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BOOK REVIEW

DWORKIN'S DOMAIN


Reviewed by Philip Soper2

No one has done more in the last twenty years to revitalize debates about how judges should and do decide cases than Ronald Dworkin. At the same time, no one has been more equivocal than Dworkin in explaining how a theory of adjudication bears on the dispute within legal theory about the connection between law and morality. This fine book continues both traditions.

Dworkin's theory of adjudication is elegant and persuasive. Its general outline will be familiar to those who have read his previous work3 and who have followed the alterations in detail and metaphor as Dworkin responded to the growing jurisprudence he inspired.4 The centerpiece of the theory has always been a single basic phenomenon: the judicial opinion. Judges, even in hard cases, write as though they are discovering the rights that litigants have. They do not purport to be "legislating" on the basis of their own determination of how to maximize collective goals; nor do they seem to think that sources of law have been exhausted just because statutes or the common law fail to point unambiguously to a single result. Whereas other legal theories find the basic phenomenon an embarrassment, to be explained away by claiming, for example, that judges are either "simpletons" or "well-meaning liars" (p. 41), Dworkin takes this phenomenon at face value and constructs a model of law to account for it. Having shown that his model better explains the phenomenon, Dworkin also defends the model normatively, arguing that it is preferable, at least within our own constitutional democracy, to other theories of judging. The result is one of the best contemporary discussions of judicial review (ch. 10), equality (ch. 8), community (ch. 6), and a variety of related issues in moral and political philosophy that have always been central to our particular legal culture.

There remains the question, what does all this have to do with the debate about the concept of law in general? The substance of

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2 Professor of Law, University of Michigan Law School.
3 Earlier statements of the theory may be found in R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977), which is itself a collection of essays by Dworkin, not all of them directly related to legal theory. Law's Empire is Dworkin's first systematic, book-length treatment of the legal theory.
4 See, e.g., RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (M. Cohen ed. 1983).
Dworkin's theory has changed little over the last twenty years, although the metaphors are different. In the beginning, Dworkin accounted for the basic phenomenon with a spatial image, positing numerous “principles” in addition to the positivist’s “rules” as sources of litigant's rights. The spatial image, however, remained compatible with the positivist’s claim that preexisting social facts, not moral considerations, determine legal rights: Dworkin had only added more such facts, of a more complex kind, to the picture. So Dworkin modified the spatial image by adding a normative dimension: his theory does not simply add more pages of relevant social facts to the positivist’s book of rules; it shows that all such facts (including the positivist’s rules) determine legal rights only to the extent that they figure in the best political theory a judge can construct to justify using those facts as the determinant of state power. Judges are constrained both by the dimension of fact (“fit”) and by a dimension requiring normative justification of those facts.

This new explanation made Dworkin's model incompatible with those forms of positivism that insist that social facts alone determine legal rights. But for two reasons it still seemed consistent with the basic positivist insistence on the distinction between law and morality. First, there was nothing in Dworkin’s theory to explain why his claims must apply to all legal systems rather than just to the Anglo-American legal system he was using as his central example. Because the United States Constitution explicitly invites judges to engage in the normative assessment of past political decisions, and much of our common law jurisprudence does the same implicitly, it is easy to see why Dworkin's model might fit our legal system, but not others. In that case, his theory could be seen not as a competitor to positivism, which is meant to be universal in scope, but simply as an application of that theory to a particular society. Second, if Dworkin's claim was meant to be universal, it seemed easy to imagine or find examples of legal systems in which the dimension of “fit” would force judges to reach decisions that, even under the best possible justification, were immoral. The “best justification,” in short, may simply be “the least odious of morally unacceptable” alternatives. What the law is, then, even under Dworkin’s model, would still have no necessary connection with what it ought to be.

6 See Dworkin, The Model of Rules, supra note 5, at 22.
8 See R. Dworkin, supra note 3, at 64-68, 103.
Law's Empire continues the attempt to explain how these two dimensions of fact and value can interact in a single enterprise. Dworkin appeals this time to the currently fashionable metaphor of interpretation (pp. 45–86). Judges must "interpret" past political decisions (the statutes and precedents they confront) in the best possible light. This new metaphor, I suspect, will not persuade those previously unpersuaded, because it does not add significantly to the force of the normative and descriptive claims Dworkin made in earlier articles. The best new material in Law's Empire lies not in the details of the "interpretive" ideal, but in the attempt to explain how all of this bears on the dispute Dworkin thinks he is having with positivists. Law's Empire contains two major new developments that bear on this dispute: (1) a sustained attempt to address the question of methodology — what are legal theorists doing when they argue about theories of law? and (2) a direct discussion of the problem of political obligation — why should citizens obey the law? — including an attempt to show how that question is connected to the problem of developing a theory of law.

In this Review, I shall concentrate on these two developments and briefly defend the following reactions. First, the methodology that Dworkin describes is needlessly confused. Either it is so different from the method of theorists like Hart that it does not compete with such theories at all; or the method, properly understood, is itself an example of the "semantic" approach that Dworkin derides. Second, the tentative outline of a theory of political obligation is an exciting and important counterweight to the modern tendency to deny that such a theory is possible. Nevertheless, the theory is incomplete: it underestimates the impact of "law" on the problem of political obligation in legal systems that do not happen to conform to the particular theory of adjudication that Dworkin claims is best.

I. METHODOLOGY

The attention philosophers pay to questions of method is often inversely related to the substantive progress being made in the field.


12 I have defended elsewhere the view that the model is theoretically plausible and serves as a valuable check on the tendency to jump to the skeptic's conclusion, whether in the form of legal realism or various versions of critical legal studies. See Soper, supra note 9, at 502-06. Among the best passages in Law's Empire are Dworkin's discussions of the problem of skepticism raised by critical legal studies, including telling observations about that movement's distortion of the premises of liberal political thought. See especially pp. 271–75, 440 n.19, and 441 n.20.

13 For descriptions of this modern tendency, see Soper, The Moral Value of Law, 84 MICH. L. REV. 63 (1985).
Thus moral philosophers turned to metaethics earlier in this century just as serious questions were being raised about whether ethical claims were meaningful at all. Recent legal theory reveals a similar cycle. When H.L.A. Hart wrote *The Concept of Law*, legal theory was wide open: John Austin, and to some extent, Hans Kelsen, provided the major existing models, and Hart was able to improve on both without devoting much attention to questions of method. Hart did suggest that his work should be viewed as "an essay in descriptive sociology," and cautioned that "nothing concise enough to be recognized as a definition" could serve as an answer to the question "What is law?" But these were casual observations incidental to the main inquiry.

In the twenty-five years since *The Concept of Law* appeared, perhaps more has been written on the "What is law?" question than was produced during all of the preceding half-century. Although some commentators have concluded that the division between positivists and nonpositivists is narrowing, the rhetoric has suggested otherwise: each side has insisted all the more vigorously that the other is clearly wrong. Inability to achieve consensus despite these renewed efforts has increasingly forced recent theorists to return to preliminary questions of method: is continued disagreement evidence, as Lon Fuller finally concluded, that the two sides have different "starting points"?

Dworkin, too, begins this time with methodology. All previous theories, he says, have been semantic theories, aiming to establish the common meaning that determines how we use the term "law." This semantic approach leads to a dilemma (p. 45). If we did share a semantic understanding of law, disagreements about what the law is in hard cases would not make sense. We would either realize that we are dealing with a borderline example, in which case further argument is as silly as arguing about whether or not Buckingham Palace is a

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15 *Id.* at v.
16 *Id.* at 16.
18 The escalating rhetoric goes back at least to the exchanges between Fuller and Hart, in which Hart suggested that Fuller's passion for purpose blinded him to the light. See Hart, Book Review, 78 *Harv. L. Rev.* 1281, 1295-96 (1965). Fuller responded by suggesting that his critics' major argument was "so bizarre, and even perverse, as not to deserve an answer." L. Fuller, *The Morality of Law* 201 (2d ed. 1969); accord J. Finnis, *Natural Law and Natural Rights* 14 (1980) (arguing that the views of Hart and Raz are based on "manifestly deviant, diluted or watered-down" versions of the correct view); H.L.A. Hart, *supra* note 10, at 152 (stating that Dworkin's "last-ditch defence" of his theory is "hopeless").
19 See L. Fuller, *supra* note 18, at 189, 201. For an example of the renewed interest in questions of methodology, see J. Finnis, *supra* note 18, ch. 1.
"house" (p. 40); or the disagreement would disappear as soon as we recalled our semantic rules: we would recognize that the disagreement is one, not about the law, but about whether to obey the law or to add to it or change it ("fidelity or repair") (p. 46). The only way to account for the kind of disagreement that occurs in hard cases is to recognize that law is an "interpretive concept": it invites and requires theoretical argument about the best possible interpretation of past political decisions (such as statutes and precedents).

Philosophers are fond of labeling their methodological breakthroughs in ways that underscore the failed vision of those who preceded them. Thus "the naturalistic fallacy" was G.E. Moore's way of describing what was wrong with all previous attempts to define "good."20 Dworkin, in a similarly dismissive mood, labels his argument for the inadequacy of all semantic theories "the semantic sting" (pp. 45–46 passim). Understanding just what the sting is, however, or how to extract it, is complicated by the fact that, after condemning all such theories, Dworkin promptly introduces his own semantic rule for the term "law." We use "law," says Dworkin, to indicate when the collective use of force is justified.21 To be sure, Dworkin does not call this a "semantic rule," he calls it an "abstract account" or concept of law (p. 93). He also insists that his argument does not depend on any particular formulation of the abstract concept. But these are semantic quibbles (at least as annoying as semantic stings). Dworkin's "abstract concept" of law is in fact the device by which the argument of the rest of the book proceeds: all other theories of law are tested and compared to Dworkin's own by reference to how well they succeed in justifying the use of collective force on the basis of past political decisions. Even more troubling, Dworkin does not defend his abstract concept; he simply asserts it. Because positivists typically go to some lengths to defend the opposite view — that the abstract concept of law refers to collective force simpliciter, not to justified collective force — Dworkin seems open to the charge of having assumed the very point at issue.

The best way to make sense of this confusion is to conduct a brief review of the various methodologies that have dominated recent legal theory. I shall accordingly apply Dworkin's own advice about interpreting the works of others in their best possible light to draw a somewhat more sympathetic map than he does of the current methodological terrain.

20 G.E. MOORE, PRINCIPIA ETHICA 9–10 (1903).
21 Dworkin offers various formulations of this key semantic claim, sometimes talking about law as a justification of collective force on the basis of past political decisions (pp. 93, 97), sometimes as simply "a political justification of coercion" (p. 103), and sometimes as simply a "justification for coercion" (p. 151). The main idea presumably is to recognize that "law" is tied to past political decisions, which judges cannot ignore, while at the same time noting that judges (and other insiders) typically believe their decisions justify the resulting sanctions.
A. Definition

Semantic theories largely dominate legal theory, as Dworkin notes. Defining "law" to reveal its fundamental or essential meaning has been the goal at least since Austin,22 and even theorists like Hart, who tried to avoid it, could not.23 The semantic goal was typically achieved in two steps. The first step was simple description of the most obvious features of legal systems: for example, they differ from moral systems because they back their prescriptions with organized sanctions. The second step involved the conceptual or semantic claim that some of these features were the most "essential" in explaining how the word is used. It was this second step that came to be viewed with suspicion in this century. Some viewed claims about "essence" as dependent on metaphysical assumptions incompatible with modern views. Others recognized that what is "essential" is not a matter of the inherent structure of the world, but of how humans have interacted with the world through language; thus, claims about "essence" are only claims about the features that are most "important" in revealing the human purposes that underlie our existing linguistic scheme. But even this more modest explanation failed to satisfy those who, believing that "importance" was inevitably in the eye of the beholder, continued to insist that definitional disputes were inherently subjective or verbal.24

B. Description

Unhappy with the conceptual step involved in definition, some legal theorists abandoned it altogether and tried to make the enterprise completely descriptive.25 Disputes about the meaning of "legal obligation" were resolved by the ecumenically simple expedient of claiming that it means different things to different people — nothing more can be said about it than that. Some mean what Austin claimed was the "essence," namely, that one has a "legal obligation" only when one risks incurring certain organized sanctions. Others mean by "legal

22 See J. Austin, The Province of Jurisprudence Determined (1832).
23 See infra note 27.
24 See, e.g., Williams, The Controversy Concerning the Word 'Law,' in Philosophy, Politics, and Society 134-56 (P. Laslett ed. 1956). The claim that definition is impossible because what is "important" is purely subjective overlooks the fact that definition reveals what is important to others in explaining existing classifications. Only Humpty Dumpty could make the mistake of thinking that persons can make words mean anything they want, depending entirely on their own subjective preferences. See Soper, Legal Theory and the Problem of Definition (Book Review), 50 U. Chi. L. Rev. 1170, 1188-90 (1983).
25 Hart’s claim that he was engaged in “descriptive sociology,” see supra p. 1169, appears to be an example of such a descriptive approach to legal theory. As noted below, however, Hart’s most recent defense of his theory implies a return to the semantic or definitional enterprise. See infra note 27.
obligation" simply the rules of the system, in the same way that one
talks about the obligation to move the bishop diagonally in chess. Still others (particularly officials of the legal system) might think that legal obligations are directives one ought (morally) to obey. All of these various "point[s] of view" are equally possible, none peculiarly essential.

Pure description, however, was doomed from the start, because it could never account for the continuing disagreements among legal theorists. Where description is the method, disagreements arise only because theorists, like the blind men describing the elephant, are looking at different parts of the phenomenon. Disputes in legal theory are not like that: they cannot be resolved by paying closer attention to the phenomenon, because both sides are already looking at the same thing. Legal theorists disagree, not about the possible "points of view," but about which one, if any, can be said to be the most important in elucidating the concept of law. It is small wonder, then, that recent legal theorists openly returned to the semantic approach that began with Austin, albeit with more modern and sophisticated explanations of what it means to claim that certain aspects of law constitute the "focal" or "central" meaning.

C. Coherence

Dworkin does not think that he is engaged in either a definitional or a descriptive enterprise, but a reader who concluded otherwise could hardly be accused of inattentiveness. In the first place, as noted above, Dworkin has his own semantic claim about the meaning of law — namely, that we use the term to denote justified acts of force by the State. Positivists, as noted, have always insisted that we use the term to designate (or predict) acts of collective force regardless of whether those acts are (morally) justified. Part of the appeal of the

27 The best illustration of how description inevitably tends toward definition can be found in the intramural disputes between positivists themselves. Hart, as noted in the text, originally claimed to be engaged in descriptive sociology rather than in definition. See supra p. 1169. He produced a model that pictured law as the rules accepted by judges, in which "acceptance" is simply a disposition to act in accordance with the rules, regardless of the judge's motives or reasons. See H.L.A. Hart, supra note 14, at 113, 198–99. In his most recent defense of this model, Hart resists the claim of Joseph Raz (among others) that judges must be seen as claiming that the rules they accept are just. Hart does not deny that judges may have such an attitude or make such a claim: he just insists that whether they do or not is irrelevant — it is still a legal system. See H.L.A. Hart, supra note 10, at 158–61. This claim can only be understood as a claim about meaning (the essence of "law" or "legal duty"), and the dispute can only be seen as definitional; it is obviously not a dispute over how to describe the attitude of any particular judge.
28 See J. Finnis, supra note 18, at 9–11.
29 See supra p. 1170.
positivists’ claim lies in its universality, which becomes apparent if one imagines asking advice about the “laws” one might encounter in visiting a foreign country. Surely, one understands that what is desired is a guide to the situations in which organized sanctions are threatened, whether or not one agrees with the moral views or the ideology that underlies those laws. So, too, requests for advice on domestic “law” from, say, a tax lawyer, are easily understood as requests for advice about the risk of incurring certain sanctions — not about the wisdom or justifiability of those sanctions.

Dworkin does not quarrel with these possible uses of “law.” Indeed, he thinks they support his view that there is no single semantic rule for the use of the term. Depending on “context,” we might well use “law” — as when we talk about “what Roman law was” — in a way that implies nothing about the justifiability, as opposed to the fact, of force (pp. 107–08). How, then, is Dworkin’s view different from the simple descriptive approach, noted above, which acknowledges various “points of view” from which one can talk about law, no one of which is more “essential” than another?

I believe one can answer this question and explain what Dworkin is about without resorting to elaborate theories of “interpretation” and fashionable continental social philosophy. Indeed, the approach Dworkin has adopted is a rather ordinary and familiar one within modern analytic philosophy. It might be called the “coherence” or “consistency” approach. It differs from definition in that it does not insist that one use of “law” is the essential one. In that respect it resembles description. Unlike description, however, it does not stop with simply recognizing the various possible meanings for terms like legal obligation. Instead, it proceeds to identify one particular point of view that stands in special need of clarification — clarification in the philosopher’s sense of showing what must be assumed if we are to be consistent in the concepts we employ.

The point of view that needs clarification is that of the insider (“the internal, participants’ point of view”) (p. 14) who uses “law” exactly as Dworkin does here: as a term that purports to connect “law” with the idea of justified State force. What makes this use problematic is that these same insiders also use law to designate past political decisions (such as statutes and precedents) that courts cannot ignore. Hence the coherence problem: how can the same concept be used to

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30 I have elsewhere called this approach the “coherence” approach, see Soper, Alternative Methodologies in Contemporary Jurisprudence: Comments on Dworkin, 36 J. LEGAL EDUC. 488, 490–91 (1986), but the term “consistency” might help guard against misunderstanding. “Coherence” is a term often used to describe a particular theory of truth, including sometimes Dworkin’s particular theory about how to find right answers in hard cases. Coherence as a methodological goal in legal theory has no necessary connection to coherence in this sense, and is independent of it.
refer both to the justified use of force, which seems a purely normative matter, and to social facts (which may, after all, be just or unjust)? Dworkin's project can be seen as an attempt to explain what "law" must be from this point of view in order to allow one consistently to use the term in this dual way. Because Dworkin also claims that there is a logical connection between justifying State force and justifying a moral obligation to obey (p. 191), we could also characterize the inquiry in another way: "what must law be if it is to obligate?"\textsuperscript{31}

It is now easier to see how far Dworkin's method is compatible, and how far competitive, with those of other legal theorists. Note first that definition and description are typically conducted from the viewpoint of the outsider — the sociologist or the philosopher, or the citizen who adopts the disinterested outsider's view. From this perspective, the object of the enterprise seems radically different from the object as perceived by the insider. The outsider starts with established laws or legal systems and looks for essential characteristics. The insider, typically, is interested in the hard cases — in the problem of establishing new legal claims, rather than in how to characterize such claims once established.

An analogy will help make the point. A sociologist of religion might suggest that what "essentially" distinguishes religion from morality is that only the former necessarily includes claims about a deity, from which particular religious norms are derived. That definition has the same universal appeal as the positivist's definition of law: it allows us to identify religions of all sorts, including those with which we are unfamiliar and whose premises we do not share. Imagine now a philosopher claiming to have discovered a "semantic sting" in this definition of religion because the definition cannot be used by members of the Catholic religion to resolve arguments about whether or not their religion permits annulment in particular cases. The short answer would be that nothing could be further from the outsider's objective than actually furnishing a guide to insiders for resolving particular disputes about what their religion does or does not require. Dworkin's sting is harmless.

D. Definition and Coherence

The upshot of the above, one might think, is that the enterprise Dworkin has joined is too different from that of definitional theorists to allow meaningful comparison. Dworkin comes close to conceding this, but in the end equivocates. On the one hand, he suggests that all other theories of law are competitors of his own — that is, they are all aimed at trying to show how one can justify collective force. Thus, he interprets the brief passage from Hart's \textit{The Concept of Law},

in which Hart talks about the move from prelegal to legal systems, as showing that Hart thinks that law justifies coercion because it fixes relatively certain rules on which people can rely about the use of collective force. But Hart never thought he was engaged in substantive political theory of any sort, much less such a blanket attempt to justify State force. So Dworkin in the end concedes that Hart’s theory is not “on the surface” about justification at all (p. 429 n.3). He accordingly modifies his claim to say only that Hart’s theory, and positivist theories in general, “become more interesting” (p. 429 n.3) when viewed as if they were attempts to justify force.

Dworkin’s ambivalence about whether other theories of law are competitors of his own is a consequence of his failure to appreciate the connection between the definitional enterprise, which he debunks, and the coherence approach that he adopts. These two enterprises, however distinct in their initial goals, are potentially related in the following ways.

First, there is little doubt that the coherence enterprise is the more interesting, if for no other reason than that it affects a far larger and more intensely interested audience. We are insiders all the time, arguing continually about law and legal rights; we are outsiders, considering and applying sociological definitions of law, only in rare moments or when academic privilege permits. To draw again on the analogy with religion, surely the question of how to determine religious norms matters far more to the religious person than the question of what makes those norms “religious” once they have been determined. Furthermore, law, unlike religion, imposes its claims on us without our consent. We can never leave its empire, abandoning the role of insider, as we might leave the church.

Second, even legal theorists whose work is primarily definitional have never been entirely able to resist the temptation to apply their models of law to insider concerns. Thus Hart spends considerable time responding to the realist claim that law is only what the courts say it is, as if he clearly intends his model to be used as a guide by judges and litigants in establishing new legal claims. This inevitable attempt to say something about the insider’s viewpoint as well as the outsider’s may be a consequence of the relative importance of the two points of view, as indicated above. More likely, it reveals an inherent uncertainty about which point of view is the appropriate preanalytic

35 One of Lon Fuller’s most frequent and passionate complaints was that positivism did not address any of the really interesting questions. See, e.g., L. FULLER, THE LAW IN QUEST OF ITSELF 88–91 (1940).
phenomenon for the definitional enterprise — thus pointing to a logical connection between the two enterprises.

The logical connection becomes apparent when one recalls that the force of the positivist's claim lies in its universal application: "law" refers to identifiable (or predictable) collective force, regardless of its merits. But there has always been a competing universal claim about the meaning of law which roughly parallels the insider's view that is the subject of the coherence inquiry: namely, the claim that "law" refers (essentially) to justified collective force. Dworkin suggests that this claim is implausible as a semantic theory because it is not a defensible universal claim: whether the content of the law is just depends on the particular law or legal system (pp. 35–36).

But Dworkin's own pursuit of the coherence inquiry uncovers the possibility that the connection between collective force and justification (even though the content of the law is unjust) is a universal one. Political theorists, after all, have long argued for just such a connection in suggesting that there is moral value to the law, and a consequent moral obligation to obey, just because of law's official, organized status; Dworkin, as discussed below, now adds his voice to these in also arguing for an obligation to obey the law. To be complete, a semantic theory would have to consider whether this claimed connection between past political decisions and the obligation to obey is coherent. If so, it reinforces the possibility that, even from the standpoint of definition, "law" is a term that distinguishes between the mere fact of force and justified force. Dworkin, in short, should embrace semantic theories and recognize his own contribution to them.

II. Theories of Adjudication

Dworkin's goal, then, is to show what law must be in order to account for the claims insiders make about it. Prior to Law's Empire, the critical insider claim was about how to determine legal rights in hard cases. Now that claim is explicitly coupled with the claim that the imposition of collective force through law is justified. Dworkin uses the same model of law to explain both phenomena, but the model proves more successful in explaining the first phenomenon than in explaining the second.

Explaining the first phenomenon previously led to Dworkin's "rights thesis": (1) there is typically a "right answer" or "best interpretation" of past political decisions, even in hard cases; and (2) this interpretation is based on principle, not policy, in a way that gives individual rights priority over collective goals. These features are

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36 See P. Soper, supra note 31, at 157–60.
37 See R. Dworkin, supra note 3, at 81–130.
preserved mostly intact in *Law's Empire*, although the name of the theory has changed and the argument reflects the shift to the interpretation metaphor. The new name for a theory of judging that has the above two characteristics is “integrity.” All other theories are classified into two major groups: “conventionalism” and “pragmatism.” The major example of conventionalism is positivism. The major examples of pragmatism are those versions of legal realism and the economic approach to law that suggest that judges, like legislators, should make law exclusively by reference to what will maximize specified social goals, like utility or efficiency.

Dworkin's tack now is to apply to these competing legal theories the same tests he previously prescribed for judges deciding concrete cases. He wants to show that law as integrity (1) better explains the insider's view about how cases are decided than either of the other models; and (2) offers a better justification for collective force than either of the other models.

**A. The Dimension of Fit**

With one exception, it is hard to fault Dworkin's arguments about fit. Legal pragmatists, after all, have never denied that judges by and large write as if they are vindicating preexisting rights, rather than maximizing efficiency or utility. So the pragmatist has always had to explain away the apparent discrepancy between his theory and actual practice. The pragmatist does so in the same way as his counterpart in moral theory, the utilitarian: we sometimes appear to honor rights without regard to overall welfare, because overall welfare is itself advanced by acting “as if” (p. 154) some rights are impervious to such calculations. Dworkin calls this a “noble lie” (p. 155) and raises telling doubts about its plausibility: Why does the judge need to hide his true theory (pragmatism) from litigants? Can they not be counted on to understand that past political decisions are merely strategic “rules of thumb” and thus in theory subject to change as calculations of utility improve or change?

Conventionalism also seems, at first glance, to “fit” badly for reasons that dominated most of Dworkin's earlier work: conventionalism holds that there are gaps in the law whenever we run out of the guidance offered by fairly explicit conventions (the language of statutes or prior cases). Judges must then exercise discretion and “make” new law as would legislators. But, again, judges do not write that way; moreover, they do not even have the “noble lie” explanation available for why their opinions depart so drastically from what conventionalism seems to require. Conventionalism, then, cannot be the theory of law that accounts for this particular phenomenon.

But there is another view of conventionalism that Dworkin cannot dismiss so easily on grounds of fit. He calls it “soft” conventionalism
This theory tells judges that they must consider not only the explicit guidance of previous conventions but also all that is implicit in it, including, for example, any underlying moral views that may help determine the content of convention. Thus, for example, the due process clause in our Constitution invites judges to test statutes for fairness. That explains why Supreme Court opinions are controversial and yet still represent a version of conventionalism: it is only by convention that we have “loosed” judges to decide hard cases by reference to underlying purposes, even underlining moral theory.38

Dworkin’s response is that soft conventionalism, thus interpreted, turns out not to be conventionalism at all: it is really only an “underdeveloped form of law as integrity” (p. 128). But there is a critical difference: even if soft conventionalism is equivalent in practice to law as integrity, it is so only contingently — only as long as society is content with the particular decisions judges reach in their search for the “best” interpretation that political theory can offer. If judges reach decisions too far out of line with what society can accept, the convention can be altered and the decisions reversed. Given the frequency with which controversial Supreme Court decisions lead to calls for constitutional amendments or conventions (as well as the accepted legislative control over common law decisions), one would be hard pressed to deny that this explanation fits our practice: we accept integrity only as long as it pleases us — only, as it were, by convention. If that is so, integrity becomes a matter of “strategy,” not of “principle” (p. 135), and Dworkin’s claim that integrity alone best “fits” our practice fails.

38 See Soper, supra note 9, at 511–16. Other versions of soft conventionalism may be found in Lyons, Principles, Positivism and Legal Theory, 87 Yale L.J. 415 (1977), and Coleman, Negative and Positive Positivism, 11 J. Legal Stud. 139 (1982). The point of suggesting that soft conventionalism might be able to account for the phenomenon of judicial evaluation of “positive” law is that such practices, if themselves authorized by convention, would still be consistent with the basic positivist claim that the ultimate source of law is human will, reflected in conventions or instructions to judges that can be altered at will. Dworkin insists that this is not Hart’s version of positivism (p. 431 n.4). See DWORKIN, supra note 3, at 47–50, but that response evades the issue. Dworkin also suggests that soft conventionalism could never justify letting judges “loose” to decide law in this way without departing from its major normative ideal of protecting expectations (p. 128). But this argument ignores the fact that clear cases for the most part will still come out the same way under all three views of law — as integrity, and as strict and soft conventionalism — so the ideal of protected expectations is preserved in these cases. That leaves only “hard cases” in which conventionalism in any event must reach decisions that could not have been “expected.” As the text notes, a society could choose to “risk” letting judges’ views of political and moral theory determine “the law” in these cases (as well as those few clear cases that consistency will require overruling), particularly because society can change judicial results it does not like; that seems as good a way as any of making it clear that, in the end, it is society’s general expectations that count, even in hard cases.
B. The Dimension of Value

To see why it matters whether integrity is merely a matter of convention, rather than a more essential aspect of our judicial practice, consider why Dworkin thinks conventionalism cannot justify collective force. Conventionalism relies on the "ideal of protected expectations" (p. 117) as its major normative value. Citizens learn that State force will be applied only in accordance with explicit rules, on which they come to rely. Of course, these rules cannot determine everything in advance, so the strongest conventionalist theory is one that tries to balance the competing goals of "reliance and flexibility" (p. 144). In clear cases, convention governs; in the case of gaps, judges decide for themselves what is "the best rule for the future" (p. 144).

Thus described, the theory is an amalgam of conventionalism and pragmatism (p. 147): judges follow rules when they are clear, otherwise they legislate. Dworkin's objection is not that this combination defers too much to pragmatism, but that it does not defer enough: it makes the clear or easy cases too important. Surely there will be times when the best combination of "reliance and flexibility" would require overruling even clear cases on pragmatic grounds. Conventionalism, in this combination with pragmatism, seems hard to defend as a better theory than pragmatism alone; it cannot, then, be the "best" interpretation along the normative dimension.

This objection, however, does not apply to soft conventionalism. Soft conventionalism is an amalgam of conventionalism and integrity, not of conventionalism and pragmatism. Judges are told to decide cases as integrity requires — easy cases and hard cases alike must be tested for consistency in principle. But as long as this process is itself only conventional, we can change it — we can undo decisions with which we are unhappy by changing conventions (removing the due process clause from the Constitution, for example, or adding an amendment to reverse the abortion decision). In this manner, the stock of "easy cases" will change to conform to current consensus. To say now that this process is simply integrity in another guise ignores the fact that the justification for legal rights has now changed: people have rights that are consistent in principle with past political decisions only as long as the judiciary's interpretation is not too inconsistent with the broader consensus of society (which may be based on collective concerns or policy rather than on principle). Society, in the end, holds the highest trump, not the individual.

Dworkin might respond that this version of conventionalism, even if it is different from integrity, fares poorly on the normative dimension and thus remains inferior to "pure" integrity. But it is hard to see

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how the argument would proceed, for we have now landed in the midst of one of the most intractable disputes in political theory: the relative priority of the individual and society. Dworkin’s argument has always been strongest on the dimension of fit for reasons already mentioned: ours is by and large a society that, contingently at least, accepts strong views about individual rights. When Dworkin moves beyond a description of our society to show why the best justification of state force must always respect such rights, he has difficulty showing why someone not already convinced should agree with him.40

This problem with the normative dimension is further illustrated by Dworkin’s attempt to justify integrity over pragmatism. Pragmatism denies that individuals have any “legal rights”; litigants, like lobbyists, urge courts to reach decisions that best advance some collective goal. We have already noted that pragmatist judges may treat some precedents and statutes as if they created rights, but they do so only as a matter of strategy. Citizens relying on such “rights” must realize that new calculations of how to advance collective welfare may leave them without recovery, even though their cases cannot be distinguished “in principle” from prior cases.

Dworkin’s explanation for why such a theory is normatively inferior includes most of the standard arguments that have been leveled against utilitarianism in general. Thus we have hypothetical horribles of the “torturing the innocent” sort (pp. 290–91), as well as references to the “burdensome responsibility” of a positive duty to maximize happiness (p. 292). But Dworkin also introduces a new argument. Most of us share the intuition that where matters of principle are involved, political compromise is not permitted: a society divided over the morality of abortion does not think that one possible solution is a “checkerboard statute” that makes abortion criminal every other year — thus giving each side some of what it thinks justice demands (pp. 178–84). The only way to explain this intuition, says Dworkin, is to recognize the distinct ideal of integrity, along with justice and fairness, as part of our stock of basic political ideals: we personify the State, requiring decisions of principle to be made as if a single person were acting, thus ruling out compromises that must, from any single actor’s view, be partly unprincipled.41

40 At times, Dworkin seems willing to concede that his normative arguments are limited to our particular culture: “Neither this argument nor . . . others . . . provides any conclusive argument for integrity on first principles of political morality. . . . I am defending an interpretation of our own political culture, not an abstract and timeless political morality . . . .” (p. 216). This concession makes it harder to understand why Dworkin thinks the theory will also “justify” collective force in other legal systems. See infra pp. 1182–85.

41 Joseph Vining anticipates and independently develops (from a quite different perspective) the claim that the presupposition of a single mind behind the law is a necessary condition of legitimacy. See J. VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986).
There is much to admire in Dworkin's development of this ideal, which is central to much of the book. The ideal does not, however, seem adequate to the task Dworkin has set for it: that of showing why pragmatism is an inferior normative theory. Dworkin thinks the pragmatist, who does not recognize preexisting rights except as a "strategic" matter, must sometimes be prepared to act in checkerboard fashion, in a manner inconsistent with integrity. Thus he imagines a pragmatist judge deciding whether to award damages for emotional distress to Mrs. McLoughlin, who first discovers her family's serious auto injuries when she arrives at the hospital (pp. 23–29). Previous decisions established only a right to recover for emotional injury suffered at the scene of the tragedy. The pragmatist who thinks all such recovery for emotional injury is unjustifiable can deny this plaintiff recovery without worrying about whether he can distinguish in a principled way McLoughlin's case from other precedents (p. 162). Thus, says Dworkin, pragmatism is inconsistent with the ideal of integrity. But this argument assumes that the pragmatist judge cannot overrule the prior precedents (p. 163) — which is exactly what integrity would lead him to do. Either this judge is right that damages for such injury should never be recovered, in which case the only problem is that he cannot persuade appellate or peer courts to agree with him (and in that case, there is no reason to think that he will be able to persuade appellate courts to deny recovery in Mrs. McLoughlin's case either); or he has a way of distinguishing the prior precedents — on "strategic" grounds — from this case. Either way, the pragmatic decision will be that of a single author, consistently maximizing justice or efficiency without worrying about past political decisions except for reasons of strategy.

The above argument can be generalized. Because Dworkin admits that there is no similar inconsistency problem when we act on policy rather than principle (pp. 179, 221–24), his claim that the pragmatist must abandon the ideal of integrity seems to beg the question: because the pragmatist thinks everything can and should be decided as a matter of policy, he will never have to act in an "unprincipled" fashion. What we need is some independent, prior argument for preferring principle over policy — but that is exactly the dispute between utilitarians and Kantians that has been going on for some time now.

III. Political Theory

There are two related reasons why the theory of adjudication described above seems unconnected to any plausible inquiry into the nature of law. The first reason has to do with the limited application

of the theory. Dworkin's aim is to show what law must be like if it is to function as a justification of collective force. But even if we believe "law as integrity" provides such a justification, it remains a theory that, as Dworkin describes it, fits only one particular society; it is not a theory that must necessarily be found in all legal systems. Indeed, even our own society, Dworkin concedes, can decide to change the theory and impose a different model on judges (p. 140). If coherence is the goal, and if only societies that accept law as integrity can justify collective force, then Dworkin's argument seems limited to special cases. "[A]ll that survives of the theory," as Hart points out, "is the truism that in a good system of law the laws and the rights and duties that arise from them would have a moral justification and in an evil system they will not. This seems indistinguishable from legal positivism."43

The second reason that the theory of adjudication is independent of the underlying enterprise is that it misses the major point behind the insider's claim that past political decisions justify collective force. Dworkin treats the puzzle of how past decisions can justify force as if it requires us to do the best we can in interpreting the content of those decisions.44 The typical insider claim, however, is that past decisions justify force regardless of content.45 Thus, even if the best justification we can give remains a poor one, or, for that matter, even if we have erroneously adopted pragmatism or conventionalism as our theory of adjudication, insiders typically think that these "mistakes" do not affect our right to make justified moral demands on others in the name of the law. I shall consider each of these problems in turn.

A. "Unjust" Law

That Dworkin intends to extend his interpretive enterprise beyond our own legal system emerges from his explicit attempt to justify official coercion in principle even in evil legal systems. Dworkin

43 H.L.A. HART, supra note 10, at 151.
44 Although most of Dworkin's discussion of particular cases suggests that he is focusing on the content of past decisions, there is some doubt about just how "integrity" affects the right to win. It sometimes appears that one has a moral right to prevail, not because there is any defensible "interpretation" of the relevant past political decisions, but simply because that is the past decision. If the claim is that there is a moral right, however weak, to prevail just because of the principle that "like cases should be treated alike" (however evil the result in the prior case), it is easy to agree with Hart that this seems an implausible moral argument. See id. at 151–53. Although Dworkin now distinguishes "integrity" from mere "consistency" (p. 219), it is still difficult to see how an evil law creates moral rights just because it represents the single voice of (in this case completely misguided) principle. If Dworkin intends to erect a content-independent justification for law based on "integrity," then he does not need to worry about "interpreting" or justifying the dimension of fit at all and should make clear that he is expanding on his argument about the obligation to obey the law.
45 This is the standard claim of political theory, arguably endorsed by those philosophers, from Socrates to Kant, who have had the greatest influence on Western consciousness. See Soper, The Moral Value of Law, 84 Mich. L. Rev. 63, 65 (1985); infra note 53.
imagines a judge called Siegfried who must operate in a society most of us would think is immoral. In such a society, interpreting legal rights by reference to the "best justification" that can be offered for past political decisions may amount to interpreting them in "their least bad light" (p. 107), and Dworkin admits that there may be cases in which the system is too wicked to be interpreted in a way that makes any sense of the idea that legal rights are a species of moral rights. But this is a rare case. Even a wicked system will involve cases — for example, ordinary contract cases — in which the best interpretation will provide a moral justification for one party to prevail. For that matter, even a contract case that involves a blatantly discriminatory statute, such as one denying Jews defenses available to Aryans (p. 106), may still be a case, Dworkin claims, yielding a very weak moral right to prevail because of past political decisions "even if we want to add that this weak right is overridden, all things considered, by a competing moral right in the defendant" (p. 106).

Two points emerge from this discussion. First, Dworkin is defending a view that connects law with a prima facie moral right, in much the same manner that political theorists discuss whether law creates a prima facie obligation to obey. Indeed, as already noted, Dworkin thinks these questions — the justification of state force and the moral duty of the citizen to obey — cannot be separated (p. 191). But Dworkin also explicitly endorses the general division of labor that sets legal theorists to look for grounds of law, while political theorists consider its force (pp. 108-13). Yet this division (as we shall see below) is not one that Dworkin himself can maintain for long, and indeed, it seems at odds with his methodology: how can we show what must be true of law if it is to justify collective force unless we engage in questions about what justifies force, not only in terms of content, but also in terms of content-independent theories about the duty to obey?

Second, the Siegfried example challenges Dworkin's theory precisely because it questions whether integrity from a tyrant has any moral relevance, however weak. For Dworkin to say "it all depends" (in essence) is too simple, particularly because his subsequent development of law as integrity never returns to show how the theory applies to the hypothetical anti-Semitic statute to yield even a weak moral right to prevail. (Instead, we get a discussion of Brown v. Board of Education.) Once again, the answer to how there can be any moral right to prevail where the best justification of content shows it to be immoral must come from a theory about the force of law — a theory of political obligation.

B. The Obligation to Obey

If past political decisions can justify force regardless of how "bad" the best justification is (and regardless of which theory of adjudication prevails in a society), it must be because of a political theory about
the force that law has independent of its content. Dworkin has such a theory, and it is more important to his enterprise than the detailed theory of adjudication to which most of the book is devoted.

The political theory begins in a review of standard arguments for the obligation to obey (tacit consent, fair play) (pp. 192–95), all of which Dworkin finds inadequate.46 In their place, Dworkin draws on the paradigm of family and similar associations.47 These associations generate "fraternal obligations" (p. 199), provided that the attitudes within the group satisfy certain conditions, the most important of which is that the obligations be seen as flowing from a general sense of responsibility, and equal concern of each member, for the well-being of every other member (pp. 199–200).

The final step in Dworkin's argument is to consider whether one can extrapolate from the smaller associations like family or club, which are most likely to meet the specified conditions, to the larger political community. Dworkin considers three possible forms of community, and it will not surprise the reader to learn that the one best suited to fulfilling all of the stated conditions is the community based on a shared commitment to underlying principle. In contrast, the community that is merely a de facto community, thrown together by history or accident, survives by self-interest and thus lacks the equal, mutual concern required for obligation. Similarly, the "rulebook" community ("a natural mate" to conventionalism) (p. 210), operates on the basis of a commitment to established rules, which, however, are negotiated not out of a commitment to principle but as a compromise to antagonistic interests. Thus, again, there is too much room for selfish manipulation of the rules in one's own interests, rather than a genuine concern for the welfare of others. Integrity, it turns out, is as important in Dworkin's view to a solution of the problem of political obligation as it is to a theory of adjudication.

I have expressed elsewhere views that coincide in many ways with much of the substance of this theory about the obligation to obey the law.48 The problem with Dworkin's account, once again, lies in his insistence that such obligation is limited to those communities that embrace Dworkin's own concept of integrity and principle. That limitation dooms the coherence enterprise for all other communities. Moreover, it seems an unnecessary limitation. The major requirement for obligation is that there be equal concern and respect among all members. But that idea is arguably independent of the particular

46 In this respect, Dworkin adds his voice to those of a number of others who have recently reached similar conclusions. For a bibliography, see P. SOPER, cited above in note 31, at 166 n.13.

47 For the suggestion that the paradigm of family offers the best chance of grounding the obligation to obey, see id. at 57–90.

48 See id.
form of community, particularly as Dworkin concedes that a community's "conception of equal concern may be defective" (p. 213). Who, for example, is to say (besides Dworkin) that a "rulebook" community is not a group of rugged individualists full of "equal concern and respect" for the right of each to use self-help and self-interest as much as possible within the limits of the negotiated rules? "Equal concern and respect," in short, is not a term that has enough content to serve as a criterion for choosing between the claims of individualists and altruists.\(^49\) It is a term, however, that will at least require sincere, good faith belief that the underlying political theory of the community is in the interests of all — regardless of whether the theory is Kantian, utilitarian, Hobbesian, or some variation.\(^50\) Moreover, recognizing that "equal concern and respect" is consistent with a wide variety of underlying normative theories promises to complete the coherence enterprise: we will now have some basis for understanding Dworkin's claim that even Siegfried's legal system might generate weak moral rights.\(^51\)

IV. CONCLUSION

Paradoxically, the source of Dworkin's greatest problem is the same as the source of his theory's strength: the phenomenon of insider


\(^{50}\) See P. SOPER, supra note 31, at 55, 117–25 (distinguishing legal systems from "coercive systems" by the presence of a "claim in good faith by those who rule that they do so in the interests of all"). In considering the fair play argument, Dworkin suggests that the mere fact that persons are better off in any society than in the state of nature (as Hobbes thought) cannot generate an obligation to obey because "it is plainly too weak — it is too easy to satisfy and therefore justifies too much" (p. 194). But Dworkin himself, with no apparent sense of inconsistency, claims there may be moral force to the law even in Siegfried's Nazi Germany, no matter "how weak" the resulting right. Dworkin, in short, wants to claim for his content-dependent "interpretive" theory the same universal ability to justify (virtually) anything that he says disqualifies a content-independent theory of political obligation.

\(^{51}\) See, e.g., id. at 119–22, 183 n.17 (arguing that the moral obligation to obey discriminatory statutes depends on whether such laws can plausibly be thought consistent with claims of equal respect). In one of Dworkin's earlier essays, he suggested that we might respect another's moral position, even if we thought the position wrong, as long as it really was a moral position (not a result of prejudice, rationalization, and so forth). See R. DWORKIN, supra note 3, at 248–53. In Law's Empire Dworkin notes that a correct theory of justice can be neutral about competing claims about the good, without implying that there is no best theory of the good (pp. 440–41 & n.19). See also Rawls, Justice as Fairness: Political not Metaphysical, 14 PHIL. & PUB. AFF. 223, 225, 245–48 (1985) (arguing that his theory of justice is prior to and independent of particular utilitarian or Kantian moral theories). What Dworkin needs to do is follow the hint that these passages provide and relax the connection between his theory of adjudication and the problem of how law can justify collective force. What counts is that the society have a good faith moral defense of its underlying theory of justice; whether or not it is Dworkin's particular theory is secondary.
attitudes. Dworkin correctly perceives that insiders believe law justifies what they do to others in its name. He takes that to mean that he must show how to "interpret" away the worst aspects of past decisions, without ignoring those past decisions altogether. But he has not shown how he can do that in Siegfried's society without giving up either "fit" or "justification." Thus, all that is left is the truism that Hart noted.\footnote{See supra p. 1182 n. 43.}

Dworkin should listen more closely to insiders. When insiders claim that what they do in the name of the law is justified, they typically mean that it is justified even if, in good faith, they have gotten the content wrong — so wrong that not even the best interpretation can rescue it.\footnote{These claims about what insiders say do not exactly raise empirical questions to be settled by taking polls. They raise the question of whether anyone can coherently make such claims — that is, a question of the meaning of "law" and "obligation" — although, of course, if nobody or only a few eccentrics (like Socrates and Hobbes) made the claim, it might not be very high on a philosopher's agenda of coherence problems. For further elaboration see Soper, Choosing a Legal Theory on Moral Grounds, 4 Soc. Phil. & Pol'y 31, 46 nn.26–27 (1986).} Perhaps partly aware of this, Dworkin turns to develop a theory of political obligation, but this theory he artificially limits to special communities. In that case, the basic insider claim that law justifies force is incoherent and we must either search for another theory or "explain away" the embarrassing facts.\footnote{It does not take much imagination to understand why insiders (particularly officials) might claim that they are justified in what they do to others — regardless of content — even though, when they turn to political theory, they realize the claim is indefensible. But why not take people at "face value" here, as Dworkin does everywhere else, and continue working on a theory of "law" and "obligation to obey" that will make the claim consistent?} The best chance for success (a theory of political obligation) is unnecessarily limited, seemingly by fiat; the worst chance for success (Dworkin's particular theory of adjudication) is declared a winner by fiat.

I have focused on what has been Dworkin's greatest difficulty from the beginning of his work, namely, showing how his theory of adjudication relates to the question of the connection between law and morality that lies at the heart of legal theory. Dworkin has not yet solved that problem. But the domain he has staked out — the description and defense of a theory of our own legal practice — will undoubtedly become a permanent part of the landscape. It is not law's empire. It is Dworkin's domain, thought by most to have disappeared, like Atlantis, until rediscovered twenty years ago, and inconceivable, even today, but for Dworkin's skill and imagination. Even though its boundaries are not those of the empire, it will remain an important port of entry for a long time to come.