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## ESSAYS

### THE DEBATE THAT NEVER WAS

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In September 1994, Professor Ronald Dworkin presented a new paper at the NYU Colloquium in Legal, Political, and Social Philosophy. Earlier that year, the second edition of Professor H.L.A. Hart's *The Concept of Law* had appeared, which now included as a postscript an edited version of an unfinished manuscript that Hart had left at his death.<sup>1</sup> Hart's Postscript (as it came to be known) was Hart's response to Dworkin's work. In part, the Postscript addressed Dworkin's arguments from the late 1960s and early 1970s that had directly discussed Hart's claims in the book.<sup>2</sup> But it also addressed Dworkin's own theory of law, developed in the 1970s and early 1980s and, most fully and systematically, in *Law's Empire*, which appeared in 1986.<sup>3</sup> The paper that Dworkin presented at the Colloquium, entitled *Hart's Posthumous Reply*,<sup>4</sup> was a rebuttal of Hart's claims in the Postscript. This was an exciting development: Dworkin's manuscript cir-

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<sup>1</sup> H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (with a Postscript edited by Penelope A. Bulloch and Joseph Raz).

<sup>2</sup> Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted in RONALD DWORIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1978) [hereinafter TRS]; Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972), reprinted as RONALD DWORIN, *The Model of Rules II*, in TRS, *supra*, at 46. Hart's Postscript devotes one section to these criticisms of Hart's theory. See HART, *supra* note 1, at 254–65.

<sup>3</sup> Dworkin's overall view is not stated in one place. The earliest statement of his own theory of law is in RONALD DWORIN, *Hard Cases*, in TRS, *supra* note 2, at 81, followed by RONALD DWORIN, *Constitutional Cases*, in TRS, *supra* note 2, at 131; RONALD DWORIN, *Taking Rights Seriously*, in TRS, *supra* note 2, at 184; RONALD DWORIN, *What Rights Do We Have?*, in TRS, *supra* note 2, at 266; RONALD DWORIN, *Can Rights Be Controversial?*, in TRS, *supra* note 2, at 279; RONALD DWORIN, *The Forum of Principle*, in *A MATTER OF PRINCIPLE* 33 (1985) [hereinafter MOP]; RONALD DWORIN, *Is There Really No Right Answer in Hard Cases?*, in MOP, *supra*, at 119; RONALD DWORIN, *How Law Is Like Literature*, in MOP, *supra*, at 146; RONALD DWORIN, *On Interpretation and Objectivity*, in MOP, *supra*, at 167; RONALD DWORIN, *How to Read the Civil Rights Act*, in MOP, *supra*, at 316; and RONALD DWORIN, *LAW'S EMPIRE* (1986) [hereinafter LE]. The bulk of Hart's Postscript discusses aspects of Dworkin's own theory of law developed in these publications, including Dworkin's claims about the nature of legal theory, see HART, *supra* note 1, at 239–44; the nature of legal positivism, see *id.* at 244–54; constructive interpretation, see *id.* at 263–68; the role of morality in the explanation of legal rights and duties, see *id.* at 268–72; and the responsibilities of judges, see *id.* at 272–76.

<sup>4</sup> Ronald Dworkin, *Hart's Posthumous Reply*, 130 HARV. L. REV. 2096 (2017).

culated rapidly and widely, in spite of the fact that, back then, dissemination of manuscripts relied on photocopier and postal service, or even fax.

### I. DWORKIN AND HIS CRITICS

To understand why this was exciting requires some background. The publication in 1967 of Dworkin's *The Model of Rules* had set off a fierce debate between Dworkin and a large number of critics. Dworkin's target in that paper was legal positivism, which he defined as a family of theories that purport to explain obligation in law by appeal to the existence of a set of special standards that meet a social test of pedigree: for example, that they have been endorsed by some institution.<sup>5</sup> Dworkin contended that such theories cannot adequately account for the role that certain unenacted moral principles play in grounding legal rights and obligations.<sup>6</sup> This failure, he argued, led the theories to conflate the use of moral judgment in judicial reasoning (a core judicial duty, given the role of principles) with judicial creation of new legal rights and duties to which litigants are retroactively held (which would be a gross violation of that duty).<sup>7</sup> In part, Dworkin framed the discussion as an attack on Hart's theory, which he considered the strongest version of positivism then available.<sup>8</sup> Dworkin's critics from that period sought to defend positivism. They, too, often focused on Hart, framing their arguments as a defence of Hart's (or a Hartian) theory, either by developing responses that they claimed to be available to Hart or by suggesting modifications to Hart's theory that they claimed to be capable of preserving the general positivist outlook that Hart championed and of making the modified theory immune to Dworkin's criticism.<sup>9</sup> Because of its framing, the relevant scholarship came to be known as the "Hart-Dworkin debate," though of course it was in fact a debate between Dworkin and his numerous critics, since Hart did not reply to Dworkin at that time.

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<sup>5</sup> See Dworkin, *The Model of Rules*, *supra* note 2, at 17–18.

<sup>6</sup> See *id.* at 35–46.

<sup>7</sup> See *id.* at 32–40. For Dworkin's earlier discussion of discretion, see Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 637 (1963). Dworkin returns to the subject in DWORKIN, *Hard Cases*, *supra* note 3, at 84–85.

<sup>8</sup> In *Social Rules and Legal Theory*, which appeared shortly after the publication of *The Model of Rules*, Dworkin further developed and defended these claims against some early objections. Moreover, he argued that, in addition to Hart's theory of law, Hart's general explanation of obligation in terms of social practices, on which the theory of law critically depends, also fails. Dworkin, *Social Rules and Legal Theory*, *supra* note 2, at 861–68.

<sup>9</sup> See RONALD DWORKIN, *A Reply to Critics*, in TRS, *supra* note 2, at 291, 294–368; RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (Marshall Cohen ed., 1984); Dworkin, *Social Rules and Legal Theory*, *supra* note 2, at 868–90.

Following the early pair of articles that sparked the debate, Dworkin embarked on the development of a novel conception of law, which came to be known as interpretivism. Dworkin's new work attracted enormous interest, with each new publication met by a flurry of fresh commentary and criticism. However, the tenor of the debate had now shifted. Dworkin's new work made scant reference to Hart,<sup>10</sup> and the same is true of the responses it elicited.<sup>11</sup> Instead, the discussion was now dominated by distinctively Dworkinian themes: the idea of interpretation and the conception of law modeled on it, the value of principled consistency, Dworkin's various novel analytical devices including the pre- and post-interpretive stages of the process of identifying legal rights and duties, the dimensions of fit and justification of the test that a successful interpretation must meet, his model judge Hercules and the determinacy of law, and so on.<sup>12</sup> Critics sought to undermine the new theory directly, with the usual philosophical tools: raising issues about the conception's initial plausibility, its explanatory power, its internal consistency, or the tenability of its implications.<sup>13</sup> The debate was no longer about a newcomer's challenge to Hart's es-

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<sup>10</sup> See DWORKIN, *The Forum of Principle*, *supra* note 3; DWORKIN, *How Law Is Like Literature*, *supra* note 3; DWORKIN, *How to Read the Civil Rights Act*, *supra* note 3; DWORKIN, *Is There Really No Right Answer in Hard Cases?*, *supra* note 3; DWORKIN, *On Interpretation and Objectivity*, *supra* note 3; see also LE, *supra* note 3 (developing interpretivism in book-length form). It's quite clear from Dworkin's work that, after his early pair of articles that directly engaged Hart's work, his attention shifted elsewhere. In *Law's Empire*, the legal theories that he discusses and argues against at length are (in his taxonomy) pragmatism and radical skepticism, both of which were highly influential in the United States at the time. LE, *supra* note 3, at 76–86, 95, 147–64, 220, 225–26, 230–38, 266–75, 372–73. By contrast, analytical positivism such as Hart's, presented as a detached, nonnormative elucidation of the concept of law, mostly serves in the book as an illustration of a threshold failure that Dworkin discusses under the rubric of “the semantic sting” (the view that meaningful disagreement about the truth of a proposition is possible only against a background of agreement about what would make the proposition true; the view implies that genuine disagreement about the grounds of law is impossible). *Id.* at 31–46.

<sup>11</sup> JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 194, 204, 209 (1994); JOSEPH RAZ, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra*, at 261; Larry Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 *LAW & PHIL.* 419 (1987); Larry Alexander & Ken Kress, *Against Legal Principles*, 82 *IOWA L. REV.* 739 (1997); John Finnis, *On Reason and Authority in Law's Empire*, 6 *LAW & PHIL.* 357 (1987); Ken Kress, *The Interpretive Turn*, 97 *ETHICS* 834 (1987) (reviewing LE, *supra* note 3); Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 *CALIF. L. REV.* 369 (1984); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 *STAN. L. REV.* 871 (1989); Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 *S. CAL. L. REV.* 453 (1987) (reviewing MOP, *supra* note 3). As before, Hart did not enter the fray.

<sup>12</sup> See, e.g., RAZ, *The Relevance of Coherence*, *supra* note 11; Finnis, *supra* note 11; Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, *supra* note 11.

<sup>13</sup> See, e.g., RAZ, *Authority, Law, and Morality*, *supra* note 11; RAZ, *The Relevance of Coherence*, *supra* note 11; Finnis, *supra* note 11; Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, *supra* note 11.

established view or even to other variants of legal positivism.<sup>14</sup> For the most part, it had now evolved into a contest about the merits of Dworkinian interpretivism in its own right.

It is nonetheless widely thought that the work produced in this longer phase extends and continues the earlier debate between Dworkin and his critics, in which Hart's work was an object of contention. Indeed, the standard view is that the two phases are continuous, parts of one long-running "Hart-Dworkin debate" that went on to dominate legal theory for decades, and which may well do so to this day.<sup>15</sup>

In view of Hart's continued silence, the lack of engagement with Hart's theory in Dworkin's work from the 1970s onward, and the content of the critical reactions to that work, we shouldn't take the suggestion of a continuous "Hart-Dworkin debate" literally. A variety of factors, however, may contribute to a sense of continuity. It might be natural for Hart's followers to read Dworkin's new work, which kept appearing as his thought developed, through the prism of its implications for Hart's work. On this approach, Dworkin's new theory raised new challenges for Hart's project, which in turn meant that a retooling of the defences developed in the past was required.<sup>16</sup>

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<sup>14</sup> Some of the critics defended such variants, though not all did. Professors John Finnis and Michael S. Moore both defend versions of natural law theory. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

<sup>15</sup> Writing in 1998, Professor Scott Shapiro says that "[t]he debate between the Dworkinian and Hartian camps . . . has been the story of analytical jurisprudence for the last thirty years." Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469, 476 (1998). Professor Brian Leiter, writing in 2003, says that "[f]or three decades . . . much of the Anglo-American legal philosophy curriculum has been organized around something called the 'Hart-Dworkin debate.'" Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 17 (2003). Leiter mentions the hitherto unpublished rejoinder by Dworkin, but says he will not discuss it because it is "not for quotation." *Id.* at 17 n.3. (Leiter refers here to the draft that Dworkin presented at the NYU Colloquium, which was marked "draft," from which Leiter may have inferred that it is not for quotation.) Leiter has expressed skepticism about the debate's enduring significance. His view that we should move on is based on his belief that Hart's responses in the Postscript were successful, making Hart the "victor" of the debate. *Id.* at 18; see also Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century* (Univ. Tex. Law Sch., Pub. Law & Legal Theory Working Paper No. 70, 2004), <https://ssrn.com/abstract=598265> [<https://perma.cc/E6B7-TUXU>]. That view does not seem widely shared. Shapiro surveys the state of play again, forty years since the debate's inception, and finds that certain key issues remain outstanding. See Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 35-43 (Arthur Ripstein ed., 2007). Eight years after Shapiro's 2007 essay, Professor Scott Hershovitz finds that the debate continues to dominate jurisprudence and proposes a way to move beyond it. See Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1162-63, 1167 (2015).

<sup>16</sup> Shapiro argues in this vein. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *supra* note 15, at 41-43. It is not clear whether Professor John Gardner endorses this view about the relation between the development of Dworkin's theory of law and Hart's original claims. See John Gardner, Book Review, 121 LAW Q. REV. 329 (2005) (reviewing NICOLA

This approach to the “Hart-Dworkin debate” does not suppose that the named principals did, or even meant to, engage with one another, but only that their theories do so engage. It uses the idea of a debate as a philosophical fiction, a mere device contrived for the purpose of organizing theoretical claims around some question perceived to be interesting or fundamental, regardless of whether those who endorse the claims are aware of the question or consider it relevant. So understood, a debate between two theorists exists when they each defend views that imply competing answers to the key question.

The obvious candidate in this case would be the question about the role of morality in the explanation of law.<sup>17</sup> For Dworkin, the law is, in its nature, a moral phenomenon. In *Hard Cases*, which launched his distinctive program, he said that legal rights are a subset of political rights.<sup>18</sup> Political rights are moral rights that obtain in civil society and are profoundly related to political institutions.<sup>19</sup> Political rights so understood include legal rights, whose content depends on the practice of institutions and which are enforceable on demand by the courts.<sup>20</sup> Their institutional dependence implies that, while legal rights are genuine moral rights, they differ from nonpolitical moral rights because they are subject to moral constraints appropriate to enforcement.<sup>21</sup>

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LACEY, A LIFE OF H.L.A. HART (2004). Some of Gardner’s remarks are consistent with supposing that, in developing his interpretivist theory of law, Dworkin was ultimately looking to refine and improve upon his original attack against Hart’s claims. *See id.* at 333.

<sup>17</sup> Shapiro’s hypothesis is that the point of contact between the two sides is the phenomenon of theoretical disagreement, accounting for which remains outstanding for Hart’s side. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed*, *supra* note 15, at 43. But that phenomenon matters to the (notional) debate primarily to the extent that Dworkin exploits it to reject the possibility of detached theory and instead motivate his preferred substantive, moralized conception of law (as Shapiro effectively admits, *id.*).

<sup>18</sup> DWORKIN, *Hard Cases*, *supra* note 3, at 87 (“[J]udicial decisions enforce existing political rights.”); *id.* at 89 (“The rights thesis supposes that the right to win a law suit is a genuine political right . . .”).

<sup>19</sup> *Id.* at 93 (“Any adequate theory will distinguish, for example, between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution.”).

<sup>20</sup> *Id.* at 87 (“[J]udicial decisions enforce existing political rights . . . [I]nstitutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment, because institutional history is part of the background that any plausible judgment about the rights of an individual must accommodate. Political rights are creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions.”); *id.* at 101 (“The rights thesis provides that judges decide hard cases by confirming or denying concrete rights. But the concrete rights upon which judges rely must have two other characteristics. They must be institutional rather than background rights, and they must be legal rather than some other form of institutional rights.”).

<sup>21</sup> RONALD DWORKIN, *Political Judges and the Rule of Law*, in MOP, *supra* note 3, at 9, 11–12. On this view, legal rights, defined as rights to some decision by the courts, are directly connected to enforcement. Other political rights are indirectly so connected. For example, the right to some legislation is a right to enforcement at one remove: it’s a right that government take ap-

They also differ from the rights that we would have if institutional history were different, so it is always appropriate to distinguish between the question what such rights exist, given the actual history of institutions, and what rights should exist; that is, what rights would exist in some ideal alternative world where institutional history has taken a different, better course.<sup>22</sup>

Legal rights so understood obtain ultimately in virtue of certain principles of political morality that make institutional practice morally significant.<sup>23</sup> In Dworkin's conception, institutional practice matters because of the moral urgency of constraining the use of the collective coercive power of government. In civil society, we are all vulnerable to demands that others place upon us, and it is vital that the collective power to enforce such demands be limited in a way that respects the fundamental equal dignity of all.<sup>24</sup> Dworkin's hypothesis is that this moral requirement can be met only when coercive force is used in a way consistent in principle with government's other actions. It follows, Dworkin contends, that legal rights are those rights that bear such a relation to institutional practice as to make it the case that their enforcement would meet the requirement of principled consistency.<sup>25</sup> In Dworkin's interpretivist vocabulary, interpretation identifies the relation that particular legal rights bear to institutional practice that satisfies this condition.<sup>26</sup>

Dworkin's conception is thus fundamentally antithetical to any view that purports to explain the grounds of legal rights or obligations (that is, to say in virtue of what more basic facts legal rights or duties obtain and to explain how they do so) without appeal to moral factors.<sup>27</sup> Hart's theory is one such view. Accordingly, in attacking

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appropriate action so as to make some right enforceable on demand. RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 406 (2011).

<sup>22</sup> DWORIN, *Hard Cases*, *supra* note 3, at 87, 101; DWORIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 21, at 408 (on the dynamic character of the morality of institutions).

<sup>23</sup> See DWORIN, *Hard Cases*, *supra* note 3, at 106–13.

<sup>24</sup> Ronald Dworkin, Keynote Address, *Justice for Hedgehogs*, 90 B.U. L. REV. 469, 476–77 (2010) (“There is a striking difference between personal and political morality. I said that we as governors, we in our political role, must treat each of us in the governed with equal concern. I don’t believe we have that responsibility as individuals to one another. Something must account for the difference. What accounts for the difference, I believe, is a fact I’ve already mentioned: politics is coercive. We are all in a position to be harmed by others in a way that would not be licensed by personal morality. We’re in that position because we’re part of a political union.”).

<sup>25</sup> DWORIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 21, at 407–09; LE, *supra* note 3, at 93–96, 134.

<sup>26</sup> LE, *supra* note 3, at 94.

<sup>27</sup> One example is the positivist view that, as a conceptual matter, “the existence and content of the law . . . [is] a matter of social fact,” which Professor Joseph Raz endorses and also attributes to Hart. RAZ, *Authority, Law, and Morality*, *supra* note 11, at 194. Dworkin’s conception is even more obviously antithetical to positivism if the latter is defined in terms of a claim about the conditions of validity of a set of special legal standards, one example being the claim that legal validi-

Dworkin's theory, Dworkin's various critics may be understood implicitly to support Hart.

## II. DWORKIN'S THEORY OF LAW'S GROUNDING

Hart's followers have long resisted Dworkin's assertion that morality plays a fundamental role in the explanation of legal rights and obligations. Hart himself joined them, even if only posthumously. It is, however, doubtful that the role of morality that Hart's side has been denying is the one that Dworkin asserted. To see this disparity, we need to consider more closely how exactly Dworkin understands moral principles as grounding legal rights and obligations. Early in *Law's Empire*, Dworkin poses the question of grounds thus:

Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic. These more familiar propositions furnish what I shall call the "grounds" of law. The proposition that no one may drive over 55 miles an hour in California is true, most people think, because a majority of that state's legislators said "aye" or raised their hands when a text to that effect lay on their desks. It could not be true if nothing of that sort had ever happened; it could not then be true just in virtue of what some ghostly figure had said or what was found on transcendental tablets in the sky.<sup>28</sup>

Dworkin's question of grounds invites us to think about the relations between legal facts and more basic, nonlegal facts in virtue of which the former obtain. As Dworkin points out, it seems obvious that the law is related in such a profound way to certain institutional facts. After all, the fact, if it's a fact, that no one may drive over 55 miles an hour in California couldn't obtain if no statute was enacted or no other fact "of that sort" had ever obtained.

Recognizing this kind of fundamental dependence of legal facts on social facts about institutions raises further questions. How do institutions shape the law? How is it that, when California legislators said "aye" when some text was put before them, people's normative situation changed in some way? What exactly about the actions of legislators matters to the law and why? Why should institutional action, as a kind, bear on the law in the first place? Why should it matter that some institution said or did something in the past, when we face the

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ty depends on a standard's source rather than its merit. See John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 214 (2001). For Dworkin's conception denies the existence of a set of special standards that make up "the law." Dworkin, *Social Rules and Legal Theory*, *supra* note 2, at 886; see also Nicos Stavropoulos, *Legal Interpretivism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist> [<https://perma.cc/7ZNN-VHFH>].

<sup>28</sup> LE, *supra* note 3, at 4.

question of what we ought to do now, or what demands government may currently enforce on people? There are importantly different answers to these questions, and the uncontroversial thesis that the law depends on institutional social facts does not discriminate among them.<sup>29</sup>

We can put Dworkin's answer, which appeals to the morality of coercion, this way: while legal facts depend on and vary with institutional social facts, the explanation of how this dependence works is ultimately moral.<sup>30</sup> Certain facts of political morality explain how it is that, by taking actions such as passing a statute or deciding a case, political institutions make the law as it is. In this explanation, the moral facts are basic: the question of why the actions of institutions matter takes priority over the question of how they make the law. It is the background moral reasons that favor the actions' having some specified role as determinants of (enforceable) rights that confer upon the

<sup>29</sup> Professor Gideon Rosen notes that a claim that the world couldn't be different in legal respects without also being different in social respects (a claim that the former supervene on the latter) fails to discriminate between importantly different positions. Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in MODALITY 109, 113–14 (Bob Hale & Aviv Hoffmann eds., 2010). Rosen says that this failure illustrates the philosophical need for explanatory accounts of constitutive determination or grounding. See *id.* at 116–17. Professor Mark Greenberg shows that accounts of the nature of mental contents restricted to relations of supervenience between mental and metaphysically more basic facts conceal various interesting possibilities, including the possibility that normative facts might play some role in the fundamental explanation of the mental. Mark Greenberg, *A New Map of Theories of Mental Content: Constitutive Accounts and Normative Theories*, 15 PHIL. ISSUES 299, 300, 311–14 (2005). Professor Kit Fine argues that grounding explanations go beyond modal connections between *explanans* and *explanandum*. Kit Fine, *Guide to Ground*, in METAPHYSICAL GROUNDING 37, 38 (Fabrice Correia & Benjamin Schnieder eds., 2012); see also Kit Fine, *Essence and Modality: The Second Philosophical Perspectives Lecture*, 8 PHIL. PERSP. 1, 3 (1994) (arguing against assimilating essence to modality); Kit Fine, *Ontological Dependence*, 95 PROC. ARISTOTELIAN SOC'Y 269, 272 (1995) (on the need for a nonmodal characterization of dependence).

<sup>30</sup> See, e.g., LE, *supra* note 3, at 93–96 (“The law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort. They are therefore ‘legal’ rights and responsibilities. . . . Each conception [of law] furnishes connected answers to three questions posed by the concept. First, is the supposed link between law and coercion justified at all? Is there any point to requiring public force to be used only in ways conforming to rights and responsibilities that ‘flow from’ past political decisions? Second, if there is such a point, what is it? Third, what reading of ‘flow from’ — what notion of consistency with past decisions — best serves it? The answer a conception gives to this third question determines the concrete legal rights and responsibilities it recognizes. . . . [L]aw as integrity . . . supposes that law’s constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does. Integrity’s response to the third question — its account of the character of consistency with past political decisions that law requires — is correspondingly different from the answer given by conventionalism. It argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification.”).



actions the specified role and thereby explain the actions' having that role.<sup>31</sup> Legal interpretations, on this approach, model the operation of this moral mechanism: they are moral explanations that run from institutional and other social facts to legal rights and duties.<sup>32</sup>

Dworkin's hypothesis is easy to miss, or to mistake for a very different one. The standard question in legal theory asks: does the law ultimately depend only on institutional social facts or do moral factors also play some fundamental role?

The standard question is almost always understood to raise certain theoretical possibilities that do not include Dworkin's hypothesis. On one side, moral factors play no role whatsoever. On the other, the possibility that we are to consider is *not* that moral factors might explain how institutions make the law as it is. Instead, we are to consider whether morality might be a separate, noninstitutional source of law. It might be that, in addition to the rights and duties made by institutions, moral factors separately contribute some further rights and duties or restrict, extend, or otherwise process those produced by institutional action. On this familiar picture, morality might filter out evil laws or fill in gaps in other laws produced by institutions, or otherwise help make laws so produced better cohere with each other.

If *that* is the possible place of moral factors in the fundamental explanation of law, there is no point querying how institutions modify legal rights and duties. We can treat it as common ground among theories on either side of the divide that, whatever the answer to the question of how institutions shape the law, it is nonmoral. Theories that fall on one side say that that is the only kind of explanatory mechanism at work. Those that fall on the other assume that mechanism as basic, but postulate a separate moral mechanism that operates in tandem with the institutional one.

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<sup>31</sup> Specifying the role requires resolving questions about how different factors combine to determine the law. For a discussion of hypotheticals where different aspects of constitutional intention pull in different directions, see DWORKIN, *The Forum of Principle*, *supra* note 3. Dworkin argues that such conflicts may only be resolved by appeal to principles of political morality that determine exactly how each aspect may bear on the law. *See id.* at 35–38, 53–55.

<sup>32</sup> It should be uncontroversial, though it is not well understood, that, in appealing to moral facts, Dworkin aims to explain how institutional facts determine the law. It may remain controversial whether he is thereby committed to the view that legal rights and obligations are (a certain subset of) the moral consequences of institutional history. *See* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1301–03 (2014) (arguing that, according to *Law's Empire*, while the relation between institutional actions and the law is a moral one, the law is the principles that justify those actions rather than the moral obligations that obtain in virtue of the actions); Hershovitz, *supra* note 15, at 1197–98 (arguing that, while in his early work Dworkin understood that the normative role of legal and other social practices is to be explained in terms of those practices' ordinary moral and prudential consequences, he subsequently lapsed back into thinking of law and morality as related, though distinct, normative domains).

This understanding of the territory therefore encourages suppressing the question of grounds in a way that favors one side. Since everyone agrees that institutional social factors somehow determine at least part of the law, it makes sense to concentrate theoretical attention on the only matter in dispute: whether morality might constitute a further genuine source of law. On this approach, the question becomes one of boundaries: does the law extend only to the content contributed by institutions, or does it also include the content separately contributed by morality?<sup>33</sup>

There is, however, an obvious and important alternative that suppressing the question of grounds has concealed: that, rather than postulating the existence of noninstitutional law, the claim that moral factors play some role in the fundamental explanation of law is instead a hypothesis about how institutions shape the law. (An example would be Dworkin's hypothesis that institutional history matters morally, and that the specifics of why it matters explain how its impact on the law obtains.)

Now if *this* is the postulated role of morality, the possibilities raised by the classic question are very different. The idea that institutions shape the law in ways that can be understood without appeal to moral factors represents only one side of the divide, rather than an unexamined background commitment shared by both. It has now become a controversial hypothesis that needs to be articulated and defended. On the other side, we have the view that moral factors explain how it is that the history of institutions can affect legal rights and duties: on this view, such factors give the history its grounding role.

If we understand moral explanations of law in this way, theories of law on either side of the social/moral divide offer competing grounding explanations that run from institutional history to the law. Both now postulate a single mechanism, by appeal to which they each purport to explain the whole of the law. The alternative understanding of moral explanations therefore allows for genuine disagreement between the

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<sup>33</sup> Readers of the early stages of the "Hart-Dworkin debate" will recognize the tendency to convert any suggestion that morality might play some role in legal theory into a suggestion that the boundaries of law are wider than previously thought. Does the law only contain rules? Or does it contain, in addition, principles? It is doubtful that early Dworkin was advancing a hypothesis about boundaries. However, he has conceded that his writing encouraged the misconception that he did. See RONALD DWORKIN, *JUSTICE IN ROBES* 234 (2006). The tendency persisted: Raz presents Dworkin's mature, interpretivist conception of law as the thesis that the law includes norms that would have been produced by hypothetical directives, if issuing such directives would be justified by reasons that justify some or all actual directives. See RAZ, *Authority, Law, and Morality*, *supra* note 11, at 204, 209; Nicos Stavropoulos, *Obligations, Interpretivism and the Legal Point of View*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 76, 89–90 (Andrei Marmor ed., 2012).

two kinds of theory and a clear way forward: we now need to settle how the history of institutions makes the law as it is.

Dworkin's work, at least from *Hard Cases* onwards, is best considered from this perspective.<sup>34</sup>

### III. HOW A DEBATE THAT NEVER WAS CAME TO BE

During his lifetime, Hart took virtually no part in the debate that bears his name, which, by the time the Postscript appeared, had been running for some twenty-seven years. He did not respond to Dworkin's early pair of papers that discussed his own work. He turned his attention to Dworkin's later work on the nature of law on only a few occasions, and did so both briefly and cautiously.<sup>35</sup> For the entire period from 1967 to 1994, the "Hart-Dworkin debate" existed only in a highly figurative sense: Hart was not a participant, and for the most part the debate did not directly engage his work.

With the appearance of the Postscript and Dworkin's prompt response, we finally got a genuine debate between the named principals of the "Hart-Dworkin debate": a direct, sustained, and forceful response to Dworkin's work by Hart, followed by a systematic and equally forceful rejoinder by Dworkin.

Soon after the Colloquium at which Dworkin presented his paper, most of us with an interest in legal philosophy had a copy.<sup>36</sup> It was discussed in seminars and placed on reserve in libraries for the use of students. It was taken into account in the avalanche of commentary on the Postscript then being written and in other work.<sup>37</sup> Dworkin was an author who went quickly to press, and this was a paper on the

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<sup>34</sup> Dworkin firmly rejected the hybrid view imputed to him (that institutionally produced law is enhanced by moral standards). Cf. Dworkin, *Social Rules and Legal Theory*, *supra* note 2, at 886 (on the idea that the law is a mix of rules and principles). He also insisted that theories of law such as Hart's, which appeal exclusively to the actions and psychology of agents, slide from claims about what people did or said or thought to claims about what the law requires or permits, without explaining how the former kind of fact grounds the latter. See Dworkin, *supra* note 4, at 2099–100, 2103–04. Both positions are directly entailed by the claims I attribute to him in the text. As a bonus, his impatience with questions of boundaries will make perfect sense this way.

<sup>35</sup> In the Postscript, Hart says that he "fired a few shots across the bows" of his critics, HART, *supra* note 1, at 238, and cites four articles (all of which have a broader subject) that include remarks on Dworkin, as well as a brief comment on a draft of *Law's Empire* that Dworkin had presented at a conference, *id.* at 238 n.2. In all cases his remarks are extremely guarded. Hart's timidity in relation to Dworkin's theory of law contrasts sharply with his forceful engagement with some of Dworkin's work in core political theory. See H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 836–46 (1979).

<sup>36</sup> In the years before email was common, Dworkin's assistant routinely mailed hard copies of all papers presented at the Colloquium to a long list of scholars based outside New York City. Those of us on the mailing list then made further copies for others.

<sup>37</sup> See, e.g., Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 LEGAL THEORY 249, 254 nn.14–15 (1998).

hottest subject in the field in a long time. In the usual course of events, the paper would have appeared in print within a few months.

This time was different. Soon, Dworkin had second thoughts. From the outset, he had doubts about the quality of the manuscript that had become the Postscript and he wondered whether Hart had been satisfied with it. He hints at these concerns in his response to the Postscript and in other work.<sup>38</sup> He was more direct in conversation. His worry was that the material in the Postscript fell short of the familiar, exceptionally high standard of Hart's previous work. Although the text was polished and the exposition as lucid as one could expect, in substance the work was weak. Dworkin was worried by what he felt was an inadequate response to the challenge posed by the question about the grounds of law introduced early in *Law's Empire* and the place of morality in the interpretive conception of law that constitutes Dworkin's answer to this question.<sup>39</sup>

He was also troubled by Hart's late embrace of inclusive positivism as a way of making sense of moral argument in adjudication. This is the thesis that moral factors may, but need not, play a role in the explanation of legal rights and obligations: if they do, it is in virtue of some fundamental social fact about what people did or said or thought, such as a social practice that constitutes a Hartian rule of recognition, which assigns them that role. If so, social facts retain explanatory priority over moral ones, which, on this view, is the core commitment of all forms of legal positivism.<sup>40</sup> On this view, equality, freedom, and fairness bear on the content of legal rights and duties in the United States, in virtue of the fact that their relevance is recognized in the settled practice of U.S. officials. Dworkin considered that view almost transparently indefensible, as he explains in his response, and he thought it mysterious that Hart could have come to endorse it.<sup>41</sup> He also had other concerns about Hart's grasp of the issues about the nature of law that divided them, including Hart's claim that his

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<sup>38</sup> See DWORKIN, *supra* note 33, at 233 & nn.14–15; Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 17 (2004).

<sup>39</sup> Information that became available much later vindicates Dworkin in his assessment that Hart's responses were weak and lends support to Dworkin's suspicion that Hart may not have been satisfied with the draft that he left at his death. In her biography of Hart, Professor Nicola Lacey shows that Hart remained unsure to the end about how to respond to Dworkin's arguments in *Law's Empire*. See LACEY, *supra* note 16, at 335. Gardner concurs that Hart's attempts to deal with basic questions about the character of philosophical explanation were not very successful and that "his final replies to Dworkin seem frail and defensive." Gardner, *supra* note 16, at 333.

<sup>40</sup> See JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 108 (2001); Jules L. Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703 (1991).

<sup>41</sup> Others more sympathetic to Hart's project agree with Dworkin on this matter. See Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1, 17 (2004); Shapiro, *On Hart's Way Out*, *supra* note 15, at 487–502.

thesis that social practice is the ultimate foundation of law would stand even if it turned out that most lawyers in fact accepted Dworkin's interpretivist theory of law.<sup>42</sup>

Dworkin thought that Hart's manuscript should not have been published and gradually leaned toward the view that, now that it had been, publishing a point by point rebuttal would have been unkind to Hart, who would have no opportunity to respond.

Dworkin dithered for a long time but publication remained on the cards. A few years later he confirmed that he intended to publish "a substantial response" to the Postscript in the near future.<sup>43</sup> To my knowledge he never made a firm decision either way and eventually lost the draft. He was unable to provide a copy when, many years later, I couldn't locate mine and discovered that everyone else seemed also to have lost theirs: he said that his original electronic file was lost when his hard disk failed. (I am grateful to Dr. Luís Duarte d'Almeida, who sent me a scan of the manuscript that had somehow come into his possession.)

It is ironic that, just like Hart's response to him, Dworkin's rejoinder should end up being published posthumously.<sup>44</sup> Publication now has a very different character than it would have had in Dworkin's lifetime. Dworkin's reservations about the quality of the Postscript are now moot. Notwithstanding any weaknesses, the Postscript has acquired a prominent place in the canon of jurisprudential scholarship as representing Hart's final view. Some of its responses to Dworkin's views are widely considered successful and have been further explored by other writers.<sup>45</sup> There is no doubt that the Postscript will continue to attract scholarly attention, and rightly so. The challenges posed by

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<sup>42</sup> Dworkin revisits this issue in Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1657, 1660-62 (2002) (reviewing COLEMAN, *supra* note 40).

<sup>43</sup> DWORKIN, *supra* note 33, at 65. Some ten years later, Dworkin wrote a very different paper about Hart's Postscript on the occasion of a Hart Memorial Lecture. Dworkin, *supra* note 38. There is little overlap between that paper and the hitherto unpublished response. In the 2004 paper, Dworkin uses some themes from the Postscript (in particular, Hart's insistence that his theory of law is descriptive of legal practice and neutral among substantive legal controversies that arise in the practice) as an occasion for introducing the problem about the nature of philosophical explanation of political concepts that commanded his attention at the time. *Id.* at 5-18. For Dworkin these include the concept of law, and he uses a hypothetical case to illustrate how any legal theory, including a theory such as Hart's, cannot hope to be neutral but of necessity favors some or other side in actual or hypothetical legal disputes. *Id.* at 3-5, 19-23. For the most part, the paper discusses the classic political concepts such as liberty, equality, or democracy, and fleshes out Dworkin's anti-Archimedean ideas that he later developed at length in *Justice for Hedgehogs*, *supra* note 24.

<sup>44</sup> The standard caveats apply. Dworkin's draft, as always, was highly polished, with a few minor errors and some incomplete citations. Still, if Dworkin had taken it to press, he might have made changes.

<sup>45</sup> See, e.g., JULIE DICKSON, *EVALUATION AND LEGAL THEORY* (2001); Timothy Endicott, *Are There Any Rules?*, 5 J. ETHICS 199 (2001).

Dworkin's work and questions about the success of Hart's responses, therefore, still matter: even if Dworkin is right that Hart's theory, however revised or reconstructed, ultimately fails, it remains important to see why it does. With the publication of the rejoinder, a new generation of legal philosophers will finally have a complete picture of the single genuine cycle in the "Hart-Dworkin debate" since that debate's inception some fifty years ago.