



OXFORD JOURNALS  
OXFORD UNIVERSITY PRESS

# ANALYSIS

---

How to Criticize Ronald Dworkin's Theory of Law

Author(s): Stephen Guest

Source: *Analysis*, APRIL 2009, Vol. 69, No. 2 (APRIL 2009), pp. 352-364

Published by: Oxford University Press on behalf of The Analysis Committee

Stable URL: <https://www.jstor.org/stable/40607584>

## REFERENCES

Linked references are available on JSTOR for this article:

[https://www.jstor.org/stable/40607584?seq=1&cid=pdf-reference#references\\_tab\\_contents](https://www.jstor.org/stable/40607584?seq=1&cid=pdf-reference#references_tab_contents)

You may need to log in to JSTOR to access the linked references.

---

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



Oxford University Press and The Analysis Committee are collaborating with JSTOR to digitize, preserve and extend access to *Analysis*

JSTOR

Perry, J. 1977. Frege on demonstratives. *Philosophical Review* 86: 474–97.

Perry, J. 1979. The problem of the essential indexical'. *Noûs* 13: 3–21.

Recanati, F. 2007. *Perspectival Thought: A Plea for (Moderate) Relativism*. Oxford: Oxford University Press.

## *How to Criticize Ronald Dworkin's Theory of Law*

STEPHEN GUEST

These excellent volumes show both the strengths and weaknesses of contemporary and serious Dworkin scholarship (Hershowitz 2006; Ripstein 2007). Mostly the articles are new, although Susan Hurley's paper in the Hershowitz volume was first published in 1990. As to be expected with work on Dworkin, the division between political and legal theory is not distinct because – as is well-known – he integrates moral problems of politics both into the choice of legal theory and legal argument itself. But, some issues may be separated and since there are excellent essays on both equality of resources and the relevance of 'intrinsic' values, I have separated my discussion into the two heads of 'legal theory' and 'political theory'. Work on his political theory is not as advanced as it is on his legal theory and so I have largely directed my attention to the latter. I conclude that the most profitable work with Dworkin's legal theory lies in exploring the idea of the 'interpretive concept' and its connection with moral ideals, and in assessing the moral weight of integrity, particularly against the ideals of justice and fairness. Almost all the essays on legal theory show awareness of difficulties concerning these two issues although no one takes on interpretivism directly (it is brilliantly described by Arthur Ripstein, along with the rest of Dworkin's methodology, in the introduction to his volume). However, Stephen Perry and Dale Smith in the Hershowitz volume and Sanford Levinson in the Ripstein volume push the boundaries some way with integrity.

### *1. Legal Theory*

*Interpretivism.* I think that, in general, people make too much of a meal of what has come to be called 'interpretive legal theory'. The idea of interpretation – for law, making the best moral sense of legal practices – seems to obscure, for many, the extent to which Dworkin's legal theory moralizes. His theory is moral to the full extent. Interpretation is therefore is not 'constrained' by facts even though it makes use of facts. It does not follow that his theory is 'subjective', because his moral views – like all moral views – are subject to revision, correction and, in short, reason. Yet, even Justice Stephen Breyer in his sympathetic and approving introduction to the Hershowitz volume ('The International and Constitutional Judge') says that constitutional standards 'keep subjective judicial decision-making in check'. This is right, but not as right as it could be, because it suggests both that there is some external checking fact on these judicial 'subjective' judgments, and that judges should not formulate applicable constitutional standards.

At the most abstract level, what is Dworkin's legal theory? It begins with the principles of freedom and equality that justify the institutions of democracy and law. Now, let us consider law as part of the institution of democracy, including democracy's characteristic legislative and judicial branches. The claim that democracy is just and that law is part of democracy is a claim about a moral ideal. A deficit of democracy in the real world amounts to a deficit of law, and vice versa. And in a world where there is no democracy, *that* world would be morally better if there were democracy and law. Of course, laws enacted and enforced in a democracy may be substantively unjust, a phenomenon often called the 'paradox' of democracy. However, the idea is not paradoxical at all; it merely says what we would expect, which is that the claim that law is part of democracy is reconcilable with the existence of morally unjust laws. For it is part of the idea of democracy that a morally bad law may nevertheless create a moral obligation to obey it.

Consider a basic objection to this picture. How can we say this is 'law' or 'democracy' unless we already have some sense of what these concepts first mean? To talk of 'democracy' or 'law', we would first have had some acquaintance with how people use these terms. So, while the theory appears to be entirely free and creative, it is in fact laden with undisclosed assumptions about what 'law' and 'democracy' and 'freedom' and 'equality' mean. This objection overemphasizes the importance of language and the idea of 'shared concepts', for we may call the ideals whatever we like, without adding to or detracting from their moral force. We may invent new words for them – 'democracy' now becomes 'alpha', say, and what was formerly called 'law', 'beta'. We claim for 'alpha' and 'beta' that these concepts have the potential for good moral use – the best moral use – if implemented, and their justification springs entirely from the moral reasons supporting them. Assuming that, in a particular society, alpha and beta find general support and are in fact instituted, we then find that it is of no methodological importance whether people keep calling these institutions and their relationships 'alpha' and 'beta' or if they revert to the language of 'law' and 'democracy'. We can, with perfect ease, slip from 'alpha' to 'democracy' and 'beta' to 'law'. We can also slip back – whenever we want – and revise or abandon these ideals. The way people happen to speak is neither here nor there. That said, if many people agree in either fairly general terms with the institution of alpha in the community and also that alpha is largely synonymous with beta (there is, in Dworkin's term, 'a consensus of convictions') then people are engaging with the concepts which 'alpha' and 'beta' represent. On many occasions, there will be such agreement about certain characteristics of alpha and beta that the agreement will be left unsaid. It will always be possible, though, for anyone to revise as thoroughly as they like these related ideals. They may also be skeptical about them, and maybe propose alternatives. Therefore, how people think about law, or how they use the word 'law' or related terms, is of no conceptual relevance at all to determining what good governance and the morally justifiable use of community force would be, or even that these are appropriate ways of looking at the problem. While others offer reasons, help us to revise and encourage us to change our views, it is we who have done the creating and endorsing, justifying ideals independently of what anyone thinks or says. That frees us from *any* constraint of supposing a need for describing what others think. Nothing in the nature of concepts or language stops us.

I believe this gets us to understanding Dworkin's moral component to law. Because, if we find that in fact a significant number of people accept the alpha/beta account, we

can engage with them in the construction of this ideal by constant revision – interpretation and reinterpretation – with the added advantage of efficiency that we are, at same time, engaged in its implementation. And so, although it looks as if, in arguing about ‘the nature’ of ‘law’, a degree of ‘conceptual description’ is required, in fact any notion that description is involved is illusory. Any reference to what another person thinks is an unnecessary (but frequently very important) part of the process. Of course, that is consistent with people finding that they share a great deal of the ideal and so will not go back to the very start of deliberations; they will – obviously – begin at the stage at which they agree.

Interpretation for Dworkin therefore represents something close to the end product of moralizing with others who are largely in agreement and who endorse true propositions of morality; that means his theory of law derives from direct moral proposals – of universal application – concerning equality and freedom. It is, I think, an implicit sense that this is what Dworkin is really doing – that spurred many critics to say his work is not ‘objective’. They sense an unconstrained ‘subjectivity’. But, the phenomenon of interpretation is no more than that of arguments involved in reconstructing the ideal and, since such arguments involve the use of reasons, such judgments cannot be a matter of ‘whim’ or arbitrary feeling. It further helps to understand that the ideal *incorporates* the convictions of others. This follows from the moral principle of equality and is best exemplified in democratic legislation. A person who believes that others are entitled to equality of respect must respect the opinions of others, not merely because they may be right – which is one reason for respecting the views of others – but even in cases where *s/he knows* the other’s view is wrong. Part of respecting the convictions of others is that those people, equally to you, have a right that their convictions are taken into account. We must not confuse strength of conviction, and expression of firm belief, with the rightness of belief. Even more important is that it may be *right* that the convictions of others count, not only when these convictions conflict with our/their own beliefs, but also when such convictions are *wrong*. So facts ‘figure’, and crucially, in the ‘interpretive’ account of law but only because they are embedded in moral judgments about the moral status of those facts. Facts therefore do not constrain moral judgments; rather, they are part of them.

And this account of how facts are not ‘significant in themselves’ is well supported by what Mark Greenberg (Hershowitz) says in two articles about the metaphysics of facts (‘How Facts Make Law’ and ‘Hartian Positivism and Normative Facts’). His argument is that one cannot explain empirical facts wholly in empirical terms and that something outside empirical truth is necessary. That leaves the way open for saying that values are in there somewhere giving significance to what would be otherwise the mere empirical facts of legal practice (whatever that would be), an argument congenial to Dworkin’s theory.

Other writers included in these two volumes, I think, fall into the ‘fact’ trap. Christopher Eisgruber (Hershowitz), a distinguished American constitutional lawyer who is largely sympathetic to Dworkin’s account, argues that Dworkin cannot explain the ‘extraordinary rigidity’ of the US Constitution, in particular the way that entrenched provisions of the Constitution conservatively constrain judges by imposing the ‘dead hand’ of the past (‘Should Constitutional Lawyers Be Judges?’). But he builds his argument on a categorical distinction between ‘history’ and ‘substance’. For Dworkin, there is no categorical distinction between the two – there is no way of

identifying historical facts about the Constitution distinct from its moral substance (the argument of ‘fit’ for him is only another form of argument of ‘substance’). The only arguments are moral arguments and Eisgruber does not develop the idea that entrenched positions can be explained morally, in terms, for example, of the protection of democratic decision-making. James Fleming (Hershowitz), although also sympathetic to Dworkin’s project, shows a similar lack of firm appreciation of this point (‘The Place of History and Philosophy in the Moral Reading’). Echoing Justice Breyer a little, he thinks that history usefully prevents ‘utopian’ or, as he calls them, ‘off-the-wall’ interpretations. He and Eisgruber have much to say that is sensible, however. They both think, for example, that Justice Scalia’s arguments for ‘originalism’ are arguments of substance rather than history, but they do not seem to be able to apply it across the board to their own judgments about Dworkin’s work.

So law is a form of moralizing (in the form of, in his words, ‘an argumentative attitude’) that is also an integral part of democracy. If we genuinely believe in equality of respect, we naturally end up with endorsing representative democracy, which means legislative activity through delegated agency. It is not just that the legislature represents my view through legislation but, merely in its existence, it expresses my conviction that I respect others equally. Since I do, I must allow that their convictions count, too, and so I must abide by whatever the procedural outcome is of this respect I owe to others.

However, viewing legal argument as interpretive moralizing rather than as (it might be put) ideal moralizing may obscure the relationship between integrity and justice (and fairness). Interpretivism advocates a way of ‘seeing’ concepts, apparent from human practices, *through* values. To view the process as interpretive encourages participants of practices not to ‘fix’ meanings or purposes but to engage constructively in producing a moral outcome in the resolution of disputes. (Not that it is just about dispute resolution so much as understanding that certain of our practices can only be understood evaluatively.)

Rebecca Brown (Hershowitz), another distinguished American constitutional lawyer, clearly understands Dworkin’s theory this way (‘How Constitutional Law Found its Soul: The Contributions of Ronald Dworkin’). She argues that the theory provides a credible account of American constitutional history, and her special commendation of Dworkin is that his reading of the Constitution is (morally) optimistic. She says that Dworkin’s theory of constitutional interpretation includes within its reach the question of the substantive rights of the individual to liberty, contrary to John Ely’s rejection of substantive values, and contrary to the doctrines of originalism (Justice Scalia’s version) and majoritarianism. Any supposed tension arising between procedural and substantive rights, she says, arise only from acceptance of similar ‘false dichotomies’. Unlike Eisgruber and Fleming, she does not see history itself a constraining factor, only part of the moral picture.

*Interpretivism and legal positivism.* The general theme of the article by Scott Shapiro (Ripstein) is that Dworkin was wrong until *Law’s Empire* where he introduced ‘theoretical disagreement’ (‘The “Hart-Dworkin” Debate: A Short Guide for the Perplexed’). This idea manifests itself when ‘legal participants’ disagree, not about what the law says, but about ‘the proper method’ for finding out what the law says. Shapiro thinks that theoretical disagreement poses a ‘pretty powerful’ problem for legal positivism because it cannot be reconciled with any *convention* for settling such disputes (and so none of the usual defenses of legal positivism work)

Well, was Dworkin wrong before and then ‘came right’? Let us go back to the ‘disagreement’ constituting the controversial ‘hard cases’ in Dworkin’s famous article (‘The Model of Rules’, 1967: 35 *Chicago L.R.* 14). What argument is there for supposing that such disagreement did not include ‘theoretical disagreement’? If it did include principles such as ‘one must use an adequate interpretive method’, and there is no reason to suppose that Dworkin excluded principles such as these, Shapiro cannot be confident that Dworkin’s theory was defeated by the early critique (or defense of Hart) of his work. That critique centred upon various permutations of the idea that the controversial areas of argument were either non-legal or legal in some indirect sense. So, the controversial areas were not law (‘hard’ positivism), or they ‘included’ law by virtue of ‘incorporation’ because judges are ‘legally’ obligated to apply morality in them. Since this line of criticism assumes that disagreement in hard cases could not concern theoretical disagreement, it assumes that legal positivism is right. As Dworkin said in his original article ‘legal positivism cannot inveigh itself in its own support’. And so the pre-*Laws Empire* critique is just as wrong then as it is now and the only thing that changed was that Dworkin later devised a means – interpretivism – for explaining what he earlier wrote, rightly, but in different terms.

Shapiro’s acceptance of theoretical disagreement does not – surprisingly – dissuade him from positivism because, he says, law consists of ‘social facts’, and the best interpretation of those social facts is the one that ‘best harmonizes with the objectives of that system’. The objectives of the legal system will be what the ‘designers’ of the legal system sought to achieve ‘regardless of the moral palatability of their ideology’. And so, he argues, legal positivism is rescued because, true, there can be ‘theoretical’ disagreement about the appropriate methodology for interpreting what designers sought to achieve. Since the designers’ objectives could be evil, he says, ‘it would by no means be a necessary truth that law reproduces the demands of morality’. But Shapiro does not justify his resolution of theoretical disagreement as opposed to Dworkin’s way of doing it – which is to consider the moral merits of the method – and which he discusses in detail in Chapter 5 of *Law’s Empire* entitled ‘Conventionalism’.

John Gardner (Hershowitz) attacks Dworkin’s legal theory in the belly, by claiming that Dworkin is actually a legal positivist (‘Law’s Aims in *Law’s Empire*). He argues that because interpretation requires first identifying the legal practice to be interpreted, the identification of legal practice, even according to Dworkin’s own theory, is independent of aim and purpose. He says of the theory, ‘if judges are to have the aim, on behalf of the law, that law be morally justified, there must be possible morally unjustified legal norms for them to have and pursue this aim...’. This very clear attack on Dworkin demonstrates the misunderstanding I have outlined in supposing that Dworkin’s interpretivism requires a mixture of ‘descriptive’ facts of legal practice and moral judgments. In Dworkin’s theory, the point is that one can not *see* the practice except through the lens of morality; the facts are not there independently to constrain. As I put it earlier, facts are only there through their moral status; they are moral propositions in the interpretive story (or they have no moral status within that story). Descriptivism of Gardner’s sort is just old-fashioned linguistic philosophy. Try it. Without aim, purpose, etc., there is only a shared describable concept whose core is very thin – the lowest common denominator of what is common to natural lawyers, legal positivists, ‘realists’, laypeople and the plaintiff and the defendant. Rather, the focal meaning for Dworkin ‘makes best sense’ of that thin common concept



by asserting a moral conception of law. (That does not remove the possibility of discussing wicked legal systems – they are within the thin concept – and socio-logical conceptions for these are available.)

Shapiro's and others' will to believe in legal positivism needs explanation. A large part of it arises from the abundant use of conventions in legal systems and, I suppose, the feeling that these can not all be dissolved into morality, which is not, ultimately, conventional. But, no one would deny that conventions are part of morality. Promising, as a social practice, for example, is driven by conventions. But whether promises should be kept is, in any given case, controlled by the moral reasons for accepting those conventions. So what should move us to insist on legal conventions as identifiable as a matter of non-moral social facts? That it is just, descriptively, *how things are*? No, because even if it were the case in our legal system, it is certainly not the case in the pure Islamic legal system whose conventions arise, it is generally believed within those systems, from God. (One could ask now whether legal positivism, in this descriptive form, is intended to be descriptive of only non-natural law based systems; but legal positivists are adamant that their theories are universal and non-parochial.) Do positivists regard pure Islamic legal systems as only on the 'edge of description'? I doubt it.

David Dyzenhaus's 'The Rule of Law as the Rule of Liberal Principle' takes a line similar to Shapiro's. He, too, is bitten by the descriptive bug. He says that Dworkin's legal theory is 'theoretically inadequate and politically suspect' because it is 'parochial' in relying on 'features of legal systems' that are 'entirely contingent'. On the other hand, he says, legal positivism can easily distinguish general theories of law from particular theories of adjudication. Part of the charge of 'parochialism' lies in Dyzenhaus's further claim that Dworkin relies on a marked division of function between the legislature and the judiciary. Dyzenhaus says that positivists do not need such an account because everything for them is 'shot through' with discretion. But, as I have argued, Dworkin's legal theory sits very neatly within his theory of democracy. And, if we must get descriptive about it, descriptively, good democracies are associated with distinguished judiciaries.

One of the problems is that the 'parochial' argument fails to respect the difference between universal and general theories. Since Dworkin's theory of law is moral, its judgments are universal: it is a universal moral legal theory. Only someone who thought his theory was descriptive could suppose that 'generality' was Dworkin's aim. By 'generality' Dyzenhaus means, as is common, that there are, in fact, legal orders in existence, which Dworkin's theory, because it is one of democracy, and adjudication, cannot explain.

Perhaps Jeremy Waldron (Hershowitz) is also swayed by what I have called descriptivism ('Did Dworkin Ever Answer the Critics?'). He thinks it is a challenge to Dworkin's 'descriptive optimism' that the facts of the American legal system could make it impossible to give an overall account of American law that would remain true to integrity. Presumably with tongue in cheek he specifies that he wants a genuine argument for integrity for otherwise 'the two parts of Dworkin's theory – the clever constructivism and the portentous theory of integrity – sail past each other' and there will be just a clever lawyer's argument that is basically pragmatic. But, as I have said there is no such tension between 'facts' and moral 'optimism' as he appears to envisage. The 'facts' are either incorporated into the argument that *makes for* integrity or they are discounted. There is the possibility that the American legal system

has become so dysfunctional that no moral case for integrity can be made for it, but that seemingly remote possibility would not be an embarrassment for Dworkin's theory. Waldron's comments seem to imply a version of the Gardner argument that there are facts that determine law independently of interpretation. And so it has the general form of: 'Imagine a legal system where integrity might not apply; what then?' Dworkin's reply can only be – and it *is* his reply – that 'We cannot be sure, before we look', because nothing in his legal theory requires that all legal systems display integrity.

*Moral convictions and objectivity.* I sense that those who perceive a tension between facts and moral substance in Dworkin do so because they are slightly skeptical about the status of having moral convictions. For example, Waldron says that Dworkin does not answer Duncan Kennedy's skeptical claim that there could not be a *correct* resolution of principles even where there is competition rather than conflict (Kennedy 1986). Waldron is too subtle to think that demonstration of correctness would be necessary – as many do. Nevertheless, he thinks that where a judge is faced with two possible yet contradictory interpretations of legal practice, the judges should not choose the interpretation that applies their 'own moral and political convictions'. I personally do not see what else they could apply. These are convictions, not whims, and – as Dworkin has repeatedly and rightly made clear – even where there is nothing else but one's own convictions to follow, no one thinks that it means those convictions are right. Yet Dale Smith (Hershowitz) appears to have the same sorts of doubt as Waldron because he supposes that Dworkin's idea of justice is unclear since (he says) it depends on 'recognizable' principles of justice ('The Many Faces of Political Integrity'). He must be right to think that the idea of what is 'recognizable' is just 'obscure'. But, none of the moralizing in which Dworkin engages as I see it depends upon 'recognizable' principles of justice, although it is true that convictions he has about justice are shared by a large number of people. To turn that argument back on Smith, why should a principle of justice have to be 'recognizable'? For principles of justice will surely gain moral recognition – if they do – because they have force independent of recognition. Someone has to do the recognizing first.

Susan Hurley (Hershowitz) bypasses these sorts of concerns in her useful discussion on coherence ('Coherence, Hypothetical Cases, and Precedent'). She defends Dworkin against a claim by Kenneth Kress that Dworkin cannot give a coherent account of law in situations where there is an intervening judicial decision between a set of facts that ground litigation and the litigation itself (Kress 1984). Does the judge decide in accordance with the previous law, or the 'intervening' law? Hurley less easily than she might have concludes that if the intervening decision is right, then there is coherence, and so no problem is created; and if it is wrong, it is a mistake, and need not count (although, it may have created further rights, say, to reasonable expectations being met, which will cohere with integrity). And so she sees the problem in terms of overall moral coherence untrammelled by worries about 'descriptive facts' (which, for his argument to work, I deduce Kress must have taken the intervening decision to be). So, she usefully broadens the picture by pointing out that coherence is determined as much by hypothetical facts, those that test the limits of principle (and which judges often use), as they are by judicial decisions.

*Wicked legal systems.* It should be obvious that nothing in Dworkin's theory requires abandoning the history or anthropology of wicked legal systems. His theory is compatible with the central propositions of Hart's theory that law should



be treated as conventional, because that is a theory that clearly has a moral point (again, see *Law's Empire*, Chapter 5). So – contrary to Shapiro – there is no need to talk in terms of ‘the Hart–Dworkin debate’, especially as they barely debated these questions. The debate should instead concern the theoretical question of the identification of the conditions according to which propositions of law are true. That debate is important because it concerns, amongst other matters, our moral obligation to conform to *law*. And so, while it is right that we move away from the ‘Hart–Dworkin’ debate, it would be wrong to move from questions concerning the identification of law, because these are at the core of our moral obligations to the community.

Dyzenhaus, who seems influenced by the conventional view of the ‘Hart–Dworkin’ debate, keeps emphasizing the ‘problem’ of the case of the ‘evil legal system’. (‘In sum, the wicked legal system seems an effective counterexample to a liberal model of law’.) It is true that there will be occasions when the law requires something the moral force of which grates with a judge’s personal convictions. There will therefore be occasions when it may be morally right for the judge to lie – where justice trumps integrity. But, I do not see how any of this affects Dworkin’s theory unless, yet again, one supposes that some descriptive fact defeats the moral judgment. Both the systems of apartheid and Nazism contained elements of good that could be put to use through ‘public articulated consistency’ (or integrity in *Law's Empire*). Since these systems regularly enforced equality in some spheres, *and* morality says that the racial classifications are wrong, then the laws promoting the immoral policies can be made out as dysfunctional, perverted or even mistaken and, so, not creative of moral obligations. However, if there is no articulated and public structure that, as Dyzenhaus says, ‘citizens have been encouraged to obey and treat as a source of rights and duties’, it is difficult to see what is left. (Not unsurprisingly there is a Fullerian flavour to this point.) Where there is such a semblance of law, of an articulate public structure of rights and duties, citizens’ acquiescence forms something of a legitimizing base, which, incidentally, Fuller called the ‘external morality’ of law.

*Law's Empire* answers these sorts of question more easily through the ideas of interpretation and integrity. Integrity is a different virtue from justice and so, according to the theory, a judge may be faced with a balance between his view of what justice requires and what integrity requires. Both integrity and justice have their roots in equality and so integrity disappears when equality disappears. There is not, as Dyzenhaus supposes, such a thing as a legal system that has no justice but is full of integrity; if a legal system is (as it were) low in integrity it nevertheless has *some* equality, and that means some justice. So a ‘publicly articulated structure’ is likely to have some legitimacy.

Further, Dworkin’s theory requires not just morality to be part of legal argument but there has to be a fair consensus on morality. It has to be a consensus of conviction as to the *right* moral principles and so a ‘mere consensus’ is insufficient because everyone can be mistaken (and presumably that scenario is that envisaged by the ‘wicked legal system’). So, Dyzenhaus cannot be right when he concludes that, because consensus is sufficient for Dworkin, ‘his theory of the rule of law is contingent on judges’ finding themselves in a legal order in which the substantive principles are not badly out of line with liberal morality’. No, the matter is conceptual, not contingent. Dworkin’s conception of law is that *right* morality is necessary to law and so judges will always find themselves in a legal order in which there is liberal morality.

At the risk of being repetitive, the possibility of an illiberal ‘legal system’ is not a counter instance. They *are* ‘legal systems’ – language is easily sufficient to explain them – but they are *not* counter instances.

Dworkin’s theory of law attempts to make moral sense of our rough consensus of what law is by proposing a conception of law – integrity – that is argued for chiefly on what that conception, if generally shared, would contribute to the stock of human good. The way to criticize (at this level of ‘theoretical’ disagreement) is to engage with the arguments of value. Ultimately, this is what Dyzenhaus does, although only at the end of his paper after some largely irrelevant skirmishing with Dworkin’s earlier work. Dyzenhaus, in Dworkin’s terms, is an interpretivist positivist, or a conventionalist in the sense in which Dworkin discusses that possible conception of law in his chapter entitled ‘Conventionalism’ in *Law’s Empire*. I suspect, however, that Dyzenhaus’s remarks concerning the parochial character of Dworkin’s morality that he is not really convinced by the idea that there are right moral convictions. In which case, he will, like Waldron, have difficulties in seeing how one interpretation might be preferred to another.

If he does not have these difficulties, Dyzenhaus needs more argument than he provides to establish such propositions as that the ‘visibility’ of conventionally identified law will lead to the establishment of standards to call rulers to account. Hart, for example, thought that certainty – his term for ‘visibility’ – only created the conditions for criticism of the rulers, not the standards of criticism to be used. It is a well-known argument that ‘visibility’ and ‘certainty’ are compatible with a cruel efficiency, too, as Hart himself pointed out when, in criticism of Fuller’s ‘inner morality’ of law, he said that there could be an ‘inner morality’ of the art of poisoning, or the construction of torture racks.

*The ideal of integrity.* However, Dworkin must allow that, by making best sense of an existing legal practice, we may still conclude that the practice failed the ideal. Take the fugitive slave acts. What should judges do when, making best sense of the law, it appears to them that they are legally bound to send captured slaves back to the South? This outcome represents a serious conflict between integrity and justice. It is important to understand Dworkin’s position here. A positivist would put that distinction merely as representing the distinction between what *legal justice* requires and what *real justice* requires. But this is not how Dworkin sees it. The relevant ideal here is the ideal of *integrity*; it is through bad *legal* argument that one fails to meet that ideal, and it is bad because it has not made maximal use, in the circumstances of actual practice, what that actual ideal of integrity requires. So interpretivism produces an *ideal*, but it is not the outcome that would be the best in all possible worlds, which is how we ordinarily think of ideals. But maybe this does not particularly matter. We have the ideal solution in integrity and this differs from the ideal solution in justice. (Both have their roots in equality; both, as Dworkin says, are part of the ‘geodesic dome’, all components of which keep the dome aloft.) This comports well with what Scott Hershowitz says. In his careful examination of the idea of coherence in Dworkin, he argues that judicial integrity requires more than merely following precedents. Its virtue, he says, lies in its engagement with history (104). At times, both fairness and efficiency require following precedents, but integrity is different, although it will serve both those values as well. Nevertheless, the ideal of integrity appears to be constrained by existing practices in a way that the ideal of justice is not. Or, by its nature, it seems, interpretation is only possible within the existing world, which suggests it is not an

ideal at all. A cruder way of putting this point is that ‘making the best sense of existing legal practices is no more than adequately characterizing equity deficits, that is to say characterizing how far these practices fall short of the ideal.

The exploratory essay by Sanford Levinson (Ripstein) on what he thinks are problems in Dworkin’s theory of integrity promises the most by way of criticizing that theory (‘Hercules, Abraham Lincoln, the United States Constitution and the Problem of Slavery’). He engages with the political value of integrity directly by considering how Dworkin’s theory is able to cope with those dramatic cases where the law appears to say one thing but justice another. He focuses on three examples, saying that because slavery was at the heart of the Constitution, slavery is the test of Dworkin’s theory. The first is the fugitive slave law. The second is the so-called Missouri compromise itself, which divided America into the slave and non-slave owning zones. The third concerns the question of whether Lincoln was legally entitled through presidential proclamation to liberate slaves in the course of the civil war. In each, it is the stark contrast between the requirements of both justice and integrity that is brought out in a way that could represent something more than a competition of geodesic values. Levinson is right to say that Dworkin never endorsed the principle that ‘legal justice should be done though the heavens fall’ and that following law can produce ‘sub-optimal’ solutions. While that does not make Dworkin a positivist (because the ‘sub-optimal’ can still be a moral solution) it means that the integrity as a value must be addressed directly. Perhaps it is just that Dworkin thinks, in the long run, the good of the community will be enhanced when judges adhere to integrity or as Levinson says in the context of the fugitive slave law, ‘Given that the “just end” of the Constitution is preservation of the Union, it rather easily follows that the fugitive slave law should be upheld if one believes that it is, in fact, instrumental to that goal.’

Dale Smith (Hershowitz) makes similar sorts of point, in his searching essay. Perhaps, by adhering to ‘checkerboard’ solutions that represent a compromise in the community, in the long run, there will be better justice, he argues, concluding that Dworkin faces a ‘dilemma’ in showing why checkerboard statutes are morally unjustifiable. Dworkin can reply that the differential treatment meted out by checkerboard statutes violates moral equality somewhere down the line, and not necessarily because they are unfair. Equality grounds integrity, and justice, and fairness and checkerboard statutes are not defeated merely on the ground that they are unfair. Indeed, as Dworkin points out, the checkerboard example is there to show that some other virtue – integrity – is in play in our rejection of checkerboard solutions.

This is fine, and consistent with the ideal of justice, and requires fine-tuning what justice requires and what consistency of decision-making requires. It looks a little like a balance between integrity (consistency with justice) and the ideal of justice, and suggests integrity is a kind of step down from justice. (We could say it is a stage in implementation towards justice, rather than an independent structural component of equality.) Perhaps this is OK. But if the community’s practices must be viewed on the assumption that people should be treated ‘as equals’, how does that differ from viewing the ideal case in justice, and then fine-tuning the practice, ‘adjusting’ it, to that ideal case as far as is possible? That again sounds as though integrity were a means of implementation. Perhaps putting it in terms of ideal plus supplementation – the correction of ‘equity-deficits’ allows us to dispense with the idea of interpretation altogether.

## 2. *Political Theory*

We may link questions concerning integrity, in particular, to whether it rests on an instrumental value, in crossing to Dworkin's political theory. In his subtle consideration of how Dworkin views political obligation, Stephen Perry (Hershowitz) argues that Dworkin's theory of associative obligation – the idea that a decent community is a community of equal concern – is a matter of non-instrumental, that is, 'intrinsic' value ('Associative Obligations and the Obligation to Obey the Law'). One aspect of that equal concern for Dworkin lies in his argument that law displays 'integrity' in 'speaking with one voice' to all members of that community. In Perry's view, associative obligation correctly establishes a 'general' obligation to obey law, because purely instrumental or pragmatic justifications will only found obligations towards particular laws. But then Perry thinks that Dworkin's general account of associative obligations is problematic because it includes obligations of the instrumental kind, such as those we might have to the university, or to our company. In his response, Dworkin says his view is that associative obligations arise from equality of concern, and these are not necessarily relationships of intrinsic value. In fact, he thinks that our legal obligations are owed to the community rather than the collective entity (the 'state') that represents it. Further, he thinks it wrong of Perry to suppose that a general obligation to obey the law is owed to the community as opposed to its members. Dworkin regards that obligation as owed to the members of the community, not to the entity (the 'state') that represents it.

A problem with writing anything critical on Dworkin's work is that its scope and complexity requires careful exegesis first. In his chapter on equality of resources, Arthur Ripstein barely has time for much more than the exegesis, although his description of its complexities is nevertheless most impressive. Nevertheless, he mounts a damning criticism of so-called 'luck egalitarianism' ('Liberty and Equality'). 'Luck egalitarians' attack equality of resources because they think economic markets distort the idea of freedom. If your 'circumstances' – how you happen to be – are not your fault, the community should step in to help, full stop. Ripstein shows how Dworkin uses that idea of luck in a different way, locating it within the demands of justice, the 'key idea' being that people must accommodate their use of resources to their fair shares. This is right. Dworkin believes our freedom is dependent on a conception of a community in which we should jostle along fraternally with others, equally free. To him, our moral life is 'parametered' through the sensitivity of our choices to others. That is why he uses familiar economic devices to provide a metric of sensitivity in the form of moral conditions for ownership (the auction), transfer (the ideal market) and compensation (hypothetical insurance). Through these, he argues, we can generate schemes of compensation and taxation. After Ripstein's careful summary, one wonders why the 'luck egalitarians', particularly Jerry Cohen, who presses for compensation for 'expensive tastes' and professes a Marxist egalitarian ethic, do not grapple more directly with Dworkin's arguments against equality of welfare (Cohen 1989). It seems puzzling that a Marxist egalitarianism would premise responsibility on merely factual statements about choice, since, popularly at least, pure communism required jostling along with comrades plus subordination to the collective. And poor people being taxed to provide for someone's devotion to truffles or opera sounds far removed from 'each according to his need'

(although, that would make sense in the wildly implausible situation where a person just ‘happened to be’ *addicted* to truffles). The underlying explanation for ‘luck egalitarianism’ might be a general distrust of markets. But Dworkin’s market is an ideal – a description of the ‘perfect’ market – and, as described, incorporates egalitarian principles right through.

A paper on Dworkin’s views on the sanctity of life, by Benjamin Zipursky and James Fleming (Ripstein), again provides a nice overview, this time of secular sacredness and its connection with our rights and responsibilities (‘Rights, Responsibilities, and Reflections on the Sanctity of Life’). Particularly useful is their distinguishing the American constitutional law arguments (the *Roe v. Wade* debate) from the purely moral. They see, too, the power in the idea that both of these debates turn on the question of the weight to be attached to the same values, common to each side. The major values are the value of life just in itself, detached from any question of rights, and the value of that life as derived from the question of any rights that the life-bearer has. Dworkin argues that to have a right, the right-bearer must at least have an interest that the right would protect, and that gives us the idea that it might be possible to value the life of an early term fetus without getting tied up in knots about whether it has rights. That kind of thinking, Zipursky and Fleming say, shows that Dworkin writes in the spirit of toleration, contrary to Michael Sandel’s criticisms of Dworkin that he promotes the idea of the anti-community ‘unencumbered self’ (Sandel 1996). But, as Zipursky and Fleming point out, Dworkin’s justifications for procreative autonomy and the right to die rely on the idea that sacredness is important. ‘The right to choose’ is not the promotion of selfishness, but part of the idea of personal conviction and conscience and so Dworkin does not make ‘autonomy arguments alone’. The argument turns on the question about who decides matters of personal conscience, and the state will have a duty to protect that choice but at the same time provide the conditions under which that choice is exercised responsibly. Thus they conclude that Dworkin’s argument, rather than ‘relying on a strong conception of neutrality’, shows concern with the role of community coercion towards questions concerning intrinsic value.

Nevertheless, they are not so taken by the liberty of conscience argument. They argue that Dworkin does not distinguish adequately between conduct and belief. It is a denial of conscience, they say, to prohibit someone to have a belief that there is a right to die, but it does not follow that it is a violation of religious freedom to fail to recognize that right. They think that this possible vulnerability in Dworkin’s arguments shows that he primarily relies on protecting autonomy, and that this leaves space for arguments justifying prohibition of assisted suicide on other grounds, such as protecting the vulnerable from coercion, a ground that does not appear to violate liberty of conscience. But both Zipursky and Fleming think that what is attractive about Dworkin’s account is the idea that autonomy is not a license to do what one wants.

In sum, these two volumes are impressive in the scope and depth of their scholarship. Both are particularly strong on the philosophical problems that face anyone engaged in legal practice at all levels and in all legal systems. It is a mark of Dworkin’s extraordinary originality, intelligence, clarity and the amazing consistency of his insights, that such a distinguished group of scholars have been stimulated

to produce work of such depth on such a broad and difficult range of questions, most, I should add, raised by Dworkin himself.

*Faculty of Laws  
University College London  
London WC1H 0EG, UK  
s.guest@ucl.ac.uk*

### *References*

- Cohen, J. 1989. On the currency of egalitarian justice. *Philosophy and Public Affairs* 99: 933.
- Hershowitz, S. 2006. *Exploring Law's Empire. The Jurisprudence of Ronald Dworkin*, ed. S. Hershowitz. New York: Oxford University Press.
- Kennedy, D. 1986. Freedom and constraint in adjudication: a critical phenomenology. *Journal of Legal Education* 36: 518.
- Kress, K. 1984. Legal reasoning and coherence theories: Dworkin's rights thesis, retroactivity and the linear order of decisions. *California Law Review* 72: 369.
- Ripstein, A. (ed.) 2007. *Ronald Dworkin*. New York: Cambridge University Press.
- Sandel, M. 1996. *Democracy's Discontent: America in Search of a Public Philosophy*. Cambridge: Harvard UP.