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# Taking Our Actual Constitution Seriously

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# TAKING OUR ACTUAL CONSTITUTION SERIOUSLY

Thomas D. Eisele\*

FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION. By *Ronald Dworkin*. Cambridge: Harvard University Press. 1996. Pp. viii, 404. \$35.

What is to be done? We can finally, after two hundred years, grow up and begin to take our actual Constitution seriously, as those many nations now hoping to imitate us have already done. We can accept that our Constitution commands, as a matter of fundamental law, that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of liberal equal concern that the great clauses, in their majestic abstraction, demand. We will then abandon the pointless search for mechanical or semantic constraints, and seek genuine constraints in the only place where they actually can be found: in good argument. We will accept that honest lawyers and judges and scholars will inevitably disagree, sometimes profoundly, about what equal concern requires, and about which rights are central and which only peripheral to liberty. [pp. 81-82]

— Ronald Dworkin<sup>1</sup>

## I. DWORKIN'S CHALLENGE

This estimable book is the latest book-length work published by Ronald Dworkin, whom many people, myself included, consider to be the most important Anglo-American legal philosopher of the past two decades. *Freedom's Law* does two things. First, it discusses "a variety of constitutional issues" (p. 1). In fact, Dworkin suggests that the book covers "almost all of the great constitutional issues of the last two decades, including abortion, affirmative action, pornography, race, homosexuality, euthanasia, and free speech" (p. 1). In addition to these specific issues, however, and the particular cases dealing with them, Dworkin also allows that "[t]he book as a whole has a larger and more general aim," which he identifies as "illustrat[ing] a particular way of reading and enforcing a political constitution, which I call the *moral* reading" (p. 2).

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In this review, by concentrating on the general aim of Dworkin's book, I hope to contribute to the discussion this book is sure to generate. What does the "moral reading" of our Constitution amount to, and what alternative do we have to endorsing such a reading? I ask these questions from what I would call a jurisprudential perspective. For, while I do teach Jurisprudence, I do not teach Constitutional Law, other than some constitutional law themes that find their way into my Property and Wills & Trusts courses. Accordingly, I am not well placed to review the details or the nuances of developments after *Roe v. Wade*,<sup>2</sup> or the progeny spawned by *New York Times Co. v. Sullivan*,<sup>3</sup> two cases that dominate Parts I and II, respectively, of the book. But this personal limitation leaves me room perhaps for a more considered review of Dworkin's main thrust in this book, which is directed toward making his view of the Constitution credible, or palatable, to his reader. Dworkin's theory of how to read the Constitution is, after all, central to his argument. And Dworkin would apparently support the idea of a review of his theory from a jurisprudential perspective, for he makes the following remark: "Scholars and lawyers disagree about constitutional theory not because some of them have read more cases than others, or read them more carefully, but because they disagree about the philosophical and jurisprudential issues that I emphasize" (p. 35).

In *Freedom's Law*, Dworkin collects seventeen of his recent articles, all published between 1987-1995 and almost all of which first appeared in *The New York Review of Books*. The collection groups itself around three foci. The first convergence of interests, comprising the six essays of Part I, considers matters associated with the constitutional right of privacy. These essays take up abortion rights, the right to practice homosexuality among adults, the right to determine the timing and circumstances of one's death, affirmative action as a constitutionally permissible remedy on behalf of minorities who have experienced constitutionally forbidden discrimination, and certain other matters subsumed under the heading, "Life, Death, and Race." The second center of interest — found in Part II, which is titled "Speech, Conscience, and Sex" — consists of five essays on topics within the First Amendment, including matters involving freedom of speech and religion, hate speech, pornography, and academic freedom. Dworkin's focus of attention in Part III is the role of the judiciary in our constitutional polity and, in particular, the importance of the Senate confirmation process in vetting and constraining the appointment of judges to the U.S. Supreme Court. This Part, "Judges," contains five essays that deal with the

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2. 410 U.S. 113 (1973).

3. 376 U.S. 254 (1964).

Robert Bork and Clarence Thomas hearings, and a final essay that affords us a personal and rather moving remembrance of Dworkin's clerkship with Judge Learned Hand.

To this collection of articles, Dworkin has added an Introduction, "The Moral Reading and the Majoritarian Premise," which does the main philosophical work in this book. Dworkin's introductory remarks lay out in considerable detail his idea that the U.S. Supreme Court, inferior courts faced with constitutional issues, and plain lawyers and citizens of the realm should all follow the same approach to reading and understanding the U.S. Constitution. Dworkin calls this approach a "moral reading" of that document. Everything he says in the book both flows from and is meant to explicate his view that this is the common view of the U.S. Constitution, and the correct one: "[T]he moral reading is not revolutionary in practice. Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments. . . . [T]hey have no real option but to do so" (p. 3). But why should it require an extended argument if, as Dworkin claims, this approach to the U.S. Constitution is in fact the approach to the Constitution that is commonly taken by U.S. judges and justices, as well as by American lawyers and lay people? Dworkin claims that while we do in fact engage in a moral reading of the Constitution, we still deny that this is what we are doing, and we continue to doubt that such a method of reading is a legitimate approach to our founding document.

In the first step of his argument, he tries to get us — the practitioners of this common approach — to acknowledge our use of the moral reading openly. He wants us to admit that this *is* the approach we take to reading and understanding the Constitution. Such candor, he believes, would do wonders for us. It would, for example, help to improve our understanding of our own fundamental law, which Dworkin believes we do not fully appreciate. Given our current understanding of how we read our Constitution, under which judicial review is legitimate only in so far as judges divorce themselves officially from any consideration of our shared moral convictions, Dworkin's proposed "moral reading" stands in disrepute. In part, Dworkin argues that this disrepute results from our failure to see that our fundamental law is itself based upon principles of political morality. This evident blindness on our part has tragic consequences:

[T]he American ideal of government not only under law but under principle as well is the most important contribution our history has given to political theory. Other nations and cultures realize this, and the American ideal has increasingly and self-consciously been adopted and imitated elsewhere. But we cannot acknowledge our



own contribution, or take the pride in it, or care of it, that we should.

[p. 6]

According to Dworkin, we interpret the Constitution in a state of dissonance, exhibiting “a striking mismatch” between what we do and what we say we do. Reading the Constitution on its moral level becomes, then, a kind of guilty pleasure, something we can indulge only surreptitiously and without any intellectually respectable justification:

[I]t would indeed be revolutionary for a judge openly to recognize the moral reading, or to admit that it is his or her strategy of constitutional interpretation, and even scholars and judges who come close to recognizing it shrink back, and try to find other, usually metaphorical, descriptions of their own practice. There is therefore a striking mismatch between the role the moral reading actually plays in American constitutional law and its reputation. It has inspired all the greatest constitutional decisions of the Supreme Court, and also some of the worst. But it is almost never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are incomprehensible on any other understanding of their responsibilities. [p. 3]

Dworkin urges us to make a candid admission of how we relate ourselves to the Constitution, so that we might begin to appreciate the extent to which we are bound by a gravely moral document, which devolves upon us a moral trust. We might then resolve to protect the constitutional treasure that is ours. As Dworkin says in the quotation that I have placed as the motto to this review,<sup>4</sup> to understand our “actual Constitution” would be to begin to take it as seriously as do “those many nations now hoping to imitate us” (p. 81). Those other nations realize more fully than we, apparently, the moral and political treasure that we have.

To understand what we possess requires, first of all, that we acknowledge the extent to which our ordinary, normal constitutional practice is a matter of moral reading of the constitutional text and associated history. It also requires, however, that we defend our constitutional practices — not all of them, but the bulk of them; those that are rationally defensible — against criticisms from the critical Left and the radical Right. In this respect, Dworkin sees his “moral reading” as a moderate position centered within the great tradition of Western liberalism, and he eagerly defends it:

This book does indeed offer a liberal view of the American Constitution. It provides arguments of liberal principle and claims that these provide the best interpretations of the constitutional tradition we have inherited and whose trustees we now are. I believe, and try to show, that liberal opinion best fits our constitutional structure, which was, after all, first constructed in the bright morning of liberal

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4. See *supra* text accompanying note 1.

thought. My arguments can certainly be resisted. But I hope they will be resisted in the right way: by pointing out their fallacies or by deploying different principles — more conservative or more radical ones — and showing why these different principles are better because grounded in a superior morality, or are more practicable, or in some other way wiser or fairer. It is too late for the old, cowardly, story about judges not being responsible for making arguments like these, or competent to do so, or that it is undemocratic for them to try, or that their job is to enforce the law, not speculate about morality. That old story is philosophy too, but it is bad philosophy. It appeals to concepts — of law and democracy — that it does not begin to understand. [pp. 37-38]

I am not as sure as Dworkin that I know whose philosophy is bad here. If, indeed, it is as obvious as Dworkin thinks it is that our Constitution is a charter of abstract moral principles, then probably we deserve the epithet “cowardly,” for surely Dworkin is right to say that the moral aspect of the U.S. Constitution and its judicial construction gets relatively short shrift in our traditional story of constitutionalism and the institution of judicial review. But perhaps it is not quite so obvious that our Constitution is a congeries of abstract moral principles. If this latter possibility proves in fact to be the case, then our reluctance to make judges moral savants, or “philosopher-kings” (p. 11), is both intelligible and justifiable. Our reticence may then be due not to cowardice but to prudence, and to an appreciation of what Alexander Bickel called “the passive virtues.”<sup>5</sup> More about this later, when I take up directly Dworkin’s challenge.<sup>6</sup>

While emphasizing that his proposed “moral reading” of the Constitution reflects our normal approach to the document, Dworkin claims that we fail to appreciate the value of such a reading to our republican democracy. Dworkin argues that his approach is fully consistent with democratic and republican principles of government, when those principles are properly interpreted and understood. “When we understand democracy better, we see that the moral reading of a political constitution is not antidemocratic but, on the contrary, is practically indispensable to democracy” (p. 7). So, according to Dworkin, the American institution of judicial review is in fact an ally of democratic and republican principles, not their enemy.

We are not apt to realize this because we tend to focus on the inherent uncertainty in deciding matters of political morality.

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5. See Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (discussing the devices available to the Supreme Court to avoid questions of constitutional law not ripe for decision). For a reply to Bickel’s characterization of these judicial devices, see Gerald Gunther, *The Subtle Vices of the “Passive Virtues,”* 64 COLUM. L. REV. 1 (1964).

6. See *infra* Parts III-V.

Dworkin is quite open about the fact that his method of reading the Constitution “brings political morality into the heart of constitutional law” (p. 2). But that process affords no guarantee that the judges will decide such matters in a manner that we would consider fair. If the judges get to decide what the Constitution means, and if they are authorized to do so at least in part by consulting their own understanding of the political morality instanced in our Constitution, what protection does this scheme of governmental arrangement afford us, the subject citizens, from dictatorship by a judicial elite? “[T]he moral reading of the Constitution is therefore said by its critics to give judges absolute power to impose their own moral convictions on the public” (p. 2).

Dworkin thinks this charge wrong, in part because it does not appreciate how judges are constrained by constitutional text, history, and practice.<sup>7</sup> This is the first part of Dworkin’s response to this traditional objection to judicial review, and in subsequent sections of this review I shall say something more about these constraints. But Dworkin has, as well, a second response to this traditional objection to judicial review: he questions the assumption that judicial review contravenes our commitment to participatory democracy even if it is true that judicial review does limit majority rule. His argument goes something like this. He says that our leeriness toward judicial review stems from a defective understanding of “democracy’s fundamental *value* or *point*” (p. 15). To remedy this defect, Dworkin contrasts two differing accounts of democracy’s value or point: an account based upon what he calls “the majoritarian premise” (p. 15), which Dworkin disfavors, and a competing account based upon a “constitutional conception of democracy” (p. 17), which he endorses. The majoritarian premise assumes “that the laws that the complex democratic process enacts and the policies that it pursues should be those, in the end, that the majority of citizens would approve” if the majority “had adequate information and enough time for reflection” (p. 16). Dworkin rejects this premise in favor of a different one. Instead, he “takes the defining aim of democracy to be . . . that collective decisions [must] be made by political institutions whose structure, composition, and practices

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7. An important part of Dworkin’s response to his critics is that we have several checks in place constraining the judiciary, at least one of which is political rather than intellectual.

The constitutional process of nomination and confirmation is an important part of the system of checks through which the actual Constitution disciplines the striking judicial power it declares. The main engines of discipline are intellectual rather than political, however, and the academic branch of the profession has a responsibility to protect that intellectual discipline, which is now threatened from several directions.

P. 82. The entire third part of Dworkin’s book is devoted to a consideration of the extent to which Senate confirmation of presidential appointees to the bench is a neglected, or wasted, opportunity to improve our constitutional polity. This is not a part of the book that I can treat in depth.

treat all members of the community, as individuals, with equal concern and respect” (p. 17). Hence, for Dworkin, it is not any notion of majority rule, but rather an abiding concern for the equal status of citizens by the political instrumentalities constituting the state which serves as the defining characteristic of his “constitutional conception of democracy.” Dworkin concludes that our disaffection with judicial review can only be explained by the strong grip that the “majoritarian” conception of democracy has had over our imaginations (p. 18).

Dworkin follows this discussion by distinguishing between what he calls “statistical” and “communal” collective action, claiming that only the latter is valuable to a correct conception of constitutional democracy. He gives extended consideration to the compatibility of constitutional democracy with the values of liberty or freedom, equality, and community (pp. 19-31). He concludes with the following suggestion:

I put the suggestion that judicial review may provide a superior kind of republican deliberation about some issues tentatively, as a possibility, because I do not believe that we have enough information for much confidence either way. I emphasize the possibility, nevertheless, because the communitarian argument simply ignores it, and assumes, with no pertinent evidence, that the only or most beneficial kind of “participation” in politics is the kind that looks toward elections of representatives who will then enact legislation. The character of recent American elections, and of contemporary national and local legislative debate and deliberation, hardly makes that assumption self-evident. . . .

. . . The argument of this [book] aims only to show why the ideal of community does not support the majoritarian premise, or undermine the moral reading [of the Constitution], any more effectively than do liberty and equality, the two senior members of the revolutionary brigade. We must set the majoritarian premise aside, and with it the majoritarian conception of democracy. It is not a defensible conception of what true democracy is, and it is not America’s conception. [p. 31]

To sum up Dworkin’s motivation, he thinks that his proposed reading of the U.S. Constitution will benefit us in two respects. First, it will help us appreciate that the “moral reading” of the U.S. Constitution is the norm for us and that such a reading deserves to be our shared approach simply because it is the most natural way to read that document and the most effective way to realize its moral promise. Second, his way of reading the U.S. Constitution in fact plays an important role in the deliberative democratic process that makes us, and keeps us, who we are.

## II. MORE DETAILS ABOUT THE "MORAL READING" OF THE U.S. CONSTITUTION

In the quotation serving as the motto to this review,<sup>8</sup> Dworkin invites us to "grow up" and begin taking seriously our actual Constitution. Dworkin proposes to take seriously the Constitution we actually possess by having us read it as a charter of moral principle. If we do this, Dworkin believes that our understanding and our appreciation of the U.S. Constitution will increase accordingly. Let us consider his claim in more detail.

According to Dworkin, a moral reading of the Constitution should lead us to see that the Constitution "commands" judges to do their collective "best" to realize the political ideal of "liberal equal concern" that Dworkin finds the abstract clauses of the Constitution to anticipate or "demand" (p. 82). Judges must accomplish this task the only way they legitimately can, which to Dworkin means interpreting the Constitution on the basis of the moral principles it expresses or implies. The only true constraint judges have in this regard, Dworkin says, is the quality of their arguments on behalf of their principled constitutional interpretations. If we face this difficult fact, Dworkin believes that "[w]e will then abandon the pointless search for mechanical or semantic constraints, and seek genuine constraints in the only place where they can actually be found: in good argument" (p. 82).

For Dworkin, a "good argument" is a constitutional interpretation consistent with principles that are expressed in or implied by the constitutional text, leavened by our experience as it is established in our constitutional history. Interpretations are checked by the constraint that they must integrate or cohere with the bulk of our already accepted constitutional doctrine.

I emphasize these constraints of history and integrity, because they show how exaggerated is the common complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of us. Macauley [sic] was wrong when he said that the American Constitution is all sail and no anchor, and so are the other critics who say that the moral reading turns judges into philosopher-kings. Our constitution is law, and like all law it is anchored in history, practice, and integrity. Most cases at law — even most constitutional cases — are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction. Still, we must not exaggerate the drag of that anchor. Very different, even contrary, conceptions of a constitutional principle — of what treating men and women as equals really means, for example — will often fit language, precedent, and practice well enough to pass these tests, and thoughtful judges must then decide on

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8. See *supra* text accompanying note 1.

their own which conception does most credit to the nation. So though the familiar complaint that the moral reading gives judges unlimited power is hyperbolic, it contains enough truth to alarm those who believe that such judicial power is inconsistent with a republican form of government. The constitutional sail is a broad one, and many people do fear that it is too big for a democratic boat. [pp. 11-12, footnote omitted]

The constitutional text is our sail, but our constitutional practice provides us with an anchoring drag. This is the challenge, then, that attempting to live freely within a constitutional democracy places on its inhabitants, both its citizens and its officials: we are required to negotiate a delicate balance between the lift of our constitutional sail and the accompanying drag of our constitutional anchor. We must learn to accept the burden of this challenge if we are to earn the ensuing blessings of liberty. Such a delicate balance is an ideal of constitutional culture, and it is engendered by the personal freedom that a republican democracy promises — freedom that it produces, and that in turn sustains this very form of life and law, i.e., a republican democracy. The form of law and of life that we know as constitutional democracy, then, is what Dworkin calls “freedom’s law.” It is law produced by freedom and, reciprocally, such law sustains the freedom which produced it.

This is not quite the way Dworkin puts his position, but I believe that my reconstruction is faithful to his vision. Clearly, in his references to our “constitutional sail” and the “democratic boat” in which we ply these dangerous seas, Dworkin is making a metaphorical claim for the heroic American voyage or adventure. If the seas of constitutionalism remain uncharted, or at least incompletely explored, Dworkin continues to believe that the American people are well placed — as they also are invested with the duty — to undertake such explorations. It is a part of the responsibility that our great charter devolves upon us, and its fulfillment requires courage. This is why Dworkin so often speaks in terms of the virtue of “courage” — which he believes the moral reading of the Constitution requires us to display — and the vice of “cowardice” — which he believes we have shown in failing to defend directly and candidly this most natural way of reading our founding document. Once, Dworkin even terms our behavior “shameful” (p. 6).

A constitutional democracy also demands courage of us in another respect, for it requires us to face the inevitability of conflicting convictions. Dworkin claims that “[v]ery different, even contrary, conceptions of a constitutional principle — of what treating men and women as equals really means, for example — will often fit language, precedent, and practice well enough to pass these tests, and thoughtful judges must then decide on their own

which conception does most credit to the nation". (p. 11). But Dworkin also admits the following:

The moral reading therefore brings political morality into the heart of constitutional law. But political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative. In the American system judges — ultimately the justices of the Supreme Court — now have that authority, and the moral reading of the Constitution is therefore said by its critics to give judges absolute power to impose their own moral convictions on the public. [p. 2; footnote omitted]

This dissonance between what our constitutional culture invites — the investigation of our shared political morality and its underlying principles by the judges appointed for this task — and what that same constitutional culture promises — no particular closure reflecting the majority's preferences or values — can be both frustrating and disillusioning. Does this scheme of government mean that unelected public officials dictate morality or politics to us? It is at such a juncture that Dworkin suggests the need for perseverance in the face of such inevitable conflict. So long as we all engage in this joint endeavor rationally and in good faith, and so long as our representatives, the judges, carry out their office in a principled way, we can ask no more of ourselves or of our fellow citizens or of our form of government.

The moral reading asks [judges] to find the best conception of constitutional moral principles — the best understanding of what equal moral status for men and women really requires, for example — that fits the broad story of America's historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record. Of course judges can abuse their power — they can pretend to observe the important restraint of integrity while really ignoring it. But generals and presidents and priests can abuse their powers, too. The moral reading is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be. [p. 11]

Legitimate, respectable, justified disagreements are certain to occur when judges engage in this serious business of trying to determine, at any given time in the life of our nation, "what equal concern requires" or "which rights are central and which only peripheral to liberty" (p. 82). But such disagreements should not discourage us, for they are bound to happen, given the nature of our constitutional system; in fact, Dworkin suggests, our political system is based upon a recognition that such conflicts are beneficial to our eventual growth and maturity, if we have the wisdom to endure their creation and their overcoming.

Dworkin does not insist, however, that our institution of judicial review is the only form of judicial decisionmaking fit for a democ-

racy. Nor does he suggest that our institution of judicial review is the best one that any people could invent or adopt. He says, rather, that this form of judicial review happens to be consistent with the idea — and the ideal — of constitutional democracy.

I do not mean that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. Many institutional arrangements are compatible with the moral reading, including some that do not give judges the power they have in the American structure. But none of these varied arrangements is in principle more democratic than others. Democracy does not insist on judges having the last word, but it [also] does not insist that they must not have it. [p. 7]

Speaking as Dworkin does, and making the sorts of claims that Dworkin does, may seem to be an idealistic way to behave toward our Constitution and the culture it has produced. Surely, when it comes to matters of primary importance to the political life of this nation, Dworkin can seem to be taking an optimistic view of our own situation and of our personal capacities for principled argument and respectful disagreement. Nonetheless, Dworkin speaks this way, and he does not do so cavalierly. Instead, this is one of the ways Dworkin takes our Constitution seriously, paying it and its obligations the respect and deference to which he believes they are entitled. Dworkin fully realizes that such idealism and optimism are out of step with our contemporary penchant for cynicism and deconstruction; as I read him, he would admit to the charge that he is being optimistic and even idealistic. He would then turn such charges against his critics:

It is in the nature of legal interpretation — not just but particularly constitutional interpretation — to aim at happy endings. There is no alternative, except aiming at unhappy ones, because once the pure form of originalism is rejected there is no such thing as neutral accuracy. Telling it how it is means, up to a point, telling it how it should be. What is that point? The American constitutional novel includes, after all, the Supreme Court's *Dred Scott* decision, which treated slaves as a kind of property, and the Court's twentieth-century "rights of property" decisions, which nearly swamped Roosevelt's New Deal. How happy an overall view of that story is actually on offer [in this book]? Many chapters raise that question, and it cannot be answered except through detailed interpretive arguments like those they provide. But political and intellectual responsibility, as well as cheerfulness, argue for optimism. The Constitution is America's moral sail, and we must hold to the courage of the conviction that fills it, the conviction that we can all be equal citizens of a moral republic. That is a noble faith, and only optimism can redeem it. [p. 38; footnote omitted]

In a constitutional democracy dedicated to liberty and equality, yet dependent in large part upon the good-faith efforts by its elected



and appointed officials for achieving anything approximating these ideals, there is no alternative but to do our best and to take our chances.

This is a heartening vision of our Constitution and the culture it is meant to sustain, and there is much in this vision to endorse. Likewise, Dworkin's book as a whole is what we have come to expect of him: thoroughly competent and rigorously professional. The prose is itself rarely inspiring, but its pitch usually is deft and difficult to fault. In the following remarks, I shall nonetheless try to point out some faults that I find; but I do so within the context of admiring the accomplishment this book displays. In particular, Dworkin's optimism is not only refreshing and timely, but also suggests that the attitude we entertain and sustain toward our constitutional endeavors may be a factor in any constructive purchase such endeavors afford us in this world. As Dworkin puts it, "Telling it how it is means, up to a point, telling it how it should be" (p. 38). This is so, I suppose, because the world does respond, to an extent and "up to a point," to our conceptions of the world, i.e., to the ideas and the concepts and the ideals we apply to it. And this in turn suggests that ideals and idealism have a role to play in the building, or the reconstruction, of our world.<sup>9</sup>

### III. OUR "ACTUAL CONSTITUTION": DOES IT EXPRESS OR IMPLY MORAL PRINCIPLES?

Dworkin's theory of the American Constitution takes that document to speak in a moral voice or to operate in a moral mode. To test his proposed theory, I shall turn to the constitutional text itself and try to see whether his theory fits the text. This procedure emulates some sage advice from Stanley Cavell, who recommends to us that "the way to overcome theory correctly, philosophically, is to let the object or the work of your interest teach you how to consider it."<sup>10</sup> How should we consider the Constitution?

We can begin by looking more closely at some of Dworkin's specific claims on behalf of his theory. His "Introduction" begins with the following statement:

Most contemporary constitutions declare individual rights against the government in very broad and abstract language, like the First Amendment of the United States Constitution, which provides that Congress shall make no law abridging "the freedom of speech." The

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9. For extended treatment of the theme that ideals are vital elements in what we are able to make out of the materials of our world, see CHARLES ALTIERI, *CANONS AND CONSEQUENCES: REFLECTIONS ON THE ETHICAL FORCE OF IMAGINATIVE IDEALS* (1990); JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* (1994).

10. STANLEY CAVELL, *PURSUIITS OF HAPPINESS: THE HOLLYWOOD COMEDY OF REMARRIAGE* 10 (1981).

moral reading proposes that we all — judges, lawyers, citizens — interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a moral principle — that it is wrong for government to censor or control what individual citizens say or publish — and incorporates it into American law. So when some novel or controversial constitutional issue arises — about whether, for instance, the First Amendment permits laws against pornography — people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography. [p. 2]

In this compact statement of his thesis, Dworkin makes a number of important observations. Consider, for example, his first claim: that moral principles are to be found in the Constitution's abstract language.

This should be a claim that we can test, but it turns out, on critical inspection, to be exceedingly difficult to do so. First of all, how exactly are we meant to take this claim? Is it that clauses in the Constitution flat out state moral principles? If this were the case, I would expect to see moral principles explicit in the text, but I do not see them there. Or is it Dworkin's claim that the language of the Constitution simply implies or invokes moral principles, by means of the abstract language of various clauses in the Constitution? If this were so, the claim would seem to be that the constitutional language itself, being abstract yet not explicitly moral, has to be made concrete by being given content in some way, and Dworkin proposes to give it content by filling in the clauses with moral principles.

The initial question, then, is this: Does the Constitution express these moral principles explicitly, or are they implied?<sup>11</sup> It may seem obvious that Dworkin's claim is that these moral principles are only implicit, because he says that his method of reading the Constitution recommends that "we all . . . interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice" (p. 2). So Dworkin's claim

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11. The question, "Explicit or implicit?" is not the same as "Enumerated or unenumerated?" As to this latter question, at the beginning of chapter 3, Dworkin says that he thinks the "distinction between enumerated and unenumerated constitutional rights . . . is bogus." P. 72. Given that Dworkin is famous for having argued that our rights derive from principles, I suspect that his rejection of this distinction would cover its application to principles as well as to rights. In passing, I should note that I find bemusing Dworkin's rejection of the distinction between enumerated and unenumerated constitutional rights. For someone who emphasizes that his "moral reading" of the Constitution is the "most natural" way to read that document, and who puts great store in finding the "best fit" with the constitutional text for one's interpretation of it, how does Dworkin get around the fact that the Ninth Amendment explicitly makes the distinction he rejects?

seems to be that the Constitution only implies these principles and does not state them explicitly. Yet there are other passages where Dworkin seems to make a stronger claim. Consider, for example, the following:

According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power. [p. 7]

On its most natural reading, then, the Bill of Rights sets out a network of principles, some extremely concrete, others more abstract, and some of near limitless abstraction. Taken together, these principles define a political ideal: they construct the constitutional skeleton of a society of citizens both equal and free. [p. 73]

[T]he revisionists . . . argue that the natural interpretation I described — that the Constitution guarantees the rights required by the best conceptions of the political ideals of equal concern and basic liberty — is not in fact the most accurate interpretation. They say that that natural interpretation neglects some crucial semantic fact, some property of language or communication or linguistic interpretation which, once we grasp it, shows us that the abstract language of the great clauses does not mean what it seems to mean. [p. 75]

The most natural interpretation of the Bill of Rights seems, as I said, to give judges great and frightening power. It is understandable that constitutional lawyers and teachers should strive to tame the Bill of Rights, to read it in a less frightening way, to change it from a systematic abstract conception of justice to a list of discrete clauses related to one another through pedigree rather than principle. [p. 81]

These passages make the stronger claim that moral principles are either referred to in the constitutional document or are explicitly “set out” there. Mixed with these claims of explicitness, however, are other formulations speaking of the most natural way to “interpret” the Constitution. Such formulations imply that the moral principles are to be found in the text only through a process of interpretation, not of reading. But reading a text is not the same as interpreting it — is it? Thus, from the beginning, I am confused as to Dworkin's claim about the exact nature of his procedure; that is, his claim about exactly how he finds in the Constitution the moral principles which he claims to find there.

Whether the question is put in terms of Dworkin's claim for his procedure — namely, is it a way of reading, or of interpreting, the Constitution? — or in terms of Dworkin's claim about the constitutional text — are its so-called moral principles explicit or implicit? — the concern I am expressing is meant to press Dworkin for further clarification. Perhaps we can seek it by looking again at his own words.

The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of

Rights — the first several amendments to the document — and the further amendments added after the Civil War. (I shall sometimes use the phrase “Bill of Rights,” inaccurately, to refer to all the provisions of the Constitution that establish individual rights, including the Fourteenth Amendment’s protection of citizens’ privileges and immunities and its guarantee of due process and equal protection of the laws.) Many of these clauses are drafted in exceedingly abstract moral language. The First Amendment refers to the “right” of free speech, for example, the Fifth Amendment to the process that is “due” to citizens, and the Fourteenth to protection that is “equal.” According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power. [p. 7]

Here, at least, Dworkin seems to be reasonably clear: many of the Constitution’s clauses “are drafted in exceedingly abstract moral language” (p. 7). This is a claim that the moral language is explicit in the document itself. As evidence for his claim, Dworkin simply recites for us a few select words.

Is it true that these uses of “right” and “due” and “equal” constitute an appeal or reference to abstract moral principles? I do not see that they must, or that they do. While it is true that such terms *can* be used in moral discourse, and often are, it is equally true that such terms are used in ordinary discourse without any particular or special moral content. For example: “Be right with you”; “You are right as rain.” They are used in political or legal discourse as well — for example: “Proceed with all due speed”; “The following sum is now due and payable.” These same words are even used in scientific or mathematical contexts — for example: “These two equations are not equal.” The same word in our language usually has a multiplicity of uses — and, thus, of meanings — and it is a mistake to assume that the meaning of any instance of a word can be known or identified simply from the “look” of the word. A century ago, Mr. Justice Holmes reminded us, specifically, that it was fallacious to assume that the use of the same word in morals and in the law meant that the two uses of that word were synonymous.

The law is full of phraseology drawn from morals, and by the mere force of language [this phraseology] continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it

is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.<sup>12</sup>

It seems to me that Dworkin passes much too quickly over this possible objection, and simply assumes without argument that the uses of "right" and "due" and "equal" in three Amendments of the Constitution are instances of those words in their moral employment.

By expressing the precaution I have mentioned above, I do not mean to be trivializing Dworkin's point; instead, I am simply trying to remind us that words taken in isolation do not have a specific or identifiable connotation. They have *connotations* — and these meanings or senses are what any good dictionary collects and collates. But a dictionary does not tell us *which* use of a word in a given context is meant or intended; it merely displays for us the possibilities of meaning that our language makes available to us. It is the use of a word in a given context that, typically, fixes or determines its actual meaning in that context. And so we must have some definite sense of a word's use *and* of the context in which it is being employed if we are to learn the word's meaning and, in particular, if we are to understand the associational force — be it moral, political, religious, economic, mathematical, legal, or whatever — the subject word has.<sup>13</sup>

Later, I want to take up directly the question of what kind of document the Constitution is and, thus, the question of what kind of context it affords the words used within it. But, for the moment, I wish to continue to explore the initial question I asked above:

12. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897). By citing Holmes to this effect, I do not wish to be taken as endorsing his apparent belief that the use of "right" in a legal context can be divorced from the use of "right" in a moral context. I would argue that the mere fact that we can *distinguish* separate uses of the same word does not mean that those two uses are unrelated. It is quite possible, for example, that the legal force that an appeal to "right" may have in the context of the law is dependent upon or derived from its force and use in discussions of morality. All the same, Holmes is correct in so far as he argues that having such a connection, or a relation of derivation or dependency, does not mean that the two uses are synonymous.

13. Dworkin might grant all of this, but then go on to argue that he *has* given us the context in which "right" and "due" and "equal" appear, the context in which they are used or employed — namely, he has given us their use *in* the First, Fifth, and Fourteenth Amendments to the U.S. Constitution. This response is adequate only if we are sure that those Amendments are themselves moral statements; or, it is an adequate response only if the Constitution itself is a moral document, speaking in a moral voice. Dworkin must be making a claim, then, that he knows how to take the U.S. Constitution. This claim is not only that he knows how to read it — which claim amounts to not much more than his argument that taking these constitutional clauses "most naturally" means to read or construe them as moral injunctions — but also that he understands the Constitution in so far as it operates as the context in which these abstract words ("right," "due," "equal") are used. I shall consider this claim more directly in the succeeding section of this review. See *infra* Part IV.

Does the Constitution put forth explicit moral principles? If so, how so? To accept Dworkin's claim that moral principles are to be found in the Constitution requires one to read the Constitution as a moral document, or to hear it speaking in a voice something like that of a moral philosopher. Do we read or hear the Constitution this way? I do not.

We are on treacherous ground here, and I must admit that I am unsure how to try to adjudicate this disagreement between Dworkin's reading and my own way of taking the Constitution. I suspect that the argument may come down to a matter of testing and comparing our linguistic intuitions, or our responses to language, or, even better, our responses to the use of language in this specific text. This is a matter that is both delicate and uncomfortable.<sup>14</sup> I can propose, however, one way to test our experience of the Constitution.

To see whether or not the Constitution speaks in a moral voice, we can compare the constitutional text with some representative philosophers who speak in moral terms. Below are sample quotations from two of the most respected moral philosophers of the time, Immanuel Kant and Jeremy Bentham, both of whom were writing or speaking during the 1780s, which is exactly the time of the creation of the Constitution — a fact to which Dworkin appeals in justifying the liberal cast of his constitutional reading.<sup>15</sup>

Kant's statement of moral principle comes in the form of three versions of his "Categorical Imperative":

*'Act only on that maxim through which you can at the same time will that it should become a universal law.'*

....

*... 'Act as if the maxim of your action were to become through your will a universal law of nature.'*

....

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14. Perhaps this matter is both delicate and uncomfortable because the possibility of community and of rationality seems to hang in the balance. Nothing shows this better than Stanley Cavell's work on the later philosophy of Wittgenstein:

The philosophical appeal to what we say, and the search for our criteria on the basis of which we say what we say, are claims to community. And the claim to community is always a search for the basis upon which it can [be] or has been established. I have nothing more to go on than my conviction, my sense that I make sense. It may prove to be the case that I am wrong, that my conviction isolates me, from all others, from myself. That will not be the same as a discovery that I am dogmatic or egomaniacal. The wish and search for community are the wish and search for reason.

STANLEY CAVELL, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY* 20 (1979).

15. As Dworkin puts it: "I believe, and try to show, that liberal opinion best fits our constitutional structure, which was, after all, first constructed in the bright morning of liberal thought." P. 38.

. . . Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.<sup>16</sup>

Bentham's statement of moral principle comes in the form of his "principle of utility":

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government.<sup>17</sup>

When I read the U.S. Constitution, I do not find any language remotely resembling these kinds of formulations. To test my assertion, try this as an experiment in reading: Look at Articles I-IV, and see whether or not the language of any of these articles strikes you as setting out moral principles, or anything akin to the formulations expressed above by Kant and Bentham. I personally do not see any similarity. Here are some samples of their language:

#### Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.<sup>18</sup>

#### Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows . . . .<sup>19</sup>

#### Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .<sup>20</sup>

#### Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>21</sup>

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16. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 88, 89, 96 (H.J. Paton trans., Harper Torchbooks 1964) (1785) (footnotes omitted).

17. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 11-12 (J.H. Burns & H.L.A. Hart eds., 1970) (1789) (footnote omitted).

18. U.S. CONST. art. I § 1.

19. U.S. CONST. art. II, § 1.

20. U.S. CONST. art. III, § 1.

21. U.S. CONST. art. IV, § 1.

The Constitution speaks mainly in imperative terms, dictating that certain things “shall” be done by a particular branch of the federal government. Occasionally, however, the document uses a permissive tone. But, in any event, the matters dictated or permitted by the Constitution have little or nothing to do with any moral test or concern, and everything to do with establishing a federal government and a set of relations between that federal government and the states that constitute it.

As a second test of Dworkin’s claim about how “most naturally” to read the U.S. Constitution, one might then look at the Bill of Rights — by which I mean, unlike Dworkin, only the first ten amendments to the original document. Here again we find imperative language, but in this case the language is specifying how a relation between an individual and the government should be established or maintained. In this case, these amendments do strike me as coming closer to statements of principle, even somewhat analogous to the Ten Commandments. But they are not statements of moral principle; rather, they seem pretty clearly to me to be statements of *political* principle, defining or adjusting the relations not between one person and another person, as I believe moral rules and principles attempt to do, but between a people and their government, or between the federal government and its constituent states.

To test my reading, I want to consider more of the text of the Bill of Rights than the small segment to which Dworkin limits his attention, which consists of the First, Fifth, and Fourteenth Amendments. Look, for example, at the Fourth, Sixth, and Eighth Amendments:

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>22</sup>

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>23</sup>

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22. U.S. CONST. amend. IV.

23. U.S. CONST. amend. VI.



## Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.<sup>24</sup>

These passages seem to me to set out prescriptions for the appropriate way in which the government is to treat those among its citizens who are suspected or accused or convicted of crimes. But there is nothing "moral" about the language used in these Amendments. That is, on my reading, the Constitution makes no moral judgment about what does or does not constitute an "unreasonable" search, or a "speedy and public trial," or "excessive" bail, or "cruel and unusual" punishment. Rather, as I read it, the Constitution uses these terms to create and adjust the proper political relations that should exist between the state and an accused citizen threatened with the loss of his liberty or life. Perhaps we might with some justice call the Bill of Rights our "Ten Commandments of Political Life in the United States." What holds true of these three amendments equally holds true of the First, Fifth, and Fourteenth Amendments: They express no moral judgments but do express or imply some political judgments.<sup>25</sup>

It is possible, I suppose, that Dworkin might agree with the claim that this language in the Constitution expresses "political"

24. U.S. CONST. amend. VIII.

25. In drawing a distinction between moral judgments, or morality, and political judgments, or politics, I am relying upon the following rough line of demarcation — which line is suggested in Michael Oakeshott's work. In making moral judgments, we normally are concerned with individuals as people, as human beings, and their status as moral agents or actors. A moral paradigm would be presented in terms of our concern for how a person was acting, or how a person was being treated by someone else. Moral judgments about corporations or nation-states derive their moral connotation, I believe, from the paradigm of personal relationships and attachments. On these matters, Oakeshott's philosophy includes the following remark:

The moral life is a life *inter homines*. Even if we are disposed to look for a remote ground (such, for example, as the will of God) for our moral obligations, moral conduct concerns the relations of human beings to one another and the power they are capable of exerting over one another. This, no doubt, spills over into other relationships — those with animals, for example, or even with things — but the moral significance of these lies solely in their reflection of the dispositions of [humans] towards one another.

MICHAEL OAKESHOTT, *The Moral Life in the Writings of Thomas Hobbes*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 248, 248 (1962).

In speaking about politics, on the other hand, we normally are concerned with a group of people who form a community, a state, or a *polis*. If we also are concerned with individuals within such a group or community, we are typically concerned with their status as citizens, or as members of the group, not with their personal relations. Individuals' political rights and duties normally stem from their political status and not from their personal relations. On these matters, Oakeshott's philosophy includes the following remark:

Politics I take to be the activity of attending to the general arrangements of a set of people whom chance or choice have brought together. In this sense, families, clubs, and learned societies have their 'politics.' But the communities in which this manner of activity is pre-eminent are the hereditary co-operative groups, many of them of ancient lineage, all of them aware of a past, a present, and a future, which we call 'states.'

MICHAEL OAKESHOTT, *Political Education*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS*, *supra*, at 111, 112 [hereinafter OAKESHOTT, *Political Education*].

judgments. He has, after all, claimed in an earlier book to have what he calls a “full political theory of law,”<sup>26</sup> and he sometimes seems to be claiming only that his method of “moral reading” injects our *political morality* into the constitutional picture or equation.<sup>27</sup> He also speaks as though the labels, “conservative” and “liberal,” are moral labels rather than, as I assume, political labels. For instance, he says:

[B]oth scholars and journalists find it reasonably easy to classify judges as “liberal” or “conservative”: the best explanation of the differing patterns of their decisions lies in their different understandings of central moral values embedded in the Constitution’s text. . . . The moral reading is not, in itself, either a liberal or a conservative charter or strategy. [pp. 2-3]

I should have thought that such labels would suggest not that the judges are basing their decisions on their different understanding of moral values — as, for example, might be the case if we were to label judges “utilitarian” or “Kantian” or even “Rawlsian” — but rather that these judges were acting out of a political predilection of a leftward-leaning or rightward-leaning kind. Apparently, Dworkin considers these to be terms illustrating the *moral* persuasion of such judges. This apparent conflation of political and moral terms leaves me confused, and I cannot think that it helps us to understand Dworkin’s claim that he is proposing a “moral reading” of our “actual Constitution.”

#### IV. OUR “ACTUAL CONSTITUTION”: IS IT A MORAL CHARTER?

Dworkin’s recommended “moral reading” of the Constitution is based upon an assumption that he, Dworkin, knows or understands what kind of a document the Constitution is. At the most basic level, Dworkin seems to think that he knows how the Constitution works and, in particular, that he knows how it speaks. Dworkin claims that the Constitution speaks with a voice pitched in, or toward, the register we call “moral discourse.”

The exercise in the preceding section asked us to read various clauses in our Constitution and to test our experience of reading that document against the claims made by Dworkin. This exercise is meant to show us that what statements of principle we may find in the American Constitution are political — not moral.<sup>28</sup> I have an additional argument to make against Dworkin’s proposed method

26. RONALD DWORIN, *LAW’S EMPIRE* 110 (1986); see also Thomas D. Eisele, *Dworkin’s ‘Full Political Theory of Law,’* 7 CRIM. JUST. ETHICS, Summer/Fall 1988, at 49 (book review).

27. See, e.g., p. 2.

28. The section of the Constitution that might be said to have the most obvious moral overtones is the Preamble, and Dworkin pays no attention to this part of the Constitution. But the Preamble is not simply a moral tract; instead, it states the purposes for the instrument of federation that is expressed in the body of the Constitution:

of reading the Constitution, because I believe that even such political principles form only a small portion of the U.S. Constitution, a portion that perhaps is not even the document's core. Let me elaborate.

As I said above, when I read the U.S. Constitution, I do not find language heavily laden with moral connotations or overtones. I do find a document of political principles, one that charters a federal government out of a collection of separate states. It is therefore a document that occasionally refers to normative matters of propriety and appropriateness and the like. But, for me, the bulk of the Constitution is given over to the organization and implementation of a system of government. As such, the Constitution serves not so much as a moral charter, but rather as a political charter and, in particular, as a charter establishing the body politic. I read the Constitution, then, as a special kind of corporate charter.

A corporate charter is an originating, an organizing, and an operating instrument. The Articles of Incorporation create a corporation; in doing so, the Articles are an originating document. The Articles also comprise the initial, skeletal organization of the corporation being set up. In this respect the Articles of Incorporation display the schema by which the various branches or divisions or parts of the organization are supposed to interrelate. The initiating and organizing document also accomplishes a third function: it sets out some of the basic mechanisms by which that corporate entity is supposed to operate.<sup>29</sup>

I suggest that we think of the U.S. Constitution on the same model as a typical corporate charter and bylaws. In other words, the body of the Constitution is analogous to articles of incorporation, and the Amendments to the U.S. Constitution are analogous

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We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. preamble.

These words set forth the reasons for instituting the Constitution and the objects our forebearers had in mind as they formed this type of government. The Preamble also begins to explain why the Framers would agree to this form of government. While some of its concerns or purposes seem to have a moral component, the Preamble also expresses political, legal, economic, and religious concerns. It makes sense to read the Constitution in the light of this collective statement of purpose, but I am not persuaded that this statement is so overwhelmingly moral in tone or intent that we should construe the Constitution as a moral document. On the Preamble as a literary statement with its own force and effect, I recommend Craig M. Lawson, *The Literary Force of the Preamble*, 39 MERCER L. REV. 879 (1988).

29. The traditional articles of incorporation set up, for example, the offices or officers of a corporation along with their duties and responsibilities and powers, and they specify the directors who shall oversee the operations of the corporation and its officers. The Articles also usually contain some statement of the corporate purpose or goal and other details of operation. Supplementing this instrument, of course, is the accompanying statement of bylaws; these bylaws typically set out in more detail the ways in which the corporation should operate within the framework created by the Articles of Incorporation.

to an evolving set of bylaws. This analogy is not farfetched: The first attempt at establishing a federal government was entitled, "The Articles of Confederation."<sup>30</sup> In any case, I prefer such an analogy to the one offered us by Dworkin, which pitches the Constitution as a document of moral principle.

Dworkin might respond to all of what I have said with the comment that he has, in fact, taken all of my criticisms into account. He would claim that the moral reading of the Constitution was never meant to be a theory of the *entire* document; rather, it is intended only to give us a true glimpse of certain selected portions of that text. Dworkin sometimes speaks this way:

Of course the moral reading is not appropriate to everything a constitution contains. The American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle. Article II specifies, for example, that the President must be at least thirty-five years old, and the Third Amendment insists that government may not quarter soldiers in citizens' houses in peacetime. The latter may have been inspired by a moral principle: those who wrote and enacted it might have been anxious to give effect to some principle protecting citizens' rights to privacy, for example. But the Third Amendment is not itself a moral principle: its *content* is not a general principle of privacy. So the first challenge to my own interpretation of the abstract clauses might be put this way. What argument or evidence do I have that the equal protection clause of the Fourteenth Amendment (for example), which declares that no state may deny any person equal protection of the laws, has a moral principle as *its* content though the Third Amendment does not? [p. 8]

To this question, Dworkin answers: "This is a question of interpretation or, if you prefer, translation" (p. 8). Dworkin's basis for distinguishing between the purportedly moral content of the Fourteenth Amendment and the supposedly nonmoral content of the Third Amendment is that he interprets them this way.

I find this unsatisfactory. It fails to offer us any way in which to make the distinction that Dworkin proposes between the Third and the Fourteenth Amendments. Is it simply that the level of abstraction in the language of the Third Amendment differs from the level of abstraction of the language used in the Fourteenth Amendment? I fail to see such a difference in "levels" of abstraction in the amendments' respective language. Even if I could discern such a difference, I am not sure how the purported difference in levels of linguistic abstraction between amendments can be taken as proving that one of those amendments speaks in terms of a moral principle and the other does not.

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30. See 1 THE DEBATE ON THE CONSTITUTION 954-64 (B. Bailyn ed., 1993).

Dworkin tries to explain his differing interpretations of these two amendments by saying that “[w]e must try to find language of our own that best captures, in terms we find clear, the content of what the ‘framers’ intended [each Amendment] to say.” He goes on, in this regard, to allow that “[h]istory is crucial” in making a correct or defensible interpretation.<sup>31</sup> If this is true, however, then I do not see that history suggests that the Third Amendment to the U.S. Constitution was any less “principled” a statement of its drafters’ political thoughts or wishes or intentions than was the Fourteenth Amendment when it was adopted almost a century later.

Along these same lines, consider Dworkin’s claim to have found moral content in the First Amendment: “The First Amendment . . . recognizes a moral principle — that it is wrong for government to censor or control what individual citizens say or publish — and incorporates it into American law” (p. 2). Yet, all that the First Amendment *says* is: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”<sup>32</sup> This wording seems to be a clear prohibition placed on Congressional power, a proscription imposed on a delegated power that Congress might otherwise have expected to exercise. But how is this reflective of any moral judgment? It might reflect a political judgment about the wisdom of governmental control over public expression, or a religious judgment about the proper place of government in the affairs of human beings, or something else again. I should think that it is most easily understandable as a political decision to place a limit on the power earlier delegated to Congress in Article I.

How, then, does Dworkin know that, in speaking in the way it does, the First Amendment is “recogniz[ing] a moral principle . . . and incorporat[ing] it into American law,” whereas he also wants to insist that the Third Amendment fails to recognize a principle of privacy when it speaks in terms of the quartering of troops in private homes during peacetime or wartime? I cannot see any rational basis for Dworkin’s saying that the First Amendment is so different from the Third Amendment. It seems to me that the Third Amendment is as much based upon a principle of the appropriate relation

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31. P. 8. I agree with Dworkin’s claim that history is crucial to interpreting the Constitution, but I do not agree with the constraints that Dworkin places on this methodological maxim. For example, Dworkin says: “We turn to history to answer the question of what [the framers] intended to *say*, not the different question of what *other* intentions they had. We have no need to decide what they expected to happen, or hoped would happen, in consequence of their having said what they did, for example; their purpose, in that sense, is not part of our study.” P. 10. This is one reason, I take it, why Dworkin ignores the statement of purpose in the Preamble. But why does Dworkin believe, on the basis he has stated, that we can simply pick and choose from among the apparently relevant portions of a text which portions we shall use or consider in interpreting that text? This selective use of history (or of the document’s text) is a weakness in Dworkin’s method.

32. U.S. CONST. amend. I.

between the government and a citizen as is the First, or the Fourteenth, Amendment.

Despite Dworkin's repeated references to the need for our making principled arguments in cases of constitutional interpretation, I do not see that in this respect he has fulfilled his own requirement. The problem here, from my perspective, is that Dworkin's recommended "moral reading" of the U.S. Constitution is based upon an ahistorical treatment of that document. Dworkin pays lip service to the need to consult history in interpreting our founding document; yet I do not believe that in practice Dworkin truly consults or listens to the historical record in reading the Constitution. Let me try to make this criticism more complete.

As I mentioned at the beginning of this review, Dworkin opens with the remark that the book covers "almost all of the great constitutional issues of the last two decades, including abortion, affirmative action, pornography, race, homosexuality, euthanasia, and free speech" (p. 1). These leading cases of the past two decades apparently serve as the basis for Dworkin's theory that the best and most natural way to read the Constitution is as a moral document. All the topics in the listing Dworkin provides fall within the ambit of either the First or the Fourteenth Amendment, with the Fifth Amendment as a kind of textual backdrop or connecting clause. On the basis of this limited record, it is not surprising that Dworkin would find a moral element running through the cases. They all involve individuals asserting a purported constitutional right against the government. In this sense, the people involved in these cases seem to be good candidates for treatment under moral categories or analysis, since morality is one way of assessing and dealing with the actions of individuals. Morality is not, however, the exclusive lens through which to view those cases, nor must judges engage in moral analysis or theorizing in order to resolve such cases in a legally acceptable or constitutionally competent way.

Does the fact that such cases *invoke* the Constitution as a way of deciding the rights of these individuals against governmental action mean or entail that the Constitution *therefore* speaks morally, or that it exhibits moral principles? I do not think so. It simply means that we have a case in which the actions of the person or people involved can be assessed *either* from a moral perspective *or* from a constitutional perspective. This fact surely does not mean, however, that the moral perspective is the same as the constitutional perspective. More than one conceptual or normative framework can apply to the same situation.

At one point in his discussion of *Roe v. Wade*,<sup>33</sup> in fact, Dworkin's argument seems to reflect the distinction I just made between

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33. 410 U.S. 113 (1973).

morality and constitutionality. As he begins his discussion of *Roe*, Dworkin makes the following query:

Is the human fetus a person from the moment of conception? That question has been argued by theologians and moral philosophers and ordinary people for many centuries. It cannot be resolved by legal research or scientific evidence or conceptual analysis; it will continue to divide people, as it divides Americans now, so long as deep disagreements remain about God and morals and metaphysics. [p. 45]

Dworkin is saying that this issue is in part a question of morality, which he doubts will soon be answered. But he then goes on to say that, legally or constitutionally speaking, the issue is answerable, and it must be answered by the courts:

The key question in the debate over *Roe v. Wade* is not a metaphysical question about the concept of personhood or a theological question about whether a fetus has a soul, but a legal question about the correct interpretation of the Constitution which in our political system *must* be settled one way or the other judicially, by the Supreme Court, rather than politically. It is the question whether the fetus is a *constitutional* person, that is, a person whose rights and interests must be ranked equally important with those of other people in the scheme of individual rights the Constitution establishes. That is a complex and difficult question, and it does involve moral issues. But it is nevertheless different from the metaphysical question philosophers and theologians debate . . . . [p. 46]

To say that a legal or constitutional question involves moral issues is not to say that the judges adjudicating such a case must have, or must produce, a moral theory in order to resolve the legal or constitutional question posed. In addition, it seems to me that Dworkin recognizes that a question arising out of the same situation can be treated differently from a moral perspective and from a legal, or constitutional, perspective.

As Dworkin understands it, the American Constitution speaks in a moral voice by expressing or implying a skeletal framework of moral principles that are meant to secure various individual rights against the central government. But, on my view, whatever principles are expressed in the U.S. Constitution tend to be political in nature, not moral. They are not controlling personal relationships, for example, as I believe moral rules or principles or maxims mainly attempt to do; nor do these principles speak in terms of the rightness or wrongness — the good or bad — of various individual or collective actions. These terms of approbation or disapprobation have been the main moral terms in Western culture. Rather, as I have suggested, the Constitution is the initial attempt by our forebearers to build a nation, an attempt that continues today in so far as we have inherited that document and the nation it constitutes,

and to the extent that we accept the responsibility such an inheritance places on us.

The Constitution itself was not the first installment in the American project to create a federal government. As I noted above, it came second, after the Articles of Confederation. This history suggests to me that the Constitution was an attempt to rescue or to redeem whatever could be salvaged from that first, failed, ten-year experiment, from 1777 to 1787. The Constitution reads to me as an attempt at securing a better, more balanced, form of government. The formation of the government — not the moral relations between that government and its citizens — is the primary goal of this text. Whatever our need may have been for moral instruction or protection at the time of the creation of our Constitution, we were in even more desperate need of a fundamental or foundational document that would help to create a federal government within which the disunited states could live and prosper. I read this document in the light of this need for instituting a federal form of government within republican and democratic principles.

It does not surprise me, then, that the seminal cases in Constitutional Law — by which I mean *Marbury v. Madison*<sup>34</sup> and *McCulloch v. Maryland*<sup>35</sup> — have nothing to do with individual rights against the government and everything to do with the separation of powers within the federal government just formed and with the relations between that federal government and the several states. The historically important issues central to our entire nation and its founding were the separation of powers and federalism. The initial problem was how to form a more perfect union, one that would last longer and better than the ill-fated confederation created by the Articles of Confederation. It took us two tries to get it right, and even then the union was not perfect — but it was feasible; it was viable.

We learned, of course, that a half-free, half-slave nation could not hold; it took the horrors of the Civil War to give us the impetus to amend our Constitution to include the kinds of protections of civil rights that we are familiar with today. But those amendments came almost a century after the creation of the U.S. Constitution, its adoption, and its initial amendment by way of the Bill of Rights.

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34. 5 U.S. (1 Cranch) 137 (1803).

35. 17 U.S. (4 Wheat.) 316 (1819). In this regard, I recommend the penultimate chapter of Jim White's magnificent book, *When Words Lose Their Meaning*, entitled "Constituting a Culture of Argument: The Possibilities of American Law." In this chapter, White offers a brief summary of the Declaration of Independence, an introduction to the Constitution, and a complicated reading of *McCulloch* that addresses in great detail many of the topics touched on by this review. See JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 231-74 (1984).



I do not believe that the Constitution should be read as though the Civil War Amendments were, from the beginning, somehow "implicit" in the original document or the Bill of Rights. What made us cognizant of the need to amend the Constitution was not, I think, our discovery that some aspect of the Constitution as it then stood required or received its full expression in the Civil War Amendments. Rather, the need for these amendments came from our discovery that our lives as we then wished to lead them outstripped the Constitution; or, that our expectations and our ideals for ourselves and our country outstripped those we found in the Constitution. Adopting the Thirteenth, Fourteenth, and Fifteenth Amendments (re)created a foundational document that comported with our lives as we wished to lead them after the Civil War.

On this reading, the Constitution is not a tract reciting moral principles; it was, and is, a political "experiment"<sup>36</sup> in creating, managing, and maintaining a national polity on a constitutional basis, or what I earlier called "the body politic." As such, the Constitution requires occasional adjustment and continual inspection and checking to ensure that the project it defines remains on track. While sometimes the nation formed by this constitutional process will itself develop ahead of the initial constituting document, as I think occurred prior to and during the Civil War, at other times the constitutional document may outstrip the development of the nation it helped, and helps, to constitute. This is what happened, I believe, in the aftermath of the Civil War, when we failed to live up to the promise of those three amendments. In such a context, it may take the courage of court action to prod the nation to bring itself into conformity with its constituting text. I think this process occurred in the judicial evolution of the nation from *Plessy v. Ferguson*<sup>37</sup> to *Brown v. Board of Education*.<sup>38</sup> Sometimes, as well, the document will leap ahead into the future, dragging the nation behind it into what then becomes the present, as I think happened with the Nineteenth Amendment, introducing women's right to vote.<sup>39</sup> At other times, of course, an attempt to leap forward, taken on behalf of the constitutional document, will be resisted by the nation, sometimes successfully, as occurred with the Eighteenth and Twenty-First Amendments, which, respectively, instituted and repealed Prohibition.<sup>40</sup> No doubt, not all of the constitutional experiments that we propose or that we try will be successful; some will be unsuccessful because they richly deserve to fail. In this respect, however, the

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36. See Louis Pollak, *The Constitution as an Experiment*, 123 U. PA. L. REV. 1318 (1975).

37. 163 U.S. 537 (1896).

38. 347 U.S. 483 (1954).

39. See U.S. CONST. amend. XIX, § 1.

40. See U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

symbiotic process between the constitutional text and the constituted nation seems to me to be preeminently political, not moral.

The theme of national constitution and reconstitution continues today, just as it has for the past two centuries. From my perspective, this aspect of our constitutional polity is the dominating theme of the Constitution. Recent cases in this same narrative line would include *Baker v. Carr*,<sup>41</sup> the *Pentagon Papers* case,<sup>42</sup> the *Watergate Tapes* case,<sup>43</sup> and perhaps even *Clinton v. Jones*.<sup>44</sup> All deal, one way or another, with the issue of what kind of a nation we are to have, what kind of a people we are to be, or what kind of a people we think we are.

This is how I view the Constitution. Dworkin sees it, on the other hand, as fundamentally a moral document. To some extent, I think that Dworkin's "moral reading" proposes a theory that ignores or misreads much of the constitutional text and the available historical evidence. Dworkin's single-minded brief on behalf of his "moral reading" expresses a penchant for seeing the Constitution only as a "skeleton" (pp. 73, 74, 82) of moral principles. This misconceives at a stroke the density and complexity of the original text and its several amendments, as well as ignoring both the history behind them and the constitutional culture that has grown alongside the text. Such a one-dimensional conception does not comport with our "actual Constitution" as I understand it.

#### V. "MORAL READING" AS IDEOLOGY: MUST JUDGES THEORIZE ABOUT PRINCIPLES?

I have argued in the foregoing sections that Dworkin's suggested method of "moral reading" is based upon a conception of the U.S. Constitution that is mistaken in at least two respects: First, I do not think that moral principles are to be found in the Constitution; and, second, I do not think that the Constitution operates as a moral charter. While I have tried to anticipate some of Dworkin's responses, he might simply point to American judges and say: "Look at them: Aren't they proceeding in the way I describe?" If this were true, it would be the best refutation of my criticisms and the most credible support for Dworkin's approach to the Constitution. But, it turns out that Dworkin's account of how judges should

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41. 369 U.S. 186 (1962) (addressing the justiciability of a political question).

42. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding publication of classified governmental papers during an undeclared war not a threat to national security).

43. *United States v. Nixon*, 418 U.S. 683 (1974) (holding that a sitting president must surrender tapes to independent prosecutor who is conducting criminal investigations and prosecutions because executive privilege offers no exemption from judicial process).

44. 65 U.S.L.W. 4372 (U.S. May 27, 1997) (holding that sitting president does not have an executive privilege from private suit while in office when suit alleges wrongdoing prior to election to presidency).

go about the business of constitutional adjudication transforms the practice of judging into an activity of ideological theorizing. I do not think that ideological theorizing has a place in the courtroom.

Let me begin with Dworkin's description of how he thinks judges should go about the business of judging. As I mentioned earlier, Dworkin is fairly harsh in his criticism of what he considers to be our timidity toward the "moral reading" of the U.S. Constitution; he assumes that this diffidence is based upon a disingenuous denial of the truth or validity of such an approach to the Constitution. On the one hand, Dworkin says, "there is nothing revolutionary about the moral reading in practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading, as I hope this book will make plain" (p. 2). But, to Dworkin's consternation, we Americans persist in denying that we use "moral reading" as our approach to the constitutional text. So, Dworkin claims, while "the moral reading . . . has inspired all the greatest constitutional decisions of the Supreme Court . . . it is almost never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are incomprehensible on any other understanding of their responsibilities" (p. 3).

On Dworkin's view, what are a judge's responsibilities? According to him, "fidelity to the Constitution and to law *demand*s that judges make contemporary judgments of political morality" (p. 37). In this respect, Dworkin's proposed "moral reading" makes possible — it even encourages — "an open display of the true grounds of judgment, in the hope that judges will construct franker arguments of principle that allow the public to join in the argument" (p. 37). Dworkin describes in some detail how this judicial duty is to be fulfilled:

The moral reading proposes that we all — judges, lawyers, citizens — interpret and apply these abstract clauses [of the Constitution] on the understanding that they invoke moral principles about political decency and justice. . . . So when some novel or controversial constitutional issue arises — about whether, for instance, the First Amendment permits laws against pornography — people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography. [p. 2]

The "people" who must decide, as Dworkin points out, are the judges; this is their particular responsibility and they dare not shirk it. Their specific duty in trying to apply the Constitution to a "novel or controversial constitutional issue" is that they "must decide how an abstract moral principle is best understood" (p. 2). This requires

the judge to decide “whether the true ground of the moral principle” invoked by one or both of the parties in fact “extends to the case [posed]” (p. 2). This description of constitutional adjudication pictures the deciding judge as first identifying the relevant moral principle and then determining whether or not that principle should be extended to cover a new case.

At times, Dworkin calls his method of “moral reading” a “strategy” for understanding and applying the Constitution (pp. 2, 6, 11, 13). I find this term revealing. For one thing, it suggests that in Dworkin’s view we can relate ourselves to something as fundamental in our lives and our law as the Constitution by means of an interpretive device, a consciously adopted construct. This label, “strategy,” implies a mechanical or artificial way to proceed, and I doubt its efficacy.<sup>45</sup> In addition, Dworkin goes on to suggest that judging done in accordance with his strategy is a kind of lockstep or dictated activity, one that he characterizes as having a question-and-answer form. Here are several selections that make this point:

The moral reading is consistent with all these institutional solutions to the problem of democratic conditions. It is a theory about how certain clauses of some constitutions should be read — about what questions must be asked and answered in deciding what those clauses mean and require. [p. 34]

So of course the moral reading encourages lawyers and judges to read an abstract constitution in the light of what they take to be justice. How else could they answer the moral questions that abstract constitution asks them? [p. 37]

Since the great clauses command simply that government show equal concern and respect for the basic liberties — without specifying in further detail what that means and requires — it falls to judges to declare what equal concern really does require and what the basic liberties really are. But that means that judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement. [p. 74]

The First Amendment’s guarantee of the “freedom of speech, or of the press” is a constitutional provision that patently cannot be understood other than as an abstract moral principle. Lawyers and judges who apply it to concrete cases must ask and answer a variety of questions of political morality. [p. 165]

So Dworkin argues that a judge must ask and answer certain questions, and that the process of asking and answering is the best way of developing a coherent theory of the relevant moral principles in

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45. It occurs to me that Dworkin’s claims for the “naturalness” of his moral reading method are undercut by his use of the term “strategy” to characterize such a method. Given Dworkin’s characterization of his reading method as a critical “strategy,” his repeated references to the “naturalness” of his method strike me as inapt.

the Constitution — if, that is, the judge is to fulfill his or her responsibility in cases involving constitutional issues.

But judges need *not* do this; they need not engage in any lock-step process of moral theorizing. Rather, it is incumbent upon each judge to exercise his or her own judgment in determining which issues of law (whatever political or moral or religious or economic principles may be involved) need to be decided in any particular case posed to that judge, and how these issues are to be decided. We vest the requisite authority in the judges to do this — to make these judgments — and leave it to them to fulfill this delegated responsibility the best way they know how. And, I would add, this responsibility can be fulfilled in a variety of rational ways — i.e., ways that make sense and that are legally and logically defensible. The primary task for any judge remains, however, to decide or settle the case facing himself or herself by whatever legal means he or she has at hand and chooses as best.

Because of the immensity of the power reposed in a judge, we ask a judge to decide *only* issues properly brought before his or her court and — among such issues — only those issues that require a judgment in order to render a decision in the case. We want a judge to decide all questions bearing directly on the case, but we treat everything else said in the opinion as mere dictum. This means, of course, that a judge sometimes can even decide that a purported issue in a case is not ripe for decision and can be avoided for the moment, reserving judgment for another day.<sup>46</sup>

I do not believe, then, that judges must ask and answer certain questions in order for them to render competent judgments in constitutional cases. In particular, they need not ask or answer various moral questions, and this entails that they need not develop any theory regarding the coherence or integration of any moral principles they may believe to be implicated in their decision. This is the larger moral that I draw from my brief description of adjudication: A judge need not have or develop a theory of morality, or a theory of any moral principles found in the Constitution, in order to competently decide a case. Accordingly, I find Dworkin's description misleading in so far as it suggests that judges *must* go through the decisionmaking process Dworkin sketches — i.e., that they *must* "ask and answer" a variety of theoretical questions about the meaning and extension of any express or implied moral principle found in the U.S. Constitution.

I think there are a number of possible ways for a judge to act within the range of judicial propriety and competence. On occasion, a judge may decide that a purported issue presented by a case

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46. See Bickel, *supra* note 5.

is not in fact presented. Leaving such “nonissues” unanswered is wholly appropriate under the “case and controversy” requirement of Article III of the U.S. Constitution. At other times, while a judge may decide that an issue is presented, he or she may also determine that it can be answered competently by considering something other than morality. And, finally, even when a judge identifies an issue presented for resolution as a moral issue, requiring an answer drawn from morality — as the judge determines what morality is — the judge need not go through a process of moral theorizing in order to reach a moral resolution of the issue. Dworkin does not acknowledge, I believe, this variety of possible judicial processes of decisionmaking.

I disagree with Dworkin, then, because I disagree with his conception of what judges must or should do. I cannot help but think that this disagreement stems, in part, from a conception of the ideal judge (whom Dworkin calls “Hercules”) which Dworkin has developed in some of his earlier writings.<sup>47</sup> Dworkin’s ideal judge works to develop a theory of what Dworkin calls our “political morality” in every “hard case” the judge faces. This conception of judging has never appealed to me, and I find it far from ideal — or real. But, having said this, it is important to note that my disagreement with Dworkin over his conception of the proper role for judges in constitutional adjudication goes deeper than simply disagreeing with his conception of judging.

Dworkin’s requirement that judges “must” engage in a kind of ideological theorizing — a kind of reasoning — about various abstract moral principles supposedly found in the Constitution can also be understood as deriving from a particular vision of human reason. I think that Dworkin’s method can be traced back to a conception of the human mind found in the current of thought we call “liberal reason.”<sup>48</sup> As Lionel Trilling puts the problem with this current of thought: “It is one of the tendencies of liberalism to simplify, and this tendency is natural in view of the effort which liberalism makes to organize the elements of life in a rational way.”<sup>49</sup> Dworkin’s is yet another attempt, from within a liberal perspective, “to organize the elements of [legal and constitutional] life”<sup>50</sup> in what Dworkin takes to be, and what liberalism takes to be, “a rational way.”<sup>51</sup> Yet, in effect, this liberal way simplifies our compli-

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47. See DWORKIN, *supra* note 26 at 239-75, 313-412; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105-30 (1977).

48. See THOMAS A. SPRAGENS, JR., THE IRONY OF LIBERAL REASON (1981). The *locus classicus* in mapping the contours of the liberal mind remains Lionel Trilling’s brilliant study. See LIONEL TRILLING, THE LIBERAL IMAGINATION (1950).

49. TRILLING, *supra* note 48, at xiv.

50. *Id.*

51. *Id.*

cated notions of rationality and argument and judging. This is somewhat ironic — or paradoxical — because Dworkin continually emphasizes both the importance of history in understanding and applying the Constitution and the ultimate uncertainty of issues of constitutional law. But, in reading his prose, one gets the impression that his answers to these complicated constitutional issues are rather predictable and even somewhat doctrinaire. Dworkin himself seems to feel some discomfort in this regard, because he tries to deflect this type of criticism in the following way:

I should like . . . to reply to an objection that has been made to my arguments before, and that I anticipate will be made again. It is said that the results I claim for the moral reading . . . magically coincide with those I favor politically myself. . . . [M]y arguments tend to endorse the Supreme Court decisions that are generally regarded as liberal ones, and to reject, as mistakes, those generally seen as conservative. [p. 36]

Dworkin attempts to evade the brunt of this charge by entering a number of qualifications, but eventually he pleads guilty (pp. 36-38). I would simply note that the objection I am entering against him in this section of my review is not a complaint lodged against the substance of his political views; rather, it is a criticism of the procedural or argumentative requirements that he lays down — that is, that every argument must be based on or tied to a formulation Dworkin would recognize as a moral principle. Dworkin's "moral reading" — with its emphasis on identifying and extending moral principles of constitutional law — is steeped in, and derived from, a liberal conception of reason; but this conception does not describe the only way for judges to proceed in a rational way. Nor does the liberal conception of reason afford us the best way in which to understand the process of adjudication.<sup>52</sup>

Judge Learned Hand might have shared my difficulties with Dworkin's recommendation that his "strategy" of "moral reading" is the best way for judges to read and apply the U.S. Constitution. About Judge Hand's hesitance to assume any mantle of ideological theorizing, Dworkin says:

Learned Hand described judges who appeal to the moral reading of the Constitution as a "bevy of Platonic guardians," and said he could not bear to be ruled by such a body of elites even if he knew how to select those fit for the task.<sup>53</sup>

Hand's diffidence was, I suspect, a function of what he felt was necessary for him to undertake in order to fulfill his judicial responsibilities, and also what he felt competent in undertaking during the

52. For an alternative conception of constitutional adjudication, with which I find myself largely in sympathy, see Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE J.L. & HUMAN. 353 (1994).

53. P. 22 (footnote omitted); see also pp. 342-43.

course of fulfilling his duties. If a judge wishes to theorize about the law, or about politics, morals, or religion, he or she can. But I take Hand to be recognizing that a judge *need* not do any of this to remain faithful to his or her oath of office. Learned Hand, I take it, felt that moral theorizing either was unnecessary or was ineffective in resolving the legal issues facing him as a judge and, thus, he declined to participate in that mode of thought. Yet, by all accounts, he was a pretty fair jurist.

In this respect, then, I reject Dworkin's assertion that we lawyers and judges use "moral reading" as a tool but deny that we use it, thereby making our actions unintelligible. Taking Judge Hand at his word — that he could not imagine himself using the method of moral reading as his method of constitutional adjudication — does not in itself make his decisions unintelligible or "incomprehensible." I assume that Hand would have declined to use Dworkin's "moral reading" method not because Hand would be afraid to do so, but because he would not — and did not — see the value or the utility in it. As I have tried to show, it was, and is, a poorly adapted tool for the issues and problems at hand.

In arguing this way, am I falling back into the trap of what Dworkin calls "the old, cowardly, story about judges not being responsible for making arguments like these, or competent to do so, or that it is undemocratic for them to try, or that their job is to enforce the law, not speculate about morality" (p. 38)? To reach an adequate answer would take, I suppose, more work and more writing than I can manage here. But I have tried to indicate how someone could read the Constitution as more than a mass of principles, and as other than a moral document, and still be working within what I take to be our tradition of constitutional law. If I am right about this in general — even if wrong in some of the particulars — then I think this suggests that it need not be any part of a judge's duties to engage in theorizing or speculating about either morality or moral principles when engaged in constitutional adjudication. I am not saying that it is harmful or wasteful for judges to do so — just that it is not necessary for judges to do so.

Dworkin claims that this "old story" is "bad philosophy. It appeals to concepts — of law and democracy — that it does not begin to understand" (p. 38). When I quoted this passage earlier, I allowed that I was less certain than Dworkin seemed to be about whose philosophy was bad here. I remain uncertain, but I should like to close this section with a suggestion as to why I am suspicious of Dworkin's philosophy in this regard. His description of judging makes the activity sound very logical; I would call it "rationalistic." I do not say that Dworkin is making a plea on behalf of any mechanical jurisprudence, because he many times states very



clearly that he opposes any conception of constitutional interpretation that makes it mechanical or artificial. I only wish to note that Dworkin's description of the judicial interpretation of the Constitution makes it sound as though determining or deciphering the logic of the applicable principles is the only thing that matters in judging and, thus, in law. Or, I might put it this way: Dworkin makes it sound as though there is only one right way for a judge to act, or to reason, with respect to a legal problem posed to him or her, and this right way is via an activity of reasoning that comprises, first, finding the purportedly applicable moral principles and, then, determining whether they can be applied to the problem calling for their possible application. Is this good philosophy? We might, following Michael Oakeshott's lead,<sup>54</sup> call this direction of thought, "Rationalism in Law."

Let me suggest a different way to look at our constitutional system. I do not believe that political principles constitute either a "skeleton" of our constituted society (p. 73), or a "charter" for our community (p. 124) — at least, not in the way that Dworkin seems to think they do. What matters most for us is the form of life and of law that we have inherited. This form of life is based in part on our constitutional text, but also on the actual ways of acting and thinking that we have inherited as we have been born into and raised within our constitutional polity. This process of living within the law is, I believe, first and foremost a matter of receiving and working with, and within, an inherited tradition of thought and behavior. Michael Oakeshott describes our situation this way:

Politics is the activity of attending to the general arrangements of a collection of people who, in respect of their common recognition of a manner of attending to its arrangements, compose a single community. . . . This activity, then, springs neither from instant desires, nor from general principles, but from the existing traditions of behaviour themselves. And the form it takes, because it can take no other, is the amendment of existing arrangements by exploring and pursuing what is intimated in them. The arrangements which constitute a society capable of political activity, whether they are customs or institutions or laws or diplomatic decisions, are at once coherent and incoherent; they compose a pattern and at the same time they intimate a sympathy for what does not fully appear. Political activity is the exploration of that sympathy; and consequently, relevant political reasoning will be the convincing exposure of a sympathy, present but not yet followed up, and the convincing demonstration that now is the appropriate moment for recognizing it.<sup>55</sup>

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54. See MICHAEL OAKESHOTT, *Rationalism in Politics*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 25, 1-36.

55. OAKESHOTT, *Political Education*, *supra* note 25, at 123-24.

Although Oakeshott speaks specifically about politics in this passage, I take his remarks to be equally applicable to the activity we know as “law,” and this is so because law *is* related internally to politics. In this respect, I agree with Dworkin that judges and lawyers work on the constitutional level with more than simply legal rules; or, rather, that the legal rules with which they work invariably and inevitably implicate them in matters of the *polis* and how it functions and how we live and work within our constitutional polity. I do not think that this makes a judge or a lawyer the kind of moral philosopher that Dworkin seems to think a judge or lawyer must be in order to resolve a constitutional question. It does, however, make such a judge or lawyer a kind of statesman, someone who must think about the state or the nation as being one of the necessary parties affected by the resolution of any constitutional issue. But this is because any change in our political arrangements is a change in the tradition we inherit and with which we live.

In law, as in politics, we are in pursuit not only of principles, but also of intimations and possibilities which derive from the existing arrangements of law and of politics that we already have and that we already possess.<sup>56</sup> We work from what we have to what we think we might like to possess. And, as to this, of course we can be mistaken; we can take a wrong turn. There is nothing lending infallibility to our pursuits of happiness — that is why our method of cooperation and competition can best be characterized not as an argument, but rather as a conversation, with all the rich give and take and diversity and flexibility, yet stability, that this term connotes or implies. Rather than the coherence of a moral theory of the Constitution, as Dworkin seems to endorse, I prefer the coherence of our constitutional tradition, as it stands and as we may pursue the variety of extensions and developments it intimates to us at any given time in any given context.

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56. Here I am paraphrasing and summarizing another passage in Oakeshott's essay, *Political Education*:

In politics, then, every enterprise is a consequential enterprise, the pursuit, not of a dream, or of a general principle, but of an intimation. What we have to do with is something less imposing than logical implications or necessary consequences: but if the intimations of a tradition of behaviour are less dignified or more elusive than these, they are not on that account less important. Of course, there is no piece of mistake-proof apparatus by means of which we can elicit the intimation most worth while pursuing; and not only do we often make gross errors of judgment in this matter, but also the total effect of a desire satisfied is so little to be forecast, that our activity of amendment is often found to lead us where we would not go. Moreover, the whole enterprise is liable at any moment to be perverted by the incursion of an approximation to empiricism in the pursuit of power. These are features which can never be eliminated; they belong to the character of political activity. But it may be believed that our mistakes of understanding will be less frequent and less disastrous if we escape the illusion that politics is ever anything more than the pursuit of intimations; a conversation, not an argument.

*Id.* at 124-25.

## VI. A MORE MATURE CONSTITUTIONAL JURISPRUDENCE

Dworkin suggests that “finally, after two hundred years, [we can] grow up and begin to take our actual Constitution seriously” (p. 81). His challenge may strike his readers as a tad severe, as though we were being told in Dworkin’s best schoolmaster tone that we have been delinquent in our studies. But Dworkin is speaking seriously here, and he is proposing that anything less than a thorough understanding of the accomplishment of the American Constitution does it and ourselves an injustice, a dishonor. I have tried to take up Dworkin’s challenge on his terms. His charge implies that, up until now, our constitutional jurisprudence has existed in a state of immaturity. I do not share this view.

Maturity is a question of experience acquired over time and put to good use. In the first place, then, I criticize Dworkin for seriously undervaluing the considerable experience we have acquired to date in constitutional jurisprudence. When I criticize him for being ahistorical, for example, I am taking him to task for ignoring relevant constitutional experience. In addition, our constitutional experience includes the achievement displayed in the practices of, for example, Justices Holmes and Brandeis and Harlan, as well as by Judge Learned Hand. In this book, Dworkin is consistently critical of both Holmes and Hand in terms of their lack of philosophical sophistication, but I do not find his criticisms persuasive. Instead, my own sense is that we are not in need of a new theory of constitutional reading; our practice of the past two hundred years itself constitutes a reasonably mature and coherent approach to the constitutional text and to the thousands of decisions it has spawned. A greater contribution to our knowledge might be made if we could describe appreciatively what judges and justices do in their day-to-day craft. I realize, of course, that this *is* what Dworkin *thinks* he is doing, or has done, in this book. But the preceding pages are meant to show that at least his description is faulty. We do not require a new theory of judicial review or of judicial reading, but rather a deeper acquaintance with our constitutional history and practice, as well as a better understanding of how they both combine to form our constitutional tradition.

Others before me, much better situated than I am, have already indicated the wealth of riches to be mined from a greater appreciation of our constitutional tradition. Let me, in closing, quote briefly from one of the best treatments of constitutional material of which I am aware, a treatment that overlaps to a large extent with Dworkin’s interest in the First Amendment and what he calls “freedom’s law.” Here I am referring to Professor Harry Kalven’s *A Worthy*

*Tradition*, a fine volume, published posthumously.<sup>57</sup> In a brief editorial summary of some of Kalven's views, we gain a sense of his estimate of the efficacy of theory — versus that of experiential description — in the field of constitutional law:

[Kalven] was highly skeptical about the quest for a general theory. . . .

It is a mistake to pursue a unitary theory of freedom of speech under the United States Constitution. There are irreducible differences in the situations the Court is called upon to review and no legal principle can accommodate them all. The most we can aspire to is not a theory but specific solutions to a congeries of speech situations. This after all has been the genius of the Common Law.

. . . The sensibility [Kalven] brought to constitutional law was steeped in the culture of the common law. Distrustful of theory, he had great faith in the common law process. He valued its attention to particulars, its tolerance for inconsistencies, its capacity for growth and self-correction. . . . The constitutional law on freedom of speech, he observed in class, is "a really great example of the common law process at work in a single jurisdiction — judge-made law, inch by inch, case by case."

[Kalven] was not anxious to generalize. He was concerned that the search for a unifying principle, if pursued with too much single-minded intensity, would blunt rather than deepen perception. He wanted to stay close to the ground of experience. In 1971 he told his students:

On my current view, one should seek not so much an organizing principle to answer all speech issues as an *organizing map* on which to place the problems. They are difficult to conceptualize and to relate to each other, depending in large part on the sociological *feel* of the situation — *genre* of the problem.

. . . "In confusion and lack of overall formula," he told his students, "I see strength."<sup>58</sup>

Since I am favorably disposed myself to the "genius" of the common law as a way both of solving legal issues or problems and of understanding the way Anglo-American law works, I am firmly aligned with Kalven's approach to constitutional law and opposed to the rationalistic approach of Dworkin's "moral reading."

Where Dworkin reaches time and again for an "organizing principle" or an "overall formula" for solving First Amendment issues or for explaining how we should read the U.S. Constitution, I find myself thinking of Holmes' reminder that "[t]he life of the law has not been logic: it has been experience."<sup>59</sup> This is not, of course, a

57. HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988).

58. Jamie Kalven, *Editor's Introduction* to HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA*, *supra* note 57, at xi, xvii-xviii.

59. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolf Howe ed., Belknap Press 1963) (1881).

claim that we need to abjure logic or reason. It is, rather, an attempt to suggest that law develops in ways that are not necessarily captured or expressed in logical terms, but rather can be characterized in experiential terms. An example of this sort is my earlier remark that the U.S. Constitution arose as a response to the failure of the Articles of Confederation, and that we ought to try to take account of this fact in reading and thinking about the Constitution. In order to grasp the layout of our legal system, including our Constitution, Holmes' advice would lead us to attempt to understand how a tradition of law can grow and change and evolve. For this task — rather than the schemata of logic — experience may make the better map. Whatever it lacks in terms of theoretical coherence or integrity, it makes up for in vitality and in responsiveness to the “felt necessities of the time.”<sup>60</sup>

I do not suppose that Dworkin would agree with any of this, and it would take a separate book to put forth the details of an alternative vision of the Constitution. It is true, however, that both Dworkin's book and my criticisms depend upon a call for increased study of our heritage, of our constitutional inheritance. As to this, Dworkin and I are in agreement. We simply disagree as to what we think such increased study will show. It is possible that the distance between our two positions may not be very far apart; at least, I am willing to imagine that it is a rift within the general contours of the liberal tradition, and not outside its potentially broad parameters.

Dworkin thinks that his theory of the “moral reading” of the Constitution makes explicit what we have been doing all along. I do not believe that this is the case but, still, I applaud Dworkin's effort insofar as it is an attempt to explore and to understand the tradition we have actually made for ourselves in constitutional law, a tradition that it is still ours to inherit.

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60. *Id.*

# IS MORALITY LIKE THE TAX CODE?

Larry Alexander\*

ILL-GOTTEN GAINS. By *Leo Katz*. Chicago: University of Chicago Press. 1996. Pp. xiv, 293. \$ 29.95.

Mildred and Abigail are two actresses of the same vintage and type who have always competed for the same roles. In this competition, Abigail has been the clear winner and has had a successful career, while Mildred has always been in Abigail's shadow. There is a part open that Mildred believes would salvage her career, if she could land it. Mildred also believes, however, that if Abigail auditions for the part, Abigail will get it, as has happened so often before.

Mildred does possess one trump card. She knows that Abigail has been unfaithful to her husband. Mildred contemplates calling Abigail and telling her that unless she stays away from the audition, Mildred will inform her husband of her infidelities. The problem with this plan is that it involves blackmail, and Abigail just might turn Mildred in to the police.

So Mildred comes up with an alternative plan. She writes a letter to Abigail's husband detailing Abigail's infidelities and mails it at a time that would make it due for delivery at Abigail's house during the audition. Mildred then calls Abigail and tells her about the letter. Sure enough, Abigail stays home to intercept the letter before her husband can get it, while Mildred auditions and, without Abigail's competition, gets the part.

The story of Mildred and Abigail is the first of many such stories in Leo Katz's<sup>1</sup> marvelous new book, *Ill-Gotten Gains*. Many of the stories are, like that of Mildred and Abigail, purely the product of Katz's quite wonderful imagination. Others, however, are drawn from real life, and from sources so varied that one is awestruck both by Katz's erudition and by the catholicity of his reading.

At the end of each story, whether fictional or real, and whether drawn from case reports, biographies of the famous, or Ann Landers, Katz's question is almost always the same: Can he or she get away with it, and not just legally, but morally? For example, has Mildred committed blackmail, or has she succeeded in getting the

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benefits of blackmail without incurring either legal or moral guilt for her actions?

Katz's answer is that Mildred has so succeeded. She has engaged in "avoision" — a neologism Katz coins out of "avoidance" and "evasion" — and avoision works not just in law but in the underlying moral universe that law reflects. As with, say, the tax code, in which the legal status of a transaction is frequently determined by its form rather than its substance or the purposes for which it is engaged in, so too, argues Katz, is the morality of many an act determined by its form rather than by the actual effects produced or the state of mind of the actor. That neither consequences nor states of mind fully determine the morality of acts is what creates the possibility for avoision, the moral equivalent of having one's cake and eating it, too. So long as the requirements of moral form are observed, one can, like Mildred, pursue nefarious ends for nefarious reasons without doing anything immoral.

Now this is a deeply counterintuitive position, as Katz is keenly aware. Indeed, its counter-intuitiveness explains both why Katz has written the book and the obvious relish with which he develops the delicious real and hypothetical examples that he marshals to illustrate and buttress his claim. Like most counter-intuitive claims, however, Katz's is, I believe, wrong, for reasons I shall address shortly. Nonetheless, neither the counter-intuitiveness of Katz's claim nor my pronouncement of error should warrant the conclusion that *Ill-Gotten Gains* can be ignored.

First, there is a chance that I am wrong and that Katz is correct; and that chance, when multiplied by the theoretical importance of the claim if true, makes the book quite important on that ground alone. In addition, even if Katz is mistaken, his errors should be instructive. Finally, Katz is an immensely entertaining writer, whose erudition, keen wit, and imagination cannot fail to delight the reader, even if she disagrees with Katz at every turn.

## I. AN OVERVIEW

The most important part of the book is, in my opinion, Part One. In Part One, Katz seeks to introduce and then solve the puzzle of avoision. The conventional view is that *legal* rules are frequently and perhaps necessarily over- and underinclusive when measured against their background purposes, and this over- and underinclusiveness creates loopholes that clever lawyers, protected by the terms of the rule and the principle of legality, can exploit for the benefit of clients. Avoision is, on the conventional view, restricted to the domain of legal rules; it does not occur in the domain of morality, which is neither posited nor encumbered by concerns

germane to the posited, such as legality.<sup>2</sup> Whether or not Mildred is guilty under the *law* of blackmail, on the conventional view, she is morally a blackmailer.

Katz attacks the conventional view in stages. First, he argues that avoision occurs in extralegal contexts, a phenomenon that cannot be explained by the conventional view. Avoision occurs in dictatorships that do not honor the principle of legality (pp. 17-19). Avoision occurs within our own consciences, surely not an obvious domain of fallibly drafted over- and underinclusive rules (pp. 19-24). And avoision occurs within "Jesuitical" religious doctrines that turn out to mirror closely the criminal law but that again do not fit the contextual presuppositions that the standard account gives for the necessity of blunt rules (pp. 24-30).

Next, Katz makes what is his central theoretical claim: Any system of morality that is not purely consequentialist inevitably is going to contain a certain amount of formalism, and formalism creates the opportunity for avoision (pp. 52-59). In other words, any deontological morality — or deontological component of morality — will be formalistic in the same way that the criminal law and the tax code are formalistic. Complying with the morally prescribed forms makes you morally safe, just as complying with the legally prescribed forms makes you legally safe. And this is true even if you follow the prescribed forms solely in order to achieve a goal that morality otherwise forbids.

Thus, according to Katz, if a deontological theory of morality condemns harvesting one healthy person's organs to save five dying persons, but does not condemn diverting a trolley from a track where it will kill five persons to a track where it will kill one, it will be possible for the determined organ harvester to achieve his otherwise immoral goal in a morally permissible manner if only he somehow can convert a "harvest" situation into a "trolley" situation (pp. 56-57). Or, if morality condemns private execution of those disposed to violence but does not condemn the use of deadly force in self-defense, then it is morally permissible for Charles Bronson to walk in Central Park at night for the sole purpose of enticing violently disposed persons to attack him so that he can, in turn, kill them in self-defense.<sup>3</sup> Or, to use an example about which Katz and I have disagreed elsewhere, Katz would claim that it is morally permissible for you to drive at a safe, legal speed around your enemy's neighborhood, even if you do so for no other reason than the slight

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2. See pp. 16-17. The principle of legality — "no crime without law, no punishment without law" — which, in its narrowest sense, demands that all criminal laws be legislatively enacted, is usually taken more broadly to mean that no one should be penalized except according to laws that are published, prospective, and clear. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 29-34 (2d ed. 1995).

3. See *DEATHWISH* (Paramount 1974). Katz uses a similar example. See pp. 30-32.



chance that your enemy will step out from behind a parked car and be run over by you before you can apply the brakes.<sup>4</sup>

Thus, for Katz, who comes down squarely on the side of the deontologists, the way we bring about desired results affects our moral responsibility for those results, and because of this we can bring them about in ways that leave us morally unscathed. There is, therefore, avoision in deontological morality, and avoision in law just as often mirrors avoision in morality as reflects the familiar problems of drafting. Katz illustrates the pertinence of this claim through a parade of problems drawn from tax (pp. 4-6, 113-19), corporate (pp. 8, 93-96), bankruptcy (pp. 7-8, 90-92), immigration (pp. 6, 71), and other areas of law — problems that Katz claims all demonstrate moral, not merely legal, “loopholes” of form.

In Part Two of *Ill-Gotten Gains*, Katz focuses on an insight derived from his central claim about the formalism of deontological morality: If the moral quality of an act is a function not only of its consequences for someone (Victim) and the state of mind of the actor, but also of how the consequences are brought about, then it should follow that Victim, concerned only with consequences for him and not causal chains, will often prefer an act that is seriously wrong to one that is less seriously wrong or not wrong at all. Katz gives the example of a victim who entreats a would-be thief to give him a beating rather than take a precious heirloom. According to Katz, if the would-be thief complies with this request, he commits a more serious wrong than he would by taking the heirloom, notwithstanding the victim’s preference for a beating (p. 148). Moreover, the beating is a more serious wrong even if no third-party interests are at stake, and even if the victim is a fully competent chooser. That’s just the way morality is.

Katz argues that this point, namely, that the seriousness of a moral wrong is a matter of its form — here, beating versus theft — and not merely its consequences — after all, the beating was less harmful than the theft — can be generalized to solve the puzzle of blackmail. That puzzle consists of the fact that the blackmail victim would prefer to pay the blackmailer for silence rather than have the blackmailer commit the perfectly permissible act of revealing the victim’s dirty secret. Yet, the law — and presumably morality — deems the act of blackmail, which in the victim’s eyes is less harmful, wrong, even though the more harmful act of exposure is permissible.

Now, there are a multitude of theories about why blackmail is wrong, as well as some libertarian theories according to which it is

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4. See Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES, 1, 4 n.10 (1994).

not wrong.<sup>5</sup> (I tend to find most attractive those accounts that liken the wrong of blackmail to that of building spite fences, which consists of intentionally exploiting another's vulnerability, making the actor better off than she would be had the victim not existed, and — importantly — making the victim worse off than she would be had the actor not existed.)<sup>6</sup> For Katz, however, there is no real puzzle here. Because form can make all the moral difference, it is not surprising that it does so in the case of blackmail. Mildred would wrong Abigail if she were to demand that Abigail stay away from the audition by threatening to spill all to Abigail's husband, even though Abigail would much prefer that deal to having Mildred actually tell Abigail's husband about Abigail's affairs, an act both legally and morally permissible. Furthermore, just as victim preference cannot make battery into a less serious wrong than theft, neither can Abigail's preference for "payment" to Mildred make Mildred's blackmail a less serious wrong than spilling the beans (pp. 151-60). Form, not function, is what makes blackmail, but not contrived warnings, morally impermissible.

The final part of the book applies Katz's basic insight about the moral significance of form to the issue of the misappropriation of glory. Katz compares the principles of allocating praise with those for allocating blame and finds the two sets of principles to be quite similar. He then points out some implications, primarily for the criminal law, that follow from comparing the two sets of principles.

## II. ARE DEONTOLOGICAL MORALITIES NECESSARILY FORMALISTIC?

Katz makes two important theoretical claims. First, he claims that deontological moralities will, of necessity, be formalistic. Major moral distinctions will turn on how consequences are brought about, not simply on what consequences are brought about, or why. Moral reasoning within deontological moralities will be Jesuitical or Talmudic, not deduced from elegant theories.

Second, Katz claims that the formalistic distinctions within law that generate the puzzles with which he is concerned track the formalistic distinctions within the law's underlying deontological morality. I shall comment on the second claim and then take up the first.

Are the formalisms that so delight Katz a reflection of an underlying morality? Katz really only gives us an *ipse dixit* on this point. For suppose someone were to say that Mildred's plan did involve

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5. The best access to the literature on blackmail is through the articles collected in Symposium, *Blackmail*, 141 U. PA. L. REV. 1565 (1993).

6. See Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639 (1993); Scott Altman, *Divorcing Threats and Offers*, 15 LAW & PHIL. 209 (1996).

blackmail, morally speaking. What does Katz provide us to adjudicate between his claim that Mildred is morally in the clear and an opposing claim? That proper casuistry would lead to Katz's verdict is nothing but a promissory note, for nowhere in the book can I find Jesuitical or Talmudic reasoning that convinces me. Nor is law's underlying deontological morality ever elaborated sufficiently to enable the skeptic to compare another's casuistry with her own. Therefore, with respect to Katz's various claims about the formalistic distinctions of morality, an appropriate response might be "Says who?"

Moreover, by portraying deontological morality as full of Jesuitical formalisms, Katz leaves himself open to the internalist rejoinder, "If this is what morality is like, then why should anyone care about it?" Of course, Katz may be an externalist, simply reporting grim news from the moral front and not prescribing, but I doubt it. The tone of the book is that it is a good thing — in an action-commending sense — that law reflects the formalisms of morality.

Katz's case for the law's formalistic distinctions reflecting those of morality is further weakened by the fact that many of the distinctions he finds within the law can be doubted. For example, is it really so clear that Mildred is not legally a blackmailer? I would assume that the answer could vary from jurisdiction to jurisdiction depending upon the wording of particular criminal statutes. If a jurisdiction deemed Mildred a blackmailer, Katz could not argue that it was wrong as a matter of law. He would instead have to argue that the law of that jurisdiction was morally flawed. But the law often serves as Katz's principal evidence for what morality prohibits and permits, so that exposure of the contingency of the law's relation to morality tends to undermine the law's weight as evidence of moral distinctions. The distinctions the law draws might be morally unjustified, reflecting venality, history, or accident; that is, the law might be immoral. Or the distinctions the law draws might be justified by indirect consequentialist reasons, reflecting the familiar problems of guidance, administrability, privacy, and control of government.

Thus, for Katz to make his claim convincing that formalistic distinctions within the law reflect similar distinctions within morality, he would have to show that the formal distinctions really were in the law and that they were neither morally unjustified nor justified on indirect consequentialist grounds. Without an elaboration of the underlying deontological morality, or at least a few examples of "right before your eyes" moral casuistry, Katz cannot vindicate his claim about the relation of legal formalisms to morality.

This brings me back to Katz's other and more central claim, namely, that deontological moralities are necessarily formalistic in the Jesuitical sense. I must confess that I do not see why that is so. Of course, all moral theories, even fully consequentialist ones, rest on bedrock principles that function as axioms. Every moral theory will be formalistic at its core, in the sense that no further substantive grounds can be adduced in support of those bedrock principles. But this is not the kind of formalism Katz has in mind when he invokes Jesuitical casuistry. Rather, he appears to be arguing that deontological moralities resist classifying all possible actions in terms of the basic values those moralities express, and instead must classify at least some actions on the basis of factors unrelated to those basic values. If so, then I submit he has not proved his case.

There are, of course, all kinds of moral theories that one might describe as at least partially deontological or nonconsequentialist. There are Kantian theories based on respect for others as ends in themselves.<sup>7</sup> Then there are theories that reflect some balancing of impartial concern for others' welfare and partiality towards one's own well-being and projects.<sup>8</sup> I see no reason to expect any of these deontological moralities to generate Katz-like formalisms, although they undoubtedly contain difficult line-drawing problems to the extent that they contain both elements of consequentialism and nonconsequentialist-based rights.

A third set of deontological moral theories, sufficiently similar in many respects to the libertarian Kantian theories that they might be labeled neo-Kantian, are those built around what I shall refer to as the nonappropriation norm: *Do not appropriate another's existence without her consent to make yourself better off than you would be had she not existed, and her worse off than she would be had you not existed.*<sup>9</sup> These theories might divide over whether the forbidden appropriation includes only appropriation of another's body, labor, or talent, or whether it extends to belief-mediated pleasure

7. These Kantian theories come in a variety of versions, from the quite libertarian to the relatively nonlibertarian. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) (assuming an ambiguous position with respect to whether bodies, labor, and talents are protected by side-constraints); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (same); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (promoting Kantian libertarianism); see also Larry Alexander, *Liberalism as Neutral Dialogue*, 28 UCLA L. Rev. 816, 822-26 (1981) (discussing the differences among Ackerman, Rawls, and Nozick).

8. See, e.g., THOMAS NAGEL, *EQUALITY AND PARTIALITY* (1991). Compare SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* (rev. ed. 1982) (advocating a non-deontological balancing of personal and impersonal perspectives) with Larry A. Alexander, *Scheffler on the Independence of Agent-centered Prerogatives from Agent-centered Restrictions*, 84 J. PHIL. 277 (1987) (arguing that Scheffler's approach of necessity results in deontological side-constraints).

9. See, e.g., 2 F.M. KAMM, *MORALITY, MORTALITY* 279-80 (1996). Thomas Nagel has recently endorsed a nonappropriation deontology similar to Kamm's. See Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83 (1995).

and distress as well,<sup>10</sup> so that, for example, it might enjoin building spite fences and similar exploitation of psychic vulnerability.

All nonappropriation theories would leave a large domain of action governed by purely consequentialist considerations. Thus, the interactions of *X* and *Y*, where either *X* or *Y* or both will be worse off than they would be had the other not existed — for example, where *X* wishes to play rock music and *Y* wishes to sleep, where *X* wishes to drive down a lane that *Y* wishes to walk on, or where *X* and *Y* both wish to use the same natural resources — must be governed by consequentialist norms because they do not involve appropriation. These consequentialist norms might be implemented by indirect consequentialist methods — formalistic rules of law or convention that will be over- and underinclusive and draw somewhat arbitrary lines — but this is not the kind of inherent moral formalism Katz is seeking to reveal. Although it would be a major theoretical task to “mesh” the nonappropriation norm with the consequentialist norms, I see no reason to expect Katz-like formalisms to pop up at the interface of these two moral domains.

Does the nonappropriation norm itself generate Katz-like formalisms? Again, I do not see why this should be so. Rather than just assert that this sort of deontological morality can avoid the formalistic distinctions that Katz finds endemic to deontology, however, I shall devote the next Part to exploring how well the nonappropriation norm handles some of Katz’s (and my own) examples nonformalistically.

### III. THE NONAPPROPRIATION NORM IN ACTION

The nonappropriation norm explains the distinction between redirecting a runaway trolley so that it kills one rather than five and carving up one healthy person in order to harvest his organs for the benefit of five dying persons. The trolley case involves interaction, not appropriation. In that case, no one is made better off than she would have been had those made worse off not existed.<sup>11</sup> The organ-harvesting case is paradigmatic appropriation.

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10. See, e.g., JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 254-55 (1990) (rejecting rights against belief-mediated distress).

11. I should acknowledge that there is a version of the trolley case that is devilishly difficult for the nonappropriation norm. In this version, the trolley tracks divide at point A and rejoin at point B. The five potential victims are on the track past point B, while the trolley has not yet reached point A. If the trolley goes down the left branch it will kill the five. If, on the other hand, it goes down the right branch, it will not kill the five, but only because it will kill one victim on that branch and will be stopped by the victim’s body. If the victim were not on the right branch, the trolley would continue to and beyond point B and kill the five even sooner than had it traveled down the left branch. If someone steers the trolley to the right to save the five by killing the one, has he violated the nonappropriation norm? Has he if he merely omits to steer it away from the right branch, when, had the victim not been there, he would have steered left in order to give the five a few seconds more to live?

What of the person who fails to rescue another so that he can then harvest the latter's organs? Katz says this conduct is morally permissible because of its form — nonrescue. He is correct about permissibility, but the conduct is permissible because it does not involve appropriation. The victim is not worse off than had the exploiter not existed. The explanation is substantive, not formal.

Perhaps Katz and I agree in the sense that what I am calling a substantive distinction between appropriation and nonappropriation is, to him, a formalistic one. After all, the line between killing and not saving does seem morally insignificant to many, particularly consequentialists, but also nonlibertarian deontologists. Nonetheless, if one regards nonappropriation as a core moral value, then the distinction is as substantive as one can have.

Next, consider the problem of blackmail that is so central to Katz's analysis. If the nonappropriation norm covers acts undertaken *because* they cause psychic distress, then many cases of blackmail violate that norm. For example, if Mildred would not inform Abigail's husband of Abigail's infidelities except in order to either cause Abigail distress or cause her to pay to avoid the distress — including paying in the currency of forgoing a part — then Mildred's original plan violates the nonappropriation norm. *But so too does Mildred's alternative plan.* The distinction between the two plans is formalistic in the pejorative sense of the word — pejorative, that is, to most, but not to Katz. There is no good reason to regard the two plans as morally different.

Or consider the person who drives carefully around his enemy's neighborhood for no other reason than the infinitesimal chance of having an "accidental" collision with his enemy. Katz believes that if his plan succeeds, and he accidentally kills or injures his enemy, he is morally blameless though disreputable. But here the nonappropriation norm again declares, *contra* Katz, that the conduct is morally wrong. The reasons why it is engaged in are just as important to its morality as its physical aspects. The state of mind affects wrongdoing, not just culpability. Katz's formalistic moral loophole does not exist.

#### IV. SOME OTHER EXAMPLES AND THE THESIS OF FORMALISTIC MORALITY

"Formalistic" is usually a pejorative term, associated at worst with clever and unprincipled lawyers' loophole-exploiting casuistry in service of clients' nefarious purposes, and at best with the moral price that must be paid for the rule-of-law virtues of guidance, predictability, and administrability. Katz's aim in *Ill-Gotten Gains* is to replace the pejorative sense of formalistic with an honorific sense. If morality is formalistic, and the formalism of law is merely a mir-

ror of this moral reality, then lawyers' Jesuitical maneuvers are to be commended rather than condemned.

I have argued that Katz has failed to make the case for morality's formalism even if pure consequentialism is rejected. Or, if the lines that deontological morality draws — say, between appropriate and nonappropriate acts — *are* formalistic, Katz has failed to make the case that drawing such lines requires Jesuitical casuistry rather than elegant theory.

I have made this case against Katz's thesis by focusing on a few examples. Katz's book is rich with examples, however, so perhaps I have stacked the deck in my favor by picking only those examples that I can undermine, and ignoring the examples that provide irrefutable support for Katz's case. Although I cannot come close to dealing with every example Katz gives, I shall devote this section to a few of the choicest ones.

A central example for Katz is the following: Victim prefers being battered to having a keepsake stolen, or being killed to being raped (p. 148). If Criminal batters rather than steals, or kills rather than rapes, has he committed a lesser wrong than had he done the opposite, and does he deserve less punishment than had he done the opposite? Katz says "no," despite the fact that Victim preferred the alternative Criminal chose.

Of course, one could argue that the criminal law must make gross judgments about the seriousness of various crimes, and that punishment cannot be tailored to the preferences of each victim. Katz, however, believes that even if the practical difficulty could be surmounted, it would remain true that the criminal should be punished more for battering or killing than for stealing or raping. Curiously, though, his argument for this conclusion seems inapposite: "The victim's decision as to whom he would rather be victimized by need bear absolutely no relationship to the culpability of the perpetrator" (p. 151). Why? Because we would rather live in a town in which a vicious killer is predicted to kill one victim a year rather than in a town in which a merely negligent factory operator is predicted to kill twenty victims a year, showing that culpability — the vicious killer is the more culpable — and victim preference do not track one another (p. 151). That is true, but it does not show that victim preference is irrelevant to culpability. All other things being equal, one who knows that one forbidden act will cause more harm than an alternative forbidden act is more culpable for choosing the former. If I know that you value your wedding ring more than not being punched in the nose, I act more culpably when I take the ring than when I punch you in the nose. Similarly, if the factory operator in Katz's example knows he is killing twenty people, he will be more culpable than the vicious killer of one.

Many of Katz's examples merely point up problems in the law that even deontologists should easily acknowledge. Moral luck plays too large a role in punishment. In many cases, this is because consequences count too much rather than too little.<sup>12</sup> In others, this is due to asymmetries in the law of attempts that no deontologist need defend.<sup>13</sup> The law is ambivalent about the necessity to retreat rather than employ force in self-defense, and therefore it is unclear what the legal status is of one who, like Charles Bronson in *Deathwish*, ventures out armed for the sole purpose of being able to kill in self-defense.<sup>14</sup> Recklessness sometimes does not suffice for criminality when it should, leading to the fiction that willful ignorance is tantamount to knowledge.<sup>15</sup> Tort law frequently performs the cost-benefit analysis of negligence without considering the costs of defendants doing cost-benefit analyses or becoming aware that they should do so.<sup>16</sup> And the notion of what should count as consent to sexual intercourse frequently is analyzed poorly.<sup>17</sup>

In short, although I cannot deal with all of Katz's examples — that would require a book twice as long as his — and although many of his examples are provocative and puzzling, I found in none of them, individually or collectively, any reason for deontologists to abandon unifying theory in favor of formalistic casuistry.

## V. ANOTHER LOOK AT FORMALISM

Perhaps I have misinterpreted Katz's basic claim. Perhaps when he maintains that morality is formalistic, he is alluding merely to the fact that things other than consequences are morally material. And perhaps when he endorses Jesuitical casuistry, he merely is admon-

12. See Alexander, *supra* note 4, at 7-22.

13. Katz gets mileage out of the following anomaly: One can be guilty of first degree murder if one sets off a bomb on a plane regardless of whether one's motive is to collect on life insurance on a passenger or property insurance on the plane; on the other hand, if the bomb fails to detonate, one has attempted murder only if one's motive was to collect on life insurance. See pp. 32-38, 241. I agree that this is an anomaly, but it is one that merely points out the need for reforming the definition of an attempt. The Model Penal Code has, in fact, taken a step toward eliminating the anomaly. See MODEL PENAL CODE § 5.01(1)(b) (1962) (making knowledge as well as purpose a mental state sufficient for attempting a result crime).

14. See *supra* note 3.

15. See pp. 39-44 (discussing willful ignorance). For a good discussion of the legal treatment of willful ignorance, see Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990).

16. See p. 34 (comparing the legal treatment of human negligence with the legal treatment of state-of-the-art products that occasionally cause injury). For my views on why the law errs in treating these two causes of injury differently, see Larry Alexander, *Foreword: Coleman and Corrective Justice*, 15 HARV. J.L. & PUB. POLY. 621, 631-36 (1992).

17. See p. 48 (discussing the obtaining of sex by various forms of lies and noting that only some lies appear to negate consent). For a discussion of consent to sex and how it is vitiated, see Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165 (1996); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996).



ishing the moral reasoner to play with lots of concrete examples and the intuitions about how those examples should be resolved before inducing the governing moral principles. In other words, perhaps he is telling us that (1) deontology is correct and consequentialism wrong, and (2) in determining the principles of a deontological moral system, we should look at lots of judgments about particular cases.

If this is all Katz is claiming, then I surely can accept his claims. I think, however, that he is making stronger claims. I think he is claiming that morality permits one to pursue and achieve nefarious goals through Jesuitically clever means, and that because morality does so, it cannot be reduced to a few basic principles that can be theoretically systematized.

The key example is that of driving around another's house in a safe manner for no other reason than the remote chance of truly accidentally killing the occupant.<sup>18</sup> If a fatal accident does occur, Katz would say the driver had not only achieved his nefarious goals, but had also achieved them in a morally permissible way.

I, on the other hand, believe the actor's purposes always affect the morality of his means, so that if the purpose is appropriation of others, the means are impermissible. The terrorist bomber and the strategic bomber employ the same means for the same ultimate end, but the former's appropriative purpose gives his act a different moral coloration.<sup>19</sup> The criminal law's definition of recklessness — the conscious taking of a substantial and *unjustifiable* risk<sup>20</sup> — displays the correct relation between our purposes and the morality of our conduct.

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*Ill-Gotten Gains* cannot fail to educate, provoke, amuse, and annoy the reader. It is a must read for anyone who is interested in legal and moral theory and the relation between the two. If I have failed to be persuaded by its stronger claims, it is perhaps because I am an incorrigible optimist about the construction of an elegant moral theory. But I must confess that, from time to time, I find myself hoping that Mildred got away with it.

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18. See *supra* note 4 and accompanying text.

19. On this point, I disagree with both Michael Moore, who completely separates state of mind from wrongdoing, and Claire Finkelstein, who discounts the importance of the purpose-knowledge distinction to culpability. See Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319 (1996); Claire Finkelstein, *The Irrelevance of the Intended to Prima Facie Culpability: Comment on Moore*, 76 B.U. L. REV. 335 (1996). I think that the purpose-knowledge distinction is quite material to moral assessment, but that in some cases — such as terrorist bomber versus strategic bomber — it is material to wrongdoing itself and not merely to culpability.

20. See MODEL PENAL CODE § 2.02(2)(c) (1962).

# LAW AND FANCY

*Robin West\**

POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE. By *Martha C. Nussbaum*. Boston: Beacon Press. 1995. Pp. xix, 143. Cloth, \$20; paper, \$12.

Martha Nussbaum's<sup>1</sup> graceful book *Poetic Justice* is an elegant brief for the importance of our capacity for imaginative "fancy" to our moral and legal lives.<sup>2</sup> Imaginative fancy, Nussbaum argues, allows us to know the internal substance and quality of the lives of others. It allows us to come to appreciate, to understand, to share, and ultimately to resist others' suffering (pp. 72-77). It is, in short, the means by which we come to care about the fate and happiness of others. It is a part, but not the whole, of our capacity to transcend a narcissistic and infantile egoism. It is therefore central, not peripheral, to our capacity for moral judgment, and it is accordingly central, not peripheral, to our lives as public citizens (pp. 1-12). Fancy is a part, not the whole, of what prompts us toward a generous, humanistic, egalitarian, and democratic stance toward others. Fancy is a part, not the whole, of what enables us to give a due regard to the individuality, the dignity, and the irreducible worth of our fellows.

Given its importance to our moral, political, and legal lives, Nussbaum argues, we should not only study our capacity for imaginative fancy, but we should also value, nurture, and encourage it. Reading modern realistic fiction, particularly (but not only) in novel form, is central to that end (pp. 1-12, 49-52). The modern realistic novel, Nussbaum argues, is the fanciful genre, *par excellence*. Through reading realistic novels — and only to a lesser extent watching films or reading history — we come to understand

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2. This short book contains a number of promises of work to be developed in the future. The most important promise the book contains, however, may be implicit rather than explicit. In this work and elsewhere, Nussbaum acts on her clearly deeply felt conviction that the western literary and philosophical canon, correctly and critically read, suggests a case for a moral and political structure that is at once humanistic, egalitarian, generous, and liberal in its respect for individuals and communities alike. If sustainable, this is a claim of tremendous importance and great hope, not only to law-and-literature or law-and-humanities scholars, but obviously for all engaged citizens in liberal societies. *Poetic Justice* does not directly argue for this claim although the first two chapters in particular — which rest almost entirely on interpretations of Dickens's *Hard Times* — suggest it.

the subjectivity and the perceptions of others, and we move some distance toward actually sharing in that subjectivity (pp. 4-7). More striking, though, we come to *care* about these fictional characters. If written well, the characters are so richly detailed that we actually concern ourselves with their projects, we share in their assessments of their lives and life situations, and we worry about their fate (pp. 7-9). This care for the fictitious lives of others is an important part — maybe the most important part — of the distinctive experience of reading realistic fiction. Because care for the real lives, fates, and projects of others is such an important part — maybe the most important part — of the moral point of view, it follows that the capacity to read and respond to narrative fiction is related, perhaps quite intimately, to our capacity for moral reflection and action. The experience of reading a novel and then engaging in the flight of fancy it engenders is not just a reminder of our moral capacities; it is training for them. Learning to read novels sympathetically is a part of our moral education (pp. 13-52).

More specifically, although they are never spelled out quite this explicitly, at least three arguments run through *Poetic Justice* regarding the relation between fancy and our moral lives. First, Nussbaum directs her elaboration of the capacity for fancy, and its relation to novelistic realism, to an internal, decidedly friendly critique of utilitarianism (p. 66). Both classical utilitarianism and its twentieth-century cousin, the normative law-and-economics movement, could attain much more sound footing if they would recognize the necessity of sympathy to moral judgment (pp. 3-33, 46-49). Utilitarianism *at its best* counsels a due and equal regard for the interests and well-being of every person affected by a moral or legal decision. It also requires a tentative assessment of the components of well-being — of the nature of suffering and of the good life — which are independent of, and even at times contrary to, the felt desires of individuals or communities (pp. 46-49, 66). Knowing an individual's external circumstances or chosen "preferences" among a range of market options does not aid an understanding of either that individual's subjective interests or the nature of the good life. Rather, one must know something deeply individualistic about the experiences, perceptions, and aspirations of the other, and at the same time know something deeply universal about the conditions of general well-being or of the ideal life. To *know* both the subjectivity of another human being and to know something of the objective content of the good life requires the capacity for fancy. Classical utilitarianism and modern normative economics both run aground when they try to eschew fancy and supplant it with more readily quantifiable sources of data. The gain in quantification, predictability, and precision is nowhere near the cost to moral *depth*. The behavioral criterion of well-being at the heart of normative economics

or utilitarianism is superficial when stripped of its relation to the internal subjective experience of life. By eschewing concern for subjective experience, both classical utilitarianism and twentieth-century law and economics gain a facility for precise quantification, but they do so by running a very real risk of inhumanity — of maximizing a sterile and behaviorally defined value without regard for the organic, lived consequences of legal or moral decisionmaking.

The second argument, elaborated upon in the third chapter, is in my view the heart of the book (pp. 53-78). In this chapter, Nussbaum argues that fancy relates not just to utilitarianism or to sound normative economics, but to moral decisionmaking generally. Fancy, Nussbaum argues, sharpens the capacity for those rational emotions — sympathy, fear, and revulsion — that in turn inform the moral sentiments of the judicious spectator. Doing the right thing and knowing the right thing to do require an understanding of the value of the consequences of actions to those affected by them, and that value is in turn partly a function of the quality of the *feelings* of the persons affected. Our own sympathetic feelings, or responses to the dilemmas of others, are windows to a rich assessment of others (pp. 72-77). To borrow from Adam Smith's original elucidation of this idea, when I see someone getting hit in the shins with a stick, I wince in pain because I am sympathetically sharing in the pain of the victim.<sup>3</sup> I share in the subjective, psychic, sensory experience of *pain*; I do not share in the bruising of the skin, muscle, and bone. That sympathetic echo of the victim's *feeling* — his pain — is a central component of my moral conviction that it is wrong to hit people in the shins. Our own sympathetic feelings — our capacity to share in the actual experience, albeit not with the same intensity, of the feelings of others, particularly their unpleasant feelings — are barometers of the emotional or simply the subjective well-being of others. Since feeling is in turn a central component of well-being — the subjective misery that goes with the experience of *hunger*, for example, detracts from well-being, just as does the objective reality of malnourishment — the capacity for sympathetic engagement in the emotional or subjective experiences of others is a necessary, not peripheral, component of moral judgment.

The third argument, alluded to throughout the book but most explicitly stated in the final chapter, *Poets as Judges*, is that fancy informs not just our moral sense, but, more specifically, our sense of justice. Accordingly, the judge who employs her capacity for fancy will simply be a better judge (pp. 79-122). Another way to put the point, I think, is that fancy and the knowledge it facilitates are com-

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3. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 3-5 (George Bell and Sons 1875) (1790).

ponents of *justice*. To judge common law cases, the judge must engage the subjectivity of the litigants if she is to do a good job. If deciding the constitutionality of a state law prohibiting homosexual sodomy, for example, she must ascertain the impact of such laws on homosexual citizens (pp. 111-19). When deciding a sexual harassment case, she must decide whether a pattern of behavior might reasonably be expected to prove unsettling to female workers (pp. 104-11). When determining whether a state is liable under civil rights acts for its failure to protect its youth against violent assaults by family members, she must assess the consequences, for a particular child, of that failure. Such a judge will have to enter the world, the sensibilities, the attachments, the projects, the sensitivities, the vulnerabilities, the anguish, and, yes, the suffering of the closeted gay or lesbian citizen, the sexually harassed female worker, or the violently abused four-year-old boy. That in turn requires, by necessity, not legal deduction and not even rational calculation, but rather a *flight of fancy* for almost any judge. She, of course, may have *experienced* being closeted, harassed, or violently abused. But very likely she has not. The judge deciding virtually *any* legal question will encounter at some point the need to understand, assess, weigh, and sometimes give voice to the subjective experiences of others. The fanciful ability to live momentarily the life of the other is an obvious prerequisite for our ability to do so, and to do so well rather than poorly. The ability to do so, then, is a part of our ability to do justice.

I will not comment here on the arguments of the first chapter of Nussbaum's book — that utilitarianism or normative economics, or both, uninformed by narrative wisdom risk being sterile, and that a sensitive reading of both Dickens's *Hard Times* and Wright's *Native Son* underscores that truth. Nussbaum has written elsewhere at greater length on the pitfalls of both utilitarianism and normative economics when not informed by what she calls "love's knowledge."<sup>4</sup> I have written on related topics elsewhere,<sup>5</sup> and I do not want to use a book review format simply to repeat myself. I have also commented elsewhere on Nussbaum's use of canonical fiction toward egalitarian and progressive political ends, broadly speaking, and the quite stark differences between the ways that she and others within the law-and-literature movement tend to read canonical fiction.<sup>6</sup> Instead, I will focus on the arguments of the middle two chapters, arguments concerning the role of imaginative fancy in moral and judicial decisionmaking. I should stress at the outset that I am largely sympathetic to the general claims Nussbaum makes.

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4. MARTHA NUSSBAUM, *LOVE'S KNOWLEDGE* (1990).

5. See ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993).

6. See Robin L. West, *The Literary Lawyer*, 27 PAC. L.J. 1187, 1200-02 (1996).

Nevertheless, I think there are a number of very real and deep problems with them. The book would have been more powerful had potential objections received more of an airing. In the remainder of this review, I want to raise three objections and attempt to answer them.

The first objection goes to Nussbaum's quasi-psychological claim about the nature of moral reasoning. In the end, it is simply not at all clear that reading realistic novels strengthens one's ability to even appreciate, much less sympathetically engage, the sufferings of others in a morally meaningful way. Let me try to make a bit more concrete what I take to be Nussbaum's claim by drawing on my own reading experience. Last summer, I read a novel, *Mason's Retreat* by Christopher Tilghman,<sup>7</sup> about a family on Maryland's eastern shore that contained, among much else, a well-written and gripping description of the accidental drowning of an adolescent youth in the Chesapeake Bay. The boy was attempting to run away from his family before their departure for England — ironically so that he could stay on the dilapidated farm that his family had barely managed to run for the prior two years and that he, alone among the family members, had come to love. The boat he had constructed for himself was not seaworthy, and he drowned. The same summer, I read in the newspaper of an accidental drowning of two very real children in the Chesapeake Bay. They had gone canoeing with their uncle, and that canoe similarly proved not up to the test of an unexpectedly strong gust of wind. The uncle not only survived the accident, but struggled unsuccessfully to keep the two children alive and afloat. One of the children died in his arms. Both stories were terrifying to me and indescribably sad. I well remember sitting in my back yard crying truly inconsolably — “like a baby” — for the small children, their parents, and their devastated uncle. I also remember tearing up, although not so hysterically, to be sure, for the young boy so artfully drawn in Christopher Tilghman's fine novel. The details of both the fictional and real stories of these dead children have stayed with me more than I would wish. It is, to be sure, quite interesting that my emotional reactions to these two stories, albeit different in intensity, were so very *similar*, given that the fictional drowning never occurred while the newspaper story most assuredly did. But it does not at all seem right that I reacted as strongly as I did to the newspaper story because of my ability, honed by the reading of realistic fiction, to engage in fancy. Rather, it seems closer to the truth to say that I sympathized with the children and the adults in both the real and fictional stories because I am a mother of young children, because I am myself frightened of large bodies of water, and because I have

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7. CHRISTOPHER TILGHMAN, *MASON'S RETREAT* (1996).

warm feelings and memories of early childhood that encourage empathetic responses to stories regarding children, their vulnerabilities, and the tragedy of their suffering. I suspect that my emotional responses, my moral sentiments, and my style of reading are *all* more influenced by other and more basic experiences — primarily early childhood experiences of nurturance, love, and connection — than by one another.

Like some, but certainly not all, readers of fiction, I am easily captured by realistic novels. I readily and willingly suspend disbelief and get caught up in the net of fictional characters. I fully see myself as Nussbaum's reader of narrative, realistic fiction. Just as Nussbaum suggests I should, when I read fiction I quickly come to care — and care a lot — about what happens to the central characters (pp. 30-36). I know, though, that other readers of fiction, including many readers who care deeply and sympathetically about the very real suffering of others, just are not easily captured readers: they always *know* they are reading fiction, they maintain distance from the characters, they are more aware of the craft of the story than immersed in it, they witness rather than participate in the tragedy or irony of the characters' lives. They do not get caught up.

Furthermore, whether or not one gets caught up in narrative fiction may be *inversely* correlated with expertise. It may be that I get as caught up in narrative fiction as I do precisely because I do not read much of it and have no expertise regarding it. But I have no idea whether or how that does or does not relate to the depth of my responsiveness to real tragedies experienced by those either close to or far removed from me. I am not claiming that they are unrelated; I just do not know. Similarly, I am not saying that there is no relationship between our moral sensitivities to others and the way in which we do or do not read realist novels, but rather, and only, that it is not obviously true that there is any such relation. The existence of one needs to be argued or shown, rather than simply asserted.

By contrast, it *does* seem fair to say that reading some narrative fiction will broaden the moral sensitivities of readers for a quite different reason: such reading may teach us something about the subjective realities of the lives of others about whom we would otherwise know very little. This knowledge, in turn, may lead us to care about people whom we otherwise would not. We may be moved to care more about the plight of the working poor by reading Dickens. E.M. Forster might have caused a sea change in attitudes toward imperialism or homosexuality, and Harriet Beecher Stowe might indeed have been partially to blame, or credit, for starting the Civil War. Upton Sinclair's *The Jungle* and Steinbeck's novels might have made a difference during and after the Depres-

sion. Toni Morrison's and Alice Walker's and Richard Wright's fiction may yet affect, and positively, our contemporary moral sentiments across and within the divides of color. Indeed, Nussbaum most assuredly insists on this political point (pp. 90-118). Literature — at least the right kind of literature — can and does teach us about, and teach us to care about, the lives of those we are otherwise inclined to keep at a distance, and for that reason alone it is of value.

But Nussbaum's claims for reading narrative fiction clearly go deeper. Reading realistic fiction, she argues, is central to our capacity for sympathy, not only because it teaches us about otherwise inaccessible peoples or cultures, but also because it develops our capacity for sympathetic engagement with others and hence hones our moral sensibilities. This is a more difficult claim to make, and it is a much more difficult claim to prove. Nussbaum succeeds in *making* the claim in this book — which is no small accomplishment. I am not convinced, however, that she moves any appreciable distance toward proving it.

The second and perhaps more central problem I want to discuss lies in the book's basic moral claim. Let us assume the causal claim discussed above: that imaginative fancy, honed by reading realistic novels, does indeed influence our capacity for sympathy and hence our moral judgement. But is it true that fancy *improves* judgment? Fancy, Nussbaum urges, enables us to see the grave error in the calculating utilitarian's willingness to sacrifice one life or one person's suffering for the sake of a greater societal gain (pp. 67-70). Through fancy we come to better appreciate the irreplaceable uniqueness of the individual, as well as the sheer magnitude of one person's suffering. Such knowledge — which, following Nussbaum, we might call love's knowledge — better enables us to assess the costs to suffering individuals of a proposed course of action. This might well be true. I think it is.

The objection I want to raise, which I think is not adequately handled in the text, is that even if fancy does enable us to better appreciate the magnitude and meaning of the suffering of one individual, it may also be the case that the use of imaginative fancy to guide moral judgment might from time to time *overcommit* us to the suffering individual. Precisely because of its discriminating nature, in other words, fancy might overcommit us to the project of alleviating the suffering of the finely rendered, detailed, compelling individual, and might unduly blind us to, or distance us from, the relatively ill-defined interests, sufferings, or lives of those who compose a collectivity. Imaginative fancy might well enable a full understanding of the plight of particular individuals — that is its strength, but it is also, quite clearly, its weakness. Because it not



only gives us a window to the plight of the individual, but commits us to alleviating the individual's plight, fancy may obscure the legitimate demands, needs, desires, or ends of the not-so-finely-rendered collective. Imaginative fancy may lead us astray for the most basic of moral reasons: an *overly* sympathetic response to the dilemma or situation of one individual may cloud rather than crystallize a moral decision, where the actor must balance the interests of an individual against those of a group.

Nussbaum of course knows this, but she seems somewhat unwilling even to clearly define the problem. Her ambivalence goes not only to how the problem should be resolved but to whether it is a problem at all, and if so, of what sort. Her ambivalence becomes most pronounced toward the middle of the central chapter of the book, when she returns to Dickens's *Hard Times* to illustrate the sort of moral insight that is facilitated by imaginative fancy. The passage is worth quoting in full, as it nicely illustrates a tension that reappears throughout the book — as well as throughout law and throughout public moral deliberation:

Sissy is told by her utilitarian teacher that in "an immense town" of a million inhabitants only twenty-five are starved to death in the streets. The teacher, M'Choakumchild, asks her what she thinks about this — plainly expecting an answer expressing satisfaction that the numbers are so low. Sissy's response, however, is that "it must be just as hard upon those who were starved, whether the others were a million, or a million million." Again, told that in a given period of time a hundred thousand people took sea voyages and only five hundred drowned, Sissy remarks that this low percentage is "nothing to the relations and friends of the people who were killed." In both of these cases, the numerical analysis comforts and distances: what a fine low percentage, . . . and no action, clearly, need be taken about that. Intellect without emotions is, we might say, value-blind: it lacks the sense of the meaning and worth of a person's death that the judgments internal to emotions would have supplied. Sissy's emotional response invests the dead with the worth of humanity. Feeling what starvation is for the starving, loss for the grief-stricken, she says, quite rightly, that the low numbers don't buy off those deaths, that complacency simply on account of the low number is not the right response. Because she is always aware that there is no replacing a dead human being, she thinks that the people in charge of sea voyages had better try harder. Dealing with numbers it is easy to say, "This figure is all right" — for none of these numbers has any nonarbitrary meaning. (And really, notice that 500 deaths out of 100,000 is incredibly high for ocean crossings, whether by sea or air). Dealing with imagined and felt human lives, one will (other things equal) accept no figures of starvation as simply all right, no statistics of passenger safety as simply acceptable (though of course one might judge that other factors make further progress on these matters for the present unwise or impossible). The emotions do not tell us how to solve these problems; they

do keep our attention focused on them as problems we ought to solve.  
[pp. 68-69]

There is obviously considerable tension in this passage between Sissy's claim — partially embraced by Nussbaum — and Nussbaum's parenthetical concessions, which are more mature, more balanced, and indeed more utilitarian. The starting, critical point is clear enough: the utilitarian teacher is wrong to insist that the numbers and only the numbers matter — Sissy's direct empathic knowledge of the suffering of the shipwrecked or the starving makes clear that one accidental death or one malnourished baby is one too many, whatever may be the social gains. Parenthetically, though, we learn that perhaps the utilitarian's mistake is not so much in thinking that the numbers matter, but simply in using the wrong proportions. Five-hundred deaths per 100,000 passages, Nussbaum suggests in the passage's first parenthetical, is just too high a number. But this objection is quite different from Sissy's. If *this* is M'Choakumchild's error, the debate is *entirely* intra-utilitarian. In the last two parentheticals, as if to drive the point home, Nussbaum entirely concedes away Sissy's position — or whatever is left of it. Nussbaum acknowledges that only when "other things are equal" — an arithmetic relation, of course — is one life lost too many, and furthermore that it may not be practically possible to actually improve the numbers at any particular point in history anyway.

In the next paragraph, when Nussbaum purports to argue directly for Sissy's position and against the utilitarian, this confusion between argument and parenthetical aside comes to a head, and the collapse of the anti-utilitarian position becomes total:

This does not mean that one would not use economic models of the familiar type. Frequently in such cases they can provide valuable information. But one's use of them would be steered by a sense of human value. Nor need emotion-based reasoning hold that human life is "sacred" or "of infinite value," vague notions that probably do not capture many people's intuitions when these are closely examined, and that have generated much confusion in arguments about animal rights, the termination of life, the treatment of severely handicapped humans. We may concede that in some of these cases the emotion-based vision of a single death might distort judgment if steered by such a vague notion of infinite value, and that the "cold" techniques of economics might give more accurate guidance. (For example, we certainly should be ready to accept a relatively low risk of death or disease to attain considerable social gains.) But in this case, I claim, what we are saying is not that the calculation per se is more reliable than emotion per se: we are saying instead that a certain degree of detachment from the immediate — which calculation may help to foster in some people — can sometimes enable us to sort out our beliefs and intuitions better and thus to get a more refined sense

of what our emotions actually are, and which among them are the most reliable. If we had only numbers to play with, and lacked the sense of value embodied in emotions of fear and compassion, we would not have any nonarbitrary way of answering such questions. [p. 69; footnote omitted]

Poor Sissy! By the last parenthetical — the insistence that “we certainly should be ready to accept a relatively low risk of death or disease to attain considerable social gains” — Nussbaum has embraced M’Choakumchild’s position in its entirety. They differ, if at all, only in their assessment of what is and is not a “relatively low risk” of death. Clearly, by the end of this paragraph, Sissy has lost her advocate.

What is the sympathetic reader to make of this? Perhaps we can sum up Nussbaum’s point in the following way: M’Choakumchild and Sissy are *both* mistaken, but in opposite directions: M’Choakumchild puts too much weight on the numbers and not enough on fancy, Sissy the inverse. To be sure, as between Sissy’s view (one death is too many), M’Choakumchild’s (500 per 100,000 is pretty good), and Nussbaum’s (one death is too low, but 500 too high), Nussbaum is probably right. But to reach this conclusion we are engaging in the M’Choakumchild-like reasoning that we are being simultaneously urged to disdain.

I want to return in a moment to explore whether or not Sissy’s view is mistaken, and if so how. First, though, let me comment briefly on M’Choakumchild’s mistaken judgment, since his mistake, not Sissy’s, is the real target of both Dickens’s fiction and Nussbaum’s argument. Again, the central argument of Nussbaum’s book is that M’Choakumchild tolerates a death toll that is too high because he lacks empathic capacity: he underestimates the sheer misery entailed by even one accidental drowning. If he better understood that anguish, if he could somehow imaginatively share it, he would not so cavalierly dismiss the twenty-five people starving in the streets, or sacrifice on the altar of societal convenience the 500 lost at sea.

Let me return now to Sissy’s assessment of value. Ignorant in her innocence of the social gains to be reaped from transatlantic transport, oblivious to qualifications of the all-things-being-equal sort, and relying entirely on her knowledge, born of sympathy and love, of the magnitude and meaning of one child’s death or one human’s suffering, Sissy declares the cost of one life not worth the gain *whatever it may be*. In a moment, I will suggest that Sissy is mistaken in this immature and quite absolute judgment, as even Nussbaum apparently concedes, and that there may be something to M’Choakumchild’s cold-hearted pedagogical claim: Sissy may be inclined to make this sort of error precisely because she reads too much sentimental fiction. But first let me stress that the question of

*whether* she is mistaken or not should not be begged: it is not all that *obvious* that she is wrong, or that the Luddites, neo-Luddites, Amish farmers, Green Party members, and counter-cultural drop-outs who might agree with her would be wrong to do so. It may well be that if the bureaucrat, or the insurance claims adjuster, or for that matter the juror in a negligence action assessing compensatory damages, fully understood the depths of a parent's grief upon losing a child, the harm to a child of losing a parent prematurely, or the suffering of a hungry child on the street, the bureaucrat and the claims adjuster would quit their jobs. The juror would set damages at a point high enough to bring our convenience and commodity-driven engine of dangerously produced industrial goods and services to a grinding halt. And again, it may be that these people, imbued with Sissy's sympathetic knowledge, would be right to do so. In other words, we should not, in our mature collective judgment, dismiss out of hand the child's insistence that the loss of even one child, parent, brother, or husband to the assembly line belt is not worth the transport, the luxuries, the conveniences, and more generally the consumption that make up modern life. If this is Sissy's assessment — if this is what she means when she pronounces one lost life as too high a price to pay for M'Choakumchild's functioning city or for one passenger's ocean passage — she may be right.

But, as Nussbaum parenthetically suggests, she may not be right, and if she is not, it is worth asking what leads her astray. It may be that like all empathic knowers — my label — Sissy commits herself, perhaps overcommits herself, to the sufferer with whom she sympathizes. Her capacity for sympathy alerts her to the existence of suffering, and her commitment to alleviate that suffering puts her on the path to moral action. Both are surely to the good, and Nussbaum might be right to locate narrative as a social activity which encourages and nurtures both reactions. But surely an absolute commitment to alleviate the suffering of the one regardless of the costs to many is not *always* warranted. Even if Sissy and Nussbaum are right to think that M'Choakumchild has stacked the deck in favor of industrialism by undercounting the suffering of individuals, surely there are many circumstances in which excessive attention to the exquisite anguish of one simply obscures the greater suffering of a greater number.

Whether *fancy* can or cannot be fairly charged with leading to this sort of mistake, I do not know, but it does seem clear that commitments born of sympathetic attachments, whatever their origin, run precisely this risk. Indeed, *whatever* may be the cause of our ability to make individualistic commitments to others — early childhood attachment, honing our capacity for fancy, or some combination — such commitments are *by their nature* exclusive, unbalanced, and *profoundly* discriminating. When we are committed,

truly committed, to the well-being of another, we necessarily violate the utilitarian-egalitarian mandate to treat all equally. When we are so committed to our child, our neighbor, or for that matter to the fate of a character in a work of fiction, we simply cannot equate the interests of the one with whom we have aligned ourselves and all other affected persons. What it means to care for one, in a sense, is to care less for all others. If love's knowledge truly and completely guides moral judgment, the result will not be a better informed and more humanistic utilitarianism. Rather, the result will be profoundly anti-utilitarian, and inequalitarian and undemocratic to boot.

Let me expand a bit on this objection, and then offer a response. Nussbaum, as noted above, suggests that empathic knowledge of the quality of the internal lives of others is honed by narrative and is a corrective to modern utilitarians' and economists' focus on quantifiable data. To this extent, in my view, her argument seems entirely correct. Read this way, her contribution is an internal and decidedly friendly critique of utilitarianism, and to a lesser extent of normative economics. Utilitarianism requires that we weigh the interests of all equally and that we aim to alleviate suffering. Love's knowledge, or fancy, helps us ascertain the nature of the latter and inclines us to do the former where we may otherwise be indifferent. But at least in this book, at least some of the time, Nussbaum seems to be intending a critique that goes further and is not so friendly: she posits a deep and arguably irresolvable conflict between the dictates of utilitarianism and the dictates of love's knowledge (pp. 3-19, 30-33, 46, 48-49, 66-67). The utilitarianism that was the object of Dickens's scorn in *Hard Times* and in some places the object of Nussbaum's critique dictates an equal regard for the interests of all, democratically equated and agnostically entertained: The interests of all count as one, no more and no less, regardless of content. The dictates of love's knowledge, by contrast, are profoundly discriminating and inequalitarian. Like Sissy, when our moral sensibilities and judgments are steered by our sympathies, they are focused rather than egalitarian, and discriminating rather than agnostic. We wish to alleviate the suffering of the individual with whom we sympathize, regardless of interest-toting calculations to the contrary. Sometimes fancy may indeed simply operate as a corrective of an overly quantified utilitarian calculus. But sometimes, as Nussbaum's ambivalence reveals, love's knowledge will conflict with the judgments of even the most enlightened and sympathetic of utilitarian decisions. This captures, perhaps, the conflict between Sissy's pure identification and commitment to the suffering of the individual and Nussbaum's own more balanced — more utilitarian — willingness to weigh that suffering against abstract social gains enjoyed by the undescribed multitude. When such a conflict arises,

it is not at all clear that the utilitarian is wrong or cold-hearted to count the gains to the many in the calculus, or that the empathic knower is right to focus so exclusively on the suffering of the individual.

Now, if it is true, as Nussbaum argues, that the experience of reading realistic novels hones the capacity for imaginative fancy, and if it is also true, as she argues, that the capacity for imaginative fancy improves our moral judgment, then we should indeed encourage and nurture the discriminating reading of fiction. But if it is also true — and I think it is — that at least some of the time, precisely the same capacity — the capacity for imaginative fancy, the ability to sympathetically understand and care for the internal well-being of the other — inclines us toward an excessive embrace of the demands of the one and an unjustified blindness to the sometimes competing interests, demands, or suffering of the multitude, then it follows that we ought to be wary of the project being urged upon us here: novel reading as moral training. Indeed, the tension that Nussbaum develops in this book — between the utilitarian's calculated concern for the pains and pleasures of the multitude and the empathic knower's directed and committed concern for the plight of the hurting individual — can just as readily be turned into a lesson diametrically opposed to the one Nussbaum imparts here. Thus, if fiction reading encourages not only sympathetic engagement, but also impermissible or unjustified bias, then what follows is not that we should read fiction to correct or soften the utilitarian mandate, but rather that we should embrace the utilitarian mandate as a corrective to our all-too-human, fanciful inclination to bind and connect with only a known few.

I would suggest, as a caveat to my endorsement of Nussbaum's argument, that this opposing lesson also is one to which it is worth attending. Realistic novels probably do strengthen our capacity for sympathy, commitment, and care. It is true that sympathy, commitment, and care are at the heart of our moral capacities. But nevertheless, it is also true that — regardless of how well, or how much, we read fiction — our ability to commit ourselves, to care, and to forge ties that bind is severely limited. Indeed, it is limited by definition. We sympathize, care for, and commit ourselves to the particular, the few, and the known. Unsurprisingly, those to whom we commit ourselves are generally those related to us or at least most like us. The result is not only that our beneficence is maldistributed — although that is obviously so. The problem is even deeper. In a world of radically unequal distributions of resources, those limitations on our sympathetic inclinations, on our imaginative fancy, and on our capacities for care further entrench injustice: We care for those most like us or for those with whom we most readily identify, and if we are relatively well off, so will be the objects of our solici-

tude. Even if our sympathetic attachments are extraordinarily generous, and whether or not they are undergirded by fiction reading, a world of moral judgment informed by them alone is likely to be an unjust one.

Now let me suggest a way out. It is true that if we assume as a baseline of the utilitarian mandate the cold indifference of M'Choakumchild and the ignorance of the nature of suffering which he embodies, then imaginative fancy is a sorely needed supplement. The utilitarian seeks to treat all equally and increase total happiness — there is nothing particularly hard-hearted about that. But it is true, as Nussbaum argues and Dickens shows, that if a utilitarian, even if sincere and genuine in his desire to do good, lacks basic empathic regard for the suffering and worth of individuals, the result will be a moral — and legal — calculus that verges on the monstrous. If the moral actor is truly oblivious to the nature — and hence the magnitude — of internal, emotional human pain, his efforts will go awry. What such an actor lacks is love's knowledge. What he needs to do and what he needs to learn is to inhabit the hearts and minds of others and to engage and align himself with their well-being. It is certainly worth contemplating the possibility that realistic fiction encourages that capacity.

On the other hand, if we assume as the heart and soul of the utilitarian mandate not a cold and ignorant M'Choakumchild, but rather a warm-hearted, flesh-and-blood, fully committed, sympathetic, empathic, well-nurtured, and well-read human being, then the risks, or possible errors, of utilitarian decisionmaking are quite different and call for a quite different corrective. The risk of error run by *this* decisionmaker, against which we must guard, is not that she will discount or undercount the magnitude or meaning of human suffering, but rather that she will be excessively and unjustly committed to those to whom she is most closely relationally tied, those with whom she most readily identifies, or those who capture her imaginative fancy. Such a person is not likely to make M'Choakumchild's mistake. But we should concede that such a person is *also* likely to care most passionately about the suffering of *her* children, siblings, parents, kin, neighbors, co-citizens, or, again, those who, for whatever reason, capture her fancy. She is likely to care considerably less for the suffering of strangers, foreigners, aliens, those not related to her, or those to whom she just does not connect. For this person — who is, one would hope, at least outside of the legal academy a more common sort than M'Choakumchild — the cold utilitarian mandate to *treat all equally* — not to favor the close over the far, the family member over the stranger, the national over the alien — is a corrective to her naturally skewed connections, biases, concerns, passions, and commitments. It is a corrective that both she and the rest of us should embrace, however

deep our revulsion at the M'Choakumchilds in our world. We need not worry that it is a mechanical formula that will steer us away from the harsh reality of human suffering or toward an inhuman disregard for our fellows. When embraced by a sympathetic soul, it is a corrective that points us toward the heart of justice.

Finally, the third objection one might pose to this very general claim — that imaginative fancy, nurtured by the reading of realistic novels, is central to moral and hence legal deliberation — is political. Nussbaum makes two claims in her book that can be roughly characterized as political. First, she suggests throughout that imaginative fancy and the realistic novels that spark it instill in readers a quintessentially liberal regard for the dignity, uniqueness, and worth of every individual. Second, she also insists, quite separately, that novel reading and imaginative fancy are central to a generally progressive and egalitarian political sensibility. The first claim — that novels in effect bolster liberalism — is a familiar one and is widely held, as Nussbaum acknowledges, not only by Nussbaum and other liberal defenders of novelistic sensibilities, but also by the novel's Marxist critics, who decry it for precisely the same bourgeois, individualistic, liberal tendencies.<sup>8</sup> Nussbaum unequivocally endorses this claim: the novel, by virtue of its form, embraces “a liberal vision, in which individuals are seen as valuable in their own right, and as having distinctive stories of their own to tell” (p. 70; footnote omitted).

Of course, whether that is something to cheer or worry over depends on one's opinion of individual liberalism. I do not want to rehash that question here. What I want to focus on instead is Nussbaum's second political claim: that the novel embraces not only liberal individualism but egalitarianism as well. This claim is not so obvious or widely shared; in fact, it exists in considerable tension with the first. One would think that to whatever degree — and there is room for debate — liberalism conflicts with egalitarianism, the novel could not support both. Nussbaum makes at least two different arguments, I think, in support of the somewhat counterintuitive claim to the contrary.

First, Nussbaum concedes that an awful lot of realistic fiction — including, importantly, Dickens's *Hard Times* — is overtly suspicious of collective action that originates on the political left. Nevertheless, she argues, reading about the suffering of the downtrodden and coming to care about them in the way encouraged by realistic fiction is a spur to left-wing or progressive political reform. Against

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8. Pp. 70-72. For a discussion and refutation of Marxist critiques of the novel, see RAYMOND WILLIAMS, *Cinema and Socialism*, in *THE POLITICS OF MODERNISM: AGAINST THE NEW CONFORMISTS* 107, 116 (Tony Pinkney ed., 1989). See also pp. 71-72 (discussing and quoting Williams).



this general backdrop, Dickens's reservations about the wisdom of unionizing, for example, should be regarded as an anomaly:

[S]ometimes the novelist's suspiciousness of any form of collective action leads to error — as when, in *Hard Times*, Dickens seems to suggest that it would be better to divert and entertain the workers rather than to change, through trade union action, the conditions of their labor; as when he portrays trade unions as in their very nature repressive toward individual workers. But such a failure in no way indicts the whole approach. More often, I think, the vision of individual life quality afforded by novels proves compatible with, and actually motivates, serious institutional and political criticism — as when, in Sissy Jupe's lesson, the reader's emotions themselves indicate the meaning of the hunger and misery of millions, directing the calculative intellect to interpret the numbers in an urgently activist spirit; as when, in Tagore's mordant portrayal of Indian nationalism, we find the movement's leaders neglecting, in their abstract zeal, the real economic misery of the poor traders who cannot earn a living unless they sell the cheaper foreign wares, while we, with the author's surrogate Nikhil, understand better what it really is to make each life count for one. [p. 71; footnote omitted]

This argument, of course, is a circumscribed one: if we are going to read realistic novels to spur us on toward political action, then we should be very careful to pick the right novels. Only some — in point of fact, most likely only a handful — will point us in the right direction.

The second argument Nussbaum urges against the Marxist critic of the bourgeois novel cuts deeper. Regardless of content, the form of the novel itself — careful regard for the fates of multiple characters in a range of circumstances — implies or embodies a sort of utopian world which might be fruitfully regarded as the goal or ideal of progressive political action. Whatever the political orientation or stance of the novel itself, or of the novelist, the regard in which the novel urges the reader to hold each character, and the moral attitude of respect which the novel instills in the reader should be understood as a necessary component, at least, of the good society toward which the activist labors:

It seems appropriate, in fact, for any form of collective action to bear in mind, as an ideal, the full accountability to the needs and particular circumstances of the individual that the novel recommends, in its form as well as its content. . . . A story of human life quality, without stories of individual human actors, would . . . be too indeterminate to show how resources actually work in promoting various types of human functioning. Similarly, a story of class action, without the stories of individuals, would not show us the point and meaning of class actions, which is always the amelioration of individual lives. Raymond Williams put this point very well, defending traditional realist narrative against socialist criticism:

[I]f we are serious about even political life we have to enter that world in which people live as they can as themselves, and then necessarily live within a whole complex of work and love and illness and natural beauty. If we are serious socialists, we shall then often find within and cutting across this real substance — always, in its details, so surprising and often vivid — the profound social and historical conditions and movements which enable us to speak, with some fullness of voice, of a human history.

In a realist novel such as *Hard Times* we enter, I claim, that full world of human effort, that “real substance” of life within which, alone, politics can speak with a full and fully human voice. This human understanding, based in part on emotional responses, is the indispensable underpinning of a well-guided abstract or formal approach. [pp. 71-72; footnote omitted]

But this is, in the end, not a very satisfying response, either to the Marxist critic who worries that the realistic novel is unduly individualistic and bourgeois or to the liberal critic who worries that socialist art, precisely because it purports to be socialist art, is just not very good. Neither will be satisfied with Nussbaum’s argument here, for two reasons. First, if it is true that the novel is as she describes, then it is not clear, as either a political or an aesthetic matter, why we should value it. The Marxist, egalitarian, socialist, or, for that matter, the democrat can justifiably complain that if this moral stance is the point of the novel, then that is all the more reason the political activist should eschew it on the grounds that this is not time well spent. Instead, the activist should work toward creating a *society* that embodies norms of equality and dignity, not an art form that does so. On the other hand, the liberal can justifiably complain that the artist who aims for political progress, rather than good art, is equally misguided. If one’s goal is art, one should aim to produce good art; if one’s goal is progress, one should, arguably, work directly for the cherished city on the hill.

Second, and more importantly, it is not at all clear that the form of the novel *is* committed to the progressive egalitarianism Nussbaum posits. One can easily construct precisely the opposite case. Nussbaum is right, one might argue, to align the point of the formal novel and the point of liberal society, but she entirely misapprehends what that shared point might be. One might argue that the point of both the liberal society and the realistic novel is not egalitarianism at all but precisely its opposite: a world of opportunity in which the dramatically unequal talents, ambitions, intelligences, strengths, powers, drives, and insights of particular, concrete, valued-for-their-own-sake individuals are given full play. The point of liberalism, one might sensibly argue, is to construct a social world in which the individual, splendid in his unequally bestowed strengths, has a full canvas on which to display the product

of his individual vision. Furthermore, it is a world in which his product and vision will be not only tolerated, but embraced, applauded, and, in a word, *valued*. More to the point, it is a world in which the inequality of resources is more than simply tolerated. Rather, radical inequality — born of freedom — is aggressively, even constitutionally, protected against the opportunity and individualism-squandering egalitarian impulses of the masses. It is a world, to take some examples, in which William Randolph Hearst's mansions, his art collections, and his idiosyncratic and acquisitive vision are as treasured and protected against redistributive madness as Orson Welles's denunciatory depiction of the same in *Citizen Kane*. It is a world in which the inequalities prerequisite to the production of *both* Welles's and Hearst's masterpieces are accepted as integral and essential to expression. It is a world in which the noise and clamor and chaos of individual and unequal expression, productivity, and effort are not only more valued than, but are also quite consciously protected against, the acquisitive and demanding oppressive silence of an egalitarian mandate.

I see no reason, on the face of it, to think that the novel, by virtue of its form, favors an egalitarian over a libertarian conception of the point of liberal democracy. In fact, there are at least two good reasons to suspect that, if anything, the moral valence of the novel will tend toward libertarian over egalitarian excess. The first reason is utterly materialistic: the novelist is participating in a form of work which flourishes under either the protective support of a patron, the legislated subsidy of a government, or the profits driven by market consumption. Either the patron, the government, or the market must positively value the individual vision of the novelist, or like all other art forms, this one will vanish. Perhaps basic conceptions of equality can be used to generate an argument that either patrons, government, or the market should support the arts, although it is not at all obvious how. But whether or not that is possible, it is easy to see the argument from basic norms of liberty. What liberty facilitates is, precisely, imaginative, fanciful expression. On this view, art, including novelistic art, is the point of the entire liberal political project. Whatever may be the case of the artistic impulse, whatever may be the held political world view of the individual artist, and whatever may be the substantive political implication of particular novels, the material base of the novel suggests that its form, if anything, is likely to imply not just a liberal, but a decidedly libertarian and inegalitarian political orientation as well.

The second reason the novel's form may not be as conducive to egalitarianism as Nussbaum hopes is moral. Nussbaum herself hints at this often enough. The novel's form, as she insists, is profoundly solicitous of the individual, his projects, and his fate. It engenders

in the reader respect for the individual, and it is this respect for individualism that may just be incompatible with the egalitarian instincts with which she also wants to credit it. In other words, it may not be possible to insist, as Nussbaum wants to, that the novel is not only liberal and individualist, but *also* egalitarian and progressive as well. Dickens, as Nussbaum shows us, abhorred the misery brought on by poverty during the industrial revolution, but he also hated the single-mindedness of the labor-union movement. The same can be said of John Steinbeck in this country during the Depression. He abhorred the misery of poverty, but also feared the union organizer. Dickens's anti-union animus may not be, as Nussbaum wants to insist, simply a failure of a vision more overwhelmingly or more typically committed to egalitarian progress. It may not be an anomaly at all. Collective action such as union organizing is often frightening to individuals precisely because of its self-conscious insistence on the secondary and contingent status of the moral claims of particular persons over the imperatives of progress. There are many people who do not want to participate in a revolution if they cannot dance in it, and it surely would not be surprising if their number included a disproportionate number of readers and writers of realistic fiction.

I have no idea, upon finishing this book, why Nussbaum does not *insist* on this antithetical relation between the novelist and the Marxist, rather than strive somewhat artificially to deny it. The novel can, and sometimes has, exposed the ugliness of market capitalism obsessively driven by profit. Melville, Dickens, Twain, Sinclair, and any number of others quite explicitly tried to do so, and to no small measure they succeeded. It is also simply true, however, that the novel — indeed, often the same novel — can expose the ugliness of a political sensibility obsessively driven by high-minded progressive reform. The great anticommunist writers such as Arthur Koestler, Aleksandr Solzhenitsyn, Vaclav Havel, and Milan Kundera; American progressives such as John Steinbeck; libertarians such as Ayn Rand; and for that matter popular writers such as Joe Klein all quickly come to mind. The lesson we should draw from that might *not* be the easy claim that the novel can be put to any political end. Rather, it may be that the Marxist critic, the liberal enthusiast, and Nussbaum herself in other passages in this book has it quite right (p. 70) — the novel is indeed the handmaiden of liberalism. That is its strength, not its weakness. That does not make it useless to the progressive political actor. Rather, like liberalism itself, it makes the novel a potent and necessary moral corrective.

Let me conclude by briefly noting that the force of all three of these objections is lessened in the context of adjudication. Whatever may be the connection between imaginative fancy and

our moral intuition, the connection between storytelling and legal reasoning is self-evident. The common law especially, but indirectly all of our judge-made law, proceeds by way of stories, counterstories, and stories within stories far more than by way of logical deduction. As I have argued at length elsewhere and will not belabor here, the trade offs between the gains to the collective and the suffering of the individual are distinctive within the context of adjudication: the judge's mandate is to do justice, not maximize welfare, and to do so requires an astute attentiveness to the internal lives of individuals. It may be entirely proper for the judge to weigh the interests and well-being of the litigants before her differently, and more heavily, than the comparable interests and well-being of the collective. It may be proper for the judge to do so, even if it is not proper for a legislator to do so, simply because of their different institutional obligations. The judge's duty is to the parties before her; the legislator's is to his constituents. And finally, the egalitarianism to which imaginative fancy leads, if it does, is surely not as grave a concern for judges as for legislators. The judge is connected to individuals and to their stories more so than legislators. Justice Breyer was right when he testified before the Senate Judiciary Committee at his confirmation hearings that "what Brönte tells you is [that] . . . [e]ach one of those persons in each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion" (p. 79). He was also right to conclude that "sometimes . . . literature [is a] very helpful . . . way out of the tower" (p.79). To paraphrase, literature can be a help to the tasks of human understanding at the heart of judging. Professor Nussbaum is right, in this book, to endorse and expand upon Justice Breyer's finding. *Poetic Justice* can perhaps best be read as an attempt to help us understand that literature to which Justice Breyer referred, our passionate responses to it, and the role it plays and should play in our legal deliberations.

# MODERN JURISPRUDENCE, POSTMODERN JURISPRUDENCE, AND TRUTH

*Ken Kress\**

LAW AND TRUTH. By *Dennis Patterson*. New York: Oxford University Press. 1996. Pp. 189. \$39.95.

## INTRODUCTION

Knowledge and truth are fantasies. Objectivity is unattainable. Foundationalism is dead. We are limited to our historically situated, subjective perspectives. So we are told by postmodern scholars both inside and outside legal academe.

Nevertheless, jurisprudence — especially analytical jurisprudence in the tradition of Bentham, Austin, Hart, and Dworkin — continues to fossick around, apparently oblivious to the postmodern revolution. In part, this state of affairs results from the social organization of knowledge, particularly specialization. In part, it derives from prejudice: many postmodernists and analytic philosophers view each other's work with disdain. Postmodernists often dismiss, without taking seriously, analytical philosophers' arguments that objective knowledge of the world is possible despite our situatedness because we can transcend our situatedness, because the high standard of justification as a prerequisite for knowledge that postmodernism sets forth can be met, or because a lower standard of justification is more appropriate and can be satisfied. Most analytic philosophers return the favor, rejecting postmodern perspectives without attempting to understand them in their best light.<sup>1</sup>

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1. Patterson describes the premodern world in terms of custom, ritual, cosmology, and, especially, authority. P. 152. Modernism is a flight from authority, preoccupied with "legitimacy, progress, autonomy, rationality, and human emancipation." P. 152 (footnotes omitted).

Modernism is defined by Patterson in terms of three dichotomies or axes, which, understood as a whole, "enable[ ] one to see a broad range of thinkers as all of a piece." P. 153. The first axis, knowledge, is characterized as epistemological foundationalism: "Knowledge can only be justified to the extent it rests upon indubitable foundations." P. 153. The two ends of this axis are therefore foundationalism and skepticism.

Dennis Patterson is well positioned to bridge the chasm between postmodern philosophy and analytic philosophy, and the one between postmodern philosophy and analytic jurisprudence. Patterson is broadly read in all three disciplines and has a gift for succinct and clear exposition. We can therefore be grateful that in *Law and Truth* he attempts to bring modern jurisprudence up to speed, first subjecting it to postmodern scrutiny and then replacing it with a postmodern jurisprudence.

One way in which Patterson partially bridges the gap between postmodernism and modernism is by staking out a position somewhere between postmodern radical skeptics and modern foundationalists, whose views are inspired by a physicalistic, scientific view of truth, language, and knowledge.<sup>2</sup> Patterson deploys a moderate postmodernism — Brian Leiter elegantly describes it as a “sanitized” postmodernism<sup>3</sup> — inspired by the philosophical work of Ludwig Wittgenstein,<sup>4</sup> Richard Rorty, Hilary Putnam, and Michael Dummett, and the constitutional jurisprudence of Philip Bobbitt. Patterson rejects the possibility of an Archimedean point, God’s-eye view, or absolute perspective from which claims about truth and knowledge can be asserted. Yet by accepting the Wittgensteinian position that local practices can ground notions of warranted behavior within the practice, as well as an understanding of mistaken behavior, Patterson is able to justify *modest* claims to objectivity, knowledge, and truth.

Patterson criticizes four related, but separable, views that, as he sees it, constitute the core of modern jurisprudence’s account of legal truth and legal semantics. First, Patterson interprets modern jurisprudence as committed to the claim that the meaning, and

The second dichotomy, the language axis, distinguishes language as representing objects or facts in the world from language as expressing speakers’ attitudes or emotions. Pp. 153, 155-56.

The third modernist axis distinguishes methodological individualism from collectivism. Patterson cautions against reading these three axes atomistically: “Each represents not an idea or element in a picture but an axis which, when taken with the others, enables one to see a broad range of thinkers as all of a piece.” P. 153.

Patterson then defines postmodernism negatively, in terms of what it is not: Postmodernism is “any mode of thought that departs from the three modern axes described above without reverting to premodern categories.” P. 158 (internal quotation marks omitted) (quoting Nancey Murphy & James McClendon, *Distinguishing Modern and Premodern Theologies*, 5 MOD. THEOLOGY 191, 199 (1989)).

2. These foundationalists are the intellectual heirs to British empiricism, which held that all knowledge was founded in the senses.

3. Brian Leiter, *Why Quine Is Not a Postmodernist*, 50 SMU L. REV. (forthcoming 1997) (manuscript at 2, on file with author).

4. Patterson is heavily influenced by G.P. Baker and P.M.S. Hacker’s interpretation of Wittgenstein’s later period and especially their interpretation of Wittgenstein’s view of normativity (rule-governed behavior). See, e.g., G.P. BAKER & P.M.S. HACKER, *SKEPTICISM, RULES & LANGUAGE* (1984); G.P. BAKER & P.M.S. HACKER, *WITTGENSTEIN, UNDERSTANDING AND MEANING* (1980).

hence the truth, of a proposition of law is a matter of its truth conditions, namely, factual or nonfactual conditions or states of affairs that, when they obtain, make the proposition true (pp. 5, 18-19). The main goal of *Law and Truth* is an attempt to demolish this truth-conditional semantics<sup>5</sup> for legal statements (p. 19).

Second, Patterson attributes<sup>6</sup> to modern philosophy — and probably attributes to modern jurisprudence — a representationalist semantics of language according to which statements represent states of affairs and events, names represent individuals, and predicates represent concepts and properties (p. 164). Patterson maintains that representationalism is explanatorily empty.

Third, Patterson attributes to modernism and modern jurisprudence the position that the predicate “‘truth’ names a relation between an asserted proposition and some state of affairs that makes the proposition true.”<sup>7</sup> Patterson rejects this view of the truth predicate, focusing his critique on its application to law.

Finally, Patterson claims to have uncovered a deep mistake common to all major contemporary jurists<sup>8</sup> except himself and Philip Bobbitt: believing that something — a ‘truth maker’ — makes propositions of law true (p. 181).

In place of modern jurisprudence’s alleged commitments to truth-conditional semantics, to representationalism, to the view that a proposition is true if it accurately corresponds to the world, and to the view that some truth maker makes propositions of law true, Patterson recommends a view of “language as practice (meaning as use)” (p. 169). He prefers a postmodern account of understanding “that emphasizes practice, warranted assertibility, and pragmatism” (p. 161). Patterson urges that a legal proposition “is true if a competent legal actor could justify its assertion” with arguments exemplifying argument forms that have been endorsed by our legal culture: historical, textual, doctrinal, and consequentialist (prudential) (p. 152). For Patterson, to call a legal proposition true is to

5. Truth-conditional semantics is described *infra* text accompanying notes 36-44.

6. I employ “attribute” in a loose sense in this review essay. When I claim that Patterson attributes a view to a theorist, I do not necessarily imply that Patterson claims that the theorist explicitly advocates that view. Rather, I imply that Patterson claims that the theorist is committed to the view by other aspects of his theory or that the view is a picture that informs the theorist’s perspective or illuminates the theory. *Cf. infra* note 13 (quoting Wittgenstein on the way language and pictures we have of the way things are confound philosophical inquiry).

7. P. 151. This sounds like the correspondence theory of truth, and definitely is, if the relation in question is correspondence. If Patterson does intend to attribute the correspondence theory of truth to modern jurisprudence, then his inclusion of Ernest Weinrib, a coherence theorist, is problematic. I discuss additional concerns about Patterson’s attribution of the correspondence theory to H.L.A. Hart *infra* note 130.

8. P. 151 (“I have considered the leading contemporary answers to the question of what it means to say that a proposition of law is true.”).



endorse or commend the proposition as justified by the forms of argument of legal practice (p. 152).

*Law and Truth* is a valuable contribution to legal theory. Patterson raises a plethora of issues in this concise volume, including the realism vs. anti-realism debate in semantics and metaphysics; the application of that distinction to jurisprudence; the postmodern rejection of that dichotomy as fruitless; modern and postmodern theories of knowledge; the nature of legal meaning and legal truth; the existence of right answers and gaps in the law; the objectivity of legal statements; the nature of mistakes about legal reasoning and propositions of law; and the issue of the legitimacy of judicial decisionmaking, especially judicial review. With rare exceptions, and despite discussing sophisticated topics quite briefly, Patterson writes with admirable clarity. He introduces his reader to many of the major modern jurisprudential theories and provides criticism, often quite original, of these theories from the perspective of postmodern jurisprudence. In a regrettably brief ten pages, Patterson develops a postmodern jurisprudence, which he claims avoids his critique of modern jurisprudence (pp. 169-79).

As an introduction to postmodern jurisprudence and to a postmodern critique of modern jurisprudence, *Law and Truth* succeeds. It will attract a wide readership among those with postmodern sympathies and among those who want to be introduced to a postmodern critique of traditional jurisprudence.

Patterson's focus on concerns about truth, meaning, epistemology, metaphysics, their interface with law, and his project of characterizing legal theories in terms of the realism/anti-realism distinction is, for the most part, welcome.<sup>9</sup> With a few notable exceptions,<sup>10</sup> jurisprudes have paid insufficient attention to these issues. Whether one accepts or rejects Patterson's claims, he raises a host of important issues for further study.

Despite these virtues, ultimately *Law and Truth* fails to persuade for a number of reasons. For example, Patterson does not sufficiently develop his *general* critique of the semantical theory of truth conditions he attributes to modern jurisprudence. Additionally, Patterson attributes to some theorists semantic views which it is dubious that they hold. Where Patterson does accurately attribute semantic views, these theorists could jettison those views without significant descriptive, explanatory, or normative costs to their theories.

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9. Patterson's focus on metaphysics, epistemology, truth, realism and anti-realism sometimes leads him to misdescribe theorists as if they were advancing scientific, theoretical reason accounts of law, when they are advancing practical reason theories of law.

10. See, e.g., Jules L. Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33 (1995); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

More important, Patterson does not sufficiently tie his general critique of representationalist theories, truth-conditional analysis of legal meaning, the correspondence theory of truth, and the existence of truth makers to the specific critiques of the particular modern jurisprudential theories that he develops. Thus, Patterson's attempt to show that all jurists except Philip Bobbitt and himself make the *same* mistake of believing that something — a truth maker — makes propositions of law true is not fully convincing. Because his critique of modern jurisprudence fails, Patterson's attempt to construct a postmodern jurisprudence that avoids the errors of modern jurisprudence by avoiding representationalist, truth-conditional, correspondence, and truth-maker theories is likewise not fully convincing.

Additionally, the specific critiques that he develops, although frequently original, are not sufficiently penetrating to devastate the targeted theories. As a result, the theories he critiques, even if flawed, are still competitors for the status of the best overall theory. Yet Patterson's own theory is at present insufficiently developed to be comprehensively compared to most of the theories he critiques. Finally, Patterson does not hold his own account up to the level of criticism he directs at his opponents.

The bulk of this review essay will focus on Patterson's rejection of truth-conditional semantics for law and his claim to have discovered that all contemporary jurisprudential theories except Bobbitt's and his own commit the fallacy of accepting the existence of truth makers for propositions of law. I focus on these issues because the rejection of truth-conditional semantics is Patterson's self-professed major thesis (p. 19). Additionally, Patterson claims that the fallacy of believing in truth makers is a "deep" error that *Law and Truth* for the first time demonstrates to be common to modern jurisprudential theorists from Ernest Weinrib to Michael Moore to H.L.A. Hart to Ronald Dworkin to Stanley Fish.

I will concentrate on these semantic and truth-theoretic aspects of Patterson's critiques of Ronald Dworkin's unique version of natural law and H.L.A. Hart's legal positivism. One reason for this focus is because Patterson's criticism of truth-conditional semantics, the correspondence theory of truth, and the existence of truth makers is more explicit in his critique of Hart's positivism than it is in his objections to other contemporary jurisprudential theories. A second reason for concentrating on Dworkin and Hart is their deserved prominence in contemporary jurisprudence. Furthermore, there are illuminating similarities between Patterson and Dworkin and between Patterson and Hart. In certain respects, Patterson's account is closer to Dworkin's, and in other respects, to Hart's, than to any of the other theories he considers, except

Bobbitt's constitutional jurisprudence. This is the third rationale for my focus on Patterson's critiques of Dworkin and Hart.

In Part I, I describe and critique Patterson's account of law, legal reasoning, and legal truth. Section I.A describes generally Patterson's rejection of traditional semantics and general theories of truth as applied to law. It also develops Patterson's Wittgensteinian, atheoretical, local-practice-oriented methodology. Section I.B describes Patterson's positive account of law and legal truth in terms of the forms of argument endorsed by legal practice, and section I.C critiques that account. I consider the possible criticism that the vagueness of Patterson's description of the forms of argument would render law radically indeterminate. I also argue that the forms of argument and the techniques for resolving conflict among them may not constitute coherent practices. Section I.D compares Patterson's account of legal truth to the major theories of truth and attempts to motivate the justificatory aspects of his account because law is a justificatory enterprise. Part II examines Patterson's critique of Ronald Dworkin's natural law jurisprudence, focusing on Patterson's critique of Dworkin as believing in truth makers. Part III examines Patterson's critique of H.L.A. Hart's positivism and concludes that neither Patterson's critique of positivism's alleged truth-conditional semantics nor his critique of positivism as a truth-maker account of law is persuasive. Part IV argues that Patterson's forms of argument can be reconstructed as a truth-conditional semantic theory, thereby placing in a new light his criticism of other contemporary jurisprudes for adhering to this semantics.

## I. PATTERSON'S ACCOUNT OF LAW AND LEGAL TRUTH

### A. *Patterson's Rejection of Traditional Semantics and General Theories of Truth*

A book entitled *Law and Truth* naturally whets the reader's appetite for answers to questions like these: What is a theory of truth? Why do we need a theory of truth? What is a theory of truth for law? What is a theory of truth for law about? Why do we need a theory of truth for law? What is the relationship between a theory of law and a theory of truth for law? What is the relationship between a theory of truth in general and a local theory of truth for law?

Readers of *Law and Truth* seeking enlightenment on these questions will, at least at first, be disappointed. Influenced by Wittgenstein and Rorty, Patterson eschews general theory. In particular, he denies that a general or theoretical account of legal truth contributes to understanding the meaning of "true" in law (pp. 21, 181). Patterson also claims that "[t]ruth is not an explanatorily use-

ful concept" (p. 21). In context, Patterson is referring to legal truth, but a reader of *Law and Truth* could hardly be faulted for inferring that Patterson also believes that, as a general concept, truth is explanatorily useless.

Patterson also claims that truth in law is neither a property of truth-bearers (pick your favorite: sentences, statements, propositions) nor a relationship between propositions and the world (p. 19). The thesis that truth is not a property is called by philosophers "deflationism," because it deflates truth from the honorific status accorded it by the other major theories of truth.

For example, the correspondence theory of truth maintains that a proposition is true if and only if it corresponds to the facts. If a proposition fails to correspond to the facts, the correspondence theory will withhold the honorific "true" and deem the proposition "false."<sup>11</sup> The coherence theory of truth holds that a proposition is true if and only if it coheres with other propositions which are accepted, or otherwise suitably determined. The pragmatic theory denominates a proposition true if and only if it is useful to believe it. Warranted-assertibility theories call a proposition true when its assertion is justified. Correspondence, coherence, pragmatic, and warranted-assertibility theories provide substantive accounts of truth, in contrast to deflationism's nonsubstantive account. Although they disagree as to which substantive property or relation constitutes truth, they agree — in opposition to deflationism — that truth is a substantive property.

In keeping with his claims that truth in law is neither a property nor a relation and that general theories of truth are not explanatorily fruitful, Patterson also asserts — but does not develop — disquotationalism (p. 19). The disquotational thesis, which is frequently held as part of a robust deflationism, comes in two main versions. The strong version asserts that "'p' is true" means the same thing as "p." The weak version claims only that they are materially equivalent: "p" is true if and only if p.<sup>12</sup> Disquotationalism further explains why deflationist accounts of truth are nonsubstantive. According to disquotationalism, asserting "'p' is true" adds no content beyond that already expressed by asserting "p."

In the spirit of Wittgenstein, rather than answering theoretical questions about the nature of truth, Patterson aims to cure those afflicted with the philosophers' disease of engaging in these nonsensical inquiries. He aims to let the fly out of the fly bottle and dis-

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11. Or it might be that the proposition lacks a truth value.

12. Patterson's brief assertion of disquotationalism does not indicate which version he holds: "'True' is best understood disquotationally." P. 19; cf. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 136 (G.E.M. Anscombe trans., 3d ed. 1958) ("'p' is true = p").

solve jurisprudences' philosophical puzzlement about legal truth. Ultimately, Patterson does address questions about the nature of truth, but only indirectly. He hopes to release us from the grip of the false philosophical picture that induces us to ask these unintelligible theoretical questions. In place of a fruitless attempt to devise a general theory of legal truth, Patterson recommends describing the practices of particular legal cultures.<sup>13</sup> Patterson urges that a legal proposition "is true if a competent legal actor could justify its assertion" with culturally endorsed arguments: historical, textual, doctrinal, and consequentialist (prudential) (p. 152). For Patterson, to call a legal statement true is to endorse or commend the proposition as justified by the forms of argument that constitute legal practice (p. 152).

Patterson attempts to dissolve the allegedly mistaken philosophical urge to theorize about the law and legal truth through a critique of four related positions. First, Patterson claims that all contemporary jurisprudences except Bobbitt and himself are committed to an analysis of the meaning of legal statements in terms of truth conditions — that is, factual or nonfactual conditions under which the statement will be true (p. 179). In its strongest version, the truth-conditional perspective maintains that there are necessary and sufficient conditions for the truth of legal propositions. A slightly weaker thesis — which some of these theorists might endorse — maintains that there are criteria for the correct application of legal concepts and propositions, criteria that might fall short of necessary and sufficient conditions.<sup>14</sup> Different theories can be distinguished — at least in part — by their deployment of different truth conditions in their analyses of the meaning of legal statements. Legal positivists, Patterson claims, employ social facts as truth conditions (pp. 3, 46, 63); natural lawyers, especially moral realists, deploy moral facts as conditions (pp. 3, 63, 78). Stanley Fish, at least on one interpretation, employs interpretive agreement (p. 99). Each of these views is a truth-conditional *semantic* thesis. Truth-conditional semantics, Patterson argues, is both explanatorily fruitless and false (pp. 19, 181). Although, at one level, Patterson claims that the problems that this semantic thesis generates differ depending on the particular truth conditions that each theory employs, at a more general and deeper level, as we shall see shortly, all truth-conditional theories for legal propositions commit the same mistake — namely,

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13. Cf. WITTGENSTEIN, *supra* note 12, § 115 ("A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably."); *id.* § 109 ("Philosophy is a battle against the bewitchment of our intelligence by means of language.").

14. For example, Hart is no fan of definition by necessary and sufficient conditions. See H.L.A. HART, *THE CONCEPT OF LAW* 13-17 (2d ed. 1994); see also *infra* text accompanying notes 107-11.

they assume there is a truth maker that makes propositions of law true (pp. 19, 181).

Because demolition of truth-conditional semantics is the major goal of *Law and Truth*, we should pause for a brief examination of that semantics. Truth-conditional semantics associates an individual or object with each name — the individual to whom the name refers. It also associates sets of objects with predicates, namely, the set of objects to which the predicate applies. These associated individuals or sets are the terms' references or extensions. Truth-conditional semantics then explains how the truth values of complex sentences derive from the references of their parts and the order in which the parts occur. A simple example will clarify. "Bill Clinton" is said to refer to, or, in another terminology, to have as its extension, the person Bill Clinton. By contrast, the predicate "is a politician" is associated with a set of individuals, called the extension or reference of the predicate, namely, those individuals who are politicians. The sentence "Bill Clinton is a politician" is true, according to truth-conditional semantics, if and only if the object referred to by "Bill Clinton," Bill Clinton, is a member of the reference of "is a politician," that is, the set of politicians. Since Bill Clinton is a member of the set of politicians, the sentence "Bill Clinton is a politician" is deemed true by truth-conditional semantics. By contrast, the sentence "Bill Clinton is a tree" is deemed false because Bill Clinton is not a member of the set of trees.<sup>15</sup>

What I have described is part of extensional truth-conditional semantics. The rest of that theory describes the semantics of the quantifiers "some" and "all," and logical connectives such as "it is not the case that," "and," and "if and only if." A complete truth-conditional semantics for law would need to go beyond extensional semantics and include intensional semantics to account for intensional terms such as "foresees" and "intends," but understanding extensional truth-conditional semantics will suffice to assess *Law and Truth*.<sup>16</sup>

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15. In fact, the formal semantics of model theory is even sneakier than the above description. Neither Bill Clinton nor any politician need appear in the universe of objects in the model to analyze the sentence "Bill Clinton is a politician." The universe could consist of any set of objects, for example, the natural numbers. An arbitrary natural number would be correlated with Bill Clinton and 'dressed up' to resemble him, by being the reference of "Bill Clinton," a member of the set of natural numbers that is the reference of "is a politician," and a member of the set of natural numbers that is the reference of "likes fast food," and the sole member of the set consisting of a natural number that is the reference of "married to Hillary Rodham Clinton," yet not being a member of the set of natural numbers that is the reference of "is a tree," and so on.

16. For descriptions of intensional semantics, see RUDOLF CARNAP, *MEANING AND NECESSITY* (1947); 1 DAVID LEWIS, *General Semantics*, in *PHILOSOPHICAL PAPERS* 189, 190 n.4, 193-203 (1983); RICHARD MONTAGUE, *FORMAL PHILOSOPHY* (Richard H. Thomason ed., 1974).

The second position Patterson attributes to modern jurisprudence is a representationalist theory of the semantics of legal language, according to which legal statements represent aspects of the world, such as legal facts, and legal terms represent legal concepts or properties. Patterson urges that representationalism is unsuccessful and explanatorily empty.

Third, Patterson rejects the correspondence theory of truth that, as applied to law, holds that legal propositions are true just in case they correspond to 'legal' facts. Call this theory the *thin* correspondence theory because it involves no metaphysical or ontological claims about what facts are. The *traditional* correspondence theory of truth adds to the thin theory a realist metaphysics about facts: facts are independent of our beliefs or conventions about those facts; there may be facts that no human will or can ever know. Facts may transcend our evidence about them.<sup>17</sup>

Finally, as noted above, Patterson also claims to have discovered a "previously unnoticed" but "deep" similarity in the theories of law and legal truth of all major contemporary jurisprudes except Philip Bobbitt and himself: "[E]ach author views propositions of law as true in virtue of 'something'; each theory is an effort to identify the 'truth maker.' My effort has been to show the fruitlessness of such an approach to law and to point the way to a different approach."<sup>18</sup> The fallacy of attempting to identify a truth maker,

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17. A realist would believe that there is now a fact of the matter about whether there will be a sea battle tomorrow, even though history has not yet unfolded. An anti-realist might deny this. Similarly, a realist would believe that in ancient times, there were electrons, even though it was not then possible to verify that claim.

18. P. 181. Regrettably, Patterson does not always distinguish the question of the proper philosophical account of the truth predicate or concept of truth from the logically independent question of whether a truth-conditional semantics is theoretically fruitful, and if so, what the truth conditions for propositions of law are. He states, for example: "The central difficulty is that the participants [in the realist/anti-realist debate] share a dubious premise about the *nature of truth*. Both realist and anti-realist alike believe that the *truth of propositions of law is a matter of truth conditions*." P. 18 (emphases added). Notice the subtle movement from discussion of the nature of truth to the claim that the truth of propositions of law is a matter of truth conditions. The change in subject matter is greater yet because Patterson, like Donald Davidson on language in general, see Donald Davidson, *Truth and Meaning*, 17 *SYNTHESE* 304 (1967), describes the meaning of propositions of law, and not just their truth, as a matter of truth conditions. Thus, Patterson slides from the nature of truth to the meaning of propositions of law in terms of truth conditions.

A similar conflation occurs on the succeeding page: "The heart of the position I advocate . . . is in the denial of the truth-conditional account of propositions of law. 'True' does not name a relationship between a state of affairs and a proposition of law. 'True' is best understood disquotationally." P. 19. Here Patterson's movement is in the opposite direction: from a truth-conditional account of propositions to an account of the nature of the predicate "true." A similar confusion may occur in Patterson's discussion of H.L.A. Hart. See p. 68.

To inquire under what conditions legal propositions are true is one concern. What a speaker is doing when he claims that a legal statement or proposition is true is a quite separate issue.

The truth-conditional analysis can be represented as follows:

It is the law in jurisdiction *J* that *p* if and only if [fill in truth conditions].

Patterson would presumably allege, is the natural concomitant — or culmination — of the other three gravely mistaken theses that Patterson detects in modern jurisprudence.

The four positions that Patterson critiques are most at home as a common-sense theory about the semantics of and nature of truth respecting everyday objects. Alternatively, these four theses are a plausible semantics and view of truth for a scientific, physicalistic world view. For example, one sensible way to understand the meaning of “grass is green” is to claim that it is true if and only if grass is a member of the set of green things. This is a truth-conditional analysis of the semantics of the sentence “grass is green” and of the proposition that grass is green. Similarly, the view that “grass” refers to that green stuff growing in your yard and requiring constant mowing is reasonable. This is a representational view of the noun “grass.” It is plausible that the sentence “grass is green” is true if and only if it corresponds to a fact, namely, the fact that grass is green. This is a weak form of the correspondence theory of truth. Finally, it seems reasonable that the fact that grass is green is the truth maker that makes the sentence “grass is green” true, and the proposition that grass is green is true; this is, of course, an example of the view that truth makers make propositions true.

One theme of *Law and Truth* is that most modern jurisprudence, especially legal positivism and natural-law moral realism, has a mistaken view of law because it views law as if it were a natural science about the external world, whereas law is a normative (rule-governed) local practice. Patterson rejects these four theses as general theory and devotes *Law and Truth* to critiquing their application to law.

Patterson, following Bobbitt, rejects the existence of truth makers and maintains that nothing makes propositions of law true: “It is in the use of the forms of argument that legal propositions are shown to be true or false.”<sup>19</sup> Unfortunately, Patterson does not

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The meaning of the truth predicate and the nature of the concept of truth appear to be entirely different matters. While Patterson might reject this claim, most of us believe that when we claim that automobiles are heavy, or that Bill’s new automobile exceeds ten feet in length, we are attributing properties to objects. By contrast, when we assert that a legal sentence or proposition is true, are we doing something similar? Is truth a substantive property of legal propositions, as correspondence, coherence, and pragmatic theorists allege? Or is the attribution of truth to a legal proposition nonsubstantive, as deflationists claim? See Coleman, *supra* note 10, at 37-38 (distinguishing the nature of truth from truth-conditional semantics).

19. P. 137 n.42 (citing PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 12 (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE]). Regrettably, the cited statement is not supported by the cited page. Patterson probably intended to cite PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION]. The forms of arguments are culturally endorsed backings for inferences or warrants from legal grounds to legal claims. For a richer development of the forms of argument, see *infra* section I.B.



provide explicit guidance for determining when a perspective claims that *something* makes propositions of law true and when a view claims that *nothing* makes propositions of law true. This significant lacuna engenders difficulty in assessing Patterson's claimed novel discovery that all major contemporary jurisprudes except Bobbitt and himself are committed to the false view that some truth maker makes propositions of law true. Additionally, Patterson provides insufficient guidance for his reader to understand just what he and Bobbitt mean in claiming that nothing makes propositions of law true.

Part of Patterson's point is that traditional jurisprudence holds that some factual or nonfactual condition or conditions make propositions of law true. For example, according to Patterson, H.L.A. Hart's legal positivism alleges that the enactment of a state statute proclaiming, "No vehicle shall drive on the highway in excess of fifty-five miles per hour," makes the proposition that it is prohibited to drive a vehicle on the highway in excess of fifty-five miles per hour true. I will initially interpret Patterson as alleging, in contrast, that *legal practice*, specifically the practice of statutory interpretation, *makes* it true that driving over fifty-five miles per hour is prohibited (pp. 67-68). He states, "[p]ractice, not facts, is what the truth of legal propositions consists in."<sup>20</sup> The enactment of the statute, by itself, Patterson urges, does not make any legal proposition true.<sup>21</sup> Only in the context of the practice of statutory interpretation do we understand the meaning of a statutory act:

Appeal to the text as a mode of justifying one's claim of legal truth is possible only because textual argument is a recognized mode of legal justification. Appeal to the text only makes sense in a practice where the text is accorded justificatory power. Without that presupposition, appeal to the text would be nothing more than an empty, perhaps unintelligible, gesture.<sup>22</sup>

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20. P. 68. I will sophisticate this interpretation *infra* text accompanying notes 128-29.

21. P. 68. But what about the proposition that the legislature enacted a statute stating: "No vehicle shall drive on the highway in excess of fifty-five miles per hour"? Does a fact make that proposition true? Patterson might allege that legal practice determines when a legislative enactment has occurred. What of the proposition that the code of jurisdiction *J*, section *X*, provides: "No vehicle shall drive on the highway in excess of fifty-five miles per hour"? Patterson might respond that only jurisdiction *J*'s legal practice determines what constitutes enactments in jurisdiction *J* and what they provide. Consider now the proposition that the book in my hand, entitled *Code of Jurisdiction J*, contains, at section *X*, the sentence token: "No vehicle shall drive on the highway in excess of fifty-five miles per hour." This proposition is true because of our general language and written language practices, and not due to specifically legal practices, according to practice-based accounts of truth. If Patterson responds that the above proposition is not a proposition of law, he will likely encounter difficulty giving an account of what a ground of law is. For further discussion of grounds, see *infra* text accompanying notes 32-33.

22. Pp. 95-96 (footnotes omitted); see also p. 64 ("The truth of a proposition of law is the product of an activity (justification) and is not a matter of correspondence between a proposition and a social fact.").

Under the circumstances, enactment of the state statute is necessary, but not sufficient, for the truth of the proposition that the speed limit on the highway is fifty-five miles per hour.<sup>23</sup>

Several sentences ago, I self-consciously attributed to Patterson the view that *legal practice makes* legal propositions true. Patterson would reject that description of his view and claim that nothing makes legal propositions true. But the claim that nothing makes legal propositions true is obscure, if not downright mysterious. Patterson repeatedly asserts that propositions of law are shown to be true by use of the historical, textual, doctrinal, and consequentialist forms of argument employed in legal practice. For example, in discussing Bobbitt's constitutional jurisprudence, from which Patterson borrows the idea of forms of argument, he states:

It is essential to understanding Bobbitt's central contention to realize that there is nothing more to constitutional argument than the [forms of argument]. As he argues repeatedly, there simply is nothing more for "philosophy" to do than describe accurately the *practice* of constitutional argument, for that practice is constitutional law. If there is nothing more nor less to constitutional law than the [forms of argument], then there is nothing more to talk about other than how the forms are employed to sustain claims that some proposition of law is either true or false.<sup>24</sup>

Patterson does not elucidate the crucial distinction between (1) propositions being *shown* to be true by legal practice, even though nothing makes them true, and (2) some truth maker *making* them true. Nor does he explain how the assertion that nothing makes propositions of law true is compatible with his claim that "[p]ractice, not facts, is what the truth of legal propositions consists in."<sup>25</sup> Pending further explanation and demystification of what it means for nothing to make propositions of law true, I shall provisionally interpret Patterson as holding that legal practice — not factual or nonfactual conditions — makes propositions of law true.<sup>26</sup>

The overwhelming majority of *Law and Truth's* 189 pages is devoted to describing and critiquing contemporary theorists' views. Patterson approvingly notes that one sympathetic reader describes the book as "a work of demolition" (p. 181). Still, Patterson does

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23. P. 68. The statute is not necessary for the truth of the proposition in general. A federal statute, an administrative act, or even a judicial decision could supply a legal ground for that proposition in the absence of the state statute. Under the circumstances of the absence of some other legal ground for the speed limit, the state statute is necessary. Patterson neglects this qualification. P. 68.

24. P. 136 n.39. I have substituted Patterson's phrase "forms of argument" for Bobbitt's equivalents "modalities" and "modes of argument."

25. P. 68 (footnote omitted); see also pp. 95-96 & nn.143-44.

26. I will argue that this interpretation of Patterson, or a moderately more sophisticated version of it, moots his criticism of Hart and renders his view consistent with a version of positivism. See *infra* text accompanying notes 127-31.

devote ten pages to a positive account of law and legal truth,<sup>27</sup> even though he rejects the claim that his account is a theory.<sup>28</sup> Methodologically, Patterson accepts Wittgenstein's claim that philosophy cannot provide foundations, but can only leave things as they are. At its best, philosophy can describe local practice.<sup>29</sup> Patterson's positive view describes American, or perhaps Anglo-American, legal practice. Its closest methodological analogue is positivist particular jurisprudence, which describes a legal system or a set of closely related legal systems.<sup>30</sup> In the end, Patterson is counseling lawyers that, qua lawyers, they can safely ignore philosophy and stick to their knitting. Put crudely, Patterson's positive account is that legal truths are the conclusions of legally warranted arguments, and only careful observation of legal practice will show which arguments are legally warranted.

### B. *Patterson's Positive Account of Law and Legal Truth*

Patterson claims that certain culturally endorsed practices — he calls them “forms of argument” — provide the warrant, or inferential connection, between legal claims and their grounds. To oversimplify, the forms of argument are the kinds of arguments in which lawyers typically engage and which legally educated individuals consider appropriate to deploy in court or elsewhere to establish the truth of legal claims. The forms of argument that Patterson recognizes include textual, doctrinal, historical, and prudential (p. 171). Textual argument appeals to the meaning a text has to the “common, professional reader.”<sup>31</sup> Historical argument, Patterson

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27. In critiquing others, Patterson foreshadows his own view, so it is partially misleading to claim that his own account occupies only 10 pages. This is particularly true in light of his 22-page discussion of Bobbitt's constitutional jurisprudence in chapter 7, from which Patterson borrows the notion of forms of argument, and his 18-page discussion of postmodern philosophy in chapter 8.

28. See Dennis Patterson, *Law and Truth: Replies to Critics*, 50 SMU L. REV. (forthcoming 1997) (manuscript at 8, on file with author) (denying that his account amounts to a general theory of truth or even a local ‘theory’ of legal truth).

29. Indeed, Patterson valorizes the following famous quote from Wittgenstein's *Philosophical Investigations* as the epigraph to *Law and Truth*: “Philosophy may in no way interfere with the actual use of language; it can in the end only describe it. For it cannot give it any foundation either. It leaves everything as it is.” P. 2 (quoting WITGENSTEIN, *supra* note 12, § 124). The same point is repeated in the Afterword to *Law and Truth*: “[W]hen it comes to law, I wish to leave everything as it is.” P. 181.

30. For further description of jurisprudential methodologies, including Patterson's, see *infra* text accompanying notes 83-94.

31. P. 66; see also p. 176. At first glance one might think “professional” is limited to lawyers and the legally educated. But in replying to David Luban, Patterson suggests that “ordinary citizens can judge for themselves the legitimacy of legal decisions” in part because they “have access to and understanding” of ordinary textual meaning. Patterson, *supra* note 28 (manuscript at 14). Yet one wonders how well ordinary citizens, or first-year law students, understand how text and purpose can combine, like ingredients in a cake, to produce a result recognizably different from that which either alone would recommend. Witness, for exam-

claims, appeals to the actual historical intent of the legislature.<sup>32</sup> Prudential argument is consequentialist, intended to promote a goal (pp. 131, 137). Doctrinal arguments apply rules developed in precedents (pp. 66-67, 137).

Patterson does not define claims and grounds, and only gives a few examples. But it appears that claims are conclusions of law and that grounds are similar to legal positivists' sources of law, such as statutes, precedents, and constitutional provisions.<sup>33</sup> This curt summary does not do justice to the complexity of Patterson's discussion of grounds, warrants, and forms of argument, but it will suffice for our purposes.

As Patterson notes, a form of argument might be applied by different lawyers to reach opposed conclusions, different forms of argument might recommend conflicting conclusions, and some might even question the legitimacy or precise form of a form of argument (p. 152). So we must complicate the account to accommodate these conflicts.

Patterson maintains that these conflicts are resolved by resort to Willard Van Orman Quine's brand of coherentist methods, in particular by applying Quine's maxim of minimum mutilation to resolve a conflict by giving up as few of our prior beliefs or practices

ple, how surprised they are to discover that the same words can have different meanings in different statutes, or even in different parts of the same statute.

32. P. 66. But see pp. 176-79, where Patterson is receptive to William Eskridge's attempt to argue that 'historical argument' should be responsive to changed social and legal circumstances, and not merely to the intent of the legislature at the time of enactment, particularly when the legislature's aspiration for a statute would not be furthered by a literal interpretation of the text.

Dworkin's distinction between concrete and abstract intentions may be illuminating. The legislature's abstract intention in enacting Title VII of the Civil Rights Act of 1964 was to create a color-blind society. At the same time, its concrete intention was to outlaw discrimination based upon race in order to create a color-blind society. Many now believe that the legislature's abstract intent will not be accomplished by prohibiting race-based, voluntary affirmative action programs such as those in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). To the contrary, these individuals believe that permitting such voluntary programs is essential to the eventual creation of a color-blind society. The legislature's abstract and concrete intentions conflict, and the Court must choose between them. See RONALD DWORKIN, *LAW'S EMPIRE* 329-37 (1986).

33. Pp. 170-71. Patterson derives the distinction between grounds and warrant from Toulmin. P. 170 n.71. Toulmin describes grounds as data or facts and warrants as principles, rules, or inference licenses. See STEPHEN EDELSTON TOULMIN, *THE USES OF ARGUMENT* 97-107 (1964). Toulmin concedes that the distinction between grounds and warrants is not absolute or logical. He merely claims that in some situations, two distinct logical functions are operative. See *id.* at 99. Given Patterson's deployment of Toulmin's distinction, it is puzzling that Toulmin asserts that: "This distinction, between data [grounds] and warrants, is similar to the distinction drawn in the law-courts between questions of fact and questions of law, and the legal distinction is indeed a special case of the more general one . . ." *Id.* at 100.

Toulmin's description of warrants as rules is in tension with Patterson's critique of H.L.A. Hart. Patterson claims that the forms of argument cannot be interpreted as a Hartian rule of recognition because they "are not a rule (or several rules). They are what makes following a legal rule possible." P. 69. For further discussion of whether the forms of argument could be a rule of recognition, see *infra* text accompanying notes 133-40.

as possible.<sup>34</sup> Resolving conflict in a normative enterprise such as law solely by minimizing change strikes me as wrongheaded. Why not maximize coherence, if coherence is valued,<sup>35</sup> or maximize other values? Patterson would remind us that his claim is descriptive, not prescriptive: he alleges that legal practice does resolve conflicts by resort to Quine's maxim of minimum mutilation. It is no part of Patterson's thesis that legal practice is perfect and could not be criticized from the perspective of moral or political theory. He is claiming only that legally legitimate behavior is a matter of following the forms of argument of legal practice and of following the maxim of minimum mutilation to resolve conflicts among the forms of argument. For Patterson, to assert a legal proposition is to appraise, commend, or endorse the proposition as justified by the forms of argument (pp. 70, 152).

### C. *A Critique of the Forms of Argument*

#### 1. *Vagueness and the Forms of Argument*

*a. Introduction.* An initial difficulty for Patterson's account of the forms of argument is how vague his description of them is. Patterson does not provide a detailed account distinguishing the different kinds of legal arguments from each other, or from arguments outside of legal practice. This is intentional. As a Wittgensteinian, Patterson views legal practice as a linguistic ability, the mastery of a technique (pp. 70, 169). Someone who has mastered legal language simply *sees* that *X* is an historical argument, that *Y* is a prudential argument, and that *Z* is not a legally authoritative argument at all. Still, as Patterson notes in his discussions of Richard Posner's and William Eskridge's challenges to the historical form of argument, someone might dispute the contours of a form of argument (pp. 174-78). Such challenges to the traditional understanding of historical argument raise a conflict between historical argument as the actual intent of the legislature and, in Eskridge's case, historical argument as also responsive to changed circumstances and present concerns.

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34. P. 172; *see also* W.V. QUINE, FROM STIMULUS TO SCIENCE 49 (1995); W.V. QUINE, THE PURSUIT OF TRUTH 15, 56 (1992); W.V. QUINE, QUIDDITIES 142 (1987) (describing the maxim of minimum mutilation).

35. My doubts about the normative value of coherence are elaborated in Larry Alexander & Ken Kress, *Against Legal Principles*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279, 308-26 (Andrei Marmor ed., 1995); Ken Kress, *Coherence*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 533, 546-51 (Dennis Patterson ed., 1996) [hereinafter Kress, *Coherence*]; Ken Kress, *Coherence and Formalism*, 16 HARV. J.L. & PUB. POLY. 639 (1993) [hereinafter Kress, *Coherence and Formalism*]; Ken Kress, *Coherence and Its Normative Value* (Mar. 20, 1996) (unpublished manuscript, on file with the author) [hereinafter Kress, *Coherence and Its Normative Value*].

*b. Understanding and Interpretation.* For Patterson, adjudicating this conflict moves us from the level of merely understanding and seeing to the realm of interpretation. When the forms of argument do not conflict, we simply apply them. For Patterson, this is a simple matter of understanding, which is a linguistic ability, the mastery of a technique. When controversy arises because the forms of argument conflict, interpretation is necessary. Oversimplifying, understanding suffices in easy cases, but interpretation is necessary in hard cases. As a Wittgensteinian, the distinction between understanding and interpretation is crucial to Patterson's account. It is the engine driving his main critique of Dworkin and Fish, whom Patterson characterizes as universal interpretivists who fail to recognize the role of understanding and the correlative limited scope of interpretation.

At first glance, understanding, as an ability, appears to be a form of *knowing how to*. By contrast, interpretation arises at a different level for Patterson, a more explicit and propositional level, perhaps even a *knowing that*. The existence of two distinguishable activities within legal practice, understanding and interpretation, raises difficult questions about the relationship between them. The difficulty is compounded because there are legal practices that appear to be situated on the borderline between understanding and interpretation and — out of the frying pan into the fire — other practices that appear to have one foot in understanding and another in interpretation. One difficulty for Patterson will be distinguishing mistaken or incompetent applications of a form of argument — misunderstandings — from creative and novel deployments of it — interpretations.

*c. Indeterminacy.* The failure to have a precise delineation of the forms of argument and an explicit, detailed account of when one application of a form of argument is preferable to another will suggest to some that Patterson's account is radically indeterminate. Patterson can respond in three ways. First, legal practice and competent legal practitioners can distinguish correct from incorrect applications of the forms of argument even though criteria for doing so cannot be made fully explicit. Second, precise delineation of the forms of argument may be a historical, not a philosophical, task (p. 182). Third, insofar as an interpretive dispute about the precise scope of a form of argument erupts, or the forms of argument conflict, or practitioners disagree about the correct application of a form of argument, the conflict is to be resolved by resort to Quinean coherentist methods and the maxim of minimum mutilation.

Patterson's deployment of Quine's coherentist methodology will not eliminate indeterminacy, although it may reduce it. As Quine has famously noted, coherentist methods are indeterminate.<sup>36</sup>

Patterson is therefore committed to the claim that law is, at least partially, indeterminate — there are gaps in the law. So are most other contemporary jurists. Because many — perhaps most — jurists find attractive both weak disquotationalism and partial indeterminacy, the clash between them has consequences for jurisprudence beyond a criticism of *Law and Truth*.

Classical legal positivism has its doctrine of hard or unregulated cases with the resulting exercise of judicial discretion.<sup>37</sup> Depending upon how many and which moral principles are incorporated into the law, and whether the incorporated morality always provides right answers, actual incorporationist positivist legal systems may or may not have truth-value gaps. At the level of general jurisprudence, however, incorporationist legal positivists are committed to the prospect of truth-value gaps.<sup>38</sup> In some possible legal systems, incorporated moral norms will not resolve all hard cases.<sup>39</sup>

Even Ronald Dworkin, who famously proposed the controversial right answer thesis in his early work, has backed away from it — Joseph Raz claims he has “jettisoned” it — in more recent writings. Even in his early middle period, Dworkin conceded the prospect of “rare” or “exotic” truth-value gaps when opposing parties' arguments were of equal strength.<sup>40</sup>

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36. See W.V. QUINE, WORD AND OBJECT 26-79 (1960); see also W.V. QUINE, *Speaking of Objects*, in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 1 (1969).

37. See, e.g., HART, *supra* note 14, at 124-54 (discussing judicial discretion); JOSEPH RAZ, THE AUTHORITY OF LAW 45-46, 96, 172-75, 181-83 (1979) (discussing unregulated disputes).

38. See HART, *supra* note 14, at 247-48, 250-54; W.J. WALACHOW, INCLUSIVE LEGAL POSITIVISM (1994); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982). Incorporationist legal positivism is described *infra* text accompanying notes 109-17.

39. A possible incorporationist position might deny this position, claiming that all of critical morality is incorporated into all legal systems and that morality resolves all hard cases. For reasons that I hope are obvious, this view is implausible, and no incorporationist holds this position as a matter of general jurisprudence. A more plausible position might employ an interpretivist methodology and claim that the American legal system (or some other) incorporates all (or enough) critical morality in a way that resolves all legal questions.

40. RONALD DWORKIN, *Appendix: A Reply to Critics* [hereinafter DWORKIN, *Appendix*], in TAKING RIGHTS SERIOUSLY 291, 334 (1978) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]; RONALD DWORKIN, *Can Rights Be Controversial?*, in TAKING RIGHTS SERIOUSLY, *supra*, at 279, 279; RONALD DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY, *supra*, at 81, 81; Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 30-32 (1978); Coleman, *supra* note 10, at 49 (“[Dworkin] has now seen fit to jettison [the right answer thesis]”); Ken Kress & Scott W. Anderson, *Dworkin in Transition*, 37 AM. J. COMP. L. 337, 340 (1989); Joseph Raz, *Dworkin: A New Link in the Chain*, 74 CAL. L. REV. 1103, 1116 (1986) (reviewing RONALD DWORKIN, A MATTER OF PRINCIPLE (1985)). For the most subdued version of Dworkin's position, see DWORKIN, *supra* note 32. *But see* Ronald Dworkin, *Indeterminacy and Law*, in POSITIVISM TODAY 1 (Stephen Guest ed., 1996).

If law is partly indeterminate,<sup>41</sup> then it appears to follow that legal truth is not disquotational. The existence of indeterminacy is inconsistent with Patterson's and others' acceptance of the seemingly innocuous weak disquotational thesis. I digress briefly to develop the argument. Readers uninterested in this issue may proceed to section I.C.2.

The weak disquotational thesis asserts all instances of the schema:

“*p*” is true if and only if *p*.

Those familiar with Alfred Tarski's semantics will recognize that an instance of the weak disquotational schema is a Tarski sentence.<sup>42</sup> Tarski maintains that a material adequacy condition of a theory of truth is entailing the Tarski sentences.<sup>43</sup> Some believe that a theory that entails the Tarski sentences provides a full theory of meaning.<sup>44</sup> Thus, there is strong support for the truth of the weak disquotational Tarski sentences. Nevertheless, I shall argue that disquotationalism is inconsistent with indeterminacy.

Consider a proposition that lacks a truth-value, that is neither true nor false but indeterminate. Hart provides the example of whether it is valid law in England that Parliament — under the doctrine that it may regulate the manner and form of legislation — could bind itself not to repeal a minimum wage law for engineers without approval of the Engineer's Union, thereby in practical effect limiting the power of future Parliaments, something it could not straightforwardly accomplish.<sup>45</sup> I shall abbreviate this proposition to “Parliament may bind its successors by indirection.”

Then

(1) “Parliament may bind its successors by indirection” is true if and only if Parliament may bind its successors by indirection.

and

(2) That Parliament may bind its successors by indirection is true if and only if Parliament may bind its successors by indirection.

both appear to be false! The weak and, a fortiori, the strong disquotational theses are false.

41. I discuss legal indeterminacy in *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989) [hereinafter Kress, *Legal Indeterminacy*]. “Indeterminacy” is here used metaphysically, not epistemically. See Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134, 138-39 (1990) [hereinafter Kress, *Epistemological Indeterminacy*]. For some invalid criticisms of views mistakenly attributed to me, see Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481 (1995).

42. See ALFRED TARSKI, *The Concept of Truth in Formalized Languages*, in LOGIC, SEMANTICS, METAMATHEMATICS 152, 154-65 (John Corcoran ed. & J.H. Woodger trans., Hackett Publishing Co., 2d ed. 1983) (1956).

43. See *id.* at 187-88.

44. See DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* 23 (1984).

45. See HART, *supra* note 14, at 148-54.



The argument is simple. The left-hand side of the disquotational Tarski sentence differs in truth value from the right-hand side. If "Parliament may bind its successors by indirection" is neither true nor false, but indeterminate, then it is not the case that "Parliament may bind its successors by indirection" is true. Therefore, "'Parliament may bind its successors by indirection' is true" is false. But "Parliament may bind its successors by indirection" is neither true nor false but indeterminate — this is no more than our original assumption. The two sides of the disquotational Tarski sentence have different truth values.

In most three-valued logics, which are motivated by modal or epistemic concerns, the truth table for the biconditional "if and only if" is Indeterminate (hereinafter "*I*") if one (or both) of the sentences on either side of the biconditional has the truth value *I*. For example, Łukasiewicz's three-valued logic interprets the third truth value as "possible." Accordingly, "False" (hereinafter "*F*") if and only if Indeterminate has the truth value Indeterminate in his system.<sup>46</sup> In essence, Łukasiewicz's system is metaphysically or ontologically committed only to the two truth values, True (hereinafter "*T*") and *F*. Attributing to the sentence *p* the truth value *I* indicates that it is possible that *p* has the truth value *T* and that it is possible that *p* has the truth value *F*. Accordingly, modally motivated three-valued logics assign the truth value *I* to a biconditional whenever either the right-hand side or the left-hand side (or both) have the truth value *I*. The intuition behind this is simple. Consider a biconditional sentence with truth values *T* if and only if *I*. *I* could be either *T* or *F*. If *I* is *T*, then the sentence becomes *T* if and only if *T*, which has the truth value *T*. Alternatively, *I* could be *F*. But if *I* is *F*, then the sentence becomes *T* if and only if *F*, which has the truth value *F*. Thus, depending upon whether *I* is *T* or *F*, the biconditional could be either *T* or *F*. In short, it is possible that the biconditional has the truth value *T*, and it is possible that the biconditional has the truth value *F*. But that is just what it means to say that it has the truth value *I*. A similar argument applies to *I* if and only if *F*, and to *I* if and only if *I*.

Epistemically motivated modal logics, such as S.C. Kleene's,<sup>47</sup> interpret Indeterminate as a matter of our not knowing whether the sentence has the truth value *T* or the truth value *F*. For reasons comparable to those described in connection with Łukasiewicz's system, a biconditional in which either side has the truth value *I* will

46. See, e.g., Jan Łukasiewicz, *On the Intuitionistic Theory of Deduction*, 14 *INDAGATIONES MATHEMATICAE* 202 (1952); Jan Łukasiewicz, *Le principe de contradiction chez Aristote*, *BULLETIN INTERNATIONAL DE L'ACADÉMIE DES SCIENCES DE CRACOVIE*, ANNÉE 1910, at 15 (1911).

47. STEPHEN COLE KLEENE, *INTRODUCTION TO METAMATHEMATICS* § 64 (1952); S.C. Kleene, *On Notation for Ordinal Numbers*, 3 *J. SYMBOLIC LOGIC* 150 (1938).

have the truth value *I*. Under such three-valued logics, my argument would demonstrate not the falsity of the disquotational thesis, but rather that it has an indeterminate truth value, as Illustration 1 indicates. This would constitute a serious problem for the disquotational thesis.

*Illustration 1*

"Parliament may bind its successors by indirection" is true	if and only if	Parliament may bind its successors by indirection.
<i>F</i>	if and only if	<i>I</i>

Truth Value of Biconditional on  
Modal or Epistemic  
Interpretation of *I*

*I*

Truth Value of Biconditional on  
Metaphysical Interpretation of *I*

*F*

In the case of "Parliament may bind its successors by indirection," the indeterminate truth value is metaphysically or ontologically motivated as an actual gap in the law. It is not that we are uncertain as to whether that proposition is true or false, or that it is possible that it is true and possible that it is false. We know for certain, according to Hart, that it is not the case that it is true and that it is not the case that it is false. It is neither true nor false, but Indeterminate.<sup>48</sup> Under that interpretation, "*p* if and only if *q*" is true just in case *p* and *q* have exactly the same truth value. Therefore, as Illustration 1 indicates, "*F* if and only if *I*" has the truth value *F* under a metaphysical or ontological interpretation of the truth value *I*. Such an interpretation takes *I* seriously ontologically as a third truth value that exists on a par with *T* and *F*. By comparison, the modal and epistemic three-valued logics, discussed above, take *I* seriously semantically as a third truth value on a par with *T* and *F*, but not ontologically. *I* simply means that it could be *T* or *F*, or that we do not know whether it is *T* or *F*.

The falsity of the disquotational thesis in the case of the truth-value gaps is a serious problem for the disquotational thesis. But the problem should not be overstated. This difficulty with truth-value gaps does not necessarily demonstrate the complete inadequacy of the disquotational thesis or demonstrate that belief in it is unjustified. Before reaching those conclusions we would need to consider and compare alternative theories of truth.

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48. Of course, if Parliament attempts to bind a future Parliament not to repeal a minimum-wage law for engineers without the approval of the Engineer's Union, this attempt may be tested in the courts. Once the courts have spoken, what was formerly indeterminate will become either true or false. I am considering the situation before that proposition has been tested in the courts.

Moreover, before rejecting disquotationalism we would need to consider its virtues and other deficiencies. Indeed, the crux of the matter would require determining whether disquotationalism or some substantive theory of truth — such as correspondence, coherence, or pragmatism — provides a better explanation of our truth-related practices, beliefs, and dispositions. Finally, we would need to reexamine the claim that law contains truth-value gaps. Perhaps upon reexamination that thesis will prove less supportable than the conventional wisdom would have us believe.

## 2. *Do the Forms of Argument Constitute a Coherent Practice?*

A serious concern about the forms of argument is whether there is a coherent practice that undergirds them. The point can be illustrated most powerfully in constitutional law because constitutional interpretation<sup>49</sup> is so controversial, although the same concerns, *mutatis mutandis*, arise respecting precedent and statutory interpretation. According to Bobbitt, there are six forms of argument in constitutional law: historical, textual, doctrinal, prudential, structural (inferring rules from the relationships that the Constitution mandates among the structures it creates), and ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution).<sup>50</sup>

Some lawyers and judges decide constitutional issues with reference to historical intent only. Others decide constitutional questions solely with reference to the plain meaning of the Constitution. Still others combine these methods. Yet others decide constitutional issues based upon prudential considerations alone. Some deploy all six forms of constitutional argument. Others accept only four. Yet others, a different four. Still other lawyers may be expedient, deploying one or another form or combination of forms as suits their present purpose. A sociology of the practice of constitutional lawyers may conclude that constitutional law does not amount to a coherent practice. If these are the facts of practice, then an explanation needs to be given as to why all six forms are legitimate must be provided, given that for nearly every form, there are some apparently competent practitioners who would reject that form.

Another way of looking at this difficulty would be to consider proposals for new forms of argument. Someone proposes that ref-

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49. "Constitutional interpretation" is employed here in its ordinary legal sense — not in Patterson's restricted usage of "interpretation" as being required only when the forms of argument conflict.

50. P. 137 (citing (incorrectly) BOBBITT, CONSTITUTIONAL FATE, *supra* note 19, at 12-13). Patterson must have intended to cite BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 19, at 12-13.

erence to social morality is a legitimate form of constitutional argument. Someone else proposes that reference to critical morality is legitimate. Some of these claims have support among legal practitioners, including in their legal practices, but they do not command universal or near-universal compliance. How do we determine when a form of argument is legitimate? More needs to be said about when a form of argument is legally legitimate because determining the full list of legal forms of argument will make a difference to which legal propositions are warrantably assertible by the forms of argument and are therefore commendable as legally true.

### 3. *Patterson's Interpretive Coherentism*

Patterson claims that when the forms of argument conflict, the conflict is resolved by deploying Quine's maxim of minimum mutilation as an interpretive technique: resolve the conflict by changing as few previously held beliefs or practices as possible (p. 172). Yet Patterson's examples of interpretive resolution to conflicts or challenges to a form of argument do not clearly exemplify minimizing change. At times, they appear to illustrate maximizing coherence, or maximizing legal values generally, including coherence (pp. 172-79). Moreover, coherence is a notoriously difficult notion to pin down.<sup>51</sup> Patterson does not provide an account of coherence, or of the two most plausible candidates for its analysis, monism and pluralism with relations of support among the principles and norms of the theory.<sup>52</sup> In the absence of an account of coherence, the full import of Patterson's examples of, and account of, interpretation remains elusive. Because understanding these considerations is facilitated in concrete context, I elaborate upon them below in connection with Patterson's discussion of *United Steelworkers v. Weber*.<sup>53</sup>

Indeed, in comparison to his otherwise atheoretical Wittgensteinian instincts, Patterson's account of interpretation as coherentist conservatism appears excessively theoretical and insufficiently descriptive. Patterson is not advocating the coherentist maxim of minimum mutilation as a prescription for law, but as a description of legal interpretation in the face of controversy. So shouldn't we, as Wittgenstein urges, go out and see what lawyers and judges do, rather than armchair philosophize? Just as we raised a concern about whether there is a coherent practice underlying

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51. Or so it has appeared to me on the occasions when I have attempted it. See Kress, *Coherence*, *supra* note 35, at 539-46; Kress, *Coherence and Formalism*, *supra* note 35, at 650-66.

52. See Kress, *Coherence and Formalism*, *supra* note 35 at 657-58, 663-66; Kress, *Coherence*, *supra* note 35, at 542-46. See generally Kress, *Coherence and Its Normative Value*, *supra* note 35.

53. 443 U.S. 193 (1979); see *infra* text accompanying notes 121-26.

Bobbitt's and Patterson's forms of argument, and a method by which to resolve disagreements about whether an argument form is a legitimate form of argument, so there is a heightened concern about whether — in the face of conflicts among forms of argument — there is a coherent practice for resolving those conflicts.

I suspect that a well-designed empirical study would find that different practitioners resolve controversial cases requiring Pattersonian interpretation by different methods. Some may follow the maxim of minimum mutilation. Others may maximize coherence. Those who do maximize coherence may maximize differing conceptions of coherence. Others may simply do what they think is right, or what they think critical morality would recommend. Others may follow the dictates of social morality. Still others may try to induce a set of principles that underlies legal practice and apply those principles to the case at hand. Once again, some practitioners will act expediently, inconsistently applying different techniques as suits their current purpose. No doubt, still other techniques are practiced. We have no reason to think that most judges and lawyers resolve hard cases in similar ways, or that interpretation forms a coherent practice. One of the appealing aspects of Dworkin's theory of law is his recognition of how thoroughly controversial it is, particularly with respect to theories of precedent, statutory and constitutional interpretation, and even more so as such theories are applied in hard cases.<sup>54</sup>

#### D. *Locating Patterson's Account of Legal Truth in Philosophical Space*

There are three main types of theories of truth: metaphysical, justificatory, and speech-act theories.<sup>55</sup> These categories are not mutually exclusive. Metaphysical theories include extensional theories such as the semantic theories of Alfred Tarski<sup>56</sup> and Saul Kripke.<sup>57</sup> These semantical theories attempt to build materially adequate definitions of the truth of sentences from their structure and the references of their parts. While correspondence and coherence theories are occasionally presented as materially equivalent metaphysical theories, more frequently they purport to provide the essence or meaning of truth. Most metaphysical theories purport to explain what constitutes truth. The second type of truth theory is the justificatory, and includes coherence, pragmatist, and war-

54. See DWORKIN, *supra* note 32, at 11; see also Ken Kress, *The Interpretive Turn*, 97 ETHICS 834, 835-38 (1987) (reviewing DWORKIN, *supra* note 32).

55. See RICHARD L. KIRKHAM, THEORIES OF TRUTH: A CRITICAL INTRODUCTION 37 tbl. 1.1 (1992). See generally *id.* at 20-40.

56. See TARSKI, *supra* note 42.

57. See Saul Kripke, *Outline of a Theory of Truth*, 72 J. PHIL. 690 (1975).

ranted-assertibility theories. Some theories, for example Brand Blanshard's coherentism<sup>58</sup> and William James's pragmatism,<sup>59</sup> are advanced as both metaphysical and justificatory theories of truth. Justificatory theories of truth are often closely related to epistemic theories of justified belief.

The last category of truth theories encompasses speech-act theories. Speech-act theories include Peter Strawson's performative theory,<sup>60</sup> according to which the utterance of "'snow is white' is true" affirms "snow is white" but does not assert anything, and Alan White's appraisal theory.<sup>61</sup> Speech-act theories also include deflationist and disquotational accounts such as Patterson's account for law. In addition, Patterson's account includes an appraisal, commendation, or endorsement aspect (pp. 70, 152), which he regrettably never elaborates.

Although Patterson rejects this label, many will read *Law and Truth* as advocating a warranted-assertibility theory of legal truth and therefore as being a justificatory account as well as a deflationist account.<sup>62</sup> At first sight, this may seem inconsistent, since a non-substantive deflationism appears to be married to a substantive warranted-assertibility account. Patterson might claim that he has an appraisal/commendation, deflationist account of legal truth that commends legal propositions as true when they are warrantably assertible but does not have a warranted-assertibility theory of legal truth *simpliciter*.

But there is another way of reconciling *Law and Truth's* non-substantive deflationism with a substantive warranted-assertibility theory. In another context, Richard Rorty has suggested that those who put forward justificatory and warranted-assertibility theories of truth frequently have something else in mind.<sup>63</sup> They may believe that the traditional conception of truth is hopeless, particularly in metaphysically robust versions such as the traditional correspondence theory of truth. Because developing a theory of truth is unworkable, they develop a theory of warranted-assertibility or justified belief as the next best thing, but confusingly describe it as a theory of truth.<sup>64</sup> Richard Kirkham, author of the most compre-

58. See 2 BRAND BLANSHARD, *THE NATURE OF THOUGHT* 212-331 (1940).

59. See WILLIAM JAMES, *THE MEANING OF TRUTH* (Fredson Bowers & Ignas K. Skrupskelis eds., Harvard Univ. Press 1975) (1909).

60. See P.F. Strawson, *Truth*, in *PSYCHICAL RESEARCH, ETHICS AND LOGIC* 129 (Aristotelian Socy. Supp. Vol. 24, 1950).

61. See Alan R. White, *Truth as Appraisal*, 66 *MIND* 318 (1957).

62. See, e.g., David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth*, 50 *SMU L. Rev.* (forthcoming 1997); George A. Martinez, *On Law and Truth*, 72 *NOTRE DAME L. REV.* 883, 895-96 (1997) (reviewing *Law and Truth*).

63. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 280 (1979).

64. See *id.*

hensive recent book on theories of truth, nicely elaborates Rorty's insight:

[A]s Richard Rorty has noticed, the truth-as-justification thesis, as I shall call it, is often asserted as a roundabout way of expressing some *other* doctrine. Sometimes it is an odd way of expressing the thesis that there really is no legitimate philosophical program in which a theory of truth could play a role; hence, we really do not need a theory of truth, distinct from a theory of justification. . . . Sometimes too the truth-as-justification thesis is meant only to express the claim that truth is a vacuous concept while justification is not.<sup>65</sup>

Nonetheless, whether interpreted as a warranted-assertibility theory of truth, or a deflationist, appraisal account rooted in a linguistic ability or technique to endorse legal propositions as justified by the forms of argument, the justificatory aspect of Patterson's view is, at least initially, plausible. Law is an assertive and argumentative practice.<sup>66</sup> In one of his earliest articles, Dworkin claimed that "a legal obligation exists whenever the case supporting such an obligation . . . is stronger than the case against it."<sup>67</sup> Whatever their plausibility as general theories of truth, justificatory accounts are especially at home in law and in adversarial legal systems.

In this Part, I have described Patterson's account of what it means to say that a proposition of law is true in terms of the forms of argument and in terms of conservative coherentist methods for resolving conflicts between forms of argument. I have briefly described Patterson's Wittgensteinian distinction between understanding and interpreting. I have raised concerns about whether the imprecision of his description of the forms of argument leads to radical indeterminacy and concluded that responses available to Patterson may reduce — but not entirely eliminate — the indeterminacy of the law on his account. In itself, moderate indeterminacy is not a criticism; most legal theorists acknowledge its existence.<sup>68</sup> Two criticisms that I have urged are that the forms of argument and the technique for resolving conflicts among them may not amount to coherent practices. Patterson's deployment of Quine's maxim of

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65. KIRKHAM, *supra* note 55, at 49 (citation omitted). Similarly, William Alston recently noted:

One thing we need to consider is what reasons epistemic theorists have for preferring their account of truth to a realist view. Actually, apart from some bald statements that it is implausible to think of truth as conceptually independent of rational acceptability and the like, those reasons are confined to reasons for rejecting a realist conception, along with a tacit assumption that epistemic accounts are the only alternative.

WILLIAM P. ALSTON, *A REALIST CONCEPTION OF TRUTH* 190 (1996).

66. P. 170; *see also* DWORKIN, *supra* note 32, at 13.

67. RONALD DWORKIN, *The Model Rules I*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 40, at 14, 44.

68. *See, e.g.*, Kress, *Legal Indeterminacy*, *supra* note 41, at 285-97 (arguing that moderate indeterminacy does not undermine law's moral legitimacy).

minimum mutilation to resolve conflicts thus appears excessively theoretical, and insufficiently empirical, in comparison to Patterson's otherwise atheoretical Wittgensteinian methodology.

I have also urged that disquotationalism and the existence of legal indeterminacy in some cases — both plausible views — are incompatible.

## II. DWORKIN, SEMANTICS, AND TRUTH MAKERS

Patterson accurately quotes Dworkin as having, on numerous occasions, stated that a theory of law is a theory of truth conditions for propositions of law, and that propositions of law are true in virtue of their grounds.<sup>69</sup> Yet Dworkin does not much care whether one uses the term "true" or the word "sound." More important, Dworkin rejects definitional, necessary, and sufficient truth-conditional semantics for the term "law," weaker criterial approaches, and meaning-as-use perspectives, which Dworkin views as rough equivalents.<sup>70</sup> In its place, Dworkin famously recommends interpretation of local social practices, including law.<sup>71</sup> Dworkin is also infamous for simultaneously maintaining some form of modest objectivity with the right answer thesis, while attempting to squirm out of any metaphysical commitments. First, Dworkin claims that legal argument is a special kind of moral argument. Second, Dworkin urges that moral truth depends upon moral reasons and moral argument, which are themselves a matter of moral practice. Dworkin denies that moral truth depends upon correspondence to moral facts that are part of the metaphysical furniture of the universe.<sup>72</sup>

Ironically, Dworkin's and Patterson's attraction to practice-oriented accounts of law suggests that there is a deep methodological similarity between their jurisprudences, despite surface disagreements. Viewed in this light, Patterson and Dworkin disagree about what constitutes legal practice. They agree that law is a justificatory and argumentative practice; they disagree about which arguments are authoritatively sanctioned. Patterson claims that legal practice consists in argument warranted by the culturally endorsed forms of argument — historical, doctrinal, textual, and prudential.<sup>73</sup> Dworkin claims that legal argument attempts to show legal practice in the best light by interpreting law as what follows

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69. See, e.g., DWORKIN, *supra* note 32, at 4-5.

70. See *id.* at 31-44.

71. See *id.* at 45-76.

72. See *id.* at 76-85; Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87 (1996).

73. For a description of these forms of argument, see *supra* text accompanying notes 30-35.



from the most morally appealing, coherent scheme of principles exemplifying a single vision of justice, due process, and fairness, and which also justifies the bulk of the settled law.<sup>74</sup>

Patterson's criticism of Dworkin for appealing, at least in part, to critical morality as a transcendent truth maker, as a "something" that makes legal propositions true, is problematic (p. 8). Dworkin does not conceive of moral 'facts' as existing transcendentally on a par with naïve realism's view of physical facts. Dworkin, like Patterson, is developing a practice-based account of law. Contrary to what Patterson claims, Dworkin's critique of hard-facts positivism — because it requires complete agreement among practitioners that a proposition is law, or else it declares the proposition not authoritatively binding — does not show that Dworkin appeals to practice-transcendent facts (p. 8). It only shows that he rejects hard-facts positivism's conception of law as *complete* agreement among competent practitioners.

What Patterson needs to demonstrate is that legal practice does not countenance appeal to critical moral principles in the special way Dworkin asserts the law requires. Patterson can point to judges' and lawyers' denials that their arguments depend on morality. Instead of arguing that it would be morally desirable or required that their client prevail, lawyers argue that the law demands it. Instead of appealing to moral principles, practitioners claim to appeal to public policy and authoritatively binding purposes. But what lawyers say they do, and what they in fact do, may well differ. Judges avoid acknowledging their legislative activities, except under the guise of cases of first impression. No doubt this helps them to preserve political capital and avoids erosion of their perceived legitimacy. Judges might avoid confessing the role morality plays in their decisionmaking for analogous reasons. Moreover, judges frequently appear to be appealing to moral principles, however they describe those appeals.<sup>75</sup>

Dworkin does not assert that legal propositions are decided by appeal to a transcendent truth maker independent of our beliefs and social practices. The 'something' that Dworkin partially appeals to as a truth maker, critical morality, is for Dworkin itself determined by our practice of moral argument.

To be sure, there is a substantial disagreement remaining between Patterson and Dworkin. It is the same question that

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74. See DWORKIN, *Appendix*, *supra* note 40, at 340-42, 360; Alexander & Kress, *supra* note 35, at 287-88, 311; Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 377-79 (1984).

75. For a helpful discussion of an analogous issue in the Hart-Dworkin debate, see Jules L. Coleman, *Book Review*, 66 CAL. L. REV. 885, 892 (1978) (reviewing DWORKIN, *supra* note 40).

divides Dworkin and Raz, and Dworkin and nonincorporationist readings of Hart: Is appeal to critical moral principles legally authorized in judicial law application? Is such appeal part of legal practice?

In short, on the questions of truth makers and the nature of legal practice, Patterson misframes the issue separating Dworkin and himself. In consequence, his critique is largely irrelevant and unsuccessful.

### III. PATTERSON AND LEGAL POSITIVISM

#### A. *Introduction*

This Part examines Patterson's discussion of legal positivism to assess his claim that modern jurisprudence is mistaken because it adheres (1) to a truth-conditional semantics, (2) to a representationalist semantics, (3) to the correspondence theory of truth, and (4) to the view that some truth maker makes propositions of law true.<sup>76</sup> Although Patterson criticizes several contemporary jurisprudential theories on these four grounds, his argument is most explicit and fully developed in his attack on positivism.<sup>77</sup>

For Patterson's critique to carry critical bite, he must show not merely that positivism holds the above theories and goes awry because of them. Rather, Patterson must show that positivism is committed to these theses and would be a significantly different — and inferior — theory if it attempted to subtract them from the rest of its theoretical commitments. Otherwise, Patterson's critique amounts to a friendly amendment to positivism. Similarly, it will not suffice to show merely that there is a plausible reading according to which one positivist might have held these views.

Patterson attacks legal positivism by critiquing his reading of H.L.A. Hart's views.<sup>78</sup> While Patterson is perhaps on shaky ground in describing one positivist's views, rather than positivism generally, given Hart's prominence, this procedure may perhaps be forgiven. Dworkin, you may recall, developed his initial argument against positivism by attacking positivism generally, employing Hart's version only when a specific target was necessary.<sup>79</sup>

76. Only in passing does Patterson critique Hart as a representationalist beyond his criticisms of the other three views. See, e.g., p. 70.

77. For example, since Ernest Weinrib holds a coherence theory of truth, Patterson criticizes Weinrib not because he holds the correspondence theory, but rather because Weinrib does not argue that the version of coherentism that he advocates is superior to alternative coherentist theories of truth. Pp. 32-35. Patterson also urges that legal concepts and objects generally are not truth makers independent of their functions and roles within our way of life — in Wittgenstein's overblown phrase, in our "form of life." P. 38. Put differently, Patterson critiques Weinrib for failing to recognize the social construction of reality. Pp. 39-42.

78. That is, he critiques those views as they are elaborated in HART, *supra* note 14.

79. See DWORKIN, *supra* note 67, at 17, 22.

In this Part, I argue that Patterson misreads Hart and positivism in ways that undercut his critique. Specifically, he misinterprets Hart and positivism as committed to a pedigree test for law that countenances as criteria of legal validity only simple social facts, such as whether a legislature has duly enacted a particular statute. To the contrary, Hart has explicitly rejected the strict pedigree test, and even if Hart were committed to it, legal positivism is not. Second, I demonstrate that Hart rejects necessary and sufficient truth-conditional semantics, but acknowledge that his views are consistent with a weaker criterial truth-conditional semantics. Third, I demonstrate that theories of law and legal validity have no entailments for theories of legal truth. Thus, Hart's theory of law is consistent with nearly any theory of legal truth: including coherence, correspondence, warranted assertibility, and deflationist. Since Hart never spoke to the issue of his views of legal truth, and his theory of legal validity is consistent with many theories of legal truth, pinning the correspondence theory on him is unjustified. Finally, I claim that even if Hart were committed to the correspondence theory of truth and to the existence of truth makers, that would not undercut either of positivism's two major theses: the logical separation of law and morals and the claim that law and its authority are matters of social fact. Indeed, I urge, in essence, that Patterson's view of what makes propositions of law true is similar to, if not identical to, a version of particular positivism's.

### B. *Patterson's Description of H.L.A. Hart's Legal Positivism*

Patterson claims that in *The Concept of Law* Hart advances both an account of the idea of a legal system (this is correct) and a theory of adjudication (this is incorrect) (p. 59).

In *The Concept of Law*, Hart provides a general jurisprudential account of a mature, municipal legal system. That is, Hart is providing a conceptual account of all possible, mature legal systems. Although it is frequently misinterpreted as a theory of adjudication, Chapter 7 of *The Concept of Law* is better understood as a defense of Hart's crucial concepts of rules and rule-guided behavior against skeptical attacks. In prior chapters, Hart argues in numerous places that Austin's ontology is too meager: in addition to Austinian habits, a theoretical understanding of law requires understanding rules and rule-guided behavior. Hart defines law as the union of primary rules about behavior and secondary rules about rules, including the rule of recognition.<sup>80</sup> The concept of a rule is crucial to Hart's account of law. If rules and rule-following behavior are incoherent or unintelligible, Hart's theory fails. Hart therefore seeks to

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80. See HART, *supra* note 14, at 98.

demonstrate that rules are not metaphysically mysterious — as Austinians might urge. Hart also defends rules against legal realists' claims that law is indeterminate because rules do not and cannot function in law and because rules cannot determine judicial decisions.

Chapter 7 is entitled "Formalism and Rule-Skepticism," not "A Theory of Adjudication." The last two sentences of the prior chapter are:

This aspect of law is often held to show that any elucidation of the concept of law in terms of rules must be misleading. To insist on it in the face of the realities of the situation is often stigmatized as 'conceptualism' or 'formalism', and it is to the estimation of this charge that we shall now turn.<sup>81</sup>

In fact, Hart believes that there are so many differences and so few similarities in the practices of adjudication of particular legal systems that any general legal positivist theory of adjudication would be nearly vacuous.<sup>82</sup>

### C. Jurisprudential Methodology

Indeed, positivist jurisprudential methodology in general, and Hart's methodology in particular, differs from Patterson's, or Ronald Dworkin's, in ways that are crucial to fully understanding disputes among those theories. Hart consistently maintains that his enterprise is descriptive and conceptual, even though it describes a normative phenomenon.<sup>83</sup> Positivist methodology countenances both particular and general jurisprudence. Particular jurisprudence describes a legal system such as that of the United States, or a set of closely related legal systems, such as those constituting Anglo-American law. Alternatively, it may describe a legal concept within a legal system. Hart and Honoré's *Causation in the Law* is an exercise in particular jurisprudence, describing causation in Anglo-American law.<sup>84</sup> Typically, hornbooks are exercises in particular jurisprudence.

Most examples of legal positivist jurisprudence, and Hart's *The Concept of Law* in particular, are exercises in general jurisprudence. This enterprise "is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect."<sup>85</sup> General

81. *Id.* at 120-21.

82. Interview with H.L.A. Hart, formerly Professor of Jurisprudence, Oxford University, in Berkeley, Cal. (1988). Joseph Raz agrees: "Adjudicative institutions vary greatly from one country to another." RAZ, *supra* note 37, at 180.

83. See HART, *supra* note 14, at 239-44.

84. H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985).

85. HART, *supra* note 14, at 239.

jurisprudence attempts to describe all possible legal systems, thereby providing a conceptual understanding of law.

By contrast, Dworkin's interpretive methodology is tied to a particular legal culture, or a few closely related ones. Thus, Dworkin interprets American or Anglo-American legal practice. Additionally, Dworkin rejects conceptual and criterial semantics and analyses of social practices, including law, as misguided because they lead to the semantic sting's conclusion that theoretical disagreement about law is impossible.<sup>86</sup> In its place, Dworkin advocates a version of interpretation with both descriptive and morally evaluative aspects. Dworkin interprets law as those propositions that follow from the morally best set of principles that meet or exceed a set threshold of fit with the settled law.<sup>87</sup> Unlike positivism's methodology, Dworkin's is not purely descriptive or conceptual.

Patterson's philosophical account of law, like Dworkin's interpretive account, is tied to a particular legal culture. Like Hart, however, Patterson's enterprise appears to be a certain kind of descriptive account, and neither a prescription for nor an interpretation of legal practice. Patterson's jurisprudential methodology is closer to particular jurisprudence than to general jurisprudence or to Dworkinian interpretation. Patterson also rejects traditional semantics as applied to legal language, but for different reasons than Dworkin does.<sup>88</sup>

Legal positivists, including Jeremy Bentham, J.L. Austin, H.L.A. Hart, and Joseph Raz, but excluding Steven Burton<sup>89</sup> and possibly Jules Coleman,<sup>90</sup> develop their theories as theories of the existence conditions for a *legal system* and for the identification of its *general* propositions of law. Hart famously argued that a legal system exists only when there is a practice among its officials — particularly judges — of identifying general propositions of law by means of a generally unstated rule of recognition.<sup>91</sup>

By contrast, Dworkin, Burton, Patterson, and perhaps Coleman can be understood as developing accounts of law grounded in legal

86. See DWORKIN, *supra* note 32, at 31-46. I describe and critique the semantic sting in Kress, *supra* note 54, at 836-38, 852-59.

87. See DWORKIN, *Appendix*, *supra* note 40, at 340-41, 360; DWORKIN, *supra* note 32, at vii, 225.

88. I do not accept Dworkin's and Patterson's attributions of traditional semantic theories to positivism, and in particular to Hart. See Kress, *supra* note 54, at 852-54; *infra* text accompanying notes 107-112.

89. See STEVEN J. BURTON, *JUDGING IN GOOD FAITH* at xv-xvi (1992).

90. See Coleman, *supra* note 38.

91. See HART, *supra* note 14, at 91-98. Hart also claims that general — but not universal — obedience to laws valid under the rule of recognition is a necessary condition for the existence of a legal system. See *id.* at 113.

reasoning or theories of adjudication. A positivist theory of legal systems and general propositions of law must be supplemented with a theory of adjudication to provide a complete explanation of authoritative judicial behavior. Regrettably, positivists rarely provide a theory of adjudication. One reason for this, as we have seen, is that Hart and other positivists are engaged in general jurisprudence yet believe that a general jurisprudential theory of adjudication would be vacuous because particular legal systems' theories of adjudication vary so greatly. A second reason is the difficulty positivism has in developing even particular theories of adjudication and interpretation. As a theory of the official acts of legally authoritative actors such as ratifiers, legislators, and judges, positivism is more plausible as a theory of enactments, which have canonical formulations, than of precedents, or lines of precedent, the import of which is often controversial. To the extent that positivism is a conventionalist account of law, grounded in social agreement, it has traditionally had difficulty explaining how law exists in the face of controversy.<sup>92</sup>

Moreover, the positivist theory of the limits of law holds that authoritative legal standards run out in hard or unregulated cases, requiring judges to exercise a legislative discretion to create law to fill the gap. Thus, positivists distinguish judicial law application from judicial law creation. As a consequence, theories of adjudication for these traditional positivists will need to be bifurcated: judicial law creation may well require different methods from those judicial application of law requires. For example, Raz maintains that in regulated cases, judges must follow binding legal standards, while acknowledging that the meaning of such standards may be difficult to determine.<sup>93</sup> However, in unregulated cases, where binding legal standards are indeterminate, Raz maintains that the law prescribes that judges should decide in accordance with critical morality.<sup>94</sup>

These distinctions are significant for evaluating Patterson's critique of positivism. The case which Patterson will deploy against positivism, *United Steelworkers v. Weber*,<sup>95</sup> Hart probably would consider to be a hard case, one in which the law does not determine the answer. Hart could claim that *Weber* could be decided only by the exercise of judicial discretion, that is, by the creation of new law by the Supreme Court. Patterson's apparent presupposition that the forms of argument showed the majority position to be true —

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92. RONALD DWORKIN, *The Model of Rules II*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 40, at 46, 49-58. *But see* Coleman, *supra* note 38.

93. *See* RAZ, *supra* note 37, at 113.

94. *See id.*

95. 443 U.S. 193 (1979).

prior to the decision — would be denied by Hart's positivism. Hart would claim there was a truth-value gap in the law prior to the decision. Patterson might maintain that the argument in the majority opinion or in Blackmun's concurring opinion showed the legal proposition that Kaiser's voluntary affirmative action program is permissible to be true via the forms of argument prior to the decision, and thus constituted law prior to the decision. If Patterson takes this tack, Hart could claim that Patterson commits the genetic fallacy of assuming that anything judges do is law application, thereby obscuring their role as lawmakers in hard cases.<sup>96</sup>

Patterson claims that, in Hart's view, "the legal system is a system of social rules" (p. 59). This is a mistake. The rule of recognition, the master test for legal validity, is a social rule, according to Hart, because it meets his criteria for being a social rule: it is generally followed by judges, who deploy it as a ground for criticism, and who accept it from the internal point of view.<sup>97</sup> More precisely, the rule of recognition is a social rule — or is so regarded — because it meets the criteria Hart specifies, and is *legally authoritative* because it is the master rule followed by legal officials, particularly judges, for determining which other norms are legally valid. Put differently, the authority of the rule of recognition depends upon a social practice among judges. The authority of all other legal norms depends upon their meeting the criteria of validity specified by the rule of recognition. Although a lower norm that is valid because it meets the criteria of validity set forth in the rule of recognition may also meet the criteria for being a social rule, this need not be the case for all valid lower norms. In general, lower norms will not be social rules.

Patterson attributes to Hart a strict, pedigree sources thesis (pp. 63, 69, 70). As elaborated by Patterson, the sources thesis means that the rule of recognition's criteria of validity are limited to social facts. Moreover, according to Patterson, the social facts that are the rule of recognition's criteria of validity are simple tests of pedigree or origins (pp. 63, 69, 70): Was the author of this norm legally authoritative? Was this piece of legislation promulgated as authorized by the Constitution? Patterson also reads the sources thesis as entailing that the *truth* of propositions of law depends only upon social facts, such as the authoritative acts of judges, legislators, and ratifiers.

Hart rejects a strict, pedigree sources thesis in favor of incorporationist positivism. Hart holds that the criteria for legal validity in the rule of recognition may go beyond social facts and explicitly incorporate critical moral criteria. Thus, an incorpora-

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96. See *infra* text accompanying notes 114-20.

97. See HART, *supra* note 14, at 55-57, 105-10.

tionist such as Hart allows that the law may not be identifiable solely on the basis of social facts, but may require reference to moral facts in addition to social facts.

In a footnote, Patterson quotes Hart's assertion of incorporationism (p. 60 n.9). Yet Patterson fails to note that Hart's incorporationism means that he rejects the strict, pedigree sources thesis.<sup>98</sup>

Reading the rule of recognition to require only pedigree sources of law is a misreading of Hart and positivism fostered by Dworkin.<sup>99</sup>

In the postscript to the second edition of *The Concept of Law*, which Patterson cites,<sup>100</sup> Hart explicitly denies that the rule of recognition's test for legal validity is a test of pedigree:

Dworkin in attributing to me a doctrine of 'plain-fact positivism' has mistakenly treated my theory as not only requiring (as it does) that the existence and authority of the rule of recognition should depend on the fact of its acceptance by the courts, but also as requiring (as it does not) that the criteria of legal validity which the rule provides should consist exclusively of the specific kind of plain fact which he calls '*pedigree*' matters and which concern the manner and form of law-creation or adoption. This is doubly mistaken. First, it ignores my explicit acknowledgement that the rule of recognition may *incorporate* as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called 'soft positivism' and not as in Dworkin's version of it 'plain-fact' positivism. Secondly, there is nothing in my book to suggest that the plain-fact criteria provided by the rule of recognition must be solely matters of pedigree; they may instead be substantive constraints on the content of legislation such as the [First] or Nineteenth Amendments to the United States Constitution respecting the establishment of religion or abridgements of the right to vote.<sup>101</sup>

Hart's incorporationism countenances moral criteria as well as social criteria for legal validity under the rule of recognition. Incorporationism generally permits that moral criteria be incorporated into constitutional provisions such as the Eighth Amendment, Due Process Clause, and Equal Protection Clause, or in a statute or

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98. Whatever one may think of Hart's posthumous claim that he held the incorporationist thesis and not the sources thesis as early as 1958 in his debate with Fuller and that he reiterated incorporationism in the first edition of *The Concept of Law*, it was clear by the mid-1980s that Hart was an incorporationist. See HART, *supra* note 14, at 247-48, 250-54; Joseph Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 295-96 (1985). Raz, who was in nearly daily contact with Hart, attributes to Hart the incorporationist thesis in opposition to Raz's strict sources thesis.

99. Patterson's attributions to Hart of a pedigree test for legality are either unsupported, or cite to Dworkin's own misreading of Hart. Pp. 63, 69.

100. See pp. 59 n.2, 60 n.9, 62 n.163.

101. HART, *supra* note 14, at 250 (emphasis added).



precedent.<sup>102</sup> Where morality is incorporated into the law, the validity and identification of the law may require reference to both moral and social facts.

Nevertheless, incorporationist positivists can maintain the crucial positivist thesis that there is no *necessary* connection between law and morality. First, they maintain that morality enters law only contingently, in some possible legal systems, but not all. More importantly, they hold that the legal authority of moral considerations does not depend on their truth as a matter of morality, but upon having been made authoritative by some authoritative social fact such as ratification or enactment like the Eighth Amendment, Due Process Clause, and Equal Protection Clause, or by an interpretive convention among judges.

Patterson misreads Hart and positivism as committed to source-based pedigree criteria of validity under the rule of recognition. Hart rejects pedigree criteria in favor of incorporationist positivism. Even if Hart were committed to a strict source-based criteria of validity, legal positivism is not. Additionally, I will urge in the next section that Patterson may misread the role of the rule of recognition within positivist general jurisprudence. Finally, Patterson attributes to Hart a theory of adjudication that Hart rejects as impossible as a matter of general jurisprudence. As we shall soon see, these misreadings of Hart and positivism significantly undermine Patterson's critique of positivism.

#### D. *Patterson's Critique of Hart*

##### 1. *Hart and a Scientific View of Law*

On the basis of his misinterpretation of Hart as having a pedigree rule of recognition conforming to the sources thesis, Patterson reads Hart as committed to (1) a truth-conditional semantics for legal propositions, (2) representationalism in law, (3) a correspondence theory of truth for law, and (4) the view that the sources of law — such as constitutions, statutes, administrative rulings, and precedents — make propositions of law true. Patterson also attributes to Hart a scientific view of law and appears to attribute to Hart significant metaphysical commitments.<sup>103</sup>

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102. See WILFRED J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1996); Coleman, *supra* note 38; E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977); David Lyons, *Principles of Positivism and Legal Theory*, 87 YALE L.J. 415 (1977) (reviewing TAKING RIGHTS SERIOUSLY, *supra* note 40).

103. Patterson states:

Hart treats propositions of law as if they were hypotheses about institutional facts that, if verified, are then taken to be true. The forms of argument are not a bridge between a putative proposition of law and some state of affairs. When judges decide cases, they are not searching out facts about past legislative acts. Deciding cases is not the same thing as conducting an experiment.

The claim that Hart holds a scientific view of law is mistaken. It would be more accurate to say that, in part, he views law from a *social* scientific perspective.<sup>104</sup> As a positivist, he does think that law — and in particular its authority — is a matter of social fact. But he also thinks that law is a normative (rule-governed) enterprise, and that a complete theory of law requires understanding law from the internal perspective of legal officials and citizens.<sup>105</sup> In particular, Hart believes that a complete understanding of law must explain how legal norms guide citizens' conduct. One of Hart's major achievements is understanding law as a matter of practical reason. Hart's methodology places law in the same category as ethics and political theory, in contrast with sciences such as physics, biology, and astronomy, which are matters of theoretical or speculative reason.

Patterson's attribution to Hart of significant metaphysical commitments appears misplaced. While Hart adds rules to Austin's meager empiricist ontology, he generally follows Bentham and Austin as well as the ordinary language philosophy of his time in minimizing his metaphysical commitments.<sup>106</sup>

## 2. *Hart and the Semantics of Legal Statements*

Hart is famous for applying to law the ordinary language philosophy developed by J.L. Austin and Wittgenstein. Neil MacCormick describes Hart as "one of the leading proponents of . . . 'ordinary language philosophy.'"<sup>107</sup> Hart explicitly acknowledges the influence of Wittgenstein, and especially Wittgenstein's notion of family resemblance, on his own work.<sup>108</sup> Hart rejects the view that legal

P. 68; see also p. 64 ("But law is not as the positivist supposes . . . akin to science . . ."). Positivists would respond that they treat law as a matter of practical reason — not as a matter of theoretical reason, as philosophers consider the natural sciences to be.

104. In the preface to *The Concept of Law*, Hart states: "Notwithstanding its concern with analysis [of the concept of law] the book may also be regarded as an essay in descriptive sociology." HART, *supra* note 14, at v. Hart also cites, with approval, PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958). See HART, *supra* note 14, at 289, 297.

105. See Stephen Perry, *Interpretation and Methodology in Legal Theory*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 97, 98-99 (Andrei Marmor ed., 1995); Gerald Postema, *The Normativity of Law*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 81, 81 (Ruth Gavison ed., 1987).

106. See HART, *supra* note 14, at 83-84.

107. NEIL MACCORMICK, *H.L.A. HART* 13 (1981). Justus Hartnack describes Hart's early essay, *The Ascription of Responsibility and Rights*, 49 *PROC. ARISTOTELIAN SOC.* 171 (1949), as an exercise in Wittgensteinian philosophy of language. See JUSTUS HARTNACK, *WITTGENSTEIN AND MODERN PHILOSOPHY* 129-30 (Maurice Cranston trans., University of Notre Dame Press 2d ed. 1986) (1965). MacCormick also sees that essay as an important contribution to ordinary language philosophy. See MACCORMICK, *supra*, at 18.

108. See HART, *supra* note 14, at 13-17, 279-80, 289, 297 (explicitly rejecting definition by genus and species); H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 1-4 (1983).

concepts can be understood in terms of necessary and sufficient conditions:

[T]here are characteristics of legal concepts which make it often absurd to use in connection with them the language of necessary and sufficient conditions. . . . "What is a trespass?" "What is a contract?" — cannot be answered by the provision of a verbal rule for the translation of a legal expression into other terms or one specifying a set of necessary and sufficient conditions.<sup>109</sup>

Later in the same article, Hart continues: "Consideration of the defeasible character of legal concepts . . . shows how wrong it would be to succumb to the temptation offered by modern theories of meaning to identify the meaning of a legal concept, say 'contract,' with the statement of the conditions in which contracts are held to exist . . . ."<sup>110</sup> Hart's discussion of international law in Chapter 10 of *The Concept of Law* is a paradigmatic analysis of the concept of a legal system in terms of Wittgenstein's idea of family resemblance, thereby rejecting necessary and sufficient conditions. While Hart did not write at length about his views of legal semantics, what evidence there is demonstrates that he rejects necessary and sufficient truth-conditional semantics for law. On the other hand, a weaker criterial — but not necessary and sufficient conditions — truth-conditional account of legal meaning is consistent with certain of Hart's remarks in his early work, and with ideas current in philosophical circles at Oxford when Hart wrote *The Concept of Law*.<sup>111</sup> It is also compatible with Hart's understanding of the rule of recognition as providing criteria for legal validity.

*The Concept of Law* also exemplifies Patterson's preferred Wittgensteinian semantic doctrine of meaning as use. Hart was the first to apply that doctrine in legal philosophy.<sup>112</sup>

### 3. *Hart and Legal Truth*

To my knowledge, Hart never in print discussed the proper theory of truth generally or the proper local theory of truth for law. Agnosticism respecting Hart's view is therefore advisable. Hart's theory is a theory of law, not a theory of truth for law. Although

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109. Hart, *supra* note 107, at 173. Hart later disowned this article, but for reasons irrelevant to the current point. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW at v (1968).

110. Hart, *supra* note 107, at 181. Even as late as 1983, Hart writes of statements attributing legal rights and duties as true and false in discussing his early articles, although in *The Concept of Law* he eschews the notion of truth for that of legal validity. See HART, *supra* note 108, at 4-6.

111. See *supra* text accompanying notes 13-14 for discussion of the weaker criterial approach.

112. See HART, *supra* note 108, at 4-6. See generally Hart, *supra* note 107.

Hart develops a theory of legal validity, that theory is distinguishable from a theory of truth for law.

Theories of law or legal validity do not entail theories of truth for law; most theories of law are consistent with many different theories of truth for law. A theorist could hold that legal propositions are valid in a particular jurisdiction if they correspond to certain legal facts, such as the contents of duly-enacted statutes, thereby holding a correspondence theory of law and legal validity. At the same time, she could hold a coherence theory of truth for law, maintaining that the proposition that *p* is valid law in jurisdiction *J* is true if and only if it coheres with other legal propositions she accepts, including the proposition that the contents of duly-enacted statutes are legally valid.

Conversely, one could hold a coherence theory of law or legal validity yet a correspondence, pragmatic, or deflationary theory of truth for law. Theories of valid law have no implications for theories of truth for law. For example, correspondence theories of truth for law must be able to account for truths involving coherence, including claims that coherence is a (or the) determinant of legal validity. Consider the proposition that comparative negligence is valid law because it coheres better with general negligence principles than any alternative doctrine, including contributory negligence. That proposition will be true according to the correspondence theory of legal truth if and only if that proposition corresponds to the 'legal' facts. The relevant factual questions are: first, does comparative negligence cohere better with negligence principles than contributory negligence or other alternatives and, second, assuming it does cohere better, is cohering better the criterion of legal validity, thus implying that it is valid law? If both questions are answered affirmatively, the correspondence theory will declare the proposition that comparative negligence is valid law true by virtue of *correspondence* with '*legal facts*' about the *coherence* of comparative negligence and general negligence, and about *coherence* as the criterion for legal validity.

No persuasive argument has yet tied theories of law and legal validity in any interesting way to either global or local theories of truth. Given Hart's failure to speak to his views of legal truth, and the lack of logical connection from theories of legal validity to theories of legal truth, agnosticism regarding Hart's theory of legal truth appears justified. Patterson's attempt to rewrite all theories of law as theories of legal truth and his desire to see the history of recent jurisprudence as a movement from concerns about legal validity to concerns about truth does him a disservice.

But suppose I am wrong in claiming that there is no logical entailment or connection from theories of legal validity or law to

theories of legal truth. Patterson might then claim that Hart is committed to a version of the correspondence theory of truth by his theory of law and legal validity, even if Hart does not recognize or would not acknowledge his commitment.

Patterson supports the view that Hart is committed to the correspondence theory of truth for law by examining Hart's doctrine of the rule of recognition. Hart holds that primitive societies' rules of obligation suffer from three significant deficiencies; the one of current concern is *uncertainty* respecting their primary rules of obligation. The most important factor in the transition from a primitive community to a mature legal system is the coming into existence of a rule of recognition which reduces uncertainty by "specify[ing] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group."<sup>113</sup> The rule of recognition is a *social practice* among legal officials, particularly judges. Hart states:

The existence of . . . [the] rule of recognition will be manifest in the general practice on the part of officials or private persons, of identifying the rules by this criterion. . . . For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers.<sup>114</sup>

Patterson focuses on some of the simple examples Hart provides for criteria of validity in a rule of recognition, such as enactment by the legislature or judicial decision. Patterson then claims that Hart views a proposition of law as true if it corresponds to the social fact of having been passed by the legislature or being a precedent. Moreover, Patterson contends that for Hart the social fact of legislative enactment or judicial decision is the truth maker that makes the proposition of law true. By contrast, Patterson claims that legislative enactments do not make propositions of law true. Nothing *makes* them true; their truth is *shown through* the use of the forms of argument to justify legal propositions.

Patterson's analysis of Hart suggests that he may misunderstand the role of the rule of recognition. There are two major interpretations. The most plausible reading of *The Concept of Law* is that the rule of recognition distinguishes authoritative general propositions of law from general propositions that are not authoritative. The rule of recognition does not determine the application of general propositions of law to particular instances, and it does not determine the validity of particular propositions of law.<sup>115</sup> To determine

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113. HART, *supra* note 14, at 94.

114. *Id.* at 101.

115. *See id.* at 122-23; *see also id.* at 126 ("Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances.").

the validity of particular propositions of law would require a theory of adjudication or interpretation. Such theories are possible as a matter of particular, but not general, jurisprudence.<sup>116</sup> Joseph Raz offers a more radical interpretation. All the rule of recognition does is determine which acts are law-creating acts. In order to determine what law is generated thereby, one needs, in addition, to understand language and any special interpretive conventions of the legal system in question.<sup>117</sup>

Patterson attempts to demonstrate Hart's commitment to truth-conditional semantics, the correspondence theory of truth, and the existence of truth makers in law by examining the Supreme Court's decision in *United Steelworkers v. Weber*.<sup>118</sup> As noted above, Hart would maintain that *Weber* was a hard case, requiring the Court to exercise discretion and create new law. For Hart, *Weber* is not a case of judicial application of law. For this reason alone, Patterson's deployment of *Weber* is inapropos. On Hart's view, the position that voluntary affirmative action programs such as Kaiser's are permissible was neither valid nor invalid prior to a court's decision.<sup>119</sup> That proposition became valid law only after the exercise of legislative discretion by a court, and in consequence of both (1) the court's decision and (2) the *practice* of legal officials to identify law with reference to precedents, statutes, and constitutions as part of the rule of recognition. Or so Hart could argue. If Hart takes this tack, Patterson might criticize Hart's theory as incomplete because it lacks a theory of adjudication for hard cases. Hart will respond that legal systems' theories of adjudication — especially for hard cases — vary so greatly that a general jurisprudential theory of adjudication would be nearly vacuous.<sup>120</sup> Patterson could urge that this demonstrates the superiority of particular jurisprudence and local description to general jurisprudence's conceptual methodology. Hart would probably reply that general and particular jurisprudence are different yet complementary jurisprudential methodologies: there is no reason to view them as incompatible.

But suppose we pretend that *Weber* were a case of judicial application of law, or consider a case of judicial application of law. Would Patterson's critique of positivism succeed under these circumstances? Consider a rich, particular positivist theory of American law, including a rule of recognition incorporating

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116. See *supra* note 82 and accompanying text.

117. Raz, *supra* note 40, at 1107 n.12.

118. 443 U.S. 193 (1979).

119. I say a "court's," not the "Supreme Court's" decision, since lower court decisions, especially intermediate appellate court decisions, also create law.

120. See *supra* note 82 and accompanying text.

Patterson's forms of argument and coherentist conflict resolution techniques, or equivalent criteria of legal validity.

In *Weber*, the plaintiff, a white employee of Kaiser, sued his employer on the ground that Kaiser had unlawfully discriminated against him within the meaning of Title VII of the Civil Rights Act. Because there were racial imbalances in its skilled worker population, Kaiser, as a private employer, had voluntarily adopted an affirmative action plan that provided craft training to blacks with less seniority than whites. Relevant statutory language prohibited discrimination "against any individual because of his race [or] color . . . in admission to, or employment in, any program established to provide apprenticeship or other training."<sup>121</sup> Regrettably, the Act does not define "discriminate." Weber urged a literal interpretation under which Kaiser's voluntary affirmative action program would be unlawful.

The Supreme Court disagreed. As Patterson interprets it, Brennan's majority opinion held that Congress's intent was to prohibit discrimination against blacks because of our social history of past discrimination, but not to require private employers to adopt affirmative action programs. From this historical form of argument, the majority inferred that in the context of racial imbalances in its workplace, an employer may create a voluntary preferential treatment program such as Kaiser's. In short, history — legislative purpose — outweighed text — plain meaning (p. 65).

By contrast, Patterson tells us, Rehnquist's dissent urged first that the text was clear and thus its plain meaning controlled, and second that Congress's intent supported outlawing Kaiser's plan. While Rehnquist's evidence established that Congress intended to prohibit government-mandated affirmative action, its application to Kaiser's voluntary program was less certain. Patterson therefore finds neither Brennan's nor Rehnquist's history decisive. At bottom, Patterson contends that the upshot of Rehnquist's argument is that history is inconclusive and therefore plain meaning controls (p. 65).

Patterson prefers Blackmun's concurrence to either the majority or the dissenting opinion. Blackmun argues:

Preferential hiring along the lines of the Kaiser program is a reasonable response for the employer, whether or not a court, on these facts, could order the same step as a remedy. The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow a response limited to such victims. If past victims should be benefited by the program, however,

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121. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(d), 78 Stat. 241, 256 (codified at 42 U.S.C. § 2000e-2(d) (1994)); see also Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255.

the company mitigates its liability to those persons. Also, to the extent that Title VII liability is predicated on the “disparate effect” of an employer’s past hiring practices, the program makes it less likely that such an effect could be demonstrated.<sup>122</sup>

Patterson analyzes Blackmun’s opinion as weaving “prudential judgment with doctrinal argument to break the deadlock between text and history played out in the majority and dissenting opinions” (p. 67).

As a preliminary matter, and in support of the critique of the forms of argument and resolution of conflict among them by coherentist methods discussed above in section I.C, note that Patterson’s explanation why Blackmun’s opinion is superior is unsatisfying. Patterson does not mean to claim that Blackmun’s concurrence is superior to the majority and dissenting opinions because every weaving of prudential and doctrinal forms of argument is preferable to arguments that tie on history, while one has plain meaning in its favor, as Patterson describes the majority and dissenting opinions.

Since the forms of argument, as deployed by Brennan, Rehnquist, and Blackmun recommend inconsistent outcomes, the conflict is to be resolved, according to Patterson, by the application of Quine’s maxim of minimum mutilation: change as few legal practices and beliefs as possible. But Patterson does not argue here that Blackmun’s opinion is preferable because it changes fewer legal practices and beliefs than Brennan’s or Rehnquist’s would: Patterson simply asserts that its weaving of doctrine and consequentialist forms of argument “break[s] the deadlock between text and history played out in the majority and dissenting opinions” (p. 67).

Moreover, how would one count which argument, or combination of arguments, changes the least? There is no simple metric for counting numbers of precedents, statutes, constitutional provisions, and other institutional facts that a form of argument fits, and those that it would change. Moreover, even if there were such a metric, it is unlikely that we would follow it. Some aspects of the settled law are more important than others. Giving up the law’s conception of individuals as autonomous — or, if this is too woolly, its presumption of liberty — would be a greater change than amending the default rule for loans which fail to specify an interest rate from five to six percent, or dropping the tort doctrine of joint and several liability. My own view is that the determination of importance would be a matter of moral evaluation, including the importance of the legal doctrine to citizens’ lives and how appealing it is, morally speaking, compared to what would replace it. A coherentist legal

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122. *Weber*, 443 U.S. at 211 (Blackmun, J., concurring).



positivist, such as Rolf Sartorius<sup>123</sup> or Steven Burton,<sup>124</sup> might argue that importance is a matter of principles and values that have been embedded into the law by some legally authoritative act. Patterson's discussion of Posner's rule of law critique of Calabresi's proposal to grant courts the power to 'overrule' statutes, grounded in the rule-of-law virtues, raises the issue of importance. Patterson states, "the *form* of Posner's criticism is that Calabresi's proposal is too inconsistent with our *fundamental* beliefs, specifically separation of powers" (p. 176 n.91; second emphasis added). The judgment that separation of powers is "fundamental" is not merely a judgment of how much would change if we limited separation of powers to allow judicial 'overruling' of statutes. It is also a judgment of the significance of those changes, and therefore a judgment of importance.

Patterson needs to elaborate his conception of coherence, and his conception of minimizing change, in order to provide an adequate understanding of conflict resolution among the forms of argument. The failure to have done so leads to what I described in Part I as Patterson's interpretive vacillation between minimizing change, maximizing coherence, and maximizing legal values generally.<sup>125</sup> These considerations also illustrate one of the reasons why coherence is such a difficult notion to understand or analyze.<sup>126</sup>

In fairness to Patterson, it should be acknowledged that he does elaborate the notion of forms of argument and the resolution of conflicts between them later in *Law and Truth*, and gives more convincing explanations for the superiority of one opinion to another (pp. 172-79). Even with this additional content, however, Patterson has barely scratched the surface: an enormous amount of work remains before the account is adequately developed. I suspect that Patterson would agree that additional elaboration is desirable. However, Patterson expresses some uncertainty as to whether further development of the forms of argument is a philosophical enterprise. It may be historical, or sociological (p. 182).

#### 4. *Hart, Legal Truth, and Truth Makers*

We are now well positioned to examine the crux of Patterson's critique of positivism as committed to the correspondence theory of truth for law and the existence of legal truth makers. Patterson states:

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123. ROLF E. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 192 (1975).

124. STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 124-34 (2d ed. 1995).

125. See *supra* text accompanying note 51.

126. See *supra* text accompanying note 52.

For the positivist, “truth” in law states a relation or correspondence between the disputed proposition and some state of affairs (social facts). The rule of recognition states criteria that, if they obtain, make the proposition at issue true. Thus, the proposition at issue in *Weber* is true if and only if there exists some social fact (e.g., an act of the legislature) in virtue of which it is true. Lawyers and judges are agreed on the criteria for satisfying the test for law set forth by the rule of recognition; the only question is whether those criteria are satisfied.

As this discussion of *Weber* illustrates, the proposition of law at issue there is not true in virtue of facts, social or otherwise. . . . The truth of propositions of law turns on facts about what Congress or the legislature has done. But as the discussion of *Weber* shows us, there are no “facts” about what Congress has done that are the conditions for the truth of legal propositions. Yes, it *is* true that the proposition in question cannot be true unless the legislature has “done” something. But the point is that it is only through the use of forms of legal argument that we can even say what it is the legislature has done. The mistake legal positivists make is to believe that the meaning of the law lies in the acts of certain institutional players in the legal system. What the analysis of *Weber* shows is that the meaning of legislative action is a matter of forms of legal argument. Practice, not facts, is what the truth of legal propositions consists in.

Propositions of law are not true in virtue of criteria specified by the rule of recognition. The forms of argument — the grammar of legal justification — are the means by which the truth of legal propositions is shown. There are no legal truths — no true propositions of law — outside these forms of argument. This is why the positivist’s criterial test of legal truth misses the mark. Propositions of law are not [true] *in virtue of* anything; not social facts, legislative facts, nor facts of past institutional decisions (e.g., prior judicial decisions). [pp. 67-68; footnote omitted]

A proponent of positivism could urge that the validity of a proposition of law founded in a statute depends both upon enactment of the relevant statute and upon the practice among judges that constitutes the existence conditions for the rule of recognition, including those parts of the practice respecting interpreting statutes. In *The Concept of Law*, Hart emphasized enactments and precedents as law-creating acts, but he did so in the context of having already discussed the rule of recognition as a necessary condition for the existence of a mature legal system. The rule of recognition, and the practice underlying it, was presupposed. Hart would not deny that the practice underlying the rule of recognition and enactments combine to create law, or that in a mature legal system they are both necessary for statutory law.<sup>127</sup>

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127. Recall the qualification provided *supra* note 23.

Indeed, one of the consequences of the coming into existence of the rule of recognition is that what in a primitive society is merely a list of primary obligations is now unified into a system. A norm is law only by virtue of membership in the legal system, and a norm is a member of the legal system only if it meets the criteria of validity set out in the rule of recognition. Thus, being valid law depends both upon (1) the social practice underlying the rule of recognition and (2) meeting the criteria for validity set out in the rule of recognition.<sup>128</sup>

Providing a slight sophistication of earlier interpretation of Patterson as holding that the deployment of the forms of argument in legal practice makes propositions of law true, the above quote suggests that Patterson, like Hart, holds that the combined force of the enactment of Title VII and legal practice makes the proposition that Kaiser's program is permissible true.<sup>129</sup> Thus, but for minor differences, soon to be discussed, Patterson and positivism differ mainly in emphasis. Both agree that the enactment of Title VII and the practice of statutory interpretation are the two main factors in determining whether the proposition that Kaiser's voluntary affirmative action program is permissible is valid (Hart) or true (Patterson). Because Hart presupposes the rule of recognition, he emphasizes enactments and precedents. As a Wittgensteinian, Patterson wishes to oppose a scientific view of legal truth and legal semantics, reject the correspondence theory of truth, oppose the idea of truth makers, and counsel as methodology description of local practice. Therefore, he emphasizes the role of legal practice.

Additionally, Hart may have misled his readers by speaking of the rule of recognition rather than emphasizing the social practice that is the condition for the rule of recognition's existence. In a sense, the rule of recognition itself is unnecessary. All its work could be performed by the underlying social practice.<sup>130</sup>

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128. As noted earlier, the existence of a legal system and thus the possibility of membership also require, for Hart, general obedience to valid law. See *supra* note 91.

129. See *supra* note 22 and accompanying text.

130. Most modern correspondence theorists hold the correspondence-as-correlation thesis, according to which true propositions *as a whole* are correlated with facts or states of affairs *as a whole*. See, e.g., J.L. Austin, *Truth*, in *PSYCHICAL RESEARCH, ETHICS AND LOGIC*, *supra* note 60, at 111, reprinted in *TRUTH* 18 (George Pitcher ed., 1964). By contrast, the correspondence-as-congruence theory maintains that true propositions are structurally isomorphic to states of affairs — their parts and structure can be put in one-to-one correspondence. See generally KIRKHAM, *supra* note 55, at 119-30.

Hart's theory of the validity of general propositions of law, such as those expressed by statutes, cannot be interpreted as a standard correspondence theory. Nor is it a congruence correspondence theory — such as those set forth in LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (1921), and BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* (1912) — of the sort Patterson appears to attribute to modern philosophy and perhaps to modern jurisprudence. P. 156.

Moreover, both views are inadequate in roughly the same place. Positivism fails to provide a satisfying theory of adjudication, interpretation, and proper judicial behavior in hard cases, both as matters of general and particular jurisprudence. The failure to do so as a matter of particular jurisprudence correlates with the vagueness of Patterson's description of the forms of argument and the vagueness of coherentist methods for resolving conflicts among them.<sup>131</sup>

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According to Hart, what facts are necessary for the validity of the proposition that (1) in Iowa, a plaintiff's tort damages are reduced by her comparative fault? Clearly relevant is § 668.3(1) of the Iowa Code, which provides:

Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released . . . but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.

IOWA CODE ANN. § 668.3(1) (West 1987).

But also relevant is (2) the existence of a *practice* among Iowa judges (thereby generating a portion of the Iowa rule of recognition) of deciding cases and legal validity with reference to the contents of duly enacted statutes. Thus, it is also relevant whether § 668.3(1) was duly enacted, which means:

(3) a majority of Iowa legislators voted for § 668.3(1) during a formal vote when the legislature was in session,

(4) there was a quorum present,

(5) those voting on § 668.3(1) were legally authorized Iowa legislators, which means:

(6) they were duly elected in valid elections by the people of the State of Iowa, as provided for under the Constitution and laws of Iowa, consistently with the Constitution of the United States. Moreover, the provisions of § 668.3(1) must not:

(7) violate the provisions of the Iowa Constitution nor

(8) violate the Bill of Rights or other protections of the United States Constitution.

No doubt this is itself an incomplete list of the social and legal facts necessary, on Hart's account, for the validity of comparative negligence in Iowa. Still, even this gross simplification is a far cry from the simple idea Patterson attributes to Hart that the words in a statute are true if they correspond to a social fact, namely, the fact of *enactment*. On Hart's theory, the facts necessary for the validity of a legal proposition are substantially more complex than the facts necessary for the truth of a proposition under either correlation or congruence correspondence theories of truth.

Put differently, the correspondence relation Patterson invokes does not quite seem to be the correspondence relationship in theories of truth. Suppose a local statute provides that no vehicles are allowed in the park. Even in Patterson's simplified account of Hart, the fact corresponding to the legal proposition — no vehicles are allowed in the park — is not the legal fact that no vehicles are allowed in the park. Rather, the legal fact contains more content and structure: it is the social fact that a statute was duly enacted and that the local statute consists of the words "no vehicles are allowed in the park." Moreover, Hart's theory is not that the proposition's validity is equivalent to (if and only if) there exists a social fact that the legislature has enacted a statute that provides that no vehicles are allowed in the park. For one thing, vehicles could have been prohibited by judicial decision. Alternatively, despite the statute, a federal statute might preempt it, or a judicial decision qualify it for motorized wheelchairs. Thus, the 'correspondence relation' that Patterson attributes to Hart as part of Hart's theory of legal validity differs substantially from standard accounts of the correspondence relation in correspondence theories of truth, and from strict congruence correspondence theories. Because Hart's theory differs in these ways from standard correspondence theories of truth, Patterson's attribution to Hart of a correspondence theory appears misplaced.

131. See *supra* text accompanying notes 91-92; see also *supra* section I.C.1.

### 5. *Is Patterson a Particular Positivist?*

A Hartian or Razian general jurisprudence would not contain a richly textured practice for determining the application of statutes such as Title VII to concrete contexts for two reasons. First, the rules of recognition of particular jurisdictions vary substantially, yet Hart and Raz engage in general jurisprudence. Second, Hart and Raz would consider *Weber* to be a hard case, to be decided by a supplementary theory of proper judicial behavior when the law runs out.

A particular positivist theory of American law with a fully developed particular rule of recognition and a particular theory of adjudication and interpretation provides a more appropriate comparison to Patterson's view. Consider a particular jurisprudence in which *Weber* could be decided as a matter of judicial application of law and would not require the exercise of judicial discretion. To maximize the analogy, suppose that this positivist theory includes a rule of recognition and theory of adjudication in terms of the forms of argument and their deployment in statutory interpretation along Pattersonian lines. This positivist theory maintains that Kaiser's voluntary affirmative action program is lawful and that *Weber's* discrimination claim fails in consequence of both Title VII and the practice that underlies the American rule of recognition.

There is still a difference between this interpretation of positivism and Patterson's actual view that I have been obscuring by interpreting Patterson as holding that institutional acts in combination with legal practice make propositions of law true. Patterson claims that when a speaker utters a legal proposition, she is thereby commending, appraising, or endorsing the proposition as justified by the forms of argument of legal practice. Patterson's view of law and legal truth therefore appears to be noncognitive. Noncognitive language expresses emotions or attitudes. Understanding this noncognitive aspect is complicated by Patterson's simultaneous assertion that "[c]laims in law are assertive in nature" (p. 170). Generally, cognitive language is thought to be assertive and descriptive, while noncognitive language is expressive.<sup>132</sup> Patterson mentions the commendation/appraisal/endorsement view of legal truth only in passing, and only on a few occasions (pp. 70, 152). He does not develop it. As elsewhere, an understanding of Patterson's view must await its elaboration.

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132. See, e.g., A.J. AYER, LANGUAGE, TRUTH AND LOGIC 102-19 (Dover Publications 2d ed. 1952) (1936) (positing a naïve emotivism); ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGEMENT (1990) (advocating norm-expressivism); R.M. HARE, FREEDOM AND REASON (1963) (advocating universal prescriptivism); R.M. HARE, THE LANGUAGE OF MORALS (2d ed. 1961) (arguing for universal prescriptivism); CHARLES L. STEVENSON, ETHICS AND LANGUAGE (1944) (presenting a sophisticated emotivism).

To his credit, Patterson considers the possibility that the forms of argument are the rule of recognition, albeit a complex one, and thus that he is a positivist.<sup>133</sup> Patterson rejects this possibility for two reasons. Patterson's weaker argument interprets Hart, and positivism generally, as committed to *pedigree* criteria of legal validity under the rule of recognition that are *source-based*, such as enactments or precedents. Patterson argues, quite plausibly, that his analysis of *Weber* in terms of textual, historical, doctrinal, and prudential forms of argument goes beyond source-based arguments. But we have seen that Hart also rejects pedigree source-based positivism in favor of incorporationism, and even if Hart were a pedigree source-based positivist, legal positivism is not committed to the pedigree sources thesis. That is Dworkin's misinterpretation of positivism. Unless Patterson can show that positivism is committed to pedigree source-based criteria of validity, Patterson's first reason for why the forms of argument could not be a rule of recognition fails. More important, Patterson's argument fails to understand the limited role of the rule of recognition in the general jurisprudence of Hart and Raz.

Patterson's second argument is more interesting. He claims that "the forms of argument are not a rule (or several rules). They are what makes following a legal rule possible" (pp. 68-69). Once again, Patterson's point is elusive. Perhaps it comes down to this. As noted above, Hart may have misled his readers by speaking of the rule of recognition rather than the underlying social practice that makes identification of legal propositions possible.<sup>134</sup> While Hart claimed that the rule of recognition is generally unstated, perhaps Patterson's point is the stronger one that the underlying social practice can never be made *fully explicit*.<sup>135</sup>

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133. Patterson puts a slightly different spin on this: he suggests that if the forms of argument were the rule of recognition, then he would have demonstrated the truth of positivism. This would be true, however, only of American particular jurisprudence and not of general jurisprudence.

134. See *supra* text accompanying note 130. To be fair to Hart, it does seem more natural to understand the aspect of the internal attitude consisting in criticism of deviations or threatened deviations in terms of a deviation or violation of the rule, rather than in terms of a deviation from the practice.

135. See Gerald J. Postema, "Protestant" Interpretation and Social Practices, 6 *LAW & PHIL.* 283, 306-15 (1987). John Searle has developed the position that truth-conditional semantics and intentionality cannot be made fully explicit. For his arguments that truth-conditional semantics cannot be made fully explicit, see JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 127-47 (1995); JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 117-36 (1979); JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 160-79 (1983); JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 175-96 (1992); John R. Searle, *The Background of Meaning*, in *SPEECH ACT THEORY AND PRAGMATICS* 221, 231 (John R. Searle et al. eds., 1980).

Even under this interpretation, this attempted reconciliation of Patterson and Hart still leaves some differences. To name only two, Hart believes the rule of recognition is a matter of the practice of legal officials, especially judges. Patterson's use of the phrase "culturally-

Assume the underlying practice cannot be made fully explicit. Would this demonstrate that positivism is incorrect? Hart concedes that the rule of recognition is generally unstated and that it may be partly indeterminate and fail to resolve some difficult issues, such as whether Parliament could limit its future legislative power by binding itself not to repeal a minimum wage statute for engineers unless the Engineers' Union agrees.<sup>136</sup> Although the rule of recognition reduces uncertainty, it does not eliminate it.<sup>137</sup> Positivism is sometimes described as a theory intended to distinguish spurious from genuine propositions of law.<sup>138</sup> In light of the above admissions, positivism could concede, if it were true, that the social practice underlying the rule of recognition could not be made fully explicit without damage to its two major commitments: first, that there is no necessary connection between law and morals, and second, that law, and its authority, are matters of social fact. And, we may add, if true, matters of social fact that cannot be made fully explicit.

If the rule of recognition cannot be made fully explicit, then its ability to reduce uncertainty by providing a "conclusive affirmative indication" that a norm is legally valid might be impaired.<sup>139</sup> Put differently, the rule of recognition's role in identifying law might be hindered. I say "might" — not "would" — because complete agreement among practitioners within the scope of the aspects of legal practice that cannot be made fully explicit would entirely alleviate any uncertainty in identifying law. Only to the extent that disagreements arise where the social practice underlying the rule of recognition cannot be made fully explicit would indeterminacy arise.

Positivism's doctrines of the limits of the law and judicial discretion countenance indeterminacy. Unless the indeterminacy is pervasive, it would not be problematic for legal positivism or for law's legitimacy.<sup>140</sup> Moreover, whatever indeterminacy arises from disagreement in areas that cannot be made explicit, positivism would share with all other conceptual and descriptive jurisprudence,

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endorsed forms of argument" suggests that the practice involves a larger community, and perhaps the full citizenry. Second, Patterson's account has a commendation/appraisal aspect absent from Hart's.

136. See HART, *supra* note 14, at 151. See generally *id.* at 147-54.

137. See *id.* at 130 ("In fact all [legal] systems, in different ways, compromise between . . . the need for certain rules . . . and the need to leave open . . . issues which can only be properly appreciated . . . in a concrete case.").

138. See, e.g., Coleman, *supra* note 75, at 887.

139. See Hart, *supra* note 14, at 94.

140. I have argued elsewhere that law is not radically indeterminate, but at most moderately indeterminate, and that moderate indeterminacy does not undermine law's moral legitimacy. See Kress, *Legal Indeterminacy*, *supra* note 41, at 285-97; see also Kress, *Epistemological Indeterminacy*, *supra* note 41.

including Patterson's. So positivism would be no more — or less — indeterminate than Patterson's account in this respect.<sup>141</sup>

Finally, reconsider Patterson's claim that nothing makes propositions of law true, that the truth of propositions of law is shown in the use of the forms of argument, and that the utterance of a legal proposition is a commendation, endorsement, or appraisal<sup>142</sup> of it as justified by the forms of argument. In order to provide a satisfying postmodern critique of positivism, Patterson must demonstrate that the above account is superior to a positivist explanation of law in terms of rules of recognition, legal sources (or sources and incorporated norms), and theories of interpretation and adjudication. For Patterson's account to be superior, it must provide a better explanation of legal practice — of the phenomenon of living under law, uttering legal propositions, assessing their truth, and the like — than positivism. Regrettably, Patterson's critique is undermined because he mistakenly attributes to positivism a source-based, pedigree rule of recognition, misreads the role of the rule of recognition, and ignores particular positivist theories of adjudication and interpretation.

Patterson provides no reason why the forms of argument explain — or, in Patterson's preferred methodology, describe — legal practice better than positivist descriptive jurisprudence does. Instead, Patterson provides his reader with a few obscure, coy, Wittgensteinian remarks about *nothing* making propositions of law true and describes assertions of legal truths as *appraisals* or *commendations* as justified by the forms of argument. Neither of these views is developed.

It has become fashionable in certain intellectual circles to look askance at the concept of truth. Some philosophers respectfully reject the idea that there are truth makers; others scoff at the notion as incoherent. Yet as soon as these critics begin developing their own positive account of the relevant subject matter, careful observation discloses that they too believe in the existence of a truth maker, although generally a different truth maker than that of the theories critiqued. Like some philosophers, Patterson explicitly rejects the idea of truth makers, at least in law. However, Patterson's own words suggest that he too believes in truth makers, namely, legal practice, and authoritative institutional acts. Ironically, this is the same truth maker as positivism.

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141. For discussion of potential Pattersonian responses to charges of indeterminacy, see *supra* section I.C.1.c.

142. Patterson conflates commendations, endorsements, and appraisals. But commendations are not endorsements. Neither commendations nor endorsements are appraisals. Appraisals are not commendations. Once again, clarification from Patterson is needed.



Patterson's other major criticism of contemporary jurisprudence, including legal positivism, is that it is committed to truth-conditional semantics. As I read it, *Law and Truth* never clearly articulates significant reasons why adherence to truth-conditional semantics is problematic. Patterson asserts, but does not argue for, this sweeping claim. Patterson does indicate that he prefers meaning-as-use theories to truth-conditional semantics, yet the two theories, at least in some versions, need not be inconsistent. Perhaps Patterson's ultimate position is simply that meaning-as-use theories are prior to and more fundamental than truth-conditional semantics.

Moreover, we have seen that Hart rejects strict necessary and sufficient truth-conditional semantics for law, and at most advocates weaker criterial semantics. In the next Part, I argue that Patterson's account of legal truth is committed to, or at least consistent with, an associated truth-conditional semantics for law.

#### IV. A TRUTH-CONDITIONAL RECONSTRUCTION OF THE FORMS OF ARGUMENT

Patterson argues that Hart (and positivism) is committed to a truth-conditional semantics for legal propositions despite how little Hart wrote about meaning and legal meaning. Moreover, what little Hart wrote conclusively demonstrates that he rejects necessary and sufficient truth-conditional semantics.<sup>143</sup> Patterson might claim that even if Hart explicitly rejects truth-conditional semantics, deep aspects of his theory commit him to it, or, in a weaker version, permit a reconstruction of Hart's views consistent with a truth-conditional semantics.

In making either the stronger or the weaker of these claims, however, Patterson places himself in a logically precarious position. Positivists can argue that deep aspects of Patterson's account of legal practice and of the meaning of claims that legal propositions are true commits him to a truth-conditional semantics for law. Alternatively, they could assert the weaker claim that Patterson's account is consistent with a truth-conditional semantics. Disregard Patterson's claims that nothing makes propositions of law true, that the forms of argument are not "truth conditions for propositions of law," and that legal utterances are appraisals or commendations (p. 20). Focusing on other aspects of Patterson's discussion of the forms of argument as justifying claims to legal truth, we shall construct a truth-conditional semantics that flows from the rest of Patterson's account.

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143. See *supra* text accompanying notes 107-11.

Truth-conditional semantics' conception of reference is thin — thin enough to be consistent with any nonskeptical theory of language of which I am aware. This includes Patterson's preferred Wittgensteinian meaning-as-use perspective. Even if Wittgenstein is correct that language does not refer in the way the picture theory of meaning or Augustinian approach suggests, neither Wittgenstein nor Patterson would deny that some objects are red and others are not. To the contrary, they would insist that local practice distinguishes red and non-red objects, that a philosophical account of correct and of mistaken color attributions is possible, and that this account helps us understand that color attributions are, in a certain sense, modestly objective.

These concessions are more than what is necessary to engage in truth-conditional semantics. Truth-conditional semantics does not require the picture theory of meaning, or even a rich representationalism. All it requires is a distinction between objects to which predicates and names apply and those to which they do not. To convince yourself of this, remember that in describing truth-conditional semantics above, I employed only the distinction between those entities to which names and predicates apply and those to which they do not.<sup>144</sup>

Patterson provides a practice-oriented account of law. But practices can be described, at least in the sense necessary to serve as truth conditions. True legal propositions would be conclusions of correct applications of the culturally endorsed forms of argument from legitimate legal grounds. Put formally, a legal proposition *p* is true if and only if there is a legally valid argument from legally valid grounds via correct (perhaps Patterson would prefer 'warranted') applications of the forms of argument. Of course, as Patterson notes, a form of argument might be applied by different lawyers to reach opposed conclusions, different forms of argument might give conflicting conclusions, and some may even question the legitimacy or precise form of a form of argument (p. 152). So we must complicate the truth conditions to account for these conflicts. But whatever resolution Patterson provides, the truth-conditional theorist can coopt it.

As noted earlier, Patterson maintains that conflict is resolved by resort to Quinean coherentist methods, applying the maxim of minimum mutilation to resolve the conflict by changing as few prior beliefs or practices as possible.

Then a truth conditional analysis can incorporate Patterson's claim and hold that *p* is true if and only if either

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144. See *supra* text accompanying notes 14-16.

(1)(a) There is an argument for  $p$  from legally valid grounds via a correct application of the culturally-endorsed forms of argument and

(b) there is no argument for not- $p$  from legally valid grounds via a correct application of the culturally endorsed forms of argument or else

(2)(a) There is an argument for  $p$  from legally valid grounds via a correct application of the culturally endorsed forms of argument and

(b) there is an argument for not- $p$  from legally valid grounds via a correct application of the culturally endorsed forms of argument and

(c) resolution of the conflict between  $p$  and not- $p$  via the culturally-endorsed conservative Quinean coherentist method recommends  $p$  over not- $p$ .

The referents of legal terms and predicates could be determined in a similar manner. For example, “first-degree murder” would refer to intentional killings with malice aforethought if and only if the proposition that a first-degree murder is an intentional killing with malice aforethought is true according to the above criteria, employing the forms of argument and the maxim of minimum mutilation.

Patterson might resist this truth-conditional semantics with the claim that, like Aristotle’s sea-battle tomorrow, the practice has not yet unfolded. Such resistance would be inconsistent with his apparent approval of Dummett and Putnam on warranted assertibility (pp. 166-68). Moreover, it would turn his position, at least implicitly, into a form of legal realism: law is the outcome of legal practice, and nothing more mysterious. It would also have the consequence that any legal proposition not yet tested — in the courts or in the arena of legal practice or argument — has no truth value.

Patterson might attack from a different vantage point. He could accept the truth-conditional reconstruction of his account of law, yet point out that the truth conditions to which it refers are not external to law, or part of the material world, but are instead part of law’s grammar. Patterson would then claim that all the work he wanted done with his critique of truth conditions can be done via a critique of the externalist truth-conditions approaches. Put differently, Patterson could concede that truth conditions can be stated so generally as to cover his conception of grammar and forms of argument, yet argue that such a generalization shows truth-conditional semantics to be vacuous. Then Patterson could reproduce his complaint by distinguishing external and practice-oriented truth-conditional analyses and argue for the superiority of practice-oriented versions.

This argument might succeed against moral realists such as Michael Moore. But it is unavailing as a response to Hart, since reconstructed Hartian truth-conditional semantics, like Pattersonian truth-conditional semantics, is internal to law.

Patterson claims that his main goal in *Law and Truth* is to destroy truth-conditional semantics in law (p. 19). Patterson does not distinguish between strong, necessary, and sufficient truth-conditional semantics and weaker criterial truth-conditional semantics. Some modern jurisprudes, most notably Hart, reject strong truth-conditional semantics. Nevertheless, perhaps on the basis of deep aspects of Hart's theory, Patterson urges that Hart is committed to a truth-conditional semantics. However, Patterson's criticism of modern jurisprudence, and especially Hart's, for adhering to a truth-conditional semantics is not persuasive, as Part III demonstrated. The argument in this Part completes the critique of Patterson on truth-conditional semantics. As noted above, Patterson might urge that some jurisprudes are committed to truth-conditional semantics by deep aspects of their theory, even if they would deny it. By the same token, however, Patterson's account of legal truth is at least consistent with, and perhaps committed to, a truth-conditional account of truth for law.

### CONCLUSION

In *Law and Truth*, Patterson provides a postmodern perspective on contemporary jurisprudence. His main goals are to reveal that all major contemporary jurisprudences are truth-maker accounts, to demonstrate that these accounts are mistaken, and to demolish truth-conditional semantics for law.

I have urged that the best reading of *Law and Truth* is that Patterson himself provides a truth-maker account of law that is similar to — if not identical to — the account provided by one version of particular positivism. Patterson has not persuasively demonstrated why truth-maker theories are problematic. In particular, he has not shown positivism's truth-maker account — conceived to include the practice underlying the rule of recognition as well as authoritative acts — to be mistaken.

Patterson's claim that positivism's alleged commitment to truth-conditional semantics for law is unsuccessful for similar reasons. Patterson does not demonstrate that truth-conditional semantics for law is problematic. At most, he indicates his own preference for meaning-as-use theories. Moreover, general jurisprudence does not attempt to provide truth conditions for particular propositions of law. Particular positivism, including a theory of adjudication that decides particular propositions of law, could be conceived as providing truth conditions for particular propositions of law. Contrary

to Patterson's suggestion that positivism includes only authoritative social facts as truth conditions, positivism is better interpreted as also including as truth conditions the legal practices underlying the rule of recognition and theory of adjudication. So conceived, positivism avoids Patterson's critique. Moreover, as Part IV demonstrated, Patterson's account of law can itself ground a truth-conditional semantics for law. If modern jurisprudence fails because it is committed to truth makers and truth-conditional semantics, then Patterson's postmodern jurisprudence suffers from the same fate.<sup>145</sup>

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145. I have focused this review essay on defending positivism against Patterson's critique. A defense of moral realism and a more complete defense of Dworkin's law as integrity could be provided if space permitted it.

POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END. By Gary Minda. New York: New York University Press. 1995. Pp. xii, 350. Cloth, \$36; paper, \$18.95.

American legal scholarship of the past thirty years has been characterized by nothing so much as *fragmentation*. The accelerating evolution of contemporary scholarship has brought about forays into all manner of cognate disciplines, has elicited considerable criticism,<sup>1</sup> and, for some scholars, has reflected an extreme disaffection with traditional techniques of law teaching and analysis.<sup>2</sup> This latter condition has come to be known by some as the “postmodern” condition (p. 2). In *Postmodern Legal Movements*, Gary Minda<sup>3</sup> attempts nothing less than to capture the whole sweep of American jurisprudence. In so doing, he purports to explain this postmodern condition as it exists in the legal academy.<sup>4</sup>

*Postmodern Legal Movements* does two things. First, the bulk of the book provides an overview of American jurisprudence, from Christopher Columbus Langdell to the present. This overview is necessary because, in order to understand “postmodern forms of jurisprudence, we must first explore what came before postmodernism, that is, modernism” (p. 5). Second, the relatively short latter portion of the book presents an argument about the current state of American legal scholarship and its future. Minda’s picture of contemporary legal thought is that of a paradigm shift in the making. As he explains it:

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1. Judge Edwards, for example, complains that law schools “should be . . . producing scholarship that judges, legislators, and practitioners can use. . . . But many law schools — especially the so-called ‘elite’ ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.” Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). See generally sources cited *infra* note 22.

2. One scholar recently described this disaffection thus:

So complete is this marginalization that even a legal theory as peculiar as Ronald Dworkin’s — a theory that claims, among other things, that there are such entities as legal “principles” that are neither positive legal rules nor autonomous moral norms, and that always generate a single correct legal answer in “hard” cases — is treated with a symptomatic combination of respectful attention and fundamental indifference by an academic discourse whose real interests obviously are elsewhere.

Paul F. Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178, 2180 n.4 (1996).

3. Professor of Law, Brooklyn Law School.

4. Postmodernists will already have objected to my use of the term *postmodern* — for to use it to describe a school or a style of scholarship or, indeed, to draw sharp distinctions between it and modernism seems to be a hopelessly modernist pursuit. Unfortunately, in order to discuss the matter at all, one must use some term as an admittedly simplistic shorthand for the postmodern phenomenon; otherwise, sensible discussion of the matter is simply impossible. Furthermore, it would be difficult to raise this argument in defense of Minda’s book, for it too is couched in modernist language and argument. See *infra* section II.B.

[T]he mainstream or modern view has broken into a diverse body of jurisprudential theories and perspectives. The current state of law and modern jurisprudence has become like a delta just before a river empties into the sea. The mighty river that was once modern jurisprudence has broken down into separate rivulets as it merges into a larger and different body of water. [p. 257]

*Postmodern Legal Movements* will prove useful to those in search of a basic introduction to the standard account of American legal thought.<sup>5</sup> Minda is well read in jurisprudence, and his book provides a comprehensive overview of legal philosophy as it has developed in this country during the twentieth century.

As an argument about the direction of legal thought, however, the book suffers from certain problems. It has a strong tendency to overgeneralization and is at times ideologically one-sided. Furthermore, the book's more fundamental arguments — about the nature of the postmodern phenomenon, its causes, and its future — seem unduly conclusory. This book is a *lumper*, as it were, not a *splitter*; its tendency to compartmentalize intellectual trends seems Procrustean and simplistic.

These criticisms lead to a more general one. Minda is quite sympathetic to the postmodern view,<sup>6</sup> and yet his book seems unduly categorical and rigid — vices, if anything, of *modernism* (as Minda uses the term). Thus, the irony of *Postmodern Legal Movements* is that the book seems itself to be a modernist work. This may be no serious criticism in itself,<sup>7</sup> but one is left to wonder why a scholar so critical of modernist scholarship has taken on such a modernist project.

Part I of this Notice discusses Minda's historical treatment. It sets out in abbreviated fashion the story as Minda has told it, in order to set the stage for his more central arguments. Part I also briefly examines the book's deeper claims and considers Minda's view that modern jurisprudence is at a critical point, verging on an inexorable turn to postmodernism. Part II takes a more critical view, assessing the problems and ironies mentioned above.

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5. Be forewarned, however, that this book is sometimes hard to read. For example: "[Legal scholars] continue to practice Langdellian formalism as the rhetoric of the transcendental object or subject in which the legal subject-interpreter is eclipsed, even while they strive to be normative." P. 59. Or try this one: "This quasi-scientific perspective presumes that lawyers can discover a relatively stable basis for justifying legal results by universalizing legal propositions abstracted from hypothetical examples structured by behavioral assumptions about economic motivations of homogeneous individuals." Pp. 100-1.

6. Minda finds postmodernism to be "the basis for satisfaction, hope, and new intellectual inquiry" and believes that "the time has come to seriously consider the transformative changes now unfolding in American legal thought," because postmodernism has "hasten[ed] the death, not of jurisprudence, but of the particular methods that modern legal scholars have employed in thinking about their subject[s]." Pp. 256-57.

7. See *infra* text accompanying notes 50-53.

## I. THE THREAD OF LEGAL HISTORY

## A. Early Trends

Minda first lays out a lengthy exegesis of what he calls “modern” jurisprudence.<sup>8</sup> He does so because definitions of *postmodernism* are usually given in relational terms — postmodernism is everything that is not modernism.<sup>9</sup> *Modernism*, in turn, seems to be basically everything that we have known as jurisprudence until the present time; only in the past few decades have we begun to explore postmodern modes of legal thought.<sup>10</sup>

The first four chapters set out a fairly traditional account of the history of American legal philosophy.<sup>11</sup> Minda locates the beginning of modern jurisprudence in the 1871 publication of Langdell’s *A Selection of Cases on the Law of Contracts*.<sup>12</sup> Langdell is for Minda the source of considerable evil in American legal thought — he was the father, or at least a chief proponent, of American “formalism.”<sup>13</sup> The evil of formalism was that it ignored the cultural context in which law exists. As later thinkers understood, formal-

8. The following summary of jurisprudential history is taken solely from the book and is intended only to reflect the story as Minda has told it. Any criticism will be made in the accompanying notes.

9. See, e.g., Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 577 (1991).

10. As Jamieson notes, the relational definition is basically uninformative because legal scholars do not agree on what *modern* means. See *id.* at 577-78. I will generally follow Minda’s usage of terms. Note that he uses “modernism” somewhat differently from how it has been used elsewhere in philosophy. As Leszek Kolakowski explains, “modern” usually refers to the recurrent trend in popular culture to question prevailing orthodoxy. See LESZEK KOLAKOWSKI, *MODERNITY ON ENDLESS TRIAL* 3-13 (1990). While definitions are hazardous in this area, I take Minda’s use of “postmodern” to mean essentially what Kolakowski means by “modern”; by “modern,” in turn, I take Minda to mean the generally accepted dogma of the time, or at least the dogma of the present time.

11. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 2 (1995) (summarizing the standard story roughly as laid out by Minda); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2507 (1992) (same).

12. See p. 13 (citing C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (Boston, Little, Brown & Co. 1871)).

13. *Formalism* holds that the principles underlying law, if properly applied, produce “right” answers to legal questions, as if those principles were the major premises of legal syllogisms. Pp. 13-14. Minda also uses the term *conceptualism* to describe Langdell’s jurisprudence. Conceptualism generally is “a form of logic that classifies legal phenomena on the basis of a few fundamental abstract principles and concepts developed from the distinct methods of legal reasoning.” P. 14. Thus, conceptualism is the belief that law is a value-free set of principles that exists independently of culture. Pp. 14-15. A good example of Langdell’s outlook is found in the introduction to his casebook:

Law, considered as a science, consists of certain principles or doctrines. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed . . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. LANGDELL, *supra* note 12, at viii-ix, quoted in Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661, 661 n.5 (1991).



ism allowed the application of rules without respect to the social inequities that may have given rise to them — racial, class inequality, and so on — or the unfairness that may result from their application (pp. 64-65).

The second major phase of American jurisprudence, which is commonly seen as a reaction to the ills of formalism,<sup>14</sup> is known as *realism*. Minda identifies the origins of realism in the frustration felt by certain faculty at the Columbia and Yale law schools with formalistic law and jurisprudence and their “deep skepticism about the possibility of decision making according to rule.”<sup>15</sup> According to Minda, however, most legal realists did not wholly reject formalism. Although the realists recognized the “relationship between law and society [that] enabled [them] to argue in favor of ‘non-technical’ or ‘extra-legal’ considerations in legal decision making” (p. 28), they “were not that different from the traditional legal scholars they criticized” (p. 31). While Langdell had argued that “law is a science,” the realists “advanced the similar idea that ‘law is a social science’ ” (p. 31). Thus, although realism was a rejection of the formalist ideal of a discrete set of guiding *legal* principles, it nonetheless maintained the view that “correct” legal answers could be discovered through social science methods that properly take into account the cultural context in which law operates.<sup>16</sup>

Realism, which flourished throughout the 1920s and 1930s and lived on into the 1940s, was ultimately defeated by a temporary return to formalism. The 1940s saw the birth of several strands of thought that ultimately crystallized into what is now known as the “legal process” or “neutral principles” school (pp. 33-40). Legal process scholars proposed that law could be made objective if decisionmaking were based only on *process* values rather than on *substantive* values. This could be accomplished, they argued, by

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14. See ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE 185-88* (1989).

15. P. 27. In particular, realists rebelled against the Supreme Court’s so-called economic due process jurisprudence, as epitomized by the Court’s decision in *Lochner v. New York*, 198 U.S. 45 (1905). Pp. 26-27.

16. Duxbury shares this view. See DUXBURY, *supra* note 11, at 158-59 (arguing that although the realists rallied against Langdellian formalism, they “generally lost their nerve when faced with the implications of their own jurisprudential constructions”). For a defense of the more traditional view — that realism fully broke with formalism and that, in fact, twentieth-century jurisprudence has merely been a “pendulum swing” between realism and formalism — see Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215, 2222-27 (1996) (reviewing DUXBURY, *supra* note 11).

As a general matter, Minda seems largely to accept the “pendulum swing” model of jurisprudential history. Although he shares some doubt that the realists wholly rejected formalism, he nevertheless seems to understand jurisprudence as an ongoing struggle between formalism and the rejection of formalism — from Langdell’s formalism to the indeterminacy claims of the realists to the formalistic rigidity of the legal process scholars (discussed in more detail below) to the more skeptical works of the 1960s and 1970s that have led to the postmodern condition of today.

allowing the courts to consider only those matters within their institutional competence — disputes involving the individual interests of private parties — and requiring that they defer in all other matters to bodies more competent to resolve them. Thus, awkward value choices would be left to the representative legislatures, rather than the antimajoritarian courts.<sup>17</sup> This, in turn, would allow law to be more like the “science” envisioned by Langdell.

Modernism — all the jurisprudence predating postmodernism, including formalism, realism, and legal process — finally met the beginning of its end when courts and commentators began to understand the reciprocity of law and society. That is, the first seeds of postmodernism were sown when it became clear that law and the people who make it and are subject to it are interconnected and interdependent. Minda locates this shift in two places. First, he cites two scholarly articles written in the early 1960s: Ronald Coase’s *The Problem of Social Cost*<sup>18</sup> and Charles Reich’s *The New Property*.<sup>19</sup> The “common jurisprudential perspective” of these two articles was their “similar critical responses to the role and function of law in society. . . . Both authors implicitly rejected traditional faith in the efficaciousness of the legal process and the autonomy of fundamental rights” (pp. 72-73). Thus, they both considered it important to reject the prevailing formalist view that law may be studied profitably in a vacuum, without reference to the cultural context surrounding it.<sup>20</sup>

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17. Pp. 34-35. This view of legal process “winning” temporarily over realism again reflects the “pendulum swing” model. See Gordon, *supra* note 16, at 2222-27.

18. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

19. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

20. This statement of the roots of postmodernism may sound suspiciously like legal realism. After all, they both focus on the fact that formalistic doctrine and scholarship obscure the cultural and political content of law. Indeed, postmodernism and its most recent antecedent, critical legal studies (CLS), are often said to be at least closely analogous to, or even simply a rehash of, realism. See J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, 18 OTTAWA L. REV. 1, 5 (1986) (claiming that critical legal studies has “a very pronounced ancestral relationship with Legal Realism”); A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 830-31 (1990) (arguing that “iconoclasm” unites skeptical philosophies and that the differences between skeptical philosophies are superficial); *Discussion: Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 341, 345 (1988) (comment by Charles Fried) (“The whole difficulty which the pseudo-philosophy of critical legal studies and legal realism raise[d] is the difficulty about explaining . . . how it is that you can follow rules, the rules about following rules, and so on. And that is a mug’s game . . . we do not need to play.”). Indeed, some postmodern authors seem to admit as much. See, e.g., Mark Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 516 (1986); Sanford Levinson, *Writing About Realism*, 1985 AM. B. FOUND. RES. J. 899, 908 (reviewing ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK’S IMPACT ON AMERICAN LAW* (1985)).

The fact that Minda understands these and other intellectual trends as distinct and separable makes up a major component of this Notice’s criticism of the book. As discussed below, see *infra* notes 41-45 and accompanying text, if postmodernism is anything, it is a rejection of attempts to categorize and compartmentalize the world. To be sure, Minda is hardly the only

Minda also sees the beginnings of postmodernism surfacing in the civil rights case law of the Warren Court. In particular, in *Brown v. Board of Education*,<sup>21</sup> the Court rejected the then-dominant “separate-but-equal” regime because “traditional legal analysis had failed to recognize that law contributes to the construction of social reality” (p. 64) — that is, that “separate” seemed “equal” at least in part because the law said it was (p. 74).

The recognition of the reciprocity of law and society precipitated the changes in scholarly thought that have led to current jurisprudence. Young thinkers influenced by this recognition “rejected the notion that law was distinct from political and moral philosophy; [they] also rejected the idea that law could be rendered coherent by a comprehensive legal theory” (p. 77). This new brand of culturally influenced scholarship soon spurred the growth of five distinct scholarly movements — the “law-and” movements and the critical theory schools — that remain with us today. These recent movements are dealt with in the second part of Minda’s book.

### B. *The Five Schools*

Minda explains “that . . . five jurisprudential movements of the 1980s have . . . come to reflect the emergence of a new skeptical aesthetic, mood, or intellectual condition in American jurisprudential studies, which many have identified as *postmodern*” (p. 2). These five schools, each of which is treated separately in its own chapter, are (i) law and economics (chapter 5), (ii) critical legal studies (chapter 6), (iii) feminist legal theory (chapter 7), (iv) law and literature (chapter 8), and (v) critical race theory (chapter 9).

Minda explains that each school has gone through “generations” (p. 94). In each case, initial proponents of the school, while innovative, retained too much of the modernist baggage that they sought to discard. Later scholars purported to avoid their predecessors’ mistakes. For example, “first-generation” law-and-economics scholars practiced a sort of orthodoxy that held that “law was economics, and economics was a neutral, apolitical science of ‘reason’” (pp. 94-95). This did not differ in essence from Langdell’s optimistic view that rigid rules underlie the law. By the mid-1980s, however, the strict first-generation orthodoxy, embraced primarily by “the ‘hardliners’ of the Chicago School” (p. 94), had begun to give way. “Second-generation” law-and-economics scholars came into their own, rejecting the rigidity of their forebears and accepting that values other than allocational efficiency can be used legitimately to drive legal choices (pp. 95-101).

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person who sees these trends as discrete entities. See, e.g., DUXBURY, *supra* note 11, at 424. The point, however, is that Minda is a *postmodernist* who sees them that way.

21. 347 U.S. 483 (1954).

Furthermore, Minda apparently believes that the same postmodern forces that brought about the five schools themselves have caused them, in recent years, to deteriorate. He says that “[i]t is only now becoming clear that the new legal discourses of the ‘law and’ movements of the late 1970s and 1980s have themselves become transformed by a general disenchanting condition that has affected contemporary legal scholarship — *postmodernism*” (p. 79). Thus, the five schools “deepened and advanced a process of crisis and transition in modern jurisprudence” (p. 189). Apparently, this transition has caused many legal scholars to reject modernism entirely and enter fully into the phase of postmodernism.

### C. *The Postmodern Turn*

It is not entirely clear what this turn to the postmodern means for legal scholarship.<sup>22</sup> In fact, the term *postmodern* itself has proved notoriously difficult to define.<sup>23</sup> As mentioned above,<sup>24</sup> *postmodernism* is generally defined by reference — it is that which is not *modern*.<sup>25</sup> This approach is significantly complicated by the fact that no one really agrees on what *modern* means<sup>26</sup> — the most precise definitions are to the effect that modernism is an extension of “the Enlightenment Project,”<sup>27</sup> and generally is an adoption of

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22. What is clear, however, is that the postmodern turn has not been received very warmly in many quarters. See, e.g., DUXBURY, *supra* note 11, at 422-28; Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEXAS L. REV. 1, 20-21 (1993); John R. Searle, *The World Turned Upside Down*, N.Y. REV. BOOKS, Oct. 27, 1983, at 74, 78 n.3 (book review) (“One [philosopher] characterized Derrida [a major influence in American postmodernism] as ‘the sort of philosopher who gives bullshit a bad name.’ We cannot, of course, exclude the possibility that this may be an expression of praise in the [postmodern] vocabulary.”).

For the reaction typical of many scholars when confronted with postmodern work, see David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986). Upon first reading *Roll Over Beethoven* by Duncan Kennedy and Peter Gabel, Luban thought “it was a pile of crap” that “sounds like a pair of old acid-heads chewing over a passage in Sartre.” *Id.* at 1671-72 (discussing Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984)).

23. Minda himself notes that “[t]o identify postmodernism with a set of propositions, beliefs, or ‘postmodern narrative’ would be too essentialist, too modernist, to be postmodern.” P. 4.

24. See *supra* notes 8-10 and accompanying text.

25. Minda does this at one point. See p. 5 (claiming that we understand postmodern jurisprudence by “explor[ing] what came before postmodernism, that is, modernism”).

26. See KOLAKOWSKI, *supra* note 10; Jamieson, *supra* note 9, at 577.

27. See, e.g., pp. 58-59; Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court’s Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1144 (1995); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 262 (1992) (“Modernism is the form of thought identified with the spirit of the Enlightenment . . .”).

foundationalist knowledge and theoretical approaches.<sup>28</sup> Perhaps the best that can be done is to identify salient characteristics of postmodern scholarship. Postmodernism apparently contemplates both a set of approaches — such as deconstructive social criticism, antifoundationalist epistemology, and rejection of traditional metaphysics<sup>29</sup> — and a collection of attitudes — such as distrust of social categories like race or sex and a subjective view of personal identity.<sup>30</sup> One commentator attempted to capture the meaning of postmodernism by identifying four “interrelated concepts” with which it is associated. They are:

- (1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation.
- (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible.
- (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted.
- (4) Because language is socially and culturally constituted it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves social constructions.<sup>31</sup>

It is unclear what Minda means by “postmodernism.” As is perhaps evident from the discussion of the five schools above, he uses it to describe different phenomena — for example, both the emergence of the schools themselves (p. 2), and the current sense of ennui and disaffection that has begun to spell their downfall (p. 79), are postmodern in nature.<sup>32</sup> His most general definition of the term

28. See STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 206-07, 230-31 (1991) (asserting that postmodernism rejects foundationalism); Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 *IND. L. REV.* 353, 353-54 (1995) (“Legal modernism is . . . motivated largely by the lawyer’s romance, faith, and yes, obsession with the central idea that it is possible to uncover and explain the essential truths of the world by employing the correct methodology, narrative technique, or mindset.”); Patterson, *supra* note 27, at 263 (asserting that modernism is characterized by “epistemological foundationalism”).

29. See Feldman, *supra* note 13, at 663-64 (claiming that while deconstruction and philosophical hermeneutics do not reject all metaphysics, they do reject Cartesian subject-object metaphysics); Moore, *supra* note 22, at 892-957 (arguing that a wide range of philosophers associated with postmodernism have rejected traditional metaphysics and epistemology).

30. See Jamieson, *supra* note 9, at 583-84.

31. Schanck, *supra* note 11, at 2508-09. Minda largely rejects Schanck’s formulation because “any attempt to locate the core concepts or essence of postmodernism falls prey to modernism.” P. 190. That is, to attempt to identify the principles driving postmodernism would be to create a narrative, which is a modernist, and not a postmodernist, pursuit.

Minda’s argument is exceptionally ironic. It may be right, but it also identifies what seems to be exactly the weakness in Minda’s own book. See *infra* section II.B.

32. Minda devotes an entire chapter to “postmodern jurisprudence,” giving it a treatment not unlike his treatment of the five schools. Thus, he seems to see postmodernism as both a set of forces guiding scholarship and a brand, or at least a loosely discernable class, of scholarship itself.

is that it is “a skeptical attitude or aesthetic that ‘distrusts all attempts to create large-scale, totalizing theories in order to explain social phenomena.’”<sup>33</sup>

## II. THE PROBLEM WITH THEORIES

Both as a historical account and as an argument about jurisprudence, *Postmodern Legal Movements* presents certain problems. First, as will be discussed in section II.A, the book’s historical overview and synthesis of modernist legal thought seem too categorical. The discussion moves at rapid-fire speed through all of twentieth-century jurisprudence, and in the process puts forth an unduly rigid account. This occurs, it seems, both because the pace is very fast and because Minda tends to take ideological sides.<sup>34</sup> In the process, his historical analysis reveals a second and rather ironic problem: the book is subject to its author’s very criticisms of modernism. This second problem will be addressed in section II.B.

### A. Difficulties of Method

First of all, Minda’s historical account often seems unduly wooden. This is an important problem in intellectual history; as Neil Duxbury writes, “the ways in which jurisprudential concepts and themes are interpreted and applied influence the manner in which ideas about law come to be understood historically” and therefore “intellectual historians ought to be wary of using words like birth and death.”<sup>35</sup>

*Postmodern Legal Movements* has a powerful tendency to categorize and reify intellectual movements. Ironically, Minda suggests that even postmodern legal thought itself can be lumped into two

33. P. 224 (quoting COSTAS DOUZINAS, *POSTMODERN JURISPRUDENCE* at x (1991)).

34. In particular, Minda berates the modernist status quo and predicts its downfall. Pp. 247-57; see also pp. 21-22 (claiming that legal modernism is based on a “paradoxical mindset” defined by “a set of conflicting and paradoxical abstract propositions about the nature of the legal system and the power of legal actors within the system”; thus, “[t]he dilemmas of modern legal theory have never been resolved”); pp. 64-65 (“[T]raditional legal analysis ha[s] failed to recognize that law contributes to the construction of social reality” because it is “naive.”); p. 75 (“[T]he old modes of representation” of modern jurisprudence “[are] no longer credible.”); p. 79 (arguing that modernist scholars fail in their attempt to “ground their particular rights in a stable meta-ethics, moral epistemology, or interpretive practice”); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 603 (1991) (“Postmodernist scholarship typically proceeds by uncovering the contradictions, paradoxes, and puzzles of American law.”); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 660 (1989) (“[T]he prevailing visions of the 1950s and 1960s no longer adequately explain or justify the operation and conflict of everyday social life occurring in the marketplace, the workplace, and the family.”); Minda, *supra* note 28, at 353 (describing legal modernism as an “obsession with . . . essential truths”).

35. DUXBURY, *supra* note 11, at 1, 6.

"sides" or "schools": the *neopragmatists* and the *ironists*.<sup>36</sup> It is unclear how this abstract classification of postmodern movements can be reconciled with Minda's general claim that the postmodernist "distrusts all attempts to create large-scale, totalizing theories" (p. 224).<sup>37</sup>

Furthermore, much of the historical discussion is one-sided and argumentative. For example, Chapter Six, devoted to the critical legal studies movement, is surprisingly polemical and defensive. The previous five chapters (setting out "modernism") are largely impartial, but when Minda reaches CLS, the book suddenly shifts in tone to read virtually like an appellate brief. CLS, says Minda, is "liberating" (p. 126), it is "important" because it "reveal[s] . . . the privileging process of legal hierarchies,"<sup>38</sup> and it is even "amazing" (p. 124). CLS is not "irresponsible" or even "irrelevant" or "banal," but rather it is of "continuing influence," for it presents a "critique [that] remains, to this day, unanswered" (pp. 123-27).

This tendency towards encapsulation and rhetoric is if anything more pronounced in Minda's characterizations of the overall *Gestalten* of various points in intellectual history. For example, in his sweeping, almost breathless summary of "Jurisprudence at Century's End" (pp. 247-57), Minda argues that postmodernism is

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36. See chapter 12. In brief, the *neopragmatists* hold that there are no "essences" or inherent truths to be discovered by humans, and thus that "right" and "wrong" are at best mere beliefs that are contingent on historical circumstance. See, e.g., RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 189-98 (1989); cf. Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990) (describing pragmatism as "freedom from theory-guilt"). Thus, neopragmatist legal scholars may believe that the law "should" take a given turn in a given case but that the normative "should" does not flow from any extra-human principle or value. These scholars are postmodernists, in Minda's view, because their "real interest is not in truth at all but in belief justified by social need." P. 235 (internal quotation marks omitted) (quoting RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 464 (1990)).

The *ironists* take a different view, rejecting the neopragmatic "middle ground" of normative answers based on historically contingent beliefs. The ironist viewpoint is "ironic" because, while legal ironists seek to "decenter and displace modernist claims of a universalist method" of legal thought, they recognize that they are themselves hopelessly trapped within modernist ways of thinking and arguing and thus that in their criticisms of modernism they are doomed to repeat its paradoxes and inconsistencies. P. 237. For an explication of this predicament and a defense of the postmodernist who operates within it, see Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 174 n.18 (1990) ("Postmodernists are quite unlikely to take the demonstration of a paradox in their text as in and of itself evidence of weakness or flaw. . . . [They view the] naive rationalist conceptions of coherence, consistency, elegance, etc., [as] largely the product of disciplinary hubris and the inertia of academic bureaucracy."). It is this recognition that even postmodernist scholars cannot escape modernism that has led the ironists to reject even neopragmatism. Pp. 236-37.

37. See discussion *infra* section II.B.

38. Pp. 116-17. That is, CLS, by way of "deconstruction," demonstrates how the selection of one value by a legal rule arbitrarily rejects all other possible values; it "privileges" the chosen value. Adherents to the writings of Jacques Derrida, which have influenced CLS and postmodernism heavily, distrust this privileging process because the "hierarchies of the 'text' [that is, socially constructed narratives], which are frequently taken for granted, are essentially impossible to use for justifying foundational claims of knowledge." P. 118.

gradually overcoming modernism, and, apparently, will eventually win. He says that “[t]he older modes of defining, appropriating, and evaluating the objects of artistic, philosophical, literary, and social sciences [are] no longer credible because the boundary between subjects and their objects [has] dissolved” (p. 249). Therefore, it seems natural to Minda that “[t]here is a rising sentiment in the legal academy that modern legal theory has failed to sustain the modernists’ hopes for social progress” (p. 249).

Strictly on the basis of numbers, however, it would seem that new “modernist” works of legal theory by far outnumber new works of arguably postmodern criticism, and while there may have been a surge of postmodern scholarship in recent years, there has also been a surge of scholarship bitterly criticizing it.<sup>39</sup> Thus, it seems that Minda is unduly hasty in his announcement that postmodernism will overcome modernism. Oddly enough, he claims in this same passage that “[c]ynicism comes with the realization that each succeeding generation of modern legal scholars has merely recycled the work of the previous generation . . . without ever achieving a successful . . . theory that can withstand the criticism of the next generation” (pp. 249-50). But it could as easily be said of legal postmodernism that it is in substance just a rehash of other skeptical movements that have already come and gone — notably the more radically skeptical works of the legal realist movement.<sup>40</sup> If so, then Minda’s claim that postmodernism is “hastening the death” of modernist scholarship (p. 257) is surely exaggerated.

39. See sources cited *supra* note 22.

40. For example, Felix Cohen argued that law and politics are interwoven, because the social forces that inform our ideals are the same forces that construct our law. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810-12 (1935). As early as 1924, Joseph Hutcheson, himself a federal judge, claimed that legal decisions were nothing more than “hunches,” seasoned, perhaps, by experience, but nonetheless not driven by external principles, suggesting an extreme sort of indeterminacy, and — although Hutcheson did not say as much — opening the door to wholly politically driven judicial decisions. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 277-78 (1924).

It is not immediately clear how postmodernism differs significantly from radical realism; both perspectives seem to share the same views as to law’s indeterminacy and its inseparability from politics. Minda admits that the critical legal studies movement grew from realism, p. 110, and that CLS as a movement grew from postmodernism, p. 116 (noting that late 1980s CLS papers began to apply postmodern techniques). But perhaps the relationship could better be stated as “reiterates.” See *generally supra* note 16.

Furthermore, one might ask: What if there is no interesting difference between *any* of the skeptical schools, in that their basic claim — doubt — does not really differ across different schools? If so, then postmodernism can hardly be thought to be the revolution that Minda makes it out to be. Rather, it is merely the most recent resurgence of the skepticism that has always been with us. In this vein, Brian Simpson points out that there have always been skeptics or “iconoclasts” in law, and, although their methodology and jargon may change over time, their central thrust — simple doubt — has remained constant. See Simpson, *supra* note 20, at 830-31. Simpson identifies written evidence of such legal iconoclasm from as early as 1345. See *id.* at 828; see also Christopher L. Sagers, *Waiting for Brother Thomas*, 15-22 (unpublished manuscript, on file with author) (developing a similar point). Not everyone



In any event, the point here is not whether modernism or postmodernism is the victor, but only that Minda for whatever reason has chosen to tell an ideologically tilted story that is not so clear as he makes it out to be.

### B. *The Modernism Irony*

These difficulties in Minda's historical presentation are ironic ones to discover in a work about postmodernism, and they point to the basic irony underlying the book: they are problems associated with *modernism*, if anything, and they occur because the book itself is a modernist project.

As discussed above,<sup>41</sup> postmodernism has proved notoriously difficult to define. If postmodernism for legal scholars has meant anything at all, however, it has been a rejection of the idea that truth can be summed up in "a theory or a concept," because in fact there is no "'real' world or legal system 'out there'."<sup>42</sup> Morton Horwitz — himself both a CLS adherent and a noted legal historian — writes that "[t]he subversive assault [on] traditional theories of law" has caused legal thinkers to "focus[ ] upon the classification and categorization of legal phenomena and [to] conclude[ ] that . . . [b]ecause there are no 'natural classes,' the process of categorization and classification is a social creation, not an act reflecting some prior organization of nature."<sup>43</sup> It is thus often said that postmodernists deeply distrust "metanarratives" — that is, broad, generalized explanations of phenomena.<sup>44</sup> As Minda explains:

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agrees, of course; for the view that realism, CLS, and postmodernism are more than trivially distinct, see DUXBURY, *supra* note 11, at 422-28.

41. See *supra* notes 8-10 and accompanying text.

42. P. 224 (quoting DOUZINAS, *supra* note 33, at x); see also DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 44 (1989) ("[T]he most startling fact about postmodernism [is] its total acceptance of ephemerality, fragmentation, discontinuity, and the chaotic . . . Postmodernism swims, even wallows, in the fragmentary and chaotic currents of change as if that is all there is."); Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 Nw. L. REV. 1046, 1080 (1994) ("Postmodernism is anti-foundationalist and anti-essentialist . . . [I]t accentuates that meaning always remains ungrounded[, and] ungrounded meanings are always unstable and shifting: meaning cannot be reduced to a static core or essence."); Jacobs, *supra* note 27, at 1144 (arguing that "postmodernism attacks the foundationalism of modernism, or the modernist belief that knowledge rests on some ultimately verifiable truths"); Schanck, *supra* note 11, at 2508 (identifying as major tenets of postmodernism that "there are no foundational principles from which other assertions can be derived" and that "[t]here can be no such thing as knowledge of reality"); Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1550 (1991) (reviewing MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990)) (describing postmodernists as the "obituarists of Truth and Grand Theory").

43. Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 33 (1993).

44. Jean-François Lyotard coined the term *metanarrative* as a means to define postmodernism itself, which, he said, is an attitude of "incredulity towards metanarrative."

[p]ostmodernism . . . . is an aesthetic practice and condition that is opposed to "Grand Theory," structural patterns, or foundational knowledges. Postmodern legal critics employ local, small-scale problem-solving strategies to raise new questions about the relation of law, politics and culture. . . .

. . . They seem to be united in their resistance to the sort of conceptual theorization and system building routinely practiced by legal academics and analytical philosophers. [p. 3].

The book thus argues at length that contemporary scholars have begun to lose faith in their ability to abstract categorizations from their observations and research. In Minda's terms, members of the American legal academy currently face a transition to a new era of scholarship in which "foundational truths, transcendental values, and neutral conceptions" are replaced with "more pluralistic, contextual, and nonessential explanation[s]" (p. 2).

Given this outlook, one might expect a postmodernist's recounting of intellectual history to be wary of rigid conclusions and categorizations. Quite to the contrary, however, Minda seems to believe that legal philosophies can be neatly sized up and summarized. Indeed, from the beginning he states as his purpose "to present a general overview of the state of law and jurisprudence at twentieth century's end" (p. xi). To do this, he "tr[ies to] capture the general jurisprudential climate by reviewing some of the 'great' books and law review articles on jurisprudence and legal theory" (p. xii). In other words, the jurisprudential *zeitgeist* can quite simply be crammed into "conceptual theorization and system building" because, apparently, there really is a "real" world "out there." The irony, then, is that Minda has written a book of the sort that he says should not be written. It does not "employ local, small-scale problem-solving strategies to raise new questions about the relation of law, politics and culture." It is simply another straightforward his-

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JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* at xxiv (Geoff Bennington & Brian Massumi trans., University of Minn. Press 1984) (1979). Lyotard defined "metanarratives" as "grand narratives," such as "the dialectics of spirit, the hermeneutics of meaning, the emancipation of the rational or working subject, or the creation of wealth." *Id.*; see also David E. Cooper, *Modern European Philosophy, in THE BLACKWELL COMPANION TO PHILOSOPHY* 702, 714 (Nicholas Bunnin & E.P. Tsui-James eds., 1996) (defining "metanarratives" as "the grand attempts, from the Enlightenment until very recently, to 'legitimate' various 'discourses' both scientific and moral"). Minda defines "legal metanarratives" as "rhetorical modes of conceptual and normative legal thought that presume the existence of a correct answer for every legal problem." P. 103 n.96. This seems unduly limited, given Lyotard's broad use of the term, and, in any event, appears indistinguishable from Minda's use of "formalism." Perhaps a better use of "legal metanarrative" would be "any attempt by legal scholars at generalized system building" or "legal theorization." For useful explanations of the influence of Lyotard and other continental philosophers on American jurisprudence, see Feldman, *supra* note 13; Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996).

tory of twentieth-century jurisprudence, several examples of which already exist.<sup>45</sup>

Minda's approach is more than simply ironic. A more careful analysis might have led Minda to face many important problems that instead are ignored here. That is, if Minda had engaged in criticism of postmodern criticism itself, he might have reached the many perplexing difficulties of postmodernism that are, to be frank, more interesting than the literature summary that makes up the bulk of this book.

For example, the thoughtful postmodernist might ask: How can one both deny the metaphysical reality of social values and engage in social criticism? That is, if all values are socially constructed, historically contingent, and relative, how can we ever say that any policy choice is "good" or "bad"? Opponents of postmodernism have raised this complaint often.<sup>46</sup> Several scholars have attempted to face this exceptionally difficult problem,<sup>47</sup> but it goes virtually unmentioned in this book.<sup>48</sup> Postmodernism raises many such paradoxes, all of which seem central to Minda's project. Yet, while he acknowledges some of them in passing, the vast bulk of the book ignores them in favor of lengthy literature review and synthesis.

A likely response to these criticisms would be that postmodernism, by its nature, is not troubled by contradiction or paradox. Postmodernism recognizes and embraces the predicaments of modernist language and argumentative techniques because the

45. See, e.g., DUXBURY, *supra* note 11; GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

46. See, e.g., DUXBURY, *supra* note 11, at 422-23; Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 *LAW & SOC. REV.* 697 (1992); Nussbaum, *supra* note 22 (arguing that the techniques of Jacques Derrida, which have been highly influential amongst postmodern legal philosophers, are nihilistic and morally relativistic); Patterson, *supra* note 22, at 21 (arguing that postmodern "interpretivism" leads to an "infinite regress" of solipsism and moral relativism, because every interpretation is subject to another interpretation).

47. For example, Stephen Feldman suggests that postmodernism does not lead to moral relativism or an infinite regression of interpretations because the interpretive or critical act that, in his view, is central to postmodernism is itself *ontological*. That is, the act *creates* meaning and thus allows us to act in the world. See Feldman, *supra* note 13, at 671-90 (arguing that postmodernism does not reject metaphysics but merely revolutionizes it; therefore, we can still meaningfully criticize); Feldman, *supra* note 44, at 185-92. J.M. Balkin, in contrast, seems to think that there are "transcendental" values on which humans can draw, including, most importantly, "justice." For him, postmodernists evade nihilism by searching for those values that flow from "the wellsprings of the human soul." J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 *MICH. L. REV.* 1131, 1139 (1994). Similarly, Joseph Singer has argued that law can be reconstructed in the wake of nihilistic critique by an essentially pragmatic process of "moral decisions" that are no different than our "everyday moral decisions." Singer sets out a short list of rudimentary values he believes should be discovered through this process, including the prevention of cruelty and misery. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 62, 67-70 (1984).

48. The problem is briefly raised late in the book, but receives no more attention than a three-page summary of the scholarship of Pierre Schlag. See pp. 243-46.

postmodernist, while aware of these problems, does not believe that scholars “should, will, or [are] even capable of demonstrably standing outside of [the modernist] system.”<sup>49</sup> The postmodernist will thus claim that it is no argument to point out the paradoxes or inconsistencies in *Postmodern Legal Movements*, because they are merely the result of the paradoxes or inconsistencies of modernist thought. Furthermore, postmodernists might argue that to attempt to avoid the paradoxes of postmodern scholarship would be not only impossible, but *limiting*; to “claim to stand outside of this system, and thus claim to avoid paradox” would be to “beg the exceedingly interesting question of where the boundaries (if any) of this system of . . . legal thought are located and whether this system can even be adequately conceptualized as having a determinate or localizable inside and outside.”<sup>50</sup>

The point, however, is not that Minda has not *solved* these problems, but rather that in this book he does not even *face* them. Furthermore, the problem is not simply lack of completeness — it is not as if this were a book on property law that fails to say enough about zoning. On the contrary, the book fails to address issues central to Minda’s picture of postmodernism overtaking the legal academy, and it fails to address the awkward irony of heralding such a paradigm shift in a book that does not itself seem to be postmodern. Thus, *Postmodern Legal Movements* is like a book about property law that fails to say anything about property law.

Finally, these various problems raise a much more basic question or paradox of postmodern jurisprudence, and it is again one that remains completely unmentioned in *Postmodern Legal Movements*. The question is this: *Can one be a postmodern legal scholar?* That is, can one share in the doubts and criticisms postmodernists share, and yet also engage in the sort of discourse on which legal scholarship traditionally has been based — which, according to the postmodernist, appears to be useless? At the very least, can one do so without being disingenuous? If not, then why do it?<sup>51</sup>

Some postmodernists have suggested that there is no reason to. Robert Williams, for example, believes that

49. Schlag, *supra* note 36, at 174 n.18.

50. *Id.*

51. As Louis Menand wrote, “[I]f one is a professor at Harvard or Stanford or Georgetown law school, one enjoys a rather desirable set of occupational conditions to have to worry about. It’s nice to have available a style of radical politics that doesn’t require giving any of them up.” This outlook commends itself to “schemes for professors and janitors to share in communal decision-making at law schools, as a substitute for asking why — given their analysis — law schools . . . should exist.” Louis Menand, *Radicalism for Yuppies*, THE NEW REPUBLIC, Mar. 17, 1986, at 20, 23.

the model of the law professor that I had bought into during the early, cursed, deformative years of my academic career was . . . a nineteenth-century relic; [it] was constructed out of a Victorian-era law professor's wet dream [and was] warped and twisted and ill-suited to the demands of a postmodern multicultural world . . .<sup>52</sup>

Williams therefore urges postmodern scholars to engage in postmodern *practice* — in his case, “Critical Race Practice.” That is, the postmodernist should apply theory to practice by helping others, or serving the needs of the community, or whatever; the point is that postmodernism counsels one to discard traditional modes of argument in favor of more appropriate action. This is so, says Williams to the postmodernist, because it does not advance the postmodern project to “deconstruct the world with your word processor.”<sup>53</sup>

The postmodernist might answer that, while it does seem to be inconsistent to be a *postmodern* legal scholar, there is nothing inherently wrong with inconsistency, and perhaps that it is impossible for humans *not* to be inconsistent. That would seem to be an implication of much of postmodern thought. Perhaps there are other compelling answers. But, again, the weakness of *Postmodern Legal Movements* is not its failure to resolve these perplexing questions, but its inexplicable failure even to address them. It could be a more interesting and provocative book if it did.

### CONCLUSION

The project underlying *Postmodern Legal Movements* is ambitious and interesting, and to a certain extent the book is a successful effort. It is a useful and reasonably accessible primer on the basic concepts of American jurisprudence, and it will serve as a good introduction to students or lawyers who have little background in legal philosophy.

Beyond that, however, the book is problematic both on a superficial and on a deeper level, and for more advanced readers it will prove frustrating. On the surface, the book lacks caution in its historical rendering. Conclusions follow too quickly from scanty evidence. Minda often makes fairly sweeping claims about whole movements or schools in the face of plentiful evidence in favor of other interpretations. More important, the book is by its nature at odds with its own premises. The implicit claim of *Postmodern Legal Movements* seems to be that one can identify *movements* in legal thought, even though the postmodernist must apparently believe that whenever we arrive at such a claim — such a metanarrative —

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52. Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741, 756-67 (1997).

53. *Id.* at 757.

we are *constructing* the world, not merely *describing* it. One construction is not more useful than any other, at least not for any reason that Minda provides. A whole series of issues arise from this conflict that are never addressed in the book but that would be very interesting and are important in defending Minda's thesis. Thus, *Postmodern Legal Movements* seems to raise more problems than it solves, whether as a defense or even a basic description of postmodernism.

—*Christopher L. Sagers*