A History and Evaluation of Dworkin's Theory of Law

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Introduction

If we consider Ronald Dworkin’s essay, “The Model of Rules!” to be the first expression of his theory of law, then we have reached the 25th anniversary of that theory. And there can be little doubt that, for the most part of the last quarter century, Professor Dworkin has been the most influential legal philosopher in the English-speaking world.

As the reigning heavy weight champion, Dworkin has, of course, been the favorite target for challengers. Not only has he withstood all such challenges, he has welcomed them.

Replying to criticism has been, for me, the most productive of all work. I hope I shall be lucky again.2

It seems, then, to apply the boxing metaphor one last time, that the most appropriate way to honor the “Champ” on his theory’s 25th anniversary, is to hit him with one’s best shot.

The initial obstacle to mounting a coherent challenge to Dworkin’s theory of law is that there now appear to be at least two such theories. Since the publication of Laws Empire it has become fashionable in some circles to speak of the “old” Dworkin and the “new” Dworkin. My own view on this issue concurs with Philip Soper who says, in a review of Laws Empire:

The substance of Dworkin’s theory has changed little over the last twenty years, although the metaphors are different.3

It is, of course, a matter of opinion as to whether the change in a person’s theory has been “substantial” or not; there is no “right” answer, but Wasserstrom’s opinion concurs with Soper’s. The very title of his review essay, “The Empire’s New Clothes”4, makes the point. But Wasserstrom is also more explicit:

While the vocabulary of “adjudicative integrity” and “constructive interpretation” is new, the ideas, for the most part, are not5

5. Ibid., at 202.
Joseph Raz, on the other hand, believes that the change in terminology, something I will hereafter call the "interpretive move", has been accompanied by important substantive change. Thus he says:

...claims which many have come to regard as the hallmark of Dworkin's theory of law, have apparently been jettisoned.\(^6\)

Professor Raz's arguments will be taken very seriously; indeed, part of my reason for writing this paper is to establish whether and how much Dworkin's theory has changed. But I also want to debate continuing concerns about Dworkin's theory, concerns about whether the theory links law to morality necessarily, whether it is compatible with positivism, whether it makes sense to speak of "right" answers in hard cases, and whether the theory is fraught with subjectivity and judicial discretion. It seems to me there is still much to be said about these issues.

My goal in exploring these issues is to set out the deep philosophical assumptions upon which Dworkin's theory consciously or unconsciously relies. Some of these assumptions are cloaked in conceptional confusions such as the "semantic sting" and Dworkin's argument that "external" moral skepticism is incoherent. I will devote much time to unravelling these and other confusions and "sleights of hand". The going will be tough but I take comfort in Hicks' view about tackling these arguments:

If this is your kind of content and process, then this book will provide an original, stimulating, and deep exercise for you in philosophical argument.\(^7\)

I will not be concerned with empirical evaluation of Dworkin's theory, that is, I will not speculate as to whether judges in fact do what Dworkin says they do. I am only interested in Dworkin's empirical claims from the point of view of how well they mesh with the deep philosophical assumptions I will be digging out. It will be seen that there is much tension here.

As I discuss the various components of Dworkin's theory, several of the different arguments I make will lead to the same stopping points. For me this will be a sign of success; the fundamental philosophical assumptions of the theory should emerge throughout it.

My presentation of Dworkin's theory will initially be, substantively, the "old" Dworkin. Thus the theory will be dressed initially in the Empire's old clothes, the language of "coherence" and "justification". This is the language I am more familiar with, and I also agree with Soper that one can, even today, "...explain what Dworkin is about without

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resorting to elaborate theories of ‘interpretation’ and fashionable continental social philosophy.”8 But I will introduce the new terminology and, of course, any substantive changes.

Since this paper is fairly lengthy and contains a few digressions, the reader may find helpful a specific “route-map” of the paper’s main arguments. The paper is divided into two main parts entitled “A. The Old Dworkin” and “B. The Empire Redressed”. The first section of Part A is mainly expository and is concerned with the question of how Dworkin’s coherence theory of legal reasoning purports to constrain judges. Dworkin’s theory is described as one containing two stages, a legal coherency stage and a stage of substantive morality. The explication of the first section of this paper is on stage one, on how, according to Dworkin, a judge’s decision must cohere with previously settled law. The explication of this legal coherency stage includes an examination of several well known Dworkinian conceptual devices including the notion of rights as trumps, the principle/policy distinction, the abstract principle/concrete principle distinction, the hard case/easy case distinction (i.e., Dworkin’s consistency requirement), and the threshold concept of coherence or fit. Part of the discussion of the threshold concept is postponed until after the new terminology of the interpretive move is introduced in Part B. Although the focus of the first section of this paper is on exposition, several criticisms of Dworkin’s coherence requirement are made. The most interesting of these, I believe, is that Dworkin’s coherence requirement, because it is in a certain sense “objective”, is far too easy to satisfy and sanctions judicial decisions which do not seem to be even remotely related to the settled law.

The second section of Part A constitutes a “deeper” analysis of Dworkin’s coherency stage of legal reasoning. The focus of this section is on the justificatory feature of the coherency stage, the feature which, according to Dworkin, requires the judge in an individual case to justify or explain the settled law that is relied upon in reaching his decision. Since, according to Dworkin, the judge must justify even the most basic rules of our law, the rules positivists refer to collectively as the “rule of recognition”, I refer to Dworkin’s justificatory process as “deep justification”. Dworkin’s assertion that judges in individual cases engage in deep justification amounts to a denial of the positivists’ claim that the rule of recognition is a social rule. Thus this section of the paper attempts to discover whether Dworkin’s arguments against social rules of recognition are sound ones. My argument will be that Dworkin’s arguments are

8. Supra, note 3, at 1173.
not sound, that the analogy Dworkin draws in this area with Thomas Kuhn's vision of science actually supports the social rule thesis rather than deep justification, and that, in any case, the process of deep justification either reduces to the social rules thesis or ends up in an infinite regress or vicious circle. The conclusion of this section is that Dworkin can only avoid the infinite regress by claiming to have "objective" moral knowledge. In the process of reaching this conclusion it is pointed out that deep justification is inconsistent with the hard case/easy case distinction and that Dworkin has now, in theory, given up on that distinction.

The third section of Part A constitutes a preliminary skirmish between Dworkin and the moral skeptic. The skirmish is an inevitable one, not only because Dworkin's battle with the positivists can only be won if he has "objective" moral knowledge, but because stage two of Dworkin's model of legal reasoning implies that there is a "right" answer in moral matters. Unfortunately, Dworkin engages in several clever sleights of hand in an attempt to avoid a direct confrontation with the moral skeptic, and the purpose of this section is to "defuse" these sleights of hand. The more direct confrontation Dworkin has with the moral skeptic is postponed until after the interpretive move is described.

The first section of Part B introduces the new terminology of the interpretive move. The second section uses the new terminology to complete the earlier Part A discussion of the threshold concept of coherence. It is argued that the threshold concept renders stage one of Dworkin's theory incapable of putting any real constraints on judges.

The third section of Part B considers the question of whether the interpretive move has diluted Dworkin's "right-answer" thesis to the point where moral skeptics need no longer be concerned with it. The arguments of Wasserstrom and Raz, who say that such a dilution has taken place, are considered and rejected. Support for the rejection of Raz's arguments is found in Dworkin's new notion of "local priority".

The conclusion of the fourth section of Part B is that Dworkin's right answer thesis does succumb to moral skepticism.

Dworkin's failure to reach this conclusion himself is attributed to a number of conceptual confusions which pervade his writing, confusions about what "truth", "knowledge" and "meaning" mean. Once these basic concepts are correctly defined, other confusions in Dworkin's writing, such as the "semantic sting" and the argument that skepticism is incoherent, are easily deconfused.

The last section of Part B is a digression from the main skeptical argument against Dworkin and examines Dworkin's "new" attempt to connect law and morality conceptually and, thus, necessarily. The section
considers the *Law's Empire* definition of "law" as justified coercion and applies this definition to the "Apartheid" problem, the problem of wicked legal regimes. Dworkin's new notion of "associative obligations" is also considered in an attempt to shed light on the problem of whether "justified coercion" means *morally* justified coercion or simply coercion that can be justified in the non-moral way that stage one of Dworkin's theory (as explicated in Part A) requires judges to justify decisions. The notion that all justification, including stage one justification, is now, for Dworkin, moral justification, is rejected but not decisively.

Since this paper embraces moral, and indeed general, skepticism, it is left with the problem of whether and how a skeptical world view is compatible with real constraints on judges. This problem is considered in the paper's conclusion.

I. The "Old" Dworkin

1. Coherence and Constraint

As already alluded to, the concept of coherence plays a central role in Professor Dworkin's theory of legal reasoning. That role is supposed to be one of constraint. According to Dworkin, when rendering a decision a judge cannot simply rely on his own preferences (moral or otherwise) as to which way the case should go, nor can he toss a coin. His decision must in some way fit or cohere with the past decisions (and statutes and the constitution if there is one) of the legal system of which he is a part. Thus in theory, at least, he does not have absolute discretion; his discretion is to a certain extent constrained.

Professor MacCormick agrees with Dworkin that judges have a responsibility to fit their judgments into a coherent program of action and he accounts for this responsibility as follows:

> what it amounts to is an insistence on rationality in practical affairs … Respect for rationality imposes formal constraints on practical arguments, and on practical theories, theories for action, whether they be moral, political or legal. Such formal constraints are not intrinsically different from those which respect for rationality imposes upon us in speculative matters such as scientific enquiry.  

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I will come back to the substance of this quotation, and the analogy with science. At present I wish merely to point out, that in the legal realm, what MacCormick calls the "insistence on rationality" expresses itself in

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Aristotle’s fairness maxim that like cases he treated alike. If X gets three years for bank robbery then Y should get three years for a relevantly similar robbery. Dworkin’s coherence theory of law can best be seen as a theory of how to treat like cases alike.

Dworkin changes the terminology. Thus he says, “This particular demand [coherence] ... is not in fact well described in the catch phrase that we must treat like cases alike. I give it a grander title: it is the virtue of political integrity.” But as was said earlier, I think traditional Dworkinian terminology will do, at least initially.

It is worth pointing out that Professor Dworkin has a special reason, implied by his familiar but vague notion of equal concern and respect, for wanting judges constrained. According to Dworkin, “…political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life.” Since, for Dworkin, judicial decisions are political ones, and since the decision of an unconstrained judge is very likely to depend on a particular conception of what life should be like, then, for Dworkin, judges must be constrained. How does Dworkin’s theory purport to constrain them?

Dworkin’s theory of legal reasoning has two stages, a legal coherency stage and a stage of substantive (political) morality. Upon completing the first stage a judge may or may not be able to decide the case. If he cannot he moves on to the second stage.

At the first stage, according to Dworkin, a judge must, “construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.” This quotation, which I will refer to as the “stage one principle”, needs some unpacking. I will start with the terminology. A principle, for Dworkin, is a proposition that describes a right. A right is an individual preference or object of interest which has at least enough weight to be protected from denial against the fact that the general utility of the society will be marginally increased if it is denied. Rights come in varying weights, but for an object of interest to be a right, it must have at least this threshold weight. This is the notion of rights as trumps, as interpreted by Donald Regan with whom Dworkin agrees.

10. Supra, note 2, at 165-166.
13. D. Regan, “Glosses on Dworkin: Rights, Principles and Policies”, in Ronald Dworkin & Contemporary Jurisprudence, supra, note 9, at 120-124, and see Dworkin’s agreement with Regan on this point in the same volume at 270.
Dworkin’s distinction between abstract and concrete principles corresponds exactly, as far as I can see, to the distinction he made in *The Model of Rules*\(^{14}\) between principles and rules. Confining ourselves to the legal context, a concrete principle of a case is simply the specific rule of law that the case stands for, e.g., the concrete principle of *Donoghue v. Stevenson*\(^{15}\) is that the manufacturer of bottled beverages which cannot reasonably be inspected either by retailer or consumer before consumption is liable to the consumer for injury his product causes so long as the injury was reasonably foreseeable and avoidable on the manufacturer’s part. Concrete principles for Dworkin function in an all or nothing fashion: if a case falls under the concrete principle of a previous case the case at hand is an “easy case” because it must be decided according to the concrete principle. Thus, in Dworkin’s terminology, concrete principles represent rights with absolute weight.

Abstract principles are rights of lesser weight. They pull in one direction or another without necessarily by themselves deciding the case. However Dworkin says that if the principles on one side outweigh those on the other the judge must decide accordingly. When he decides accordingly, he establishes a concrete right for the future. Abstract rights, then, provide arguments for and justify (i.e., explain) concrete principles. In *Riggs v. Palmer*\(^{16}\), according to Dworkin, the abstract principle that no man may profit from his own wrong argued for and justified the concrete principle established by the case, namely that a murderer cannot inherit under the will of the person he murders.

The problem of how weights are to be assigned to abstract principles seems to me to admit of no “objective” answer. The judge will have a “feel” for it, no doubt, but different judges may have different “feels”.

Principles are to be distinguished from policies. An argument of policy does not seek, as an argument of principle does, to protect and advance a certain object of interest of an individual; rather it seeks to advance a collective goal such as stimulation of the economy. Judges, says Dworkin, are not to rely on arguments of policy.

With the terminology settled, I want to return to the stage one principle and see what sense can be made of it. Dworkin says a judge must construct a scheme of abstract and concrete principles that provide a coherent justification for all common law precedents and, *so far as these are to be justified on principle*, constitutional and statutory provisions as well.

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16. (1889), 115 N.Y. 506, 22 N.E. 188.
What the italicized phrase means, it seems to me, is that if a statutory or constitutional provision has been enacted on policy grounds, as of course many of the former are, then a judge, in constructing his justificatory scheme of abstract and concrete principles, ought not to take these provisions into account, or at least not give them as much weight as he would had they been laid down on grounds of principle. The reason for this, according to Dworkin, is that policy arguments have no or less gravitational force than arguments of principle. Dworkin believes that if a legislature gives wheat farmers subsidies as a matter of policy to stimulate the economy, and not because the individual wheat farmer has a right to state help in times of need, then that decision by itself does not then obligate the legislature to give needy hog farmers similar subsidies. Although some critics have argued persuasively that arguments of policy, at least the sort that judges are apt to use (Greenawalt points out that judges are not in the habit of granting subsidies\(^7\)), do have considerable gravitational force, I am willing to concede this point to Dworkin. What I will argue, however, is that, as Dworkin uses the terms “policy” and “principle”, there is in practice no viable distinction to be made between them, and even if there is, the judge who is following Dworkin’s orders in constructing his scheme of abstract and concrete principles need pay no attention to how those who passed statutes and constitutional provisions justified those provisions.

This latter claim follows from the very wording of the stage one principle. The judge must coherently justify all common law precedents and constitutional and statutory provisions. Well, he can do this by looking solely to the provisions themselves and “seeing” what abstract principles they embody. He need not worry about whether they were initially justified on principle or policy grounds. It seems clear enough that Dworkin is amenable to this way of constructing a coherent justificatory scheme. Thus he says,

> If, therefore, a principle other than the principle Cardozo cites can be found to justify *MacPherson*, and if this other principle also justifies a great deal of precedent that Cardozo’s does not, or if it provides a smoother fit with arguments taken to justify decisions of a higher rank in vertical order, then this new principle is a more satisfactory basis for further decision.\(^8\)

There is no reason why, on Dworkin’s scheme, a judge could not similarly disregard the reason the legislature gave in passing a particular

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provision, provided the judge’s own reason coheres better with settled law as a whole. Of course the judge must still ensure that the coherent scheme he is building is one of principle rather than policy (if this distinction holds) but he need not be concerned with how past judges and legislatures justified the provisions he is now justifying.

The fact that Dworkin’s theory can be applied in the above “objective” manner has led to misgivings among some critics. As Raz points out:

Thus Dworkinian “implicit law” includes much that was not communicated by anyone, explicitly or by implication, may have never been in anyone’s mind, and which may bear no relation to the political ideas or programs of anyone who ever wielded political power.  

Yet Dworkin heartily embraces these conclusions. He takes pride in the fact that “Integrity is a more dynamic and radical standard than it first seemed, because it encourages a judge to be wide-ranging and imaginative in his search for coherence with fundamental principle.”

My own misgivings about imaginative “objective” justifications of law stem from the fact that objective justification of human behaviour in general is far too easy to accomplish. Thus Freud’s theory can be used, after the fact, to “explain” every aspect of anybody’s behaviour (and any piece of literature); the more the individual who’s behaviour is being “explained” insists that he is acting for other reasons, the more Freud’s theory is confirmed. Marxist theory is also brilliant at “explaining” collective human behaviour after the fact; Stalin’s activities can be “explained”, the fact the revolution occurred in Russia rather than England or Germany as predicted can be “explained”, etc. As stated by Karl Popper,

A Marxist could not open a newspaper without finding on every page confirming evidence for his interpretation of history; not only in the news but also in its presentation—which revealed the class bias of the paper—and especially of course in what the paper did not say. The Freudian analysts emphasized that their theories were constantly verified by their clinical observations ... It was precisely this fact—that they always fitted, that they were always confirmed—which in the eyes of their admirers constituted the strongest argument in favour of these theories. It began to dawn on me that this apparent strength was in fact their weakness.

Neither Freudian nor Marxist explanations can ever be proved wrong. In Popper’s view this fact alone is enough to condemn both theories as

19. Supra, note 6 at 1109.
20. R. Dworkin, supra, note 2, at 220.
lacking in credibility. (Popper would probably condemn economic analysis of law for the same reason.) It seems to me that Dworkin's theory is vulnerable to the charge of making it too easy for judges to explain the settled law. It seems that if a proposed justification of the law is so imaginative that, as Raz says, it bears no relation to the ideas of anyone who ever wielded political power in the community under consideration, then that justification does not really represent the community's law. Justification of human behaviour, including law-making behaviour, must in some way be subjective, i.e., it must in some way take place from the internal point of view of those whose behaviour is being explained.

Before discussing the stage one principle further, it is important to make the point that Dworkin's coherence requirement exists alongside a requirement of consistency, a requirement that no ruling contemplated by a judge can be acceptable if it contradicts a previously established concrete principle of law. Indeed the consistency requirement is implied by the fact that concrete principles are rights of absolute weight, as stated earlier. It is the consistency requirement that generates easy cases. Another way Dworkin expresses the consistency requirement is by saying that precedents have "enactment force", i.e., if the ratio decidendi or concrete principle of an earlier case applies, it must be followed.

I only want to make two points now about the consistency requirement, both very obvious. First of all, the consistency requirement is inconsistent with the fact that precedents are overruled. Secondly, the consistency requirement does not, irrespective of the overruling possibilities, impose any real constraint on judges given how easily cases may be distinguished. Very often all a judge says in distinguishing an earlier precedent is, "But that case was decided on its own facts...".

Back to the stage one principle: What is it for a judge to construct a coherent, justificatory scheme of abstract and concrete principles? Strictly speaking stage one itself consists of several stages. Given that the authority of the constitution is greater than that of the legislature and that of the legislature is greater than that of the highest court in the land, a judge constructing a coherent justificatory scheme should, says Dworkin, first construct one for constitutional provisions, then fit in the legislative provisions, then the rulings of the highest court, and so on. Having mentioned this qualification I will temporarily just consider it understood (it gets turned on its head in Law's Empire as will be seen) and concentrate on the big picture as set out in the stage one principle.

It is difficult to wrap one's mind around the big picture, around a coherent scheme of abstract and concrete principles.
Wasserstrom has the same problem:

I am not entirely sure what Dworkin means by a single coherent scheme of principle, but based on statements elsewhere ... I take it he means by it some coherent theory of political morality.22

That does indeed seem to be what Dworkin means for he says (using the term "dimension of fit" to designate what I call the stage one principle), "The dimension of fit supposes that one political theory is pro tanto a better justification than another, if, roughly speaking, someone who held that theory would, in its service, enact more of what is settled than would someone who held the other."23 In Dworkin's view, the settled law that is not enacted by the theory is considered mistaken and loses its gravitational but not enactment force.

But although the term "theory" is more familiar and therefore "sits" more comfortably in the mind, it is unclear how a "high-fallutin" political theory, like liberalism, can be expected to decide the specific, mundane issues that come before our courts. The answer is that the "high-fallutin" theory must be worked out in exquisite detail, which pushes the discussion back to abstract and concrete principles. The most abstract principle of the political theory, say that the government must treat its citizens with equal concern and respect, must be "cashed out" so as to yield a set of less abstract principles, e.g., the right to freedom of speech; then all these less abstract principles must be "cashed out" so as to yield a set of even less abstract principles and so on until one ends up with a set of concrete principles such as, "People have a moral right to compensation for emotional injury suffered at the scene of an accident against anyone whose carelessness caused the accident but have no right to compensation for emotional injury suffered later."24

This unites the "political theory" terminology with the "scheme of principle" terminology but makes it difficult to see how a mere mortal could even attempt the stage one assignment. But this point is misconceived. Dworkin does not suggest that every judge actually constructs such a scheme in every hard case; rather his claim is that his theory "... shows us the hidden structure of their [judges'] judgments and so lays these open to study and criticism."25 Dworkin thus claims that legal reasoning in our society follows the structure of stage one and would meet stage one's requirements perfectly if each judge had Herculean judging capacity.

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22. Supra, note 4, at 247.
23. Supra, note 11, at 143.
24. Supra, note 2, at 240.
25. Ibid., at 265.
I will shortly undertake a “deep” explanation and evaluation of stage one. But first I want to show how Dworkin has responded to some telling, but more “superficial” criticisms of the theory as developed so far. It does seem that, in principle, there will be one most coherent theory of our settled law, i.e. one theory that “enacts” more of the settled law than any other. If all our judges developed Herculean capacities overnight and could find that theory, and then obliged each other to use it, no judge could decide a case according to his personal preferences—each judge would be completely constrained. Unfortunately, even in this ideal sort of legal atmosphere there would still be some problems: (i) The most coherent theory could in theory turn out to be one which coheres beautifully with all the pre-1900 settled law and not very well with relatively recent rules of law. Thus it could dictate decisions that would seem a bit backward. (ii) The most coherent theory could turn out to be one which dictates decisions that do not cohere very well with our moral views, e.g., the most coherent theory of South Africa’s laws might dictate the continuation of apartheid. (iii) Not all of the settled law which the most coherent theory justifies can itself have been the product of a coherent type of legal reasoning. The earliest legal decisions would have had nothing to cohere with and so must have been decided according to someone’s subjective moral preferences. What this means is that what the most coherent theory could ultimately cohere with are the preferences of our judicial ancestors. This should be unsatisfactory to Dworkin given his equal concern and respect maxim.

Of course the fact that our judges do not have Herculean abilities presents added problems. Since the ordinary judge would not be able to find the most coherent theory, the best he could do would be to apply the theory he thought most coherent. And though this would not by itself violate Dworkin’s equal concern and respect maxim, it would make room for a “legal realist” judge to smuggle in his own preferences under the guise of them belonging to what he thought was the most coherent theory. This would violate Dworkin’s maxim. (A different problem would be faced if the judge looking for the most coherent theory thought he had two competing contenders. But this cannot be counted as a criticism of Dworkin’s theory because the soon-to-be-discussed stage two of the theory is designed to deal with this situation.)

Dworkin was, of course, made aware of these objections. The following passage from his reply to a John Mackie article accommodates almost all of them. Dworkin says of Mackie:

First, he assumes that a justification of a body of material automatically becomes better, as a justification, when it justifies a greater percentage—even a very marginally greater percentage—of that material. I see no reason
why this should be so. When two theories compete along what I have called the dimension of fit, the contest is not to see how many distinct bits of institutional history each explains ... each of two theories may fit "reasonably" but not very well the "great bulk" of precedents, and yet one be preferred to the other because it can more plausibly be seen as explaining the "trend" of recent decisions. In that case the justification for neither is improved simply by the discovery of one or two older cases explained by one but not the other. Secondly the conception of justification I described does not provide that any improvement along the dimension of fit is automatically an improvement in overall justification. It provides for a threshold of fit that must be met by any theory that is ultimately to qualify, but argues that if two theories each pass the threshold, the choice between the two will be governed by political morality.26

So now the judge is not asked to justify as much of the settled law as he possibly can; he need only justify a certain threshold level of it. And if he can construct two theories that pass the threshold, the one that is morally best is the one to be used to decide the case.

The phenomenon of political morality deciding among theories that pass the threshold is stage two, or the second dimension, of Dworkin's theory. Before discussing it in any detail I want to say a few things about the "new" threshold concept of coherence and how it interacts with stage two. But I do not propose, at this point, to answer the most pressing question about the threshold concept, namely, "What is the threshold level; how much of the settled law must the judge's justificatory scheme justify?" Although Dworkin provides an answer, it is couched in the language of "interpretation" and "integrity" and will be considered later. Right now I want to consider the threshold concept as Dworkin's response to the South Africa problem mentioned earlier. To set the stage, I need to state the obvious.

Dworkin's Hard Cases27, which constitutes the earliest complete statement of his coherence theory and the basis of this paper so far, is about hard cases, i.e., cases where concrete principles already explicit in settled law do not dictate an easy answer. (In other words, hard cases are not easy ones). Dworkin's theory, as developed in Hard Cases tells judges that when faced with a hard case they must apply the most coherent theory of settled law. In a regime of wicked law this requirement can make the situation even worse. Professor Raz explains:

... it is not merely an obligation to obey the letter of the law, but its spirit as well. Judges are called upon to decide cases where source based law is indeterminate or includes unresolved conflicts in accordance with the

27. Supra, note 12, in chapter 4.
prevailing spirit behind the law. That would require a South African judge to use his power to extend Apartheid.\(^\text{28}\)

But now that coherence is a threshold concept this extension of Apartheid might be avoided. If the judge can find a non-discriminatory theory, morally better let us assume, that justifies the requisite threshold amount of settled law, then stage two of Dworkin's theory tells the judge to apply that theory even though the competing discriminatory one may justify more settled law. But it is important to realize that this solution has its price for Dworkin. Raz identifies this price and explains how stage one and two used to interact before the threshold concept. Raz says that that concept,

gives less weight to the condition of fit. It is no longer the case that the law consists of the political morality which fits the facts best, with ideal morality coming in just as a tie-breaker. Fit (a certain unspecified level of it) now provides only a sort of flexible threshold test. Among the, presumably numerous, political moralities which pass it the one which is closest to correct morality is the law.\(^\text{29}\)

2. **Coherence as deep justification: the battle with the positivists**

In constructing a justificatory scheme Hercules must start with some very basic questions. According to Dworkin, "He might begin by asking why the constitution has any power at all to create or destroy rights."\(^\text{30}\) Later, when he looks at statutes, he "... must begin by asking why any statute has the power to alter legal rights."\(^\text{31}\) Later still, when considering the common law doctrine of precedent, the judge "... must begin by asking why arguments of that form are ever, even in principle, sound."\(^\text{32}\)

Positivists, like H.L.A. Hart, do not believe that judges subscribe to this method of "deep" justification. While the positivist believes that judges do and should look to the purpose of (i.e., justify) lower level rules of law, the highest level rules, such as the rule that the constitution creates legal rights and the rule that statutes do, are social rules, binding because accepted by the judges, and not considered to be in need of justification. For the positivist, these highest level rules constitute the rule of recognition; they identify, and thus enable one to recognize, what sources count as the sources of law in a community. The manner in which the rule of recognition imposes duties on judges, i.e., makes them recognize statutes

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29. Ibid., at 307-308.
30. Supra, note 12, at 106.
31. Ibid., at 108
32. Ibid., at 110.
and precedents and the constitution as law, is neatly summarized by Coleman as follows:

According to the social rule theory an individual has an obligation to act in a particular way only if (1) there is a general practice of acting in that way; and (2) the rule that is constructed or built up from the practice is accepted from an internal point of view. To accept a rule from an internal point of view is to use it normatively as providing reasons both for acting in accordance with it and for criticizing departures from it.33

Now, of course, Dworkin’s theory must have a rule of recognition. Before one can justify settled law one must be able to find law. One must believe that enactments of parliament are law and that what Mrs. Grundy says in heated political discussion is not. What Dworkin says, however, is that no legal rule, including the rule of recognition, can be a social rule.34 Rather, the binding force of the rule of recognition, for a judge in a particular case, depends upon the fact that the rule flows from the best justification of the legal system as a whole.

There is a danger of circularity here. I have just said that the judge must have a rule of recognition before he constructs his justificatory scheme. Now I am saying that that very scheme justifies the rule of recognition and makes it binding. The way out of the circle, for Dworkin, is the claim that although the judge starts with a rule of recognition, indeed one he thinks “goes without saying”, he accepts it as a matter of conviction, not convention.35 He accepts it, not because everyone else does, but because he independently believes it to be justified. In effect then, the judge approaches individual cases with the deep justification for the system already accomplished. Dworkin has Hercules start from square one simply because, as has already been pointed out, this procedure shows the hidden structure of the judge’s judgments.

How can Dworkin’s claim that judges are “deep justifiers” of their rule of recognition instead of “acceptors” of it be evaluated? Dworkin asks himself the same question,

Which explanation provides the better description of how lawyers and judges treat propositions about legislation that “go without saying?” We are unlikely to find much evidence one way or the other just by reading judicial opinions at random, for judges are unlikely to explain why they believe what everyone believes. We must look to the pattern of judicial decisions over time.36

34. Supra, note 12, in Ch. 2.
35. Supra, note 2, at 136.
36. Ibid., at 136.
Dworkin goes on to sketch a picture of legal history which involves rules of recognition being departed from in individual cases in response to challenges to the reasons for which they were held. Dworkin asserts that such challenges would have been “out of order” had they been made against social rules of recognition because such rules are not held for reasons.

Since I am no legal historian I cannot directly evaluate Dworkin’s assertions about how rules of recognition are departed from and how they change. But I can try to undercut some of what Dworkin sees as the analogical support for his historical thesis. Dworkin has been much influenced by Thomas Kuhn, an eminent historian and philosopher of science. Dworkin seems to think that Kuhn’s view that the foundations of science have changed over time, parallels his own similar thesis about law. Indeed, in Law’s Empire, Dworkin adopts Kuhn’s term “paradigms” to refer to a legal system’s foundations, i.e., the components of its rule of recognition, at a particular point in time.

But there is no doubt that Kuhn’s scientific paradigms are social rules. Thus Kuhn says,

> When paradigms enter, as they must, into a debate about paradigm choice, their role is necessarily circular. Each group uses its own paradigm to argue in that paradigm’s defense ... in paradigm choice—there is no standard higher than the assent of the relevant community.\(^{37}\)

Kuhn argues vigorously that scientific paradigms, when they change, do not change as a result of reasoned arguments but as the result of persuasion, bloodshed and “Gestalt switches”, viz., as a result of “arguments” that are initially “out of order”. Dworkin seems to think that where paradigms are held by convention they can only change as “... the result of special agreement to have a new set of conventions.”\(^{38}\) But this is not the story Kuhn tells us about the history of science; no special agreements for paradigm change took place when Newton breached the paradigm constituted by the corpuscularian theory of matter. Kuhn tells us that, in science, conventional paradigms change in mid-game, exactly the way Dworkin tells us conventional paradigms do not change. Kuhn’s vision of science is perhaps best described by Hart’s phrase, “Here all that succeeds is success.”\(^{39}\) Thus Kuhn’s theory works against Dworkin rather than for him.

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38. Supra, note 2, at 138.
Dworkin's views about how conventional paradigms change, go wrong, I think, not only because he does not look closely enough at science, but because he looks too closely at games. Thus Dworkin says, perhaps chess would be more exciting and interesting if the rules were changed to allow the king to move two spaces once a game. But no one who thought so would treat the suggestion as an argument that the king can now, as the rules stand, move two steps in one game. Lawyers, on the other hand, often call for changing even settled practice in mid-game.40

I have no doubt that the rules of games, like chess, are conventional. (Neither does Dworkin though it is not clear to me how he can so easily and instinctively distinguish chess and law in this regard). But there seems to be an obvious reason why chess players do not and lawyers do call for changing settled practice in mid-game. It is just not worth kicking up the fuss in chess. In law and science, on the other hand, careers and even lives may be at stake. Whether arguments are "out of order" or not, they will be made. As Kuhn points out, persuasion is the order of the day in science. The same is true in law.

Dworkin fails to appreciate the significance of these "irrational" elements in practices where there is incentive to engage in them. Because such irrational elements are not present in chess, where there is no incentive to engage in them (the players can afford to wait for a world chess congress to air views about rule-change), Dworkin concludes that their absence is an inherent feature of conventional rule-following. In this I believe he is mistaken.

But Dworkin has another argument against social rules of recognition which needs to be considered. Dworkin's argument capitalizes on the fact that, according to the social rules theory, judges are only obligated to apply rules, including the rule of recognition, as long as there is a general practice of applying them. What this means is that in controversial cases, where no general practice of applying a rule can be found, judges are under no obligation to decide one way rather than the other. Since Dworkin thinks judges are obligated to decide one way, even in controversial cases, the social rules theory must be wrong.

But Dworkin must tread carefully here. He cannot claim that the rule of recognition is not a social rule simply because it designates the Highway Traffic Act as law and that Act contains controversial provisions. The job of the rule of recognition is not to specify the content of laws but just to point to them. As put by Raz,

40. Supra, note 2, at 138.
To expect the Rule of Recognition to include criteria for the identification of implied law is to misconceive its function. In a sense it does not even contain criteria for the identification of explicit law. All it does, and all it is meant to do, is to identify which acts are acts of legislation and which are the rendering of binding judicial decisions, or more generally, which acts create law. The Rule of Recognition does not help one to understand what is the law thus created, whether it is stated or implied. To understand that, one requires the general ability to interpret linguistic utterances, ... 41

Dworkin does tread carefully. His argument starts by referring to Hart's admission that the rule of recognition might itself be uncertain in some cases. 42 The example Hart uses is hypothetical. He imagines that a past English parliament has entrenched a particular enactment by providing that neither the rule itself nor the entrenching provisions can be repealed except by a two-thirds majority vote of the Commons. Given that the English rule of recognition provides that whatever the Queen in Parliament enacts is law, Hart speculates that judges might be divided about whether this rule permits the present Parliament to repeal the entrenched provision by mere majority vote. Dworkin reacts to this possibility as follows:

It simply does not fit the concept of a social rule, as Hart uses that concept, to say that a social rule may be uncertain in the sense Hart now has in mind. If judges are in fact divided about what they must do if a subsequent Parliament tries to repeal an entrenched rule, then it is not uncertain whether any social rule governs that decision, on the contrary, it is certain that none does. 43

Dworkin seems to be right here but he cannot succeed in undermining the claim that the rule of recognition is a social rule unless he can show that, despite the uncertainty in the above example, the judge deciding the case would have an obligation to decide a particular way. If there were such an obligation, Dworkin might be right that that obligation would stem from the underlying justification for the rule of recognition. Clearly, in the particular example under consideration, there is no general practice from which it could be derived. Thus if there were an obligation it would refute positivism and support Dworkin's notion of deep justification. To put it in Dworkin's own terms, the rule of recognition would be a normative rather than a social rule.

But, again, none of this follows unless there is an obligation in the case and this is precisely what the social rule theory denies. Clear thinking positivists must admit that if a rule, including the rule of recognition, is

41. Supra, note 6, at 1107.
42. Supra, note 39, at 144.
43. Supra, note 12, at 63.
uncertain in a particular case then there is no obligation on the judge to decide one way rather than the other; the judge has discretion.

A certain "red herring" associated with the positivist's notion of discretion needs to be resolved here. The positivist cannot intelligibly claim, as some have done, that although a judge is not obligated by law to decide one way rather than the other, he may be obligated to do so by other standards, such as those of morality. Why not? If those "other" obligations stem from social rules that judges follow, then they must be considered to be legal obligations since, on the positivist model, the rule of recognition for law consists of the social rules that judges follow. On the other hand, if the obligations are somehow objective in the sense that they do not stem from social rules, then the social rule theory, and thus positivism, has been given up. So when the clear thinking positivist refers to a situation of judicial discretion, he must mean a situation not governed by social rules and thus devoid of any obligation to decide one way rather than the other. It is this situation that Dworkin describes as "hard" or controversial. Since Dworkin believes that judges are obligated to decide one way rather than another in hard cases, then he believes that judges are somehow "objectively" obligated. Thus the issue between Dworkin and the positivists can usefully be framed as the issue of whether or not such "objective" obligations exist.

This way of framing the issue also results from a deeper confrontation between Dworkin and the positivists. The confrontation begins with the following statement by Soper directed at Dworkin,

... what is missing from this account is an argument that demonstrates that "law" necessarily rests on an underlying normative rather than social rule. As an empirical matter, it is difficult to deny that social situations can be organized in ways that fit the positivist's model—that is, in such a way as to make the fact of acceptance the final court of appeal in determining the appropriateness of applying organized sanctions to specified conduct.45

Strangely enough, in Law's Empire, Dworkin accepts this argument but then fires it right back at the positivists. Dworkin says,

Perhaps all judges do accept the authority of the Constitution as a matter of convention rather than as the upshot of sound political theory. But ... nothing need be settled as a matter of convention in order for a legal system not only to exist but to flourish.46

45. Ibid., at 20.
46. Supra, note 2, at 138.
What is going on here? Soper clearly thinks that if it is true that normativeness of the sort Dworkin has in mind is not a necessary feature of law, then the social rules theory prevails after all. Why? Soper believes that if Dworkin’s theory is, as Dworkin claims, an empirical theory of what our judges do, then even if they are “deep justifiers”, this is only because the particular rule of recognition of our community makes them so, and thus Dworkin’s theory reduces to positivism. As Soper says, 

... the positivist’s model remains intact in the face of Dworkin’s argument, precisely because the rights thesis is cloaked in empirical claims and girded by arguments peculiar to a particular system. The conceptual theorist can discount the thesis— even if true— as an accidental, not an essential, aspect of law, explaining that the normative debates that the thesis entails occur only because social rules make such debates relevant to determining legal validity.\textsuperscript{47}

What Soper clearly sees as a knock-down argument proceeds too quickly. No doubt it is true that a “Dworkinian” legal community that “justified” all the way down past its rule of recognition could be explained on the basis of a social rule that required them to do that. But that alleged social rule could be explained in turn by Dworkin as followed because justified. One would then have a Dworkinian community that “deeply” justified justifiably. Soper could then claim that a social rule required them to deeply justify justifiably but it is clear that an infinite regress is in progress. I will return to resolve it in a moment but first I need to update Dworkin’s theory.

Initially, as we have seen, Dworkin did not consider his coherence theory to be at work in easy cases, i.e., the process of deep justification was not considered appropriate for such cases which were governed entirely by the consistency requirement. In \textit{Law’s Empire,} however, Dworkin explicitly states that, “Hercules does not need one method for hard cases and another for easy cases. His method is equally at work in easy cases, but since the answers to the questions it puts are then obvious, or at least seem to be so, we are not aware that any theory is at work at all.”\textsuperscript{48} What this incorporation of easy cases means, for Dworkin, is that the consistency requirement has lost its protected “accepted” status (which was unreconcilable with a normative rule of recognition); it is now, in principle, in as much need of justification as any other part of the law. In practice, however, says Dworkin, since all judges believe the consistency requirement to be justified, it will be applied much as before. Thus, the extension of deep justification to the consistency requirement

\textsuperscript{47} Supra, note 44, at 22.

\textsuperscript{48} Supra, note 2, at 354.
need not, in practice, create less easy cases. And in principle, the extension makes Dworkin's theory compatible with the rare instances when judges must overrule earlier precedents. An instance of overruling constitutes an instance where the consistency doctrine is not justified.

So now deep justification further pervades into Dworkin's theory. But it does not pervade it completely. There remains the question, generated by the earlier infinite regress, of what justifies deep justification itself? And if there is an answer, what justifies the answer? And so on. If the buck does not stop somewhere then Dworkin is stuck in the infinite regress or at least in a vicious circle.

The buck must stop somewhere; reasons will run out. How can Dworkin respond? One possible Dworkinian response is ineffectual. Dworkin might say, as was said at the beginning of this paper, that his theory is actually a theory of how like cases are to be treated alike. Then, using the "new" theory and terminology of the interpretive move (you need not be familiar with that move at this stage), Dworkin might say that his theory, i.e., deep justification, is the best interpretation of the practice of treating like cases alike. But this argument cannot help Dworkin here. We still need to know why we ought to treat like cases alike. And if the answer to that question is that treating like cases alike is the best interpretation of rationality, then we want to know why we ought to be rational.

MacCormick tells us what our options are in answering this last question.

But ought we in either sphere [legal or scientific] to observe the constraints imposed by respect for rationality? There are two possible ways of answering such a question as that. One way is to say that rationality is and is perceived by us to be an objective good, to belong within the "objective order of values". The other way is to offer rationality as a value absolute in so far as it goes within a Weltanschauung the "constructive" nature of which one cheerfully admits, happy in the knowledge that if any one person presents reasoned arguments against such a position, he is thereby estopped from denying the standard of rationality. The latter is certainly the course I would take. But then what is one doing? One is offering to others for their adoption a certain form of life which, for oneself, one finds more acceptable than available alternatives. In the last resort the appeal is to what is experienced as acceptable to this or that or another human being.49

It is now clear that when MacCormick, as quoted earlier, bases his requirement of coherence in law on an "insistence on rationality in

49. Supra, note 9, at 184.
practical affairs”, he is basing it on a social rule. Soper goes the same route. So would I.

In the end, then, Soper is correct; both MacCormick and Soper tell Dworkin that if he wants to maintain the “constructive” or empirical cloak on his theory, then he will have to embrace the social rule theory.

Dworkin, however, does not seem prepared to do this. He has already said that nothing need be settled as a matter of convention for a legal theory to flourish. Dworkin has only one other option. He must abandon “constructivism” and go for objective morality; he must subscribe to an objective obligation on judges to apply his theory. Yet Dworkin clearly does not want to give up the claim that his theory is an empirical one. We will have to keep our eyes open for further indications of where Dworkin’s heart really lies.

3. Dworkinian sleight of hand: The battle with the moral skeptics

We have twice now been led by argument to the conclusion that Dworkin’s theory implies objective morality. And we have been told explicitly by Dworkin that stage two of his theory requires judges to make substantive judgments of political morality, viz., it requires them to decide, of two or more competing theories, which is morally better than the others. Given how heavily his theory relies on substantive moral judgments, it is no surprise that Dworkin has been confronted by moral skeptics. Regrettably, however, Dworkin has used, and continues to use, intellectual sleight of hand to try to deflect the skeptical challenge. Thus, in Hard Cases, in response to the obvious objection that any claimed morally best justification must be merely a subjective preference, Dworkin responded as follows (bear in mind that the following response was made before the threshold concept of coherence was developed, at a time when, as Raz put it earlier, the law consisted of “the political morality which fits the facts best, with ideal morality coming in just as a tie-breaker.”

Suppose two coherent justifications can be given for earlier Supreme Court decisions enforcing the due process clause. One justification contains some principle of extreme liberality that cannot be reconciled with the criminal law of most of the states. Hercules cannot seize upon the former justification as licence for deciding the abortion cases in favour of abortion, even if he is himself an extreme liberal.

No, of course he cannot, I would answer, because this is ruled out at stage one. In the above example it is simply not the case that the judge is

50. Supra, note 28, at 307-308.
51. Supra, note 12, at 126.
faced with a tie. One theory coheres better (nothing to do with morality) with the criminal law and therefore is more coherent overall. It is incorrect for Dworkin to claim that there is a stage one tie and that the matter is then settled at stage two. Stage two never comes into it and thus, to use Raz's term, ideal morality never comes into it. Therefore the example is no answer at all to the concern that when ideal morality does come in, it will be irreducibly subjective.

Dworkin has pressed and continues to press other arguments designed to lead the moral skeptic back to stage one without him knowing it. In the last chapter of Taking Rights Seriously, Dworkin challenges the moral skeptic, who Dworkin calls the "Philosopher", to attend law school and then sit as a judge. Dworkin predicts that the Philosopher will find choices in hard cases forced upon him by his judgment that one theory of law is a better justification than another (Dworkin is very careful not to say "morally" better). In short, says Dworkin, "... the philosopher's own capacities will embarrass him." 52

But the Philosopher's own capacities will only embarrass him if three conditions hold: (1) if he is really making moral, i.e., stage two choices, (2) if he believes that his choice is morally right or at least morally better than the alternatives, and (3) if before law school he did not make genuine moral judgments, viz., he did not believe anything was right, wrong or better from the standpoint of morality.

You may be surprised by the extreme type of moral skepticism described in (3) but this is the only sort of skeptic who would be embarrassed by Dworkin's challenge. A Humean moral skeptic such as myself, who makes moral judgments all the time, and believes them to be true, but also believes that he could never know them to be true, would not suffer any embarrassment if he found himself believing that one theory of law was morally better than another. Such a belief would be no different from ones he had had all his life.

Now I see no reason why an extreme moral skeptic of the type under consideration would necessarily find himself, after law school, believing that one theory of law is morally better than another. Dworkin's challenge lacks any intuitive force if seen (as Dworkin wants it to be seen) as a response to a skeptical challenge to stage two.

But it has plenty of force if seen as a response to a skeptical challenge to stage one. Now it is mystifying why anyone would launch such a challenge but suppose someone did. Suppose that person, let's call him the "Foolosopher", did not believe that one theory of law could be better

52. Ibid., at 284.
than another at justifying the settled law, that is, that no theory could fit more law than another. Clearly the Foolosopher’s post law school capacities would embarrass him.

But what does this prove? It proves that, because Dworkin can respond to the straw man Foolosopher in far more convincing fashion than he can to the Philosopher, he therefore does respond to the Foolosopher in the hope that the Philosopher will be fooled.

Dworkin continues this ingenious sleight of hand in *A Matter of Principle*. In the essay, “Is There Really No Right Answer in Hard Cases”, an essay clearly designed to address the Philosopher’s concerns, Dworkin has the Philosopher observe a certain literary group. The participants in the group interpret the book *David Copperfield* by establishing,

facts of narrative consistency like the fact that the hypothesis that David had a sexual relationship with Steerforth provides a more satisfactory explanation of what he subsequently did and thought than the hypothesis that he did not.53

Up walks the Foolosopher (Dworkin, of course, says it is the Philosopher) and denies the existence of such facts of narrative consistency. The story ends there but of course Dworkin predicts that were the Foolosopher to read *David Copperfield* and join the group, he would soon find himself holding his own beliefs about narrative consistency.

The arguments made in the earlier story of the Philosopher going to law school apply, *mutatis mutandis*, to this one. Either facts of narrative consistency are simply facts about the degree to which hypotheses about the book fit the book’s text, in which case Dworkin is responding to the Foolosopher, or, facts of narrative consistency involve genuine moral or aesthetic judgments, in which case Dworkin is responding to the Philosopher but the story has no force. Again, I believe Dworkin is responding to the Foolosopher.

In an article called “No Right Answer”, Professor Woozley, although addressing himself to the different question of what Dworkin means by “right answer” (I will address this point later), comments on the *David Copperfield* story in a manner that clearly indicates he would agree with my assessment of it.

An empiricist philosopher comes along and denies that there are such facts as facts of narrative consistency—although why any empirical philosopher would be so idiotic as to deny that we are not told—and he is then punched all round the ring ... Now this really will not do.54

Nor will it do when, in *Law's Empire*, we get more of the same. There Dworkin describes all Foolosophers as follows:

... they grumble that jurisprudence is subjective only. Then finally, they return to their knitting-making, accepting, resisting, rejecting arguments in the normal way, consulting, revising, developing convictions pertinent to deciding which of competing accounts of legal practice provides the best justification of that practice.55

Dworkin has other arguments against moral skepticism which may or may not be intended to fool but which definitely rest on some conceptual errors. Since these conceptual errors pervade all Dworkin's writings, old and new, the discussion of them is best postponed until after the following section which translates the old vocabulary into the new.

II. *The Empire Redressed*

1. *New Terminology*

The new name for Dworkin's theory is "law as integrity". "Integrity" is also used on its own to mean coherence. Although the terminology is not, Dworkin theory is, in substance, the same coherence theory as before.

Dworkin himself equates the old and new expressions on the first page of the Preface to *Law's Empire*:

legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.56

For Dworkin, then, legal reasoning is only one form of constructive interpretation. Not only can the law be constructively interpreted but so can literary works, such as *Hamlet*, some concepts such as justice, and possibly even science and ordinary communication as well.57 Even the practice of interpretation can be constructively interpreted and this cashes out for Dworkin as follows:

... constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.58

Since literature is a form of art, to interpret *Hamlet* is to impose purpose on it so as to make it the best possible example of a work of art. Since law is, for Dworkin, a form of political morality, to interpret law is to impose

55. *Supra*, note 2, at 85-86.
purpose on it so as to make of it the best possible example of political
morality. To impose purpose on an object or practice is, to use Dworkin’s
old vocabulary, to justify it. The object or practice that purpose is imposed
on is called the preinterpretive data. In the literary sphere the preinterpretive
data is the text; in law it is the settled law. The preinterpretive data will
contain paradigms as already discussed.

The imposition of purpose is constructive because it is the interpretor’s
purpose that counts, not the purpose of the “author” of the object or
practice being interpreted. Thus one does not interpret Fellini’s film La
Strada simply by asking Fellini what the purpose or point of the film is.
Rather one constructs one’s own purpose or point from watching the film
or reading the script. I have already described how interpreting law, for
Dworkin, is constructive in this way and I expressed my misgivings about
it all being “too easy”.

What I have been calling stage one and stage two are now called
dimensions one and two. The first dimension is the dimension of fit; any
interpretation must fit a threshold level of preinterpretive data. The type
of judgments required in the second dimension will depend on the
preinterpretive data being interpreted. If that data constitutes a literary
text, the dimension two judgments will be aesthetic ones. If the
preinterpretive data is the settled law the judgments will be ones of
substantive political morality.

2. The Threshold Concept of Fit

I can now deliver on the earlier promise to answer the obvious question,
“How much of the settled law must the interpretation fit?” Dworkin’s
answer is as follows:

Any judge’s sense of the point or function of law, on which every aspect
of his approach to interpretation will depend, will include or imply some
conception of the integrity and coherence of law as an institution, and this
conception will both tutor and constrain his working conception of fit—that
is, his convictions about how much of the prior law an interpretation must
fit, and which of it, and how…

It should be apparent, however, that any particular judge’s theory of fit will
often fail to produce a unique interpretation.59

Dworkin also acknowledges explicitly that, “Different judges will set
the threshold differently.”60

59. Supra, note 11, at 161.
60. Supra, note 2, at 255.
So the individual judge’s sense of fit determines how much and which part of the settled law his decision will cohere with. But if the individual judge is in effect determining what the settled law is, how can it be said that the settled law constrains him in any way? Dworkin has a couple of answers. One consists of another analogy with the philosophy of science. Dworkin first agrees with the familiar thesis in the philosophy of science that there is no firm fact/theory distinction, that all of our so-called facts or observations are theory laden. But, he claims, “There is no paradox in the proposition that facts both depend on and constrain the theories that explain them.”61 Similarly, he thinks, a judge’s theory of coherence, despite being “theoretical”, i.e., his own, can constrain his second dimension substantive moral judgments.

But the analogy is a false one. Facts only have a constraining function on theories when they are accepted by the scientific community as true. Once a so-called fact is sufficiently contested it loses its constraining power and is no longer a fact. This is what happened to the “fact” that the earth does not move. Between Aristarchus’ time (Aristarchus proposed a heliocentric theory of the solar system more than 2,000 years ago) and today it lost its constraining power and today it constrains no more. So unless a particular judge’s theory of the threshold level is accepted by the legal community it cannot intelligently be analogized to the constraints facts impose on theories in science.

Dworkin, at one point, seems to realize this. Thus he admits, “... there cannot be too great a disparity in different people’s convictions about fit;”62. Why would judges’ respective theories of fit have to converge (to some extent) for Dworkin unless the constraint derives from the convergence? Dworkin’s admission sounds very positivistic, much like a social rule.

Dworkin’s second answer to the question of how the settled law can constrain the judge who determines what the settled law is confronts the question head on rather than by way of analogy. Dworkin says,

... some of our beliefs and convictions operate as checks in deciding how far we can or should accept or give effect to others, ... We might say that ... the constraint is “internal” or “subjective”. It is nevertheless phenomenologically genuine. We are trying to see what interpretation is like from the point of view of the interpretor....63

I would say that this answer is misconceived. No doubt internal constraints are genuine and all people, including judges, have them. But

61. Supra, note 11, at 169.
62. Supra, note 2, at 67.
63. Ibid., at 235.
the person who objects to the phenomenon of judges determining individually what the settled law is is not objecting to that phenomenon as a description of what interpreting is like from the point of view of the interpretor. He is objecting to it from the point of view of litigants and lawyers who would like consistent, predictable and acceptable judicial decisions. Obviously one can be internally constrained and still behave abominably according to community standards. The litigant who complains about a "way out" decision will hardly be comforted to hear that the judge was internally constrained. Would a relative of one of the Boston Strangler's victims be comforted to hear that internal constraints prevented him from using knives? We want our judges held to effective external constraints. We want constraints that would constrain the legal realist judge. Since Dworkin's dimension of fit does not give as such constraints it seems to be irreducibly subjective.

Well, perhaps not irreducibly. The judge's decision still must fit or cohere with something; it must cohere with at least one principle of law. This requirement of coherence may sound familiar to some of you; it is in fact Neil MacCormick's conception of coherence in legal reasoning. Is it a real constraint? That depends on whether a judge can always find, reflected somewhere in legal history, a principle that sanctions the decisions he wants to make. On this issue we would do well to listen to Unger who speaks of, "The many conflicts of interest and vision that law-making involves, fought out by countless minds and wills working at cross-purposes,..."64 It seems to me that an unscrupulous legal realist judge will always be able to sanction the decision he wants to make. The dimension of fit does not impose a real constraint.

3. Has the "Right Answer" Thesis Been Watered Down?

If Dworkin has a battle on his hands in defending the first dimension against claims of subjectivity, then the defense of the second dimension against similar claims must be considered a world war, part of which has already been fought (recall the Philosopher/Foolosopher stories).

"Law as integrity" imposes, as we have seen, an "objective" obligation on a judge in every case, no matter how controversial, to decide one way rather than the other. This implies that there is an objectively right answer in every hard case. That right answer is found by applying the morally best interpretation of the settled law to the case at hand. The judge who applies anything but the morally best interpretation has made a mistake,

a mistake which nonetheless becomes settled law, i.e., preinterpretive data, for future judges. Thus it is only when mistakes are made that law is created rather than discovered.

This exposition of what has come to be called Dworkin’s “right answer” thesis has been forced upon us by sound (I believe) argument and does, I believe, fairly represent Dworkin’s views. Nonetheless there are some critics who think that the interpretive move has diluted the thesis. Thus Wasserstrom says,

... it is clear in Law’s Empire that his claim that there is a right answer even in hard cases is not now the sort of objective one it has been understood to be by some of the challengers. Dworkin is not claiming that the judge’s decisions in hard cases will be uncontroversial, or that the judge will be able to prove that her decisions are correct ... But from the perspective of a judge who accepts law as integrity there will invariably seem to be a right answer.65

Wasserstrom is clearly correct in saying that the right answer thesis does not deny controversiality and thus does not insist that right answers be provable to everyone’s satisfaction. But is he right in saying that the thesis has been watered down to the claim that, to law-as-integrity judges, there will invariably seem to be right answers? This is not the tautological claim that judges who accept Dworkin’s theory accept Dworkin’s theory; rather it is closer to the claim that judges who accept Dworkin’s theory live Dworkin’s theory.

If this were what Dworkin had in mind, one would expect his argument to consist of the results of a poll asking law-as-integrity judges how they viewed their work. There is no such poll. No doubt Dworkin thinks that all, or at least most, judges live his theory. He even believes, as we have seen, that the moral skeptic Philosopher will live his theory after three years of law school. But unless I have seriously misinterpreted Dworkin and his theory, empirical claims such as these are not what the right answer thesis is all about.

Professor Raz also argues that the thesis has been diluted by the interpretive move but his argument is more subtle. Raz says,

... the suggestion that the right answers are there to be discovered by judges, the claim that courts never make law but merely apply it, ... have apparently been jettisoned. Instead we are told that “the ways in which interpretive arguments may be said to admit of right answers are sufficiently special, and complex, ... [that] there is little point in either asserting or denying an ‘objective’ truth for legal claims” [p.4 Matter of Principle]. Judicial decisions as interpretations of the law both apply the law and

65. Supra, note 4, at 272.
create law at the same time. Courts are like authors of chapters of chain novels, who add new chapters in a way which reflects their understanding of the story so far [pp 158-162 *Matter of Principle*].

The quotation by Dworkin within the above quotation by Raz seems to me, when seen in its full context, to admit of a different meaning from the one Raz puts on it. Dworkin actually says the following:

... the ways in which interpretive arguments may be said to admit of right answers are sufficiently special, and complex, *as to call into question the familiar arguments for skepticism*. Indeed, once law is seen in this way, there is little point in either asserting or denying an “objective” truth for legal claims (italics added).

The italicized words left out by Raz indicate that this passage is a response to the skeptic who interprets Dworkin, as I have, as saying that the judge’s task in a case is to find the objectively morally right answer. Dworkin still claims, I would argue, that judges should be looking for and can discover these morally right answers, but that it is a conceptual mistake to call them “objectively” morally right. I, in turn, think the conceptual mistake is Dworkin’s.

This conceptual issue will be considered shortly. At present I want merely to stress that Dworkin’s right answers, as he sees them, are as right as ever; the only change is that Dworkin now feels that the skeptical challenge is misconceived.

But Raz has another reason, apart from the quotation by Dworkin, in support of his claim that the right answer thesis has been jettisoned; that is Dworkin’s chain novel analogy. Dworkin likens the role of a judge to that of an author asked to write the next chapter of a novel, the completed part of which has been written chapter by chapter by different writers. Dworkin says the author must write his chapter in accordance with the best interpretation of the previous ones.

The problem raised by the chain novel situation, as seen by Raz, seems to be this: the author, even if he finds and conscientiously applies the best interpretation of the previous chapters, will still have a number of directions (e.g., with respect to character development) that he can set off on. The judge in an analogous position, says Raz, would both apply and create law.

Raz’s point is well taken if the author is the ordinary author and the judge is the ordinary judge. But recall that Dworkinian theory relies on the “Hercules” device to set out the hidden structure of what judges do. And Hercules’ scheme of abstract and concrete principles is, as was said

66. *Supra*, note 6, at 1116.
earlier, exquisitely developed. Indeed, the very point of introducing Hercules is to show that, in theory, there will be no gaps, no way to apply the law and still have discretion to go one way rather than another.

Thus the chain novel analogy, in order to constitute a real analogy with Dworkin's theory, must be interpreted so as to have a Herculean author writing the next chapter. Now, if one believes (as I do not) that Dworkin's theory before the chain novel analogy describes a real constraint on judges, then the analogy should powerfully confirm this belief. For it seems, to me anyway, that if Dworkin's theory is theoretically sound, then Hercules the author should be forced to write his chapter one way rather than all others just as surely as Hercules the judge is similarly constrained. Thus, for a Dworkinian, Wasserstrom's claim that the chain novel analogy "... hardly evokes confidence in Dworkin's claim that there is a right answer even in hard cases." is simply not true.

But even if Raz and Wasserstrom are right that the chain novel analogy appears inconsistent with the right answer thesis, it seems clear that Dworkin did not intend the analogy to be taken this way. There are a number of ways I could argue for this claim, e.g., I could say that the analogy makes Dworkin a positivist (as Raz does\textsuperscript{69}), and since he could not have intended that, it is better to believe that he simply did not think the analogy through very carefully (It is after all, only an analogy). But the argument I want to use is based upon a new wrinkle in Dworkin's theory. This doctrine is a concession to non-Herculean judges and "... gives a kind of local priority to what we might call 'departments' of law." The local priority doctrine tells the judge who is deciding a case to interpret so as to give priority to the settled law involving similar fact situations. The procedure is as follows: Before even examining the precedents, the judge deciding, say, a nervous-shock-caused-by-accident case, uses his general legal knowledge and his imagination and draws up a list of competing concrete principles that would decide the case. One such principle might be that no one has a moral right to compensation except for physical injury. After drawing up a list of such principles the judge then finds out which one or ones fit the emotional injury cases. Any principle flatly contradicted by the bulk of the settled law in the area is rejected. The survivors are then tested for fit against accident law in general. The survivors of that test are then tested against damage-to-economic interest cases. And so on, taking a broader and broader survey of the law until either only one principle is left (the winner) or, of the

\textsuperscript{68} Supra, note 4, at 275.
\textsuperscript{69} Supra, note 6, at 1116.
\textsuperscript{70} Supra, note 2, at 250.
competing ones remaining, the judge decides that any further, more
general tests of fit would be survived by all of them, in which case the
winner will be the morally best surviving principle. This procedure
constitutes a reversal from the procedure in *Hard Cases*. There Hercules
starts with the department of constitutional law and then fits in lower level
law in stages. Now Hercules starts with local law and works his way (in
theory) up to constitutional law.

It is a nice question whether, for Hercules, the results will be different.
If one of his initial “imagined” concrete principles is one that, using the
old method, would have been generated by the best justification of the law
as a whole, then the old and new methods will presumably converge on
the same result. Will one of the imagined principles always satisfy this
test? Given that we are talking about a Herculean imagination, the answer
must be “yes”, for one of the principles that Hercules will always be able
to imagine, and thus include in his list, will be the concrete principle that
would have decided the case using the “old” procedure. The inclusion of
this principle will insure that the eliminative rounds carry on all the way
up to the rule of recognition and beyond, for Hercules will always be able
to foresee that the “right” principle fits better higher up.

But, you may well ask, what happens if, at a particular level or in a
particular sphere of law, the “right” principle is contradicted by the bulk
of the precedents. Isn’t this principle eliminated even if Hercules can
foresee that it fits better higher up? The answer is “No”. Dworkin is careful
to point out that the eliminative procedure of the doctrine of local priority
is not absolute; it applies only when justified. Dworkin has to say this;
otherwise he has created a conventional rule and the positivists have won
(or he has created an objective truth that local priority must be applied, in
which case local priority is not an empirical doctrine).

But for the ordinary judge, in practice, says Dworkin, the eliminative
procedure of local priority will always seem justified; it will, like the
doctrine of consistency, become an “iron clad” rule of thumb that judges
work with. What this means is that even in practice, the situation
envisaged by Raz’s interpretation of the chain novel analogy will not
apply. Since, according to local priority, the judge initially draws up a set
of concrete principles, each of which can force him to decide the case one
way (if one is a Dworkinian) and one of which will, there will be no room
for the judge to both apply the law and create it. Dworkin could not have
intended to be interpreted as Raz interprets him. The right answer thesis
is back.

Although Dworkin may disabuse us later, let us begin criticizing the
thesis by construing it to imply that we have objective knowledge of
moral matters, that is, objective knowledge of how we ought to behave,
who is right and who is wrong. Presumably Dworkin would not want to restrict this knowledge to judges. But if we all know the right answers to questions of morality (political or otherwise) why do we need judges at all? It will always be clear who is wrong. As stated by Roberto Unger,

If objective values were available to us, if we knew the true good with certainty, and understood all its implications and requirements perfectly, we would not need a method of impartial adjudication.

... The problem of adjudication is inextricably linked with the conception that values are subjective and individual.\textsuperscript{71}

MacCormick would agree with this statement. But what about Dworkin? In a reply to MacCormick, Dworkin says, "It is not their [judges] job to show which principles are best independent of history, but to show which principles provide the best justification of a particular legal record."\textsuperscript{72}

What Dworkin may be suggesting here is that if, in the interim between the time X is sentenced (having received three years) and Y comes up for sentencing (the two having committed a relevantly similar crime), the world comes to have knowledge in matters of morality, and this knowledge, though consisting of principles not recognized by the legal system, presents itself as clearly as $2 + 2 = 4$ to everyone in the world, including X and the judge sentencing Y, and tells the world that Y should get one year rather than three, the judge sentencing Y should nonetheless give him three years. This, I suggest, is absurd. It is not an adequate rebuttal to the new found knowledge to say that giving Y less than three years would be unfair to X, for the one year sentence is objectively fair; it is the right answer all things considered including the fact that X got three years. One could of course say that the coherence requirement is part of the very meaning of the term "judging", but then the question becomes that of whether the judge should be judging if he has objective knowledge of normative issues, and it seems to me that Unger has already answered that question.

4. \textit{Conceptual Confusions in Dworkin's Theory}

Dworkin's failure to see that adjudication is inextricably linked to the subjectivity of values stems from the fact that he is confused about what "truth" and "knowledge" mean. This confusion, in turn, stems from a confusion about the meaning of "meaning". These confusions pervade Dworkin's whole theory and make him think that law as integrity is geared toward generating a uniquely correct answer in every hard case.

\textsuperscript{72} Supra, note 26, at 279.
If we are to understand what law as integrity is geared towards generating, we must first understand what the concepts “meaning”, “truth” and “knowledge” mean and how Dworkin misunderstands them.

There is no doubt that Dworkin’s theory rests on a theory of meaning that says words and sentences have literal, plain meaning. Raz argues this point far more eloquently than I could and his argument merits quotation in full.

A judge’s duty is to interpret the legal history as he finds it, not to invent a better history. That seems to mean that the coherence method applies to a given set of legal materials, statutes and decisions which constitute the legal history. It may disregard some legal material but it must make sense of much of it or it would be an invention of an ideal rather than an interpretation of an existing history. But what is this legal material? It is not a set of meaningless inscriptions on paper, etc. It is a body of interpreted history, of meaningful documents. Otherwise, why fix on this legal history? If you regard the constitution as an uninterpreted jumble of ink scratchings and regard legal theory as designed to give it meaning in accordance with the best moral theory there is, then there is no gap between ideal law and an interpretation of existing law. Under these conditions one can interpret the Constitution to mean anything at all. It can be read to mean the same as Shakespeare’s Hamlet. (If, for example, it has double the number of words as the number of sentences in Hamlet, all you have to do is to read every two words as if they meant one sentence in Hamlet.). Dworkin is of course aware of this ...

His method of coherence can only apply to legal documents which are given their plain meaning.  

And indeed, Dworkin himself tells the judge to justify “… what the plain words of the statute plainly require.”

I accept the thesis that words and sentences have literal, plain meanings. Since Dworkin and I are in agreement on this I will not spend much time arguing for the thesis; rather my argument will be that Dworkin misunderstands some of its implications. But let me say a few things in defense of the thesis.

To accept the plain meaning thesis is not to say that the plain meaning of a sentence will necessarily capture what the speaker or author intended it to mean; there is a clear distinction between what a sentence means and what it is intended to mean. No doubt as interpreters of law or even ordinary communication we are often more interested in what the speaker or author intends than what he literally says, e.g., the well known example of the servant who is told over the phone, while holding the master’s baby, to “drop everything and go to the airport”, but this does not change the fact that what he says has literal meaning.

73. Supra, note 6, at 1118. 
74. Supra, note 2, at 338.
To accept the plain meaning thesis is also not to deny that meanings can change, or that a word can be used metaphorically, or indeed, that a word may have more than one literal meaning. Where a word has more than one literal meaning there may be ambiguity as to the literal meaning of a sentence in which it figures. The sentence, "We need to find another foot", can mean two very different things depending upon whether it is said by one architect to another or by a policeman collecting the remains of a brutal killing in the forest. Thus context is important in deciding which of the word's literal meanings, a unit of measurement or a part of the body, is at play. But context did not, in this example (as Stanley Fish seems to think) give the word meaning when it had none before. The word "foot" was not a meaningless inscription until we were told, say, that the sentence was spoken by the policeman rather than the architect.

No doubt in a more general way it is true to say that meanings are determined by "context" (though I would not put it that way). The utterance "coin" means coin in English and corner in French. If this is what Fish means by context determining meanings, I am in complete agreement. My point is simply that, in looking at our community's specific sentences and utterances, context does not create meanings out of the blue; once words acquire meaning, they have literal meaning on their own.

Again, if Fish wants to argue, in some historical sense, that the acquisition of meaning depends on context, I am in complete agreement. When the meaningless inscription or utterance "fish" was initially given meaning, its meaning was certainly determined by a certain context, viz, a watery one. Had the inscription initially been given meaning in a different context, say the Sahara Desert, then it might mean sand today instead of fish. But this does not challenge my claim that once words acquire meaning they have literal meaning on their own.

So how do you find out what the literal meaning of a word is? Dworkin starts off on the right track. He says that "... all our concepts, including our philosophical concepts, take the only meaning they have from the function they play in our reasoning, argument and conviction."76 In other words, as I would put it, a word's meaning derives from the way it is commonly used. To discover the meaning of a word within a particular community, you look at as many samples of that word being used in that community as you can (the "pre-interpretive data"). Then you form hypotheses ("interpretations"), expressed in words not containing the

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75. See S. Fish, "Is There a Text in this Class", in S. Fish, Is There a Text in this Class (Cambridge: Harvard University Press, 1980), at 303-321.
76. Supra, note 26, at 277.
word to be defined, about what it is that is common to ("justifies") all the
samples or the bulk of them. The hypothesis that best coheres (no moral
element here) with the samples of ordinary discourse is the meaning of the
concept within the community under consideration.

Clearly there is no significant difference between the common method
of finding a term’s meaning and dimension one of Dworkin’s method of
constructive interpretation. It seems the “Webster’s” people were
Dworkinians before Dworkin was born.

The theory of meaning just described is certainly not the peculiar one
that Dworkin says one critic has attributed to him, namely, that meanings
are “just there” in the universe.7 What I have described is the common
reportive theory of meaning; when common usage changes, meaning
changes.

There is no doubt that Dworkin subscribes to this theory. Indeed he is
very adept at pointing out that his opponents have violated linguistic rules
of common usage. Thus in response to Hart’s claim that his social rules
theory is conceptually connected to the concept of obligation, Dworkin
says, “A vegetarian might say … that we have no right [i.e., an obligation
not to] to kill animals for food … Obviously no social rule exists to that
effect.”78 Given that what the vegetarian says makes sense, i.e., does not
seem to contradict itself, the term “obligation” cannot mean social rule.

In A Matter of Principle, Dworkin chastizes certain proponents of the
“no right answer” thesis for not backing up their arguments. He says, “It
is a semantic claim, about the meaning of legal concepts, and it would
therefore be natural to support the claim by some appeal to a linguistic
practice that is decisive.”79

Since I do not want to be chastized, I will now appeal to linguistic
practice in an attempt to show that Dworkin’s own theory of meaning
(which I believe to be correct) undermines his “right answer” thesis.

It seems quite clear that our ordinary concept of truth functions so as
to point to an external world outside of our experiences. That this is so can
be seen from the fact that it makes perfect sense to say that although I think
I am happily writing an essay, the truth may be that I am a brain in a vat
being given these experiences by the electrical probes of a mad scientist.
That the term “truth” means the same in the moral sphere can be seen from
the fact that no matter which empirical properties someone attributes to
an action in arguing that it is wrong, whether he says the action is
disapproved of by society, or that it promotes more misery than happi-

77. Supra, note 11, at 167.
78. Supra, note 12, at 52.
79. Supra, note 11, at 123.
ness, or that the Bible condemns it, it makes sense to ask, "But is it really wrong?" Truth, for us, means correspondence to the facts that are "out there", part of the real world, part of the fabric of the universe, etc. Whether or not there are such facts (solipsism could be true) is an entirely different question.

Dworkin tries to evade these conclusions as follows: "People who make these judgments [moral ones] do not believe any of this nonsense about brute facts (I doubt there is anything there to believe) and yet they continue to make... claims ... supposing that ... some are right and others wrong." But since when did the meaning of a term depend upon whether people believed in the actual existence of what the term referred to? Is the term "phlogiston" meaningless because people no longer believe that it exists? Is the term "God" meaningless because many people do not believe in God? Clearly not. Meaning, as Dworkin himself has said, comes from linguistic practice. If Dworkin wants to deny that "truth" means correspondence to the facts, he had better turn to linguistic practice to do it, not to peoples' philosophical beliefs. Let us now return to linguistic practice.

Philosophers tell us that the concept of knowledge cashes out as true, justified, belief. But justification, in this sense, requires proof of some sort and thus the concept of knowledge is, I believe, conceptually connected with proving things, with what Dworkin refers to as the demonstrability thesis. If X, a famous scientist, says he knows the world will end tomorrow, the obvious response to him will be, "Prove it" or "How do you know?" If there is no satisfactory demonstration or proof the verdict will be that X knows nothing at all, that he at best believes the world will end when he says. Embedded in the concept of knowledge seems to be the notion that if someone knows something he can prove it, to himself and anybody else, that he can, to use Dworkin's phrase, "wring assent from a stone." Controversiality is simply not, as Dworkin seems to think, consistent with knowledge, whether scientific knowledge or moral knowledge. (To say this, of course, is not to say that if everyone consents to a proposition then it is known; it must still be true.)

To know that a proposition is true, then, means to be able to prove it to be true. Given our notion of "out there" truth this is a very tall order, impossible I think, even if there is such a thing as a real world. The conclusion to be drawn from all of this is that although some or all of the propositions we believe in could be true, we could never know them to be

80. Ibid., at 167.
81. Ibid., at 162.
true. This Humean skepticism applies to scientific, common sense, and moral propositions. All such propositions can only be matters of opinion.

But the "out there" concept of truth does not apply to all legal or literary propositions. To see this consider the following two scenarios:

1. An English barrister argues on behalf of his client as follows:
   "Granted the Law of Property Act, 1925, a valid statute enacted by the English Parliament and in force, says that the only legal estates in land are the estate in fee simple absolute in possession and the term of years absolute, but I don't think that's true."

2. A literary critic who argues as follows: "Granted Shakespeare says that his fictional character Juliet's last name is Capulet, but I don't think that's true."

It seems to me that the reaction to scenario (1) by the average lawyer or judge would be, "You don't understand—if the Law of Property Act says that the only legal estates in land are the estate in fee simple absolute in possession and the term of years absolute, then that is the truth and those are the only legal estates in land." The response to scenario (2) by the average reader, author or literary critic would be similar. "You don't understand. If Shakespeare says that Juliet's last name is Capulet then that is the truth and her last name is Capulet." What these instances of usage indicate is that the term "truth" has meanings in the literary and legal communities which are different from the "out there" meaning of common, scientific and moral usage. In these latter communities, the appropriate arguments of the form, "Granted X says Y but I don't believe it's true", make perfect sense and would not be met by the, "You don't understand", response.

The barrister's comment in the above example seems contradictory, out of order. According to Dworkin's theory, as we have seen, such comments should not be so considered because the legal profession is made up of "deep justifiers". On the other hand, the senseless nature of the barrister's comments fits very well with positivism. This suggests that H.L.A. Hart was justified in titling his book, The Concept of Law.\footnote{See supra, note 39.} The terms "legal truth" and "law" seem to be conceptually connected to Hart's rule of recognition.

Dworkin does everything possible to avoid this conclusion (short of actually looking at linguistic practice which is where the answer really lies), and he makes some remarkable statements. Dworkin says that the issue between himself and the postivists is not a semantic issue at all and that anyone who believes that it is has fallen prey to a "semantic sting". How is this conclusion reached?
Dworkin begins by asserting that "... none but the most trivial theory of law could possibly be understood as an account of the linguistic conventions governing that concept's use". Dworkin believes that the concept of law is a contestable concept, one for which no (significant) common rules of usage can be found. Dworkin does not mean to insult Hart or other positivists; rather he suggests that even if they thought their theories were semantic ones, they actually were not. What they were, he says, were constructive interpretations of the concept of law, or, what amounts to the same thing, conceptions of the concept of law. Such constructive interpretations can be successfully carried out, asserts Dworkin, even if there are no common rules of usage for the term "law". It is a fallacy, says Dworkin, that you have to agree on the meaning of a concept to have intelligent disagreements about it. Disagreement is possible not because common rules are obeyed but because competing interpretations are trained on the same pre-interpretive data.

The fatal question, of course, is, "How do two interpreters manage to focus on the same pre-interpretive data unless they share common rules for recognizing that data?" We have gone through all this before. Dworkin needs a shared rule of recognition as much as any positivist. If there is a shared rule of recognition for law, there will be a shared meaning of "law". To think otherwise is to fall prey to the "Dworkinian Sting".

The last point I was making, before the semantic sting digression, using the barrister example, is that "truth" means something different in law than it means in science, common sense and morality. "Truth" in law is not "out there" truth.

That the same word can mean different things in different communities is no major revelation. Dworkin admits that the legal enterprise is one which "... stipulates certain truth conditions for propositions of law." He also argues that "... the question of what independence and 'reality' are, for any practice, is a question within the practice..." What Dworkin fails to realize is that a practice may stipulate truth conditions that make the truth of a proposition dependent on an external world. Thus he says, ...

If moral ... judgments have the sense ... they do just because they figure in a collective human enterprise; then such judgments cannot have a "real" sense and a "real" truth value which transcend that enterprise and somehow take hold of the real world.

83. Supra, note 26, at 256.
84. Supra, note 12, at 283.
85. Supra, note 11, at 174.
86. Ibid., at 174.
And Dworkin also says,

The external skeptic supposes ... that he can step wholly outside the enterprise, give some different sense to interpretive judgments from the sense they have within it ... test these judgments ... and find them all false or senseless when measured against this supposedly more objective standard.\textsuperscript{87}

In these passages Dworkin is ridiculing the barrister we have already encountered who purports to apply the correspondence to fact concept of truth where it does not belong, to an enterprise with its own, different truth conditions. Dworkin claims that the moral enterprise is also such an enterprise, i.e., one to which the "out there" notion of truth is inapplicable.

Clearly it is an extremely difficult meta-ethical issue as to exactly what moral terms mean; one which I cannot pursue here. But I stand by my claim that the sense which judgments about moral truth are given within the moral enterprise itself is the correspondence to the real world sense. Dworkin offers no argument from ordinary discourse against this claim and there is nothing incoherent about it. Nor does this empirical claim about what we mean by moral truth commit one to the claim that one can step outside the enterprise and check the real world to see whether moral judgments are true. Indeed that is just what the moral skeptic, who is also a general skeptic, says cannot be done, and that is why he is skeptical, not only about morals, but about science and common sense as well. I find nothing in Dworkin's argument to refute this sort of skepticism.

Dworkin has another argument against "out there" truth. This one seems to deny that the "out there" concept of truth can be a concept at all. Thus he says, "... skepticism ... needs to be defended by arguments that employ our actual concept of truth and don't suppose some transcendant kind of truth that can be expressed only metaphorically and mockingly."\textsuperscript{88}

I grant Dworkin that the "out there" concept of truth is metaphorical and mocking but I still claim that it is our ordinary concept of truth. I see no reason why the concepts we have cannot be metaphorical and mocking. Would Dworkin wish to deny that the concepts of gravity, space-time and God are not real concepts because they are metaphorical and mocking? Perhaps Dworkin's problem is that he has trouble imagining how a moral proposition could correspond to the real world. I also have this problem, but then I also have a problem imagining how space could be curved or finite. A possible answer to this problem is the rhetorical question, "Why should man's puny imagination have anything to do with truth?"

\textsuperscript{87} Ibid., at 176.

\textsuperscript{88} Supra, note 25, at 273.
This completes my disentanglement of the truth issue in Dworkin's theory. The important conclusions that have emerged are the following:

1. Our moral, scientific and common sense concepts of truth are "out there" concepts;
2. We can have no knowledge of the real world;
3. Therefore moral, scientific and common sense propositions are matters of opinion, viz., subjective;
4. The truth conditions for propositions of law are, by Dworkin's own admission, ones stipulated by a particular legal community.

5. The Connection Between Law and Morality

This last conclusion, no. 4, dispels the confusion that if Dworkin is right there is a necessary connection between law and morality. For if it is an empirical, contingent matter as to what the truth conditions for law are, then, even if Dworkin is right in saying those truth conditions have a moral element, it is still a matter of contingent fact that they do so. Dworkin, having admitted that the legal enterprise stipulates truth conditions, cannot deny that it could have stipulated conditions that did not have a moral element. It could, for instance, have stipulated the more positivistic notion that true propositions of law are ones that have been expressly "enacted" by either the legislature or the courts. So even if Dworkin's theory were descriptively accurate for our community, as far as establishing a necessary connection between law and morality, the theory fails, as Soper says, "... precisely because, and to the extent that, it is presented and viewed as a descriptive theory."89

There are indications in Law's Empire that, notwithstanding his semantic sting argument, Dworkin now wants to claim a conceptual connection between law and morality, a connection that would necessarily connect the two in our community. As Soper points out,

... after condemning all such theories, [semantic ones] 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. [Law's Empire p. 53] To be sure, Dworkin does not call this a "semantic rule", he calls it an "abstract account" or concept of law. But these are semantic quibbles (at least as annoying as semantic stings) ... Even more troubling, Dworkin does not defend his abstract concept, he simply asserts it.90

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89. Supra, note 44, at 22.
90. Supra, note 3, at 1170.
The only way Dworkin could defend his “abstract concept” is to interpret linguistic practice. And he might succeed to some extent. The barrister example does not exhaustively define “law”; it only shows that the concept of law includes at least Hart’s rule of recognition.

It may be true that the judge who is deciding a hard case uses the term “law” to mean the morally best justification of the settled law, given that the rule of recognition holds. Thus Dworkin might be able to mount a linguistic argument that, in our community of judges, “law” means the sources of law pointed to by the rule of recognition plus the morally best justification of what those sources point to.

Positivists would probably not object to this definition of “law”; it leaves the rule of recognition intact. And it also brings into the definition of "law" the way judges live Dworkin’s theory. It seems a suitable compromise.

But Dworkin does not want this compromise. He says, as indicated in the quotation from Soper, that “law” means justified, coercive force plain and simple. If the rule of recognition is not justified, it is not the law.

It is important to notice that when Dworkin says that we use “law” to indicate when collective force is justified, he is using the term “justified” in a stronger sense than before. I have assumed all along that the justification or fit required in the first dimension of Dworkin’s theory is not a moral justification, but simply an explanation that fits the law and shows its point, no matter how immoral, from an objective point of view, that point may be. Indeed the terms “fit” and “point” which Dworkin uses extensively do not seem to admit of a “moral” interpretation. But “justification” does and there are some critics, e.g., Lyons,91 who do interpret (and have all along interpreted) Dworkin as requiring moral justification in the first dimension.

If Dworkin is serious about “law” meaning morally justified coercive force, then Lyons’ interpretation is confirmed and Dworkin’s theory must be seen as different from the way I have described it in this paper. On Lyons’ interpretation, a judge in dimension one could not propose any theory that did not have some moral merit. If the law of the regime he was in was wicked, and he thought it to be so wicked that no theory that fitted it could morally justify it, then there would be no law. The judge could ignore even the most explicit statutory requirements and strike out on his own.

Dworkin comes very close to saying this in the following quotation:

... the question whether a particular proposition counts as a justification of a group of political decisions—even a relatively poor justification—depends on whether it shows those decisions in a better light to suppose they were taken out of respect for that proposition than to suppose that they are taken haphazardly or for no particular reason at all. Principles we think wrong, even unacceptable, would meet that test.92

The interesting implication of this argument is that even if a theory fits all of the settled law of a community it still may not even count as a justification if that theory is so wicked that it would be morally better to see the law as a random group of decisions.

But Dworkin is only prepared to accept what his argument implies in hard cases, as shown by the italicized words (my italics) in the example he gives to illustrate his argument.

Imagine some hard case arising in Nazi Germany involving a Jew, but not a case arising directly under one ... of the discriminatorystatutes. Suppose an aryan suits a Jew in tort, for example, and the case is a hard one because lawyers are divided whether the pertinent standard is one of negligence or strict liability. The aryan plaintiff might argue that, since the best justification of German law as a whole includes the principle that Jews are less worthy than aryans, the correct conclusion of law, in the instant case, is that Jews are strictly liable to aryans even when one aryan would only be liable to another for negligence. A German judge, even if he accepts the point that he must decide hard cases by extending the best justification of the past, need not accept this particular argument, because he need not recognize the discriminatory principle as playing any part in that justification.93

Dworkin is not being consistent. If he believes that Hercules' theory of law must justify the rule of recognition (like any other law) for it to be binding, but that no justification of law can even count as a justification unless it is a moral justification, then, when there is no such justification, the whole system should lose its binding force including the rule of recognition. Yet the italicised words in the above passage suggest that wicked statutes remain law whether there is any moral justification for the system or not. As Hart points out,

All that survives of the theory 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.94

The issue is made even more confusing by the fact that even after the judge has transversed both dimensions of Dworkin's theory and has

92. Supra note 26, at 299.
93. Ibid., at 299.
found the best justification of the settled law, his obligation to apply that theory to the case at hand may be outweighed by other factors. Dworkin’s obligations, although they are “out there” obligations, are not absolute. Obligations are the flip side of rights. If a judge is obligated to decide one way then the party he is deciding in favour of has a right to that decision, and vice versa. Given that Dworkin’s rights can, in practice, be overridden by considerations of general utility (as discussed earlier) as long as it is not a marginal increase in general utility that overrides a right, then judges’ obligations can also, in practice, be overridden by utility considerations. Dworkin, in fact, admits this explicitly in Law’s Empire. He says that “... litigants ... are entitled, in principle, to have their acts and affairs judged in accordance with the best view of what the legal standards ... required at the time they acted, ... But other and more powerful aspects of political morality might outweigh this requirement ...”95 Elsewhere in the book Dworkin admits that “... the law is one thing and what judges should do about it is quite another.”96

This then is the final solution, in Dworkin’s theory, to the South Africa problem. Even if dimension two requires the application or extension of Apartheid, the judge can decide that the law is too immoral to be followed. This too, sounds like positivism.

In Law’s Empire Dworkin gives new food for thought to those trying to understood how his theory connects law and morality. He introduces the notion of “associative obligations”. There are, says Dworkin, obligations owed by one member of a group, such as a family, to all other members of the group, but the obligations only arise if the members of that group display equal concern and respect for one another. This does not mean that they must feel any sort of love for one another but rather that their behaviour, if constructively interpreted, could best be described by a theory of equal concern and respect. If it can then the associative obligations arise automatically.

Dworkin claims that if a political community exhibits the requisite concern and respect then it too generates associative obligations. Dworkin argues that only a political community that exhibits integrity in its politics would satisfy the equal concern and respect requirement and thus generate the obligations.

The important point, for our purposes, is that Dworkin “… assimilates political obligation to the general class of associative obligations.”97 Thus

95. Supra, note 2, at 219.
96. Ibid., at 112.
97. Ibid., at 216.
the citizen’s obligation to obey the law and the judge’s obligation to apply it are associative obligations. This means they only arise in a society that exhibits integrity in its politics.

Do these associative obligations fit in with Dworkin’s theory as I understand it? This is the same question, in essence, as the question of whether Dworkin’s first dimension requires moral justification. If “integrity” is understood as moral integrity, then the judge’s associative obligation to apply the law only arises if a theory of the law with moral merit can be constructed. If, on the other hand, “integrity” simply means coherence, then, as long as the law is not completely random, the judge will, on Dworkin’s scheme, have an obligation to apply it. This latter interpretation of “integrity” is the one I would choose.

But perhaps Dworkin intends neither of these interpretations. Perhaps he means to suggest that to have coherence is to have some amount of moral merit, or, as Fuller puts it, that all order is to some extent good order, that coherence constitutes the inner morality of law. Against this claim would have to be set Raz’s argument, discussed earlier, that to order a wicked system is to extend the wickedness. Elsewhere Raz makes the same point by saying that ordering a legal system is like sharpening a knife; the knife functions more efficiently when sharp but it is a factual question whether the increased efficiency is put to good or evil use. If Dworkin is referring to an inner morality of law, then whether or not Raz’s counter arguments are sound (I believe they are), at least the workings of Dworkin’s theory, as I have presented them, are not affected. The South African judge will have to apply Apartheid if a discriminatory theory of the settled law is the only one that passes the threshold level of coherence.

I confess I can take this line of argument no further. I believe dimension one justification does not contain a moral element but I recognize that there is evidence in Dworkin’s writing to the contrary. As Soper says, “... 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.” In any case, if Dworkin’s theory does entail a moral element in dimension one, then dimension one faces a challenge from the moral skeptic. My opinion on the outcome of that challenge is clear.

100. Supra, note 3, at 1166.
Conclusions

1. Summary

This essay is titled “A History and Evaluation of Dworkin’s Theory of Law”. I do not, by the choice of the term “history”, mean arrogantly to suggest that I have buried Dworkin’s theory and written its epitaph. As a description of the life judges lead when deciding cases, Dworkin’s theory has much to offer. What I do want to see buried, however, is Dworkin’s insistence, everytime he is confronted with a social rule, that it is not followed because accepted but rather that each individual chooses to follow it for his own reasons. This idea of individuals each marching to his or her own tune, but somehow choosing the same tune, is simply not a very good constructive interpretation of convergent behaviour, i.e., it is not a good constructive interpretation of the practice of practices. The fact that it even counts as such an interpretation underscores the misgivings I expressed earlier about constructive interpretation being “too easy”.

Nor does Dworkin really seem to believe in his own interpretation. He clings to doctrines such as consistency and local priority which can best be explained as social rules; he often says there must be convergent behaviour, e.g., as to the threshold amount of fit, when such an imperative seems incompatible with individuals marching to their own tune; and he admits that the rule of recognition “goes without saying” and that the case law will not show judges explaining why they follow it. And when confronted on this latter point Dworkin says that he is showing us the “hidden structure” of judicial reasoning. Well, it is hidden all right, from you, me, the judges and clear thinking.

But the clinching argument is that Dworkin’s notion of deep justification is logically incoherent; it leads to an infinite regress or vicious circle. Some things do have to be accepted as a matter of convention for a legal system to get off the ground, let alone flourish. The only other option is moral knowledge, but unfortunately, as I have argued, despite Dworkin’s charge that moral skepticism is incoherent, such skepticism is in fact the order of the day.

2. Picking up the pieces

If skepticism rules the day, not only in morality, but in science and common sense as well, then can a judge deciding a case just make the whole thing up? The facetious answer is that he certainly can if he does not value his job. But there is much truth in this answer. Judges are in most cases, obliged to give decisions that cohere with the current common-sense,
science and settled law. I say in most cases—when can a judge give a non-coherent decision? When he can get away with it—it’s as simple as that.

I have chosen the word “obliged” rather than “obligated” deliberately. Both Hart and Dworkin feel that what judges do is a matter of obligation; they reject the notion of being obliged as a description of judges’ behaviour. In this I think they are mistaken. What a judge’s or anybody else’s duty is is not something that can be known because the concept of truth operative in the moral realm is an “out there” concept. It is no small wonder that Dworkin can so easily reject Hart’s social rules concept of obligation; being under a social rule is not what we mean by being obliged. But it is, I will argue, part of what we mean by being obliged.

The classic jurisprudential illustration of “obliged” behaviour is Hart’s gun-man situation. The person with a gun to his head is obliged to hand over his wallet. Hart argues that law is not the gun-man situation writ large because judges accept the rules they follow and criticize those who deviate from the behaviour the rules prescribe. This is Hart’s famous internal aspect of rules and he thinks it turns obliged behaviour into obliged behaviour. Thus, thinks Hart, social rules do not oblige.

Hart is wrong on a couple of counts. First of all, if social rules involve criticism of deviant behaviour then they clearly oblige. There is no difference in principle between handing over your wallet for fear of being shot and handing it over for fear of being criticized. It is important to note that such criticism could (and does) oblige even the highest court in the land. Even if the Supreme Court is not cognizant of the criticism of lower court judges, it is certainly cognizant of public criticism.

Secondly, even the judge who follows a rule because he firmly accepts it and not because of any external criticism or possibility of censure, can be said to be obliged. Again I would argue that there is no difference in principle between the gun-man situation and that of the judge. The gun-man’s victim clearly accepts that he must hand the money over; certainly he does not like it but Hart never said anything about having to like the social rule you are following. I do not like having to wear a suit to go to the law office but I accept it and might well criticize someone who did not conform. Am I not obliged rather than obligated?

“Yes,” Hart might say, “but only because moral language is inapplicable to the social rule about wearing suits.” When it comes to the way judges decide cases, such language is used and this makes it obligating behaviour rather than obliging behaviour.

101. Supra, note 39, at 80-81.
But Dworkin's vegetarian example shows that there is no conceptual connection between social rules and obligations. And, in any case, it is not clear that the fact that we talk about judges being obligated proves anything. We all speak of the sun rising and setting—does that mean that it does?

The above arguments, I think, clear the way for the term "obliged" to be used to describe judges' behaviour. And certainly there is no sense of contradiction in saying "The judge was obliged to decide for the plaintiff"; the concept seems perfectly at home in the context of social rules, including the ones judges follow.

Thus, although Hart is correct in saying that a social rule theory describes what judges "must" do, there is no way he can justify saying that it describes what they are obligated to do. It may be, for all we know, but since that cannot be demonstrated all we are left with is the concept of being obliged. It is the only game in town.

If it is any consolation to those who want to talk about judges' duties and obligations, the notion of being obliged is also the only game in town in the scientific enterprise. It cannot be shown that there are any "out there" true theories which scientists are obligated to apply. Scientists today are obliged to make sure their theories cohere with the heliocentric theory of the solar system. But, as was pointed out earlier, this was not always the case. In the third century B.C. Aristarchus proposed this theory but the social, scientific rules of the day forbade its adoption. Scientists of the day were obliged by the prospect of at least ridicule and censure not to espouse Aristarchus' theory. Galileo was obliged by the prospect of being tortured to recant many views which would be accepted today. Aristarchus' and Galileo's views could only be accepted when the social rules of the scientific enterprise changed. Kuhn tells us that they changed in "irrational" ways, via persuasion and "bullying". Thus the history of science is one where all that succeeds is success. A scientist breaks a social rule at his peril. If he is lucky his theory survives. I claim that a judge is in the same position.