice, the agreement does not render the interpretation true, or make contesting it otiose. For instance, even if everyone were to be believed that there is nothing wrong with slavery, that would not change the fact that slavery is wrong (p. 60).

This, I believe, is a clearer explication of the notion of interpretive concepts than anything Dworkin has ever provided. But it does not yet answer the question whether there are any interpretive concepts.

⁴⁶ Dworkin denies the familiar distinction between first-order moral statements and meta-ethical, second order, statements about moral statements. He calls this distinction Archimedeanism and argues that it is false. For discussion see Subsection III.B(2), *infra*. But Dworkin’s claim about the undemonstrability of moral proposition is itself *not* a first-order moral claim. Has Dworkin just shown by this that his rejection of Archimedeanism is “demonstrably” false?

(2) Are There Any Interpretive Concepts?

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

If I point at a table and say "this is a sofa" I make an error, and if my error is not just the result of thoughtlessness or poor command of the English language, it is because I am mistaken about the content of the E-concept of sofa. What fixes the objective content of the concept is an implicitly accepted set of criteria by a community, i.e. it is the existence of some kind of societal (conventional) agreement "on semantic grounds" (p. 151) about the matter. If I employ the concept sofa differently, I am wrong. But an entire community cannot be wrong about sofas: the communal sense of what sofas are is fixed by what people believe sofas are.⁴⁷ In contrast, in the case of interpretive concepts Dworkin believes it is always open for people to question the content of such concepts, and they can always offer novel "interpretations" of them that show these concepts in their "best light." Thus what counts as the right answer to the question "what is the content of the concept of justice?" is never fully determined by people's attitudes on the concept.

But at the same time Dworkin does not want to reach the conclusion that there is something outside our lives that fixes the content of moral concepts in the same way that the chemical structure of water fixes what water is. If that were the case we could describe moral concepts without being engaged in moral argument; we would simply be describing the features of such concepts in the same way that we describe the features of natural kind concepts like water. But Dworkin vigorously rejects this view, which he calls Archimedeanism (pp. 142-43). Archimedeanism presupposes two levels of moral discourse, one "internal" to morality about what one should do, and another "external" about what moral concepts mean. Dworkin's response is that "the external level that [Archimedean] hope[] to occupy does not exist" (pp. 38-39).⁴⁸ So Dworkin must carve a space for a kind of concept whose

⁴⁷ This standard of correctness conforms to what Jules Coleman and Brian Leiter called "minimal objectivity," according to which "what seems right to the majority of the community determines what is right." See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 203, 253 (Andrei Marmor ed., 1995).

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

referent is in some sense created by us (unlike discourse on the natural kind concept *water*), but whose content is nevertheless never exhausted by our attitudes, because disagreement over the application of the concept, and even challenges to universally accepted views, are possible even against a background of conventional agreement (unlike the discourse on the criterial concept *sofa*).

Let us begin by considering the case of sofas: we *can* imagine someone arguing that we have all been wrong in our understanding of what sofas are, and that in fact they are objects of ritual.⁴⁹ We would, no doubt, initially tell such a person that he simply does not know what a sofa is. But with enough persuasive power and some evidence we might come to appreciate his claims. If that is true, then the only difference between the concept of equality and the concept of sofa is that in the former debate about what the concept refer to is real in the case of equality and merely hypothetical in the case

(1) Against the distinction between meta-ethics and normative ethics and between conceptual and normative discussions of political concepts (pp. 108-10).

(2) More generally, against the distinction between claims within a practice and claims *about* claims within a practice. This is his claim against philosophers who “distinguish the first-order discourse of the practice [those theorists] study... from their own second-order platform or ‘meta’ discourse, in which first-order concepts are defined and explored” (p. 141).

(3) Against a distinction of principle between general jurisprudence and doctrinal analysis of particular cases (see text accompanying note 32, *supra*).

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

Theorists of entirely different philosophical persuasions who have offered utterly different arguments defending these different views are thus all found to be guilty of Archimedeanism. It is unlikely that all four versions of Dworkin’s anti-Archimedeanism are true (partly because in attacking (1) and (2) Dworkin comes extremely close to endorsing something like (4)), but even if they are, Dworkin needs four different arguments to show that. Dworkin might contend (using some meta-anti-Archimedean argument, perhaps) that despite appearances all these arguments are actually the same, but he has not done that.

I should note that though I will discuss some aspects of Dworkin’s anti-Archimedeanism that are pertinent for understanding his theory of law, my comments are by no means exhaustive of what I believe to be the problems with it. For this one should start with Dworkin’s fullest anti-Archimedean manifesto, not reprinted in *Justice in Robes*, namely Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 89 (1996). For criticism see Allan, *supra* note 3; Brian Leiter, *Objectivity, Morality, and Adjudication*, in OBJECTIVITY IN LAW AND MORALS 66 (Brian Leiter ed., 2001); see also SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING 296-97 (1998).

⁴⁹ Cf. Tyler Burge, *Intellectual Norms and Foundations of Mind*, 83 J. PHIL. 697, 707-10 (1986). Burge’s argument seeks to establish that communal agreement can never fix the content of concepts, because “the sort of agreement that fixes a communal meaning ... is itself, in principle, open to challenge.” *Id.* at 707. This means that by Burge’s own lights either there are no criterial concepts, or every criterial concept has the potential to become an interpretive concept. We need not consider the former possibility here (as Dworkin evidently believes there are criterial concepts). The latter possibility is one that Dworkin seems to hold. See text to note 50, *infra*.

of sofas. Can this be the basis for the distinction between criterial and interpretive concepts? This solution seems unappealing, because it suggests that if a vigorous debate were to emerge about sofas, this would change the concept sofa from a criterial to an interpretive one. More seriously it would suggest that what distinguishes between criterial and interpretive concepts is nothing more than the contingent fact about the existence of debate on its criteria. If that is all, then it would turn out that Dworkin's claims about the need for a new kind of concept to accommodate social practices were exaggerated.

But this seems to be exactly Dworkin's view. Tucked away in one of the endnotes we find Dworkin's offhand remark that "[p]erhaps some or all interpretive concepts began their conceptual lives as criterial." He also adds "for example" that "[a]n imprecise criterial concept *becomes* interpretive when it is embedded in a rule or direction or principle on whose correct interpretation something important turns" (p. 264, n.7, emphasis added).⁵⁰ Notice how Dworkin smuggles in the notion of "correct" interpretation, but whether such a "correct" interpretation (one that transcends the shared criteria of a particular linguistic community) *exists* is exactly the question at stake, and the account he gives leaves open less extravagant explanations, that do not demand the invention of new concepts. Indeed, now it seems that even by Dworkin's lights interpretive concepts are either concepts about which it is implicitly *accepted* that their criteria of application are open for challenge, or alternatively that the disagreement emerges because different people use the same *word* while employing different (criterial) concepts. Both these possibilities explain how a criterial concept could become interpretive, but both explanations do so by making the notion of interpretive concepts explanatorily redundant. Moreover, because Dworkin says nothing about the "mechanics" of transformation from criterial to interpretive concept, this "historical" account of the emergence of interpretive concepts leaves it utterly mysterious how, once criterial concepts become interpretive, they acquire objective content that may be different from what any user of them ever entertained.

Instead of answering such challenges what Dworkin does is block all evidence that could undermine his account (e.g., that disagreement is the result of different people having conflicting criterial concepts) as irrelevant. For instance, according to Dworkin anyone who tries to use empirical findings about the moral views of different people at different times is making a fundamental error, because all this evidence belongs to different intellectual "domains" like sociology or anthropology, and as such has no bearing whatsoever on morality proper, which seeks to discover the true content of

⁵⁰ Is this why at one point Dworkin says that marriage is a criterial concept (p. 9), and at another that it is an interpretive concept (p. 153)?

moral concepts (pp. 76-78). But this claim is problematic in several respects. First, Dworkin simply asserts this view, without explaining on what basis he makes it. Second, this assertion is Archimedeanism *par excellence*. This claim by itself is not part of moral discourse but a claim *about* moral discourse, or more precisely, about what *could* belong to moral discourse. Third, Dworkin provides no standard for deciding which claims are internal moral claims and which are sociological observations that are not part of the moral “domain.” In fact, he often relies on “sociological” observations about moral discourse as if they are part of morality, or at least as supporting his view about the objectivity of morality. For instance he has argued that “[p]eople who say that it is unjust to deny adequate medical care to the poor *do not think* that they are just expressing an attitude or accepting a rule or standard as a kind of personal commitment. *They think* they are calling attention to something that is already true independently of anyone’s attitude, including theirs....”⁵¹ But this seems like a sociological fact, which by Dworkin’s lights should be irrelevant for understanding the content of moral concepts. Why are such empirical observations (for which, by the way, Dworkin offers no evidence) within the domain of morality?

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

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

This shows that something has gone wrong with Dworkin’s argument, and it also points to where the error is: Dworkin recognizes this challenge and answers that unlike claims about God or astrology, “morality and the other evaluative domains make no causal claims.”⁵² But if that is the case, how do we get to know what morality requires? If we reject the possibility of some special moral faculty by which

⁵¹ Dworkin, *supra* note 48, at 109 (emphases added).

⁵² *See id.* at 120. Again, this is an Archimedean claim.

we get a sense of the moral as implausible, then we remain we the possibility that morality and its requirements are what is accepted as part of some discourse. The implications of this view to Dworkin's position are devastating.

An example from a different domain will help us understand the issues. Consider the discourse that exists among literary theorists of explaining Hamlet's behavior. There exists a certain discourse and there are certain rules on the question what counts as "valid moves" within the discourse. For instance, the text of *Hamlet* is considered important for assessing Hamlet's behavior whereas the text of volume 1 of the *Harvard Law Review* is not. Suppose now someone comes and claims that it makes no sense to ascribe any beliefs, desires, or qualities to Hamlet, since he does not exist and never existed, and that only real persons can have psychological attitudes. This skeptical "error theory" about Hamlet would strike us as odd; as a challenge that somehow misses the point of the debate for reasons very similar to those Dworkin advances against the skeptical critic of the objectivity of morality: from within the discourse that presupposes Hamlet's existence (even if in a make-believe way) it literally makes no sense to raise the skeptical claim that Hamlet does not exist. In contrast as an external claim made from outside the discourse, this claim, though true, is irrelevant because the Hamlet discourse operates on a "separate domain" from that of the real world.⁵³ Crucially, however, in the same way that the "Hamlet discourse" can disregard as irrelevant anything that happens outside its domain, other domains are unaffected by what happens within that domain. This is in fact the exact mirror image of the unintelligibility of the external skeptical claim from within the practice. And so any claim made within the discourse will not be *intelligible* outside the discourse. If one fails to join in the "make-believe" game of Hamlet's existence, all ascriptions of attitude to him would be false. This means that the discourse cannot "impose" itself on those who do not join it. Only once one joins a discourse, and only so long as one remains within the discourse, one is bound by the normative limits it sets.

But in this way Dworkin, who professes to defend the common sense conception of morality, ends up offering a conception of morality that is fundamentally different from it, a set of demands that one

⁵³ A third type of claim is one that challenges what the discourse is, or what counts as an intelligible claim within the discourse. Dworkin would presumably deny that such a third type exists and that all such claims are reducible to claims within the practice. His argument would be that these are internal claims because they will affect our first-order judgments about Hamlet. (This is one type of his anti-Archimedeanism.) But this argument is unsuccessful: one can claim that in ascribing beliefs to Shakespeare's Hamlet we should rely on the Danish legend of Hamlet (or Amleth), which served as a source in writing the play. It is true, of course, that our view on this question is likely to affect our judgment on Shakespeare's Hamlet, but one can decide on the question whether the legend is an acceptable source for discussing Shakespeare's Hamlet independently of (and even with little concern for) its implications for any "internal" question.

has to follow only if one “signs in” to them. Common sense morality claims universality that is not grounded in the existence of a discourse, and it denies that morality is something we need to “sign in” to or can “sign out” of. Moral discourse presents itself as making universal demands upon us, demands that are not part of a “game.” Dworkin might try to present this claim itself as within the discourse itself, but no matter how universally a discourse takes itself to be (or participants in the discourse believe it to be), the discourse cannot have any normative force beyond its boundaries. Since the claims to the universality of the discourse are themselves made within the discourse, they too are only intelligible from within the discourse.

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

Thus, by insisting on the “independence” of moral concepts (pp. 76-78) Dworkin insulates his argument from criticism, but he does so in a question-begging fashion, for it is *exactly* the independence of moral discourse that his opponents challenge. It is exactly the claim of some moral anti-realists that even though moral discourse is conducted *as if* morality is independent of other discourses, its claim to independence can make sense only if certain, and highly implausible facts, are true.⁵⁴ To answer by saying that this claim is false because moral discourse is conducted independently of other discourses is not to answer the challenge but to repeat the claim being challenged.

All this shows that Dworkin’s response has no force against the moral skeptic who claims that the *kind* of claims that morality makes are false. At this point Dworkin may revise his response by saying that though this imaginary objector is right, her claim is not interesting or important for real life debate: we may have some academic interest in the moral nihilist, but she is not someone we encounter in real life and her qualms are of little practical interest. Most professed moral skeptics live a moral life and defend or criticize certain moral behaviors. Evidently then, in word and action they joined the moral

⁵⁴ See J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 30-42 (1978). Critics of Mackie often erroneously claim that he sought to deny all senses of the objectivity of value. See, e.g., MARMOR, *supra* note 20, at 123. But this is a mistake. See MACKIE, *supra*, at 22, 25-27. His argument is that the *kind* of objectivity that moral discourse presents itself to have, i.e. objectivity that does not depend on the existence and acceptance of a certain discourse, is false. For a powerful defense of Mackie’s position see RICHARD JOYCE, THE MYTH OF MORALITY 1-52, *passim* (2001).

discourse and therefore their external challenges are just as interesting as skeptical comments about Hamlet's real-life existence made in the course of a Shakespeare convention.⁵⁵

But even this construal of Dworkin's argument does not lead to the conclusion he seeks. Dworkin relied on the fact of persistent disagreement about moral concepts to show that participants in the discourse are trying to offer the best account they can of a single, shared, concept. But if Dworkin endorses the fact that moral discourse is independent of other discourses and "answers" only to arguments from within, he must allow for the possibility of *several* moral discourses, that are by-and-large internally consistent but are, at least to some degree, incomprehensible to each other. That is one possible way of introducing the evidence about different moral codes in different times and in different parts of the world, evidence that Dworkin did not contest but dismissed as irrelevant. This is a possible explanation for the existence of moral disagreement, and unlike Dworkin's this explanation enjoys much evidential support and does not require any of the heavy-duty philosophical argument that involves the invention of new kinds of concepts that Dworkin advances in order to support his view. On this account many of today's moral clashes are the result of different moral traditions that developed with relative independence and internal coherence from each other until disappearing geographical or cultural barriers have brought them together, and quite often into clash. In fact, even within the "Western" moral tradition we can trace two distinct and until recently quite separate moral discourses, one, Judeo-Christian, mainly concerned with ideas of duty, action, and individual responsibility, and more recently rights; and the other, Greco-Roman, which is founded on ideas of virtue, character, nature, and community.⁵⁶ Many modern moral conflicts can be traced back to these two conflicting moral discourses.

How Dworkin would respond to this suggestion is not entirely clear. Sometimes he seems to hold a view that accepts the conclusion that there may be more than one objective truth to a particular moral or legal question. He says at one point that for a view to be objective all that is required is that it be supported by "[s]ubstantive reasons" (p. 260): "If we think that our reasons for thinking [that the manufacturers of a dangerous medicine are legally responsible for injuries in proportion to their market

⁵⁵ Though Dworkin never says that the external challenge is possible and makes sense, it often seems to be that he is less concerned with the moral nihilist who denies the intelligibility of all moral claims, and more with the moral skeptic who goes on to make "internal" moral claims (e.g., pp. 93-94). See also Dworkin, *supra* note 48, at 93-94.

⁵⁶ The inconsistency of Christian and Greek moralities is the running theme in FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Douglas Smith trans., Oxford University Press 1996) (1887). Related ideas are developed also in ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 51-61 (2d ed. 1984); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985), and G.E.M. Anscombe, *Modern Moral Philosophy*, 33 *PHIL.* 1, 5-6 (1958).

share], then we must also think that the proposition that the manufacturers are liable is objectively true” (*id.*). So for our legal responses to be objectively true, all that we need is to think (confidently?) that our reasons supporting those views are convincing. In the end what counts are “any lawyer’s or judge’s . . . convictions of personal and political morality” (p. 32, emphasis added; *cf.* p. 42). But there are other people who are equally confident that there are good reasons leading to the opposite conclusion, and as Dworkin admits (in words that have been quoted earlier), he does not believe his arguments would convince them. So we have two groups of people with strong convictions that their opposite conclusions to legal questions are explained by good reasons, and thus both groups satisfy Dworkin’s requirements for objective truth. Needless to say, if *that* is all that Dworkin means by objectivity, there is little to object about it. But if that counts as objective truth, what by Dworkin’s lights could count as a discourse on which there is no objective truth? More importantly, since this sense of objectivity could legitimate *every* decision, it is hard to see how it could legitimate *any* decision.

At other times Dworkin seems to say something else. In answering the claim that moral values conflict he says that anyone who wants to support this view must show “why the understanding of that value that produces the conflict *is the most appropriate one*” (p. 116, emphasis added), and that we must always try to articulate a “conception” (p. 114) of those values in which they do not conflict. Dworkin thus criticizes those theorists who seem to believe they are merely describing a fact about morality when they talk about value conflicts (pp. 109-10).⁵⁷

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

⁵⁷ Dworkin’s similar argument against incommensurability is in Dworkin, *supra* note 48, at 136 (claiming that incommensurability “cannot be true by default” and requires “an ethical defense of the kind it almost never receives from philosophers who embrace it).

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

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

C. Dworkin's Thesis in Practice

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

But perhaps the real test of Dworkin's argument is not in the Olympian heights of abstract moral philosophy. All of Dworkin's arguments examined so far—his rejection of the positivist model of rules, the idea of interpretive concepts, his peculiar defense of the objectivity, which makes objective value depend on the existence of disagreement—should all be seen as scaffolds to a single huge construction whose ultimate conclusion is “Therefore, courts should be actively engaged in political debate (and decide the case in the following way).” Even Dworkin's tendency to use similar arguments to challenge theorists with utterly different views (like all the theorists Dworkin labels Archimedean, or his odd coupling of Sunstein and Hart, p. 65) makes more sense from this perspective: what matters to Dworkin is that these theorists challenged the ultimate conclusion about the role of the courts. So the real test of his ideas is how they play out in the workings of courts. If his arguments work in practice, then perhaps that is all that we should care about. I turn to this question now.

Although Hercules, Dworkin's imaginary judge who played a lead role in many of Dworkin's writings on the subject⁵⁸ only makes a cameo appearance in *Justice in Robes* (pp. 53-57), his spirit pervades the book. Dworkin still urges judges to confront the moral issues before them, and still urges other branches of government to become more like his conception of the ideal judiciary,⁵⁹ and not the other way around.

The Herculean model manifests three aspects of Dworkin's thought. First, the legal decision rendered by following it is (prima facie) legitimate, because the legitimacy of judicial decisions depends on finding the correct answer to legal questions. Hercules then is not just a good advice: significant degree of compliance with it is required to guarantee the legitimacy of a legal system. Second, by definition Hercules cannot be mistaken; the results of the Herculean method *constitute* the right

⁵⁸ Hercules first appeared in Dworkin, *Hard Cases*, *supra* note 44, at 105; *see also* DWORKIN, *supra* note 11, at 238-40, 258-66.

⁵⁹ *See id.* at 178-86, 217-18; *cf.* DWORKIN, *DEMOCRACY*, *supra* note 41, at 4-6.

answer.⁶⁰ This implies that virtually all significant instances of disagreements among judges are the result of judicial failure to employ the Herculean method: if we all had Herculean powers, there would no longer be legal disagreements⁶¹ (except, perhaps, for disagreements on the application of vague concepts to marginal cases). This is of course a corollary to Dworkin's rejection of Archimedeanism and belief that moral (and legal) correctness are set by the discourse, and not by anything external to it. Hercules is simply someone capable of taking in and "computing" the entire legal-moral discourse and thus *guaranteeing* the correctness of his judgments. Third, the extension of the model to legislatures is closely tied to Dworkin's conception of democracy that ignores the desires of majorities when those infringe rights,⁶² which may be just the flipside of the argument for Herculean method: the very reasons for trusting the judgment of Hercules are the reasons for not caring much for the plainly un-Herculean judgments of most members of society.

Modeling adjudication and Politics (with a capital P) after the philosopher-judge has an inspiring ring, but I will argue that Dworkin's arguments in support of Herculean adjudication are unconvincing. Dworkin's focus on the question of legitimacy and his view that connects legitimacy to moral correctness leads him to neglect what may be a far more pressing issue. My concern with Hercules is not that he is so unlike any real life judges, as many critics have suggested.⁶³ It is the exact opposite: it is that when something reasonably close to the Herculean model is put in practice the results are quite different from those envisioned by Dworkin. The United States Supreme Court is as close an example

⁶⁰ This suggests that the only reason for theoretical disagreement among us is epistemic or cognitive failure on our part. This is what Coleman and Leiter called "modest objectivity." See Coleman & Leiter, *supra* note 47, at 263-64. They argue, and I agree with them, that Dworkin is a modest objectivist. *Id.* at 274-76.

⁶¹ Dworkin's more substantive writings on particular constitutional questions are dedicated to exposing exactly those errors, and to offering his Herculean helping hand. After all, even though "[t]he courts are the capitals of law's empire, and judges are its princes, ... [i]t falls to philosophers, if they are willing, to work out law's ambitions for itself, the purer form of law within and beyond the law we have." DWORKIN, *supra* note 11, at 407.

⁶² See DWORKIN, DEMOCRACY, *supra* note 39, at 139-47 (questioning majoritarian democracy and outlining a "partnership" conception of democracy instead); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 356-70 (2000) (same); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 344 (1996) ("individual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts.").

⁶³ See, e.g., Brian Leiter, *Naturalism and Naturalized Jurisprudence*, in ANALYZING LAW: ESSAYS IN LEGAL PHILOSOPHY 79, 102 (Brian Bix ed., 1998) ("One thing judges cannot do is what Dworkin's Judge Hercules does"); Adrian Vermuele & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 730-31, 759 (2000). Dworkin anticipated this criticism and replied in DWORKIN, *supra* note 11, at 264-65.

of Herculean adjudication as one is likely to ever find, but this implies that the Court delivers full opinions on less than a hundred cases a year, instead of, say a thousand cases a year.⁶⁴ A court that tries to decide one case according to the Herculean approach will not be able to decide ten other cases *at all*. This of course does not yet suggest that the philosopher-judge model is wrong, but it shows that it comes with substantial costs, and these are not necessarily strictly monetary costs, but quite possibly “moral costs” as well.

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

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

⁶⁵ *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

⁶⁶ See, e.g., *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 337-43 (Ill. 1990) (pointing out both manageability and justice concerns); *Payton v. Abbott Labs.*, 437 N.E.2d 171, 189-90 (Mass. 1982) (focusing on justice concerns); *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187 (Ohio 1998) (focusing on separation of powers considerations).

⁶⁷ In particular this refers to the requirement of “fungibility.” As a result the Market share liability doctrine has been rejected in various areas. See *Mullen v. Armstrong World Indus. Inc.*, 246 Cal. Rptr. 32, 35-36 (Ct. App. 1988) (refusing to extend market share liability to asbestos products); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1067 (N.Y. 2001).

operate, the likelihood of such errors is significant. Dworkin cannot isolate *Sindell* as proof that his suggested approach works and disregard the context of other cases decided in the same area that show that it does not.

I believe, however, that there is an even more significant problem with Dworkin's model of Hercules, and it is that his approach is self-defeating. The Herculean model is premised on the existence of a legal system that pursues the value of legality, the value Dworkin now sees as the fundamental value for legal practice and thus central to understanding law (pp. 169-70).⁶⁸ Chief among those is that judges are impartial and that they decide cases not according to their personal preferences but according to some impartial standards. What ideally makes courts a good place for deliberation is the fact that judges are (ideally) elected on the basis of expertise and not because of political affiliation, and they operate in an institutional environment that insulates them to some extent from political pressure, not least by the existence of certain traditions of appropriate behavior, as well as by more tangible means such as life (or long) tenure, and immunity from prosecution (or persecution) for their judicial decisions. Judges are never totally politically disinterested (and in the United States probably less so than in other countries), but the Herculean model pressures them to act in ways that counter the value of legality and in this way undermines the distinction between law and politics.

Adjudication with a Herculean frame of mind when conducted in an environment saturated with politics leads to outcomes that Dworkin himself deplors: the appointment of judges in the United States has become a volatile and openly partisan battleground. Against this background prospective judges are right to assume that they are elected on a particular political (small "p") ticket. As a result the Supreme Court has often become a forum of personal instead of forum of principle. There is empirical evidence of increasing polarization and partisanship in the Supreme Court,⁶⁹ supported by evidence that

⁶⁸ The "value of legality—or, as it is sometimes more grandly called, the rule of law" and which "has been much more widely embraced, over many more centuries than the other values [like liberty, democracy, and equality]" (p. 169) is something that Dworkin seems to have warmed to only recently. Earlier in his career Dworkin chided Lon Fuller's articulation of the requirements of legality for mere "matters of strategy," and asking rhetorically "what does all this have to do with morality?" See Ronald Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668, 669 (1965).

⁶⁹ See Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869 (2001) (finding evidence of Supreme Court polarization from the justices' choice of law clerks); see also Gary Zuk et al., *Partisan Transformation of the Federal Judiciary, 1869-1992*, 21 AM. POL. Q. 439 (1993) (finding similar findings with regard to the entire Federal judiciary). For a similar assessment by a senior judge see Richard A. Posner, *The Supreme Court 2004 Term Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

radical political groups are making a concentrated effort to advance their cause by getting their favorites to the Bench rather than to the legislature or executive.⁷⁰

Dworkin would no doubt say that this is a fundamental misunderstanding of the Herculean model, which is premised on grounding adjudication on the *correct* moral principles as discovered by moral reasoning. That may be true, but my point is that Dworkin's model represents an ideal that cannot succeed given certain realities about modern politics and perhaps also human nature. I must stress that my point is not that courts must not rely on some moral or political considerations. I believe that in some sense they have to.⁷¹ But recognizing this fact does not imply that courts should engage in moral questions in the way Dworkin believes they should. There may be times when this may be required, but often it will be wiser for the court to refrain from doing this, because exactly those features that courts commonly have and because of which they seem the most appropriate forum for deliberation and moral argument are the features that almost inevitably get lost when courts become increasingly engaged directly in political argument.

Perhaps Hercules could engage in principled argument while remaining impartial, perhaps mere mortals who work in the slightly less politically loaded atmosphere of the university could use the method Dworkin favors and reach the right answers to political questions, but the combination of political surroundings and influence and an approach to adjudication, that enjoins judges to engage in the political debate makes the infiltration of those outcomes Dworkin laments inevitable.

There is an air of paradox to what I just said: it suggests that exactly those features that make courts the most appropriate of all branches of government for engaging in debate on political rights and duties will tend to wane if such debate is conducted in them. But in fact there is little mystery in recognizing this point: courts seem the most appropriate bodies for handling such issues because (in many countries) judges are not elected in an overtly political process, and judges are required to refrain from partiality and partisanship. But relying on these features for assigning political matters to courts would naturally lead to pressure that would tend to undermine those very features. This kind of self-

⁷⁰ See Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., Apr. 17, 2005, at 42. In this piece Michael Greve, a libertarian affiliated with the conservative American Enterprise Institute is said to acknowledge that the deregulation he favors is not likely to be achieved even by a Republican Congress. He says that in order to achieve his goals "judicial activism will have to be deployed." *Id.* Greve is said to believe that "the movement should focus its energies on the appointment of sympathetic judges." *Id.* Incidentally, among the people he says he would want to see on the Supreme Court is John Roberts, the current Chief Justice. *See id.*

⁷¹ See Priel, *supra* note 15. My argument for this conclusion, though, is different from Dworkin's. *See id.* at 238-39.

defeating situation is not an unknown phenomenon.⁷² In the case of courts, even if we believe that the most important general goal for courts is to participate in the fashioning of the values the state should pursue (and in this way, as Dworkin believes, help create in society the requisite deliberative attitude towards people's rights and duties), pursuing those goals directly may be the wrong strategy.

Dworkin has always resisted the simplistic assertion that law is just politics, and I believe that he was right about that. But even if false as a general proposition, it is important to bear in mind that law *may become* indistinguishable from politics. When decrying an increasingly partisan Supreme Court (pp. 24, 104), as well as the fact that nominees to senior judicial positions try to reveal as little as possible of their substantive views,⁷³ Dworkin never stops to consider that this may be a direct outcome of the politically engaged court he has always advocated.

D. *Legitimacy Without Objectivity?*

We have walked along the path paved by Dworkin with the hope of having a convincing account of the legitimacy of law, but the conclusions we reached are disappointing. We have seen that Dworkin's suggestion is fraught with both theoretical difficulties and practical problems. Because Dworkin's account links the legitimacy of law with the objectivity of morality, once the latter falls, the former seems to fall with it. Of course, this does not yet imply that law is illegitimate, for there may well be other ways to establish law's legitimacy. We may, for example, adopt Dworkin's general view about the relationship between law's content and its legitimacy and be persuaded by other defenses of the objectivity of morality and the possibility of finding the right answers to legal questions. A different possibility is that law may be legitimate if it provides those who are subject to it a right to participate and voice their opinion. If a decision-procedure is designed in a way that enables members of a community to express their views and affect the content of the laws that will govern them, then according to this view, laws may be legitimate even if we know that some people in the end of the process will think they are wrong, and even if we have no guarantee that the course elected is indeed

⁷² Cf. DEREK PARFIT, REASONS AND PERSONS 5 (1984) (defining a theory as indirectly self-defeating "when it is true that, if someone tries to achieve his ... aims [given that theory], these aims will be, on the whole, worse achieved"). See *id.* 5-7, 24-28 (demonstrating how some well known ethical theories may be indirectly self-defeating); Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 560 (1980) (questioning the assumption that "that the best way to get to a point is always to focus directly on it, rather than on some road signs that point toward it.").

⁷³ See, e.g., Ronald Dworkin, *The Strange Case of Justice Alito*, N.Y. REV. BOOKS, Feb. 23, 2006; Ronald Dworkin, *Justice for Clarence Thomas*, N.Y. REV. BOOKS, Nov. 7, 1991, reprinted in DWORKIN, *supra* note 62, at 306.

the morally right one. I believe this is a more promising route to establishing law's legitimacy, but it is evidently not Dworkin's. Examining it would therefore have to wait for another occasion.

IV. INTO THE WORLD

So how are we to assess Dworkin's project as it emerges *Justice in Robes*? My view is that a measured assessment of Dworkin's arguments, one that tries to take sides, shows that some parts of his work are worthy of careful consideration, whereas others are unconvincing. But the ultimate test of Dworkin's theory in which jurisprudence is the prologue to how cases are decided, has to be the way how theory tests in reality. Yet this is something that Dworkin, always sure of his power of reason, has hardly troubled himself with. To be sure, he "tested" his theory on a few famous cases, but he neglected the fact that the constraints judges face suggest that his theory might not work when it is required to operate in a politically loaded environment or even such a mundane fact as heavy workloads.

In fact, even with the most celebrated cases, close examination reveals a story quite different from Dworkin's account. The Warren Court is no doubt close to Dworkin's ideal for how courts should perceive of their role and fulfill it, but when discussing its decisions (e.g., p. 123), Dworkin does not even spare a nod of recognition to the literature suggesting that that Court had less influence than is popularly conceived,⁷⁴ thus highlighting the limitations of principled politics through courts that Dworkin advocates. Furthermore, while arguably this approach had less actual impact than is commonly perceived on the issues the Court decided, adopting something like Dworkin's favored approach had a significant effect on how courts in the United States are being perceived. The result was a backlash, still visible today, that looks like the exact opposite of Dworkin's ideals. Instead of courts serving as the catalyst for spreading the notion of principled decision-making to other branches of government, what happened is that courts' decisions are increasingly described in terms of the party affiliation or personal views of those occupying them. Dworkin is of course keenly aware of the current situation, but he never acknowledges—let alone discusses—the possibility that it is not because his approach has not been adopted, but because something resembling it *has* been, that all too often what the Supreme Court delivers is not justice, but politics in robes.

⁷⁴ See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 39-169 (1993) (examining the practical effect of *Brown v. Board of Education*, 347 U.S. 483 (1954)); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement* 80 VA. L. REV. 7 (1994) (questioning the historical significance and influence of *Brown*). Needless to say, such views are controversial.