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Microwaving Dreams? Why There is No Point in Reheating the Hart-Dworkin Debate for International Law

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1. INTRODUCTION

So, let me begin with a definition, and examination, of methodology itself. A methodology is the technique by which a researcher proposes to identify, delimit, and collect data. It encompasses the definition of what will be taken as relevant data, and how and where that data will be discovered or generated.[1] It is a pre-theoretical stage of analysis in the precise sense that it collates and curates the data which the theory will be used to analyse and structure. Neither Hart nor Dworkin are willing to expose or discuss methodological commitments.

Instead, Hart proposes to *elucidate*[2] that which he will not define[3] (which is conceptually impossible). Dworkin sanguinely dismisses the 'pre-interpretative stage' (the methodological) as 'given';[4] 'judges and academic lawyers … begin in answers to those questions that they take to go without saying'.[5] In other words, each simply assumes that the data on which his theory will operate is naturally self-identifying. This assumption may have some merit in a domestic legal order, but the failure to disclose or analyse it makes transposition of their theories to Public International Law (PIL) too easy and, simultaneously, impossible.

To understand their methodological contributions, one must 'rationally reconstruct',[6] that first step on Hart and Dworkin's behalf. Fortunately, it turns out that they essentially share the same empirical methodological assumptions and techniques; albeit Dworkin adds an ethical twist as garnish. Thus, it was not mere rhetorical hyperbole when Dworkin gushed:

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1 S.L.T. McGregor and J.A. Murname, 'Paradigm, Methodology and Method: Intellectual Integrity in Consumer Scholarship' (2010) 34 *International Journal of Consumer Studies* 419 at 420.

2 H.L.A. Hart, *The Concept of Law* (2nd edition) 208. Hereinafter CoL.

3 CoL 16.

4 R.M. Dworkin, *Law's Empire* 66.

5 R. Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy and Public Affairs* 2 at 12.

6 N. MacCormick, 'Reconstruction After Deconstruction: A Response to CLS' (1990) 10 *Oxford Journal of Legal Studies* 539.

> from time to time the achievement of a single man is so powerful and so original as to form a new paradigm, that is, to change a discipline's sense of what its problems are and what counts as success in solving them. Professor H.L.A. Hart's work is a paradigm for jurisprudence … throughout the world.[7]

Dworkin's work would never escape the unstated assumptions of this Hartian paradigm. Unfortunately, Hart refused to define this new paradigm. Instead, he stated that his 'purpose is not to provide a definition of law'.[8] His declared aim is to 'provid[e] an improved analysis of a municipal legal system'[9] whose existence he takes for granted. This focus both grounds *and limits* his theory, and Dworkin's as well. His primary concern is the evolution from a 'prelegal' to a fully 'legal' society, and the necessity of creating an *institutionalised* legal *system* to ensure this.[10]

Instead of asking 'what is law?', or even 'what is a legal system?', Hart refocuses the question to ask: 'how do we identify the rules of *this* legal system?'[11] Assuming the system to be self-identifying, Hart looks for the content of the law in the actions of (undefined) 'legal officials'. He assumes legal officials are those, primarily judges, who work in (equally undefined) 'courts'.[12] Hart neither explains nor justifies this focus on courtrooms; rather than, say, public bars or laundrettes; or law schools, police departments, prisons, or even law offices. He assumes that 'courts' are where (real) 'law' happens. This presupposes a very specific definition of law;[13] and a very specific understanding of courts as institutions with 'special authoritative status'.[14]

This authority comes from courts' institutional status and reflexive links to centralised violence;[15] their capacity to *enforce* their judgments. Hart focuses on the exercise of centralised authority; this provides the data his theory will attempt to analyse. Likewise:

> For Dworkin, questions about law are always questions about the moral justification of political power, and any answer to those questions that purports to be about something else must be interpreted as an oblique answer to that moral question.[16]

Law must take place in empirically identifiable institutions, as an exercise of political power, and as an *actual* practice. '*The idea of a social practice is central* to' Dworkin's project.[17] Only in the context of an institutionalised system can 'legal

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7 R.M. Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057.
8 CoL 16.
9 CoL 14.
10 CoL 91–9.
11 J. Gardner, 'The Legality of Law' (2004) 17 *Ratio Juris* 168 at 170–71.
12 CoL 101–2.
13 N.Tzouvala. *Capitalism as Civilisation: A History of International Law* (Forthcoming 2020).
14 CoL 102.
15 R.M. Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.
16 A. Ripstein, 'Introduction' in *Ronald Dworkin* (2007) 4.
17 Ibid., 13.

rules' be identified using Hart or Dworkin's theories. These are theories of centralised political power as law, where the 'legal system' is *defined* as the totality of 'central social institutions: i.e., legal institutions'.[18] This link between law and the centralised monopoly on legitimate violence is the implicit condition which (alone) makes their work intelligible.[19]

Because Hart focuses on the activities of actually extant and authoritative institutions, his theory cannot be separated from his methodology. The social facts Hart identifies (centralised hierarchical institutions, direct access to state violence, and an ideologically homogenous judiciary) are the minimum combination which could plausibly support an empirically describable legal system with a coherent rule of recognition. The theory itself is empirically driven and subject to empirical evaluation. It presents law as a description of the rules which legally obligate people (or states); the rules against which legal officials will judge the conduct of others.[20] The purpose of Hart's theory is, empirically, to identify those rules; with a slight ethical twist, this is also the purpose of Dworkin's theory.

To demonstrate the inapplicability of these theories, and how that is ignored, I will first explore their shared definition of the legal system; and the necessity of this for the 'objective' identification of legal norms. I will then show how that fails to function in the international realm, where norms cannot be objectively identified or applied using either Hartian or Dworkinian methods. Finally, I will look at the way that all of this is disguised by the fragmentation of international lawyers into distinct communities; or hidden behind the comforting, ideological, myth of an 'international community'.

2. IDENTIFYING AND DESCRIBING A LEGAL SYSTEM

Hart and Dworkin are *both* empirical theorists of law. Their disagreement does not concern *how* to theorise law, but how to interpret the data. Each portrays law as the ordered distillation of legal officials' acts. Their dispute concerns only the interpretation and classification of those acts. Their consensus that legal theory be reduced to the description of official conduct in centralised, authoritative institutions is what renders their transposition to the international plane either impossible or pointless.

In Hart's analysis, the legal system is the institutional centralisation of coercive violence,[21] organised as a system of rules. Its defining element is the famous 'union of primary and secondary rules' under the rule of recognition, which forms 'not only the heart of a legal system, but a most powerful tool for the analysis of much that has

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[18] Joseph Raz, 'Authority, Law, and Morality' in J. Raz, *Ethics in the Public Domain* (1994) 236.

[19] CoL 98.

[20] CoL 136–41.

[21] J. Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 *American Journal of Jurisprudence* 199, at 208–9.

puzzled … the jurist'.[22] Primary rules are direct legal obligations, orders backed by sanctions. Secondary rules are rules about rules: how to find rules, how to alter rules, who may apply those rules, and how they should do so. The rule of recognition is the master-rule, determining what counts as primary and secondary rules.

'The question of whether a rule of recognition exists and what its content is … is an empirical, though complex, question of fact.'[23] It can be identified only through observation of system officials, 'The rule of recognition', like the legal system itself, is thus an empirical reality. 'Its existence … must consist in an actual practice.'[24]

Thus, for Hart, law *is*, and law is what legal officials consider it to be. Law is discovered by observing, classifying, and understanding the activities (and rhetoric) of legal officials. This can be done *only* in the context of a legal system. Hart presupposes the legal system as an aspect of empirical reality; an object susceptible to direct observation. 'Legal systems are the basic units of law;'[25] so 'one needs to begin by asking what property or set of properties all legal systems have in common that distinguish them from non-legal systems'.[26] And the basic set of properties they have in common are centrality and authority.[27] To exist, a legal system must be efficacious,[28] it must be coherent, and it must be unified under a rule of recognition.[29]

A functioning rule of recognition must *actually exist*, must be *actually observable*. It can only be observed in the regularities of official conduct; and official conduct can only be observed in centralised, authoritative institutions. When a body of legal officials can be factually observed as adopting a common standard (whatever that might be) for the identification (*recognition*) of legal rules, *and* where this body has access to the institutionalised monopoly on legitimate violence (its interpretations are *enforced*), then a rule of recognition, and hence a legal system, exists. What that body of officials recognise as law is the law; simply by virtue of their recognising and applying it. The existence of a legal system is a question of fact; observing reality may reveal a legal system – or it may *not*! Only in such a system 'can one identify legal norms (including laws) as legal norms.'[30] Without a legal system legal norms cannot be identified.

Thus, *contra* Payandeh, the rules of adjudication cannot be separated from, nor exist without, the rule of recognition.[31] Likewise, *contra* Pavel, it is *not* 'possible to have legal orders where the rules of recognition and change are well developed and institutionalized, but the rules of adjudication are absent or weakly institution-

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[22] CoL 97.
[23] CoL 292.
[24] CoL 111.
[25] Gardner, *supra* note 21, 209.
[26] Gardner, *supra* note 11, 170–71.
[27] Ibid.
[28] CoL 103.
[29] Ibid.
[30] Gardner, *supra* note 11, 171.
[31] M. Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 *EJIL* 967, 986.

alized'.[32] The rule of recognition can *only* be constituted through official, judicial practice; and the unfolding of the rules of adjudication and change is totally derivative on the functioning of the rule of recognition. Empowered courts and enforced adjudication are central to this model.

These conditions are not met in international law. Besson nonetheless claims that, 'as a matter of fact', 'numerous secondary rules may be retrieved in international law nowadays'. She does however concede 'for the rules regulating the international law-making process to be respected as secondary rules, the international system needs a rule of recognition'.[33] She, and others, claim that Article 38 of the International Court of Justice (ICJ) Statute (with a few modifications[34]) provides us, again 'as a matter of fact', with such a rule. For Pavel, 'today we are able to identify a more complex rule of recognition operating in international law'.[35]

Both claim that the international rule of recognition is, as a fact,[36] unitary;[37] despite the ICJ's lack of enforcement powers and marginal role in international affairs, and the proliferation of other decision-makers. But in a Hartian model, Article 38 cannot be a rule of recognition – because there are no system officials, no one authorised to *create* or *recognise* a rule of recognition. Defending the role of the ICJ as enunciator of the rule of recognition, Payandeh simply states that 'its decisions are generally considered to have a high degree of authority'.[38] For these Hartians, international 'judicial' conduct can be observed and described as coherent; but that is achieved by abandoning Hart's methodology, and the potential stabilising factors it produced.

The Dworkinian position is that, although centrally important, a Hartian description can never be objective or complete. 'The *idea of a social practice is central* to this focus on interpretation.'[39] However, 'a practice contains all of the disputed claims about the topic, including the debates that sometimes arise about what is, or is not, included within the topic under discussion'.[40] 'None of these purely descriptive accounts is really what it purports to be.'[41] The judge should be understood to be doing more than merely identifying or describing the law; they are 'interpreting' the meaning of the law 'in its best light'. And so, 'the point of legal interpretation is given by political morality'.[42]

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[32] C.E. Pavel, 'Is International Law a Hartian Legal System?' (2018) 31 *Ratio Juris* 307, 311.

[33] S. Besson. 'Theorizing the Sources of International Law' in S. Besson and J. Tasioulas (eds) (2011) 22(4) *The Philosophy of International Law* 180.

[34] Ibid.

[35] Pavel, *supra* note 32, 318.

[36] Ibid.

[37] Besson, *supra* note 33, 181.

[38] Payandeh, *supra* note 31, 991.

[39] Ripstein 'Introduction', *supra* note 16, 13, emphasis added.

[40] Ibid.

[41] Ibid.

[42] Ibid.

One is still invited to study the judge; but elements are added to Hart's definition of the judicial role. In the Dworkinian model, judges have zero discretion and every case, every legal issue, has a single right answer. This is discovered by augmenting the legal rules of the Hartian model with a recognition and use of 'principles'[43] which are embedded in the legal system. This leads to Dworkin's understanding of law as a precise balance of 'fit and substance'.[44] Dworkin provides 'a more general account of *interpretation*, which is concerned with explaining how our judgments about various domains of value *can be correct*,.[45] In this variant, 'to interpret a statute is to explain the meaning of its clauses in terms of an account of the *values underlying the legal system* in general'.[46] The aim is 'the identification of the conditions according to which propositions of law are true'.[47]

Dworkin believed that Hart allowed his dogmatic definition of law (as a system of rules) to obscure the data's reality, i.e., a judicial decision fully determined by law. Hart failed to see the reality of the law; his vision failed to correspond with Dworkin's 'true' observation of what law *is*. Dworkin challenges Hart's *interpretations*. The challenge disputes the fundamental proposition that law can be accurately described as a system of observable rules. Dworkin challenges Hart's *evaluation* of the data: 'If the positivists see this as institutional deception, *it is only because their understanding of law is wrong*.'[48] But he challenges neither the empirical methodology, nor *the choice of data itself*.

3. KNOWING THE LAW

In either approach, the theorist or academic who wants to 'know the law', assumes the posture of the judge, impartially observing the rules as they apply to the facts at hand. This is encapsulated in Thirlway's claim that: 'The distinguishing character of a *legal* claim … is surely an implied assertion that an impartial third-party, called upon to consider the matter from the standpoint of law, would decide that the claim is justified.'[49]

In a moment of candid synergy, Dworkin advocates this 'counterfactual exercise … as a way of … identifying international law'.[50] That is, Dworkin too endorses hypothetical – *imaginary* – courts to identify the content of international law! In the

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[43] O. Raban, 'Dworkin's 'Best Light' Requirement and the Proper Methodology of Legal Theory' (2003) 23 *OJLS* 243, 261–2.

[44] J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85.

[45] Ripstein, *supra* note 16, 8.

[46] Ibid., emphasis added.

[47] S. Guest, 'How to Criticize Ronald Dworkin's Theory of Law' (2009) 69 *Analysis* 352, 359.

[48] Ibid., emphasis added.

[49] H.W.A. Thirlway, *Customary Law and Codification* (1972), 51–2.

[50] *Supra* note 5, 14.

absence of a centralised, institutional judicial order, Dworkin suggests we *pretend* there is one:

> Let us imagine … an international court with jurisdiction over all the nations of the world. … If we can imagine such a court, even as fantasy, then we can frame a tractable question of political morality. What tests … should that hypothetical court adopt to determine the rights and obligations of states?[51]

This is the only way Dworkinians or Hartians can 'identify the law of a community' without 'asking which rules its citizens or officials have a right they can demand be enforced by its coercive institutions'.[52] If there exist no actual institutional structures, they can proceed only by pretending that there are; *and* pretending that imagining the imaginary judgments of these imaginary courts provides an objective way of identifying law.

4. EMPIRICAL METHODOLOGY IN A NON-CENTRALISED LEGAL SYSTEM

For both Dworkin and Hart, law equals institutional control. This is treated as axiomatic fact; summed up by Raz's claim that 'the concept of law is not a product of the theory of law'.[53] This is a strong ontological claim: law is an empirical phenomenon which resides *outside* legal theory, with the latter simply describing the former.

This understanding of law is actually contingent. It is neither conceptually nor empirically necessary;[54] it is stipulative, conclusory, *definitional*. Definitional, because Hart has *chosen* institutional centrality as defining the site from which the data of legal systems, and law, are to be 'elucidated'; and Dworkin has chosen to accept Hart's decision as a paradigm shift. We can choose to endorse this definition, but we should choose to reject it. Its basic assumptions are not applicable to international law. It is impossible to transpose Hart or Dworkin's methodology (and the theories predicated thereon) to a non-centralised, largely non-institutionalised, legal system. Attempts to do so invariably collapse into pure fantasy.

So, we have two problems. First, Hart and Dworkin never discussed methodology; second, the institutional and empirical facts necessary for the deployment of the methodology they do in fact use, simply do not exist in the discourse we want to describe as public international law. There are no authoritative tribunals whose judgments we can process as data. Instead, there exists a plethora of committees, commissions, courts, reports, conclusions, judgments, almost all without substantive

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[51] Ibid.

[52] Ibid., 12.

[53] J. Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in Coleman (ed), *Hart's Postscript* 1 at 36.

[54] Tzouvala, *supra* note 13.

enforcement mechanisms; without authority. The defined producers of distinctively legal norms do not operate here.

I believe that this absence is fatal to any attempt to develop an empirical methodology or theory of international law; but others do not. There have, in fact, been many attempts, over many years, to develop Hartian and Dworkinian accounts of international law. Most operate by pretending that the empirically necessary conditions really do exist in international society. They have become so adept at ignoring the basic features of reality that they return to Dworkin's own intuition – or Thirlway's *reductio ad absurdum* of the Hartian project – that the 'counterfactual exercise [the imaginary decrees of imaginary courts, provides …] a scheme for identifying international law'.[55] Returning to Thirlway:

> [A] question which the national decisionmaker would be bound to put to his legal adviser would be: Which view is right? – and this would mean, Which alleged rule represents the correct rule of international law? This in turn means … Which rule would be upheld by an impartial tribunal on the basis of international law?[56]

But, again, this tribunal is not only impartial, but *imaginary*. However, there are in international society not only imaginary courts, but also a collection of real institutions which international lawyers like to imagine are (real) courts. These institutions are real, but they are not courts in the Hartian or Dworkinian sense; nor are they organised into the type of systemic hierarchy on which both models depend for their data. Again, these inconvenient facts must be denied or ignored to persevere with the transposition of the 'great' or 'seminal' theories of municipal law to the inhospitable environs of international society. All this to maintain a charade, to be 'constantly acting as if one represents a state in front of an imaginary judge'.[57] These imaginary tribunals and their imaginary judges are, however, tenuously anchored to reality. This is achieved by highly selective reference to the other actual tribunals and international actors.

To augment the imaginary courts on which Thirlway and Dworkin rely we have, of course, the ICJ, the ICC, regional human rights courts and commissions, the apex national courts when they decide on matters of international law, the dispute settlement system of the WTO, the machinery of international arbitration, the committees of each major human rights treaty (which claim to act as both tribunal for individual petition and legislature through their general comments), a wide array of special rapporteurs, the UN Human Rights Committee, national legal advisers, and – depending on the individual theory – a disputed array of further 'authoritative decision-makers'.[58] And then we have the academic and activist practitioners of international law's various sub-systems, producing an endless yet ever expanding,

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55 *Supra* note 5, 14.
56 *Supra* note 49.
57 Tzouvala, *supra* note 13.
58 M.S. McDougal et al., *Studies in World Public Order* (1986), 276.

litany of articles, books, comments, critiques, expositions, interpretations, declarations, and elucidations of all the foregoing, and of each other's contributions. A veritably transfinite supply of potential data, 'legally cognisable materials',[59] and 'competent legal arguments'.[60]

There is a lot of *potential data* from which a Hartian or Dworkinian methodology could choose and abstract. But there is *not* any authority, any hierarchy, any coherence, nor any empirically observable order or pattern. This returns us to Hart's injunction to observe the legal world as it is, not as we might wish it to be. To forsake 'the obstinate search for unity and system where these desirable elements are not in fact to be found.[61] However, to do so would also be to forsake the search for an international legal system, and for a vaguely determinate set of rules we could call international law. True to form, Hartians ignore Hart's most basic injunction, and Dworkinians claim to have alternative mechanisms for purifying the data. In both cases, reality is dealt with in a highly selective manner, order is imposed on the chaos of the data, and the process of 'rationally reconstructing'[62] the legal system is initiated.

Some talk of a hierarchy of preferred institutions – treating the toothless faux-judicial institutions above as if they were authoritative and organised into their preferred hierarchy. Others postulate coherence between a web of apparently contradicting obligations, a deeper unity and system below the surface confusion. Some write of compliance pull; world order values, the liberal alliance, human rights, liberal-legal ethics, and much else besides. Yet others claim simply to describe it all: the web of institutions applying their own rules of adjudication, but unbound by a common rule of recognition.[63]

Of course, each of these methods has countless tweaks and evolutions; and each and every one is cognising and producing (legal) norms, claims, and proposals. Thousands of incompatible legal descriptions and analyses, each equally foundationless, visibly unreal to varying degrees. The lucky few are picked up and amplified; they go viral (by international law standards), and generate their own discursive clusters – interpretative communities – and so-called mainstreams. Their unreality hidden behind repetition of, and squabbling over, their normative presuppositions, and the norms these may or may not have produced, expanded, concretised, modified, or destroyed.

Data is mined (indiscriminately) from everything above, plus rapporteurs' reports, the work of the International Law Commission (ILC), NGOs, decisions of national courts, UN General Assembly resolutions, UN Security Council resolutions, and the endless 'academic' and 'practitioner' writings, analyses, critiques, panegyrics, taxon-

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[59] P. Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 *Georgetown Law Journal* 803, 809.

[60] M. Koskenniemi, *From Apology to Utopia* (2nd edition) 566–8.

[61] CoL 230.

[62] MacCormick, *supra* note 6.

[63] Payandeh, *supra* note 31.

omies, extensions, compilations, and miscellaneous other literatures, these inevitably provoke. This provides an even more dazzlingly massive, incoherent, contradictory, indeterminate, and unruly mass than that which confronted Hart and Dworkin on their home terrain. This is where theory should kick in, and order be discovered in, and (re)imposed upon, the data.[64] This is where the line between rationalising and ordering the data on one hand, and simply articulating our individual normative desires and fantasies in legalese, on the other, should be drawn. The data must be refined; not everything can be included: 'there has to be some discrimination between the parts that belong in the coherent whole and the mistakes or anomalies that … ought to be discarded'.[65]

Given Hart's empirical commitments, Hartians cannot structure this process of exclusion. The theory's point is to avoid imposing personal moral, ethical, or political preferences. But without this, there is no way order can be imposed, 'mistakes or anomalies' identified, or a coherent whole created. Moreover, given the sheer scale of the originally identified data, the so-called anomalies or mistakes will vastly outweigh that data chosen to create the 'coherent whole'.[66]

Nonetheless, the data *is* reduced. Structured hierarchies or 'coherences' are chosen; patterns are created. But this can only be done by imposing each theorist's own – unstated and often unexamined – ethical, political, and moral presuppositions. These drive the process of reduction and the imposition of order; decisions are buried in those choices. These hidden, *subjective* assumptions become the bedrock on which the chosen theory's 'objectivity' is built. 'This reduces "legal analysis",' according to Koskenniemi, to 'an objectionable attempt to score a political victory outside politics.'[67]

This process is not empirical, it is not scientific, and it is certainly not an exercise in 'descriptive sociology'. It is a 'science' more akin to astrology than to astronomy. Looking into the billions of discrete, shining pieces of data available, the Hartian theorist chooses four, or 20, identifies them as coherent, and claims that they form or resemble a rule. This seems like the same process by which the ancients identified pictures among the stars; ignoring the billions of glowing points of light that did not fit into their idealised image.

5. LAW AS INTERPRETATIVE CONCEPT: THE DWORKINIAN TWIST

Although he took the empirical existence and authority of the legal system as a methodological given, Dworkin consistently argued that the norms and norm-creating/recognising procedures produced by such an order would *not* be empirically coherent

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64 MacCormick, *supra* note 6.
65 Ibid.
66 J.A. Beckett, 'Rebel Without a Cause' (2006) 7 *German Law Journal* 1045, 1054.
67 Koskenniemi, *supra* note 60, 1055.

or consistent. Order would have to be imposed by augmenting empirical fit with normative substance. The distinction between the chosen and the excised legal material would be driven by moral considerations. This does provide a potential rationalisation for each writer's preferred order, and probably also explains why so many Hartians have wandered on to the Dworkinian trail.

Thus although Besson claims to be neo-Hartian, and Cali quasi-Dworkinian, each can claim *both* that their approach rejects Hart's 'descriptive sociology', *and yet* that *they know* (and can describe) how international law *works in practice*. For each of them: 'Theorizing international law does not amount to descriptive sociology, but sets standards for a coherent and legitimate international legal practice. As a result, it is as normative as the processes it purports to explain.'[68]

Thus, while the 'interpreter is constrained by the history or shape of the object of the practice',[69] there 'cannot be a neutral description of a legal practice because interpreters have theoretical disagreements about what the practice requires'.[70] Nonetheless, 'international law's *normativity* has … evolved drastically: from being subjective international law has become more objective, from relative it has turned more universal'.[71]

From Cali's perspective, arguments about radical indeterminacy 'are removed from how international lawyers argue and establish international law in everyday discussions'.[72] Besson concurs, arguing that although 'some may claim, following Hart, that international law is not yet sufficiently developed to be regarded as a legal system. This critique is largely obsolete … and shows too little respect for the *facts of international law*'.[73] If, of course, those facts are identified and delimited through the normative lenses of 'the international rule of law' and its demand for 'international democratic legitimacy'; which allow us to 'identify democratic probationary processes to attest to the existence of norms'.[74]

This is all compatible with Guest's elucidation of Dworkin. Guest rejects the idea 'that Dworkin's interpretivism requires a mixture of 'descriptive' facts of legal practice and moral judgments'.[75] Rather: 'In Dworkin's theory, the point is that one cannot *see* the practice except through the lens of morality; the facts are not there independently to constrain … facts are only there through their moral status; they are moral propositions in the interpretive story.'[76]

This confluence makes sense, as Guest's understanding of Dworkin resembles and refines Gardner's (Hartian) idea of the 'true' and the 'important' of law.[77] All

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68 Besson, *supra* note 33, 166.
69 B. Cali 'On Interpretivism and International Law' (2009) 20 *EJIL* 805, 816.
70 Ibid.
71 Besson, *supra* note 33, 165.
72 Cali, *supra* note 69, 808.
73 Besson, *supra* note 33, 178.
74 Ibid.
75 Guest, *supra* note 49, 356.
76 Ibid.
77 Gardner, *supra* note 21, 200.

legally cognisable material exists (is 'true'), but integrity (or whatever alternative unifying principle is presupposed) lets us see what is important. The chosen morality is a pre-theoretical, methodological function. It identifies data, *as well as* ordering, structuring, and explaining it. Whilst acknowledging the true, integrity isolates the important, thus purifying the data; albeit with the exclusion of about 99 per cent of said data. Nonetheless, existing practices are claimed to have some constraining effect. 'So interpretivism provides an *ideal*, but it is not the outcome that would be the best in all possible worlds … the ideal of integrity [is] constrained by existing practices in a way that the ideal of justice is not.'[78]

Consequently, Cali suggests: 'In ordinary discussions many international lawyers or stateswomen/statesmen are able to reach a determinate international legal decision by using international law's resources, and without using personal or political preferences as the essential feature or the basis of the decision.'[79]

To transpose Dworkin's theory to the international plane, Cali suggests *abandoning* his concept of integrity and replacing it with an alternative (more suitable) unifying principle.[80] Rejecting the positivist claim that there is no universal morality on which PIL can be staked, she remains adamant that law is a 'social practice' with a 'purpose',[81] but leaves open what that purpose might be. Consequently, all that 'is required is that practitioners share a common understanding of the purpose of the practice'.[82] She believes that this requirement can be factually met, once we stop looking for integrity.[83]

However, the positivist and CLS refutations of Dworkin's approach do not focus on the *specific* form of community championed in Dworkin's own work. Rather the concern is with the *idea* of a singular community interest, which would be identified morally, and then *imposed* upon an 'international community' whose own legal texts did *not* manifest that interest. This objection holds regardless of whether the imposed morality is termed 'integrity', 'justice', 'John', or anything else.

The entire methodology (observe the decisions of courts, loosely defined as tribunals and their surrogates, and impose patterns thereon) should be rejected. It is an empirical fallacy to claim that there are patterns forming the rules (and principles) of the international legal system. It is moral imperialism to claim that one such pattern could or should be imposed upon it. There is no fundamental imperative: no Hartian rule of recognition; no institutional history or ethical imperative for Dworkin. While Hartians must stop here (or continue to berate reality for misbehaving), Dworkinian moral hubris maintains the claim that the data can be purified even though (or perhaps because) this normative aspect is treated as a fact in the imagined unfolding of his theory.

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78 Guest, *supra* note 49, 360.
79 Cali, *supra* note 69, 814.
80 Ibid., 818–9.
81 Ibid., 817.
82 Ibid., 818.
83 Ibid.

Dworkinians have three options for refining the data:

1. Claim that all legal systems share a liberal morality;
2. Follow Cali and Tasioulas in seeking an alternative universal morality;
3. Find a morality within PIL (or in the jurisprudence of its imaginary court).

There is no apparent consensus on any of these options, and so Dworkinians sub-divide into smaller, but often interacting, groups of like-minded souls. They retreat into their own interpretive communities.

6. THE FRAGMENTATION OF INTERNATIONAL LAWYERS: DESCRIPTIVE SOCIOLOGIES, DELIMITED NORMS, AND INTERPRETIVE COMMUNITIES

Not only are there no real international courts and no empirically extant international legal system, there is also no 'international community' and no international common interest.[84] We are generally socialised to conceive of PIL as universal and just, but weak and lacking in enforcement. We are encouraged to look at the moral claims its rules are said to embody as what Teitel calls 'humanity's law'.[85] But this is just one, rather fantastical, way of perceiving it.

There is another international law, functioning quietly as an 'extractive machine'. Effective and even enforced, this insidious international law moves resources and money around the world. It functions to plunder from the already poor, and give to the already rich; to produce poverty and regulate the resource flows that enables.[86] This is the functional, colonial core of international law, and it has operated, fairly consistently, for the last 500 years. This law may actually be susceptible to Hartian analysis,[87] though Dworkinians would struggle to find an acceptable moral justification. Instead, it is largely ignored, left unseen and undiscussed; hidden behind and beneath romanticised arguments over the (non-existent) content of humanity's law and its 'failures' of application.

The mainstreamers (the indeterminacy and conflict deniers), whether Hartian or Dworkinian discuss 'international lawyers', 'practices', or 'the facts of international law'. I suspect this is a very Hartian exercise in 'descriptive sociology'. Mirroring Hart's 'data gathering' from his various favourite Oxford Senior Common

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[84] For the most comprehensive dismantling of the fantasy/ideology of the 'international community' to date, see J. Hickel, *The Divide: A Brief Guide to Global Inequality and Its Solutions* (2017).

[85] R.G. Teitel, *Humanity's Law* (2011).

[86] J. Beckett, 'Creating Poverty' in Hoffman and Orford (eds) *The Oxford Handbook of International Legal Theory*.

[87] R. Yearwood, *The Relationship between World Trade Organisation (WTO) Law and External Law: The Constrained Openness of WTO Law* (2012).

Rooms, these scholars are not describing 'the profession'; they are describing the self-description of a tiny part of the profession into which they were trained and inducted; this is the part they confuse with the whole. They are describing (the self-understanding of) their own interpretative communities.

In contrast to the faux-empirical platitudes of the Hartian and Dworkinian approaches to law, there appears to be an increasing acceptance that the 'identification' and 'interpretation' of (international) law are inherently constructivist and contested processes. These are carried out by diverse groups of actors, and consequently, there is widespread and entrenched *disagreement* about both *which international legal norms can be said to exist*, and *how these should be interpreted*. Mainstream scholars simply deny this obvious fact.[88]

I believe that this can best be explained through the ideas of 'interpretive' and 'epistemic' communities. Stanley Fish introduced the concept of 'interpretive communities' into literary theory. It essentially asserts that meaning is imposed on to a text by readers' background assumptions and that these assumptions are themselves the product of group socialisation.[89] The interpretive community is the group where this socialisation takes place, whose members are made likeminded. Consequently, although 'the meaning of international law norms hinges on background principles shared by interpreters who form part of one or several interpretive communities';[90] different communities will construct *different* meanings. Two things flow from this:

1. Members of the same interpretive community will read the same texts in similar ways.
2. Members of distinct interpretive communities are likely to read the same texts in quite different ways.

Neither 'reading' is more truthful, nor more faithful, to the text than the other. Understanding is always a unity of text and interpretive community. The conflict runs deeper than this. It is not only a question of what a given norm means (already radically indeterminate),[91] but also over which norms exist,[92] and which apply to the given (chosen) facts.[93] Behind the interpretative conflict lies an epistemic conflict: a conflict over the very content of PIL. Alongside a plethora of interpretative communities lies a plurality of 'epistemic communities':

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88 Schlag, *supra* note 59.

89 Stanley Fish, *Is There a Text in this Class?* (Harvard University Press 1982).

90 Michael Waibel 'Interpretive Communities in International Law', in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds) *Interpretation in International Law* (OUP 2015).

91 Koskenniemi, *supra* note 60, 591.

92 Beckett, *supra* note 66.

93 Koskenniemi on Regime Choice/Jurisdictional conflict.

> 'Epistemic Communities' is a term occasionally used … to describe fairly heterogeneous social groups that perform functions related to the formation of knowledge in the field of international law.[94]

So, there are co-existing and competing communities of 'international lawyers', each with its own procedures for identifying the norms of PIL; for determining their applicability; and for interpreting the meaning of the applicable norm(s). Each works in self-referential isolation, believing its own techniques and conclusions to be universal; or at least 'true'. 'Epistemic communities … tend to be insular if not completely self-referential,' 'they tend to believe "that the only meaningful practice or the very core business of international law is their own specialisation."'[95]

The unacknowledged conflict between these communities characterises PIL and contains our varied and varying (mis)understandings of it. Yet, mainstream lawyers somehow perceive unity amidst what should be self-evident chaos.

Haas 'denies that international lawyers may constitute an epistemic community',[96] instead arguing 'the professional knowledge of lawyers [is] "insufficiently institutionalized to generate common truth tests and a tight sociological network"'.[97] Waibel attempts to take a middle line:

> interpretive community involves 'implicitly shared ideas which become part of the "professional sensibility" of participants . . . and produce a characteristic way of categorising the world and orienting their response to it'. [But,] no single interpretive community exists in international law.[98]

In fact, both Waibel and Bianchi oscillate between the claims that PIL is *one* epistemic community and that it is *many different* epistemic communities. Bianchi initially asserts that PIL is a *single* epistemic community:

> both the theoretical discourse on law and the social practice of law presuppose an *episteme* and, therefore, an epistemic community that shapes the discourse and sets the boundaries for what is accepted and/or acceptable in the scientific discipline and in the practice of international law.[99]

He then subdivides this '*episteme*' between three competing communities: 'the complex and broad epistemic community that shapes up international law'; and the 'distinct epistemic communities that constitute the episteme of international law as an academic discipline or a social practice.'[100] These compete for dominance over

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[94] Andrea Bianchi, 'Epistemic Communities' in J. D'Aspremont and S. Singh: *Concepts for International Law* (2019) 251.
[95] Ibid., 264.
[96] Ibid., 255.
[97] Ibid., quoting Haas.
[98] Waibel, *supra* note 90.
[99] Bianchi, *supra* note 94, 257.
[100] Ibid., 258.

a single *episteme*: 'The way in which international law is thought of and practiced is pretty much the making of epistemic communities that shape our knowledge of international law at the theoretical and practical level.'[101]

Moreover, it is unclear where this multiplicity comes from and how it functions. Waibel argues that it is the fragmentation of PIL into multiple subfields which creates the plurality of interpretive communities; but that each subfield can be identified by its own (singular, or at least dominant) epistemic community. There is a single 'philosophy animating a particular regime', which ensures 'that "extraneous" interests that are not central to the regime at issue are kept largely at bay'.[102] He sees these regimes as internally homogeneous but in conflict with one another. 'Interpretive communities use various strategies to enhance their prestige and influence over competing communities.' Consequently, 'it is likely that the close-knit epistemic communities in human rights law and international trade law are more influential, as compared to the more diffuse epistemic community in general international law'.[103]

Bianchi picks up the theme of fragmentation and competition between regimes but takes an important further step. Recognising fragmentation *within* the subfields of international law he observes that interpretive communities 'are carriers of distinct normative visions that they advocate more or less overtly *in order to gain or consolidate control of any given field*'.[104] This is so whether they seek to capture 'one of the substantive areas in which they operate', or even 'the whole of international law'.[105] It remains true even though the attempted capture inevitably fails; the competing epistemic communities remain un-subjugated and continue to produce and pursue their own 'distinct normative visions' of the field. Finally, Bianchi accepts the existence of multiple interpretive communities, each struggling to become *the* epistemic community in any given field or subfield of PIL. 'This plurality of visions quite obviously entails a struggle between different social groups that attempt to impose their own view as the most authoritative and legitimate one.'[106]

All of these contortions and confusions can be avoided if we simply accept that there is no singular epistemic community in PIL. It is not 'diffuse' but plural, divided, fragmented, contested. There are multiple interpretive communities at work throughout PIL, some concerned with the same subject matter, others with different specialisations. There are multiple different approaches taken and conclusions reached in each field, just as there are in the study of any given literary text. This conflict's contours may be seen in 'how epistemic communities over time have … shaped the perception of what is and what is not (international) law'.[107]

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[101] Ibid., 265.
[102] Waibel, *supra* note 90.
[103] Ibid.
[104] Bianchi, *supra* note 94, 264.
[105] Ibid.
[106] Ibid., 265.
[107] Ibid., 264.

However, each of these co-existing communities only overlaps or interacts with *certain* others – those which are 'acceptable in the scientific discipline' as defined by that community. That is those tolerable to its definition of 'the practice of international law'.[108] The rest are excluded as professionally incompetent.[109] And even this circumscribed interaction is limited by each community's belief in its own truth. Each community is fundamentally self-referential and tends to choose interlocutors based on similarity to self (perhaps understood as intelligibility or inter-communicability). As a result, communications are confined, and it becomes easy, even natural, to confuse intra-community agreement with 'truth', 'global agreement', 'actual practice', or 'the facts of international law'. This tendency should be resisted.

Instead, it behoves us to remember that there are other interpretive communities of international lawyers, whose world views and core assumptions are very different to our own. And whose analyses, interpretations, and even identifications, of PIL are also very different. These are no less international lawyers than we are; no less entitled to determine and define the content of PIL. They cannot be, because no one has the authority to define PIL; we can all only postulate and argue over its content, or discuss its actualisation (whether we perceive that as realisation or breach).

Each community necessarily perceives its beliefs and commitments to be true, important, and universal. Thus each understands itself as uniquely competent, and its adversaries as misguided, incompetent, excluded from professional life and valid academic discussion.[110] Absent significant self-analysis, the individual members of each community will unreflectively share and promulgate those beliefs. This allows them to confuse their socialised beliefs with universal truths about the discipline of international law as a whole. It is patently absurd, but their professional training inures them to that absurdity.

Consequently, these interpretative communities function well and can be quite influential, at least among themselves. They sustain many a career, and pathway to the international civil service. They produce many a PIL book, article, lecture, speech, syllabus, etc. But they neither describe nor affect the world. They are idiosyncratic renditions of a circumscribed collective imaginary. To recognise this is, however, to undermine one's own professional self-understanding and put one's career trajectory at risk. Perhaps this explains the attractiveness of the Hartian and Dworkinian fantasies that individuals can speak objectively about the content and meaning of PIL, and that PIL itself could reflect a universal position – the position of the international community.

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[108] Ibid., 257.

[109] C. Miéville, 'Multilateralism as Terror' (2008) 19 *Finnish Yearbook of International Law* 63.

[110] Ibid., 75.

7. STABILISING AND DRIVING THE PROJECT: THE NORMATIVE MYTH OF THE INTERNATIONAL COMMUNITY

The ideas of an international community and a common interest are the core ideologies of mainstream legal theory. They are the assumptions justifying the discourse of international law, and purportedly unify the data on which the discourse is built. They form the horizon of justice to which we are headed, and so allow us to ignore the present's rampant injustice.[111] The realisation of the common interest of all states is the dream which drives mainstream analysis. This is so, even though its realisation is eschatologically deferred.

In the correct hands, they allow the mess of data to be sorted, categorised, abstracted/selected from, and then ordered, creating the illusions of factual support and quasi-empirical analyses. They also justify the normative factors which must augment the empirical analysis to allow for its 'rational reconstruction' into coherent rules and doctrine. I think it is the glaring empirical absence of such a community or common interest which causes many Hartian theorists to gravitate towards Dworkin.

Dworkin allows the moral superiority of liberalism (or 'integrity', 'the international rule of law', 'democracy', 'world order values', etc.) to more easily justify itself through self-observation. A self-fulfilling, but illusory, prophecy: look hard enough for liberal order, compromise, co-operation, or community, and you will find it.

However, the comforting myth of the international community must be abandoned. There can be no international community, because there is no common interest in a world riven by poverty, racism, misogyny, and neo-colonialism. The international community is a distraction, a collection of elites we turn to to provide veneers of legitimacy and hope over the vicious and exploitative global system.[112]

The 'international community' is comprised of global financial elites (largely ignored as extra-legal, unless funding academia or civil society) and the cosmopolitan elite (the upper echelons of the international civil service). Mingling with political and financial elites, and, of course, each other. This is intermingled with an elite of global civil society: transnational corporations' presidents and senior corporate social responsibility types, NGO higher ups, celebrities, charities, and foundations; some crossover 'elite' academics followed by the cosmopolitan under-elite, of international civil service workers, international civil society workers, and some academics. Then the cosmopolitan: academics, lower civil service/societies, NGOs and field workers, activists.

Each of these looks up, focusing on those 'above' them in the hierarchy. With admiration for the roles, but perhaps scepticism about the current incumbents or even apparent historical trajectories. They study and analyse them, describe, idealise, cri-

[111] W. Rasch, *Sovereignty and Its Discontents* (2004).
[112] Beckett *supra* note 86; Hickel, *supra* note 84.

tique, and evaluate them; civil servants may also seek to imitate or modify the roles they see above; e.g., field workers thinking global offices need more people with recent fieldwork experience.

Academics generally produce idealised descriptions of upper echelon discourse and its spectacular displays. They are elite ideologies permeating elite discourses deemed worthy of study, analyses, commentary, and engagement. Elites formulate international rules and standards, create charities, and fund NGOs, think tanks, academic conferences, centres, chairs, and research. Their ideologies construct the international community.

Then there is the murky region, the local elites and bosses, providing the protective layer that allows us to ignore the exploitation, oppression, and misery below.[113] For example, sweatshop owners, local elites and politicians, law enforcement, gangs and warlords exploiting mineral reserves (coltan and cobalt), and those running agribusinesses. A whole seedy layer of exploitation and wealth. Presented as pariahs of the international community, the unreliable, unknown links in the global supply chains; these actually provide its driving force.[114] Aspiring, sometimes even succeeding, in accumulating enough wealth to move up, outsource their own exploitation, and move towards their global customers, who already sit in the international community or civil society.

It is international law that allows these people to function, which facilitates the movement of their commodities and capital around the world.[115] International law is the extractive machine which integrates the exploitation of sweatshops and coltan mines into 'global value chains'.[116] International law regulates the conversion of exploitative practices into pristine title over the resources they produce and facilitates transfer of this title to (artificially innocent) purchasers around the globe. It is international law which washes the blood and tears of the exploited off the commodities they are forced to produce.[117]

Then there are the global masses. Hidden from sight. Expected to silently acquiesce to their suffering and exploitation. They support the system, generating – but excluded from – its wealth.[118] And they are expected to remain unseen, not riot or strike, not seek our shores.[119] No. Wait for development and the international community's assistance. Do not disturb us in our dreams of community and society,

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[113] Hickel., ibid.

[114] Baars et al. 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 *London Review of International Law* 57.

[115] Beckett *supra* note 90.

[116] Baars et al., *supra* note 114.

[117] Beckett, *supra* note 86.

[118] S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2013).

[119] The long-hidden violence of European International Law can now be witnessed in the bodies of its victims floating dead in the Mediterranean Sea, or imprisoned in EU-funded Libyan concentration camps.

we will not forget you. Trust in the international community, for they are people of wisdom and good intention.

Of course, this does not really work for, or on, the 68 per cent of humanity reduced by PIL to living on less than $5 per day,[120] *after* PPP calculations have been performed.[121] But it does not need to; it only needs to comfort those above that seedy crust, assure them (us!) that things are being done, local actors condemned or praised. That progress is being made, and the 'international community' is being slowly realised.

And so, mainstreamers assume that community, idealise it, use it to underpin their theories, hold them together, give them plausibility. We perpetuate the ideology the elites continue to so carefully cultivate. And on the ground, nothing changes; *fifty thousand* human beings are sacrificed needlessly on the altars of profit and wealth *every single day*.[122] The descriptions and incantations of the laws of the international community have no effect; they fail more or less spectacularly. And we bemoan, and analyse, those failures. And so the cycle repeats. And attention can remain stubbornly in thrall to the discourse of the imaginary international community, which permeates and sustains both the discourse of a benevolent international law and the world of suffering it ignores and gorges itself upon.

[120] Hickel, *supra* note 84.
[121] Beckett, *supra* note 86.
[122] Ibid.