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Defending Dworkin's One-System Anti-Positivism

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Abstract

In this article, I argue that Dworkin's one-system view of law and morality is not as easy to refute or dismiss as some would suggest. In a recent article, Dindjer criticizes a new kind of opposition to legal positivism characterized by both its opposition to a two-system view of law and morality and its promotion of a one-system alternative picture. By re-examining Dworkin's criticisms of the two-system view and by providing additional reasoning of my own, I show that Dworkin's one-system interpretative approach is not just sensible but also promising in refocusing contemporary debates in general jurisprudence on a moral and political reading of the structural features of law.

Keywords: *Ronald Dworkin; Interpretivism; Legal Positivism*

Introduction: A new kind of opposition to legal positivism

In the article "The New Legal Anti-Positivism," Hasan Dindjer criticizes a "new wave of anti-positivist writing" that is characterized, at least in part, by its opposition to an orthodox two-system view of law and morals.[1] As a result, Dindjer sees this new and distinct kind of opposition to legal positivism as promoting a 'one-system' view of law and morals, a one-system picture that owes much of its notoriety or influence to its most prominent proponent, Ronald Dworkin.[2] Although Dindjer is correct that Dworkin's explicit discussion in *Justice for Hedgehogs* of both his opposition to the orthodox two-system view of law and morals, as well as his 'tree structure' of law as morality, is both "brief and suggestive," I will suggest that a failure to account for Dworkin's full

1. Hasan Dindjer, "The New Legal Anti-Positivism" (2020) 26:3 Leg Theory 181 at 181.
2. See Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011). Dworkin provides a brief autobiographical paragraph on this change in approach to defending interpretivism (*ibid* at 402). Dindjer also attributes a 'one-system view' to other authors. See e.g. Scott Hershovitz, "The End of Jurisprudence" (2015) 124:4 Yale LJ 882; Mark Greenberg, "The Moral Impact Theory of Law" (2014) 123:5 Yale LJ 1118 at 1308; Jeremy Waldron, "Jurisprudence for Hedgehogs" (2013) NYC School of Law, Public Law Research Paper No 13-45 (which highlights a sympathetic reconstruction of Dworkin); Nicos Stavropoulos, "Legal Interpretivism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2021), online: plato.stanford.edu/archives/spr2021/entries/law-interpretivist/. Stavropoulos characterizes the theories of Greenberg and Hershovitz as distinct, but 'related' to his own (and arguably Dworkin's) non-hybrid version of interpretivism (*ibid* at §7).

reasoning for opposing the two-system picture meant that Dindjer's characterization of the 'one-system' view is significantly problematic, and much of Dindjer's arguments end up missing the mark.[3] In this paper, I want to explain Dworkin's account of the "fatal flaw" of the two-systems approach, provide additional arguments in support of his criticisms of this two-systems picture (and the legal positivism that seems to be easier to justify within this picture), and then show the implications of Dworkin's "tree structure" picture for understanding the importance and significance of the structural features characteristic of the legal institutionalization of political morality.[4]

In the first section, I will focus more on Dworkin's explicit reasons for rejecting the two-system view and develop his arguments further. In the second section, I will provide additional reasons of my own (inspired by Winch's regrets about his early influential account of rule-governed social practices) in support of Dworkin's rejection of the two-system picture of law and morals, and then draw out some implications of these arguments for his tree structure view of law and morality.[5] In the third section, I will explain why Dindjer's characterization of the "core commitments" of the one-system viewpoint is problematic as it relates to Dworkin's one-system view.[6] In the process, it will become clear why the "structural features" of law are so crucial to an evaluation of Dworkin's one-system view of law and morality.[7]

1. Dworkin's rejection of the orthodox two-picture view of law and morality

In an autobiographical note in the last chapter of *Justice for Hedgehogs*, Dworkin acknowledges that he had previously attempted to defend interpretivism within the framework of an orthodox two-picture view of law and morals. He states,

> I assumed that law and morals are different systems of norms and that the crucial question is how they interact. So I said what I have just said: that the law includes not just enacted rules, or rules with pedigree, but justifying principles as well. I soon came to think, however, that the two-systems picture was itself flawed, and I began to approach the issue through a very different picture.[8]

He adds that he only became aware of the full significance of his alternative picture and the implications of rejecting the two-system picture with his research for this book. However, he also is aware of the reaction people might have to his own very unorthodox 'tree structure' picture of law as a branch of political

3. Dindjer, *supra* note 1 at 183. For this reason, Dindjer focuses much more on Greenberg and Hershovitz's specific elaborations or versions of a one-system view.
4. Dworkin, *supra* note 2 at 402, 5.
5. See Peter Winch, *The Idea of a Social Science and its Relation to Philosophy*, 2d ed (Routledge, 1990). The first edition of the book was published in 1958, and the regrets expressed by Winch are found in the Preface to the second edition.
6. Dindjer, *supra* note 1 at 184.
7. *Ibid* at 199.
8. Dworkin, *supra* note 2 at 402.

morality. He states, "We have replaced this with a one-system picture. . . . Many readers will think that I have finally pressed my ambition to unify value too far: I have indeed become Proscrustes sacrificing sense to a philosophical theory."[9] Thus, his task in this chapter is not just to provide his reasons for rejecting the orthodox two-system picture, but also to provide some reasons for thinking his alternative picture makes sense. In this section, I will explain the orthodox two-system picture and Dworkin's explicit reasons for rejecting it. I will explain how this leads Dworkin to a criticism of analytic philosophy and its emphasis on conceptual analysis. In the next section, I will provide additional support for Dworkin's arguments by considering problems with Hart's second-order 'sociological' approach to conceptual analysis.

Dworkin describes the orthodox two-picture view of law and morals (or "classical view") as presenting law and morals as two distinct systems of norms, with the differences between these two systems being "deep and important."[10] This orthodox view can be seen in the early legal positivism of Austin, who sought to determine the 'province' of jurisprudence by distinguishing positive law (law's commands from a particular political superior at a time and place) from both a positive morality (what passes for morality at a time and place, regardless of its merits) and from the critical morality or true moral standards (the commands of a god as expressed best according to Austin in utilitarianism).[11] Thus, the difference in systems of norms is sometimes described as a difference between a historically and politically constituted set of legal norms and an abstract, objective, and universally valid set of moral norms (or god-given moral commandments or natural laws or categorical imperatives). But it is also clear from Austin there is a significant and important difference between positive law and positive morality; the system of legal norms has its source in the commands of political superiors, while positive morality is not so established by political superiors (having its source in customary practices and other kinds of human superiors).[12]

With Hart's 'sociological' approach in *The Concept of Law* (a sociological approach influenced by Wittgenstein)[13] the key to jurisprudence is to see law

9. *Ibid* at 405.
10. *Ibid* at 400.
11. See John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995).
12. Austin describes the fact that the two classes (positive law and positive morality) are often "blended" but they "differ extremely" (*ibid* at 19). Of course, by "superior," Austin is not referring to any kind of moral superiority or excellence; he is just referring to the "might" or "power" of some people over others (*ibid* at 30). Thus, for example, a religious institution might be a source of positive morality for a people at a place and time.
13. See HLA Hart, *The Concept of Law,* 2nd ed (Oxford's Clarendon Press, 1995); Winch, *supra* note 5. Although Hart does not refer to Peter Winch often in *The Concept of Law* (he explicitly refers to Winch in only two notes, *ibid* at 289, 297), the influence of the later Wittgenstein, as presented in Winch's *The Idea of a Social Science and its Relation to Philosophy*, is clear (at least to me) from Hart's account of rule-governed social practices and its comparisons with language and games. According to Leslie Green, the influence of Winch on Hart is further validated by both the biographer Nicola Lacy and Brian Simpson. Green writes, "Simpson confirms much of what Lacey tells us while bringing a few points into sharper focus. For example, he plausibly argues that Peter Winch had a bigger influence on Hart's methodology than

as a rule-governed social practice (characterized by a union of primary and secondary rules) distinct from other rule-governed social practices like rules of etiquette or rules of grammar or moral practices.[14] As such, law is a system of valid legal norms (some of which impose legal obligations and others facilitate the realization of people's wishes "by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law")[15] that have their source for validity in an ultimate constitutive rule which authoritatively determines some practices as properly legal norm-making and legal norm-applying practices. Thus, 'valid' legal norms are identified by an ultimate rule of recognition (an ultimate social practice of recognition by officials for identifying legitimate or authoritative social/institutional sources for creating and applying legal norms). The ultimate rule of recognition does the work of not just identifying specific valid legal norms but also constituting a distinct 'system' or social practice by identifying properly 'legal' processes and procedures. This system, so identified by this ultimate rule of recognition, is distinct from not only other legal systems (with their own ultimate rule or rules of recognition) but is also distinct from other rule-governed social practices, like rules of etiquette and rules of grammar.[16]

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did Max Weber." Leslie Green, "Jurisprudence for Foxes" (2012) 3:2 Transnational Legal Theory 150 at 151. See also Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2006); Brian Simpson, *Reflections on 'The Concept of Law'* (Oxford University Press, 2011). I agree with the view that Hart's 'sociological approach' was influenced greatly by Winch's book.

14. See Hart, *supra* note 13 at 86. According to Hart, while Austin wrongly claimed to find the key to jurisprudence in the notion of coercive commands, the proper place to look for this key to jurisprudence is in the interplay between two kinds of rules, primary and secondary rules. Hart describes the "structure" that results from the combination of primary rules of obligation and secondary rules of recognition, change, and adjudication as not just the "heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist" (*ibid* at 98).

15. *Ibid* at 27.

16. According to Hart, rules of etiquette and rules for correct speech are more than mere convergences of behaviour (i.e., they are more than merely rule-described practices), they are rule-governed. Hart points to the fact that, "they are taught and efforts are made to maintain them; they are used in criticizing our own and other people's behaviour in the characteristic normative vocabulary" (*ibid* at 86). All this points to the fact that these kinds of social practices are 'normative' practices like law (i.e., both are rule-governed practices). However, Hart argues that it would "misdescribe" these kinds of social practices and the "social situation" to say of these normative practices that they impose "obligation" or "duty" (*ibid*). Hart characterizes obligation in terms of a "figure of a *bond* binding the person obligated" and he characterizes duty in terms of a notion of debt (*ibid* at 87 [emphasis in original]), both of which imply that the social pressure/coercion brought to bear against an individual's own wishes is *believed* to be justified due to the *belief* in the importance of the rules for social life. The belief is from the 'internal' perspective of a committed participant (often exemplified by the perspective of a judge or legal official), and the notion of obligation and duty cannot be fully or adequately characterized without some reference to this internal point of view. In this way, both law and morality are normative systems that can impose 'obligations' and 'duties,' while other normative systems like rules of etiquette, rules of correct speech, or the rules of a game do not (or it would be a misdescription to say that they do). Whether there are other normative systems distinct from both law and morality that could impose obligations and duties (like a religious institution that might also use serious social pressure and believe that its rules are necessary for human life, for instance) is unclear.

Thus, law and morality are two significantly different 'systems' of rules or norms for Hart. They differ primarily in terms of their ultimate source (legal norms have their 'source' for validity in an ultimate rule of recognition or an ultimate constituting and customary practice of recognition by legal officials, while moral norms do not have this source). This also means that these two systems differ in terms of their relation to institutional processes and thus the social practices and beliefs of people at a specific time and place (legal norms are relative to the institutional legal processes determined by people at a specific time and place, while moral norms are not). They differ clearly in their content (there are valid legal norms that are unjust and immoral, but also ones that facilitate the doing of things whether these things are moral or not). Although these differing systems of norms will overlap in content due to certain facts (simple truisms) about our nature and the limited resources of nature itself (Hart famously calls this overlap a "minimum content" that all legal systems and moral systems have in common)[17] and the influence of both the "social morality" and "wider moral ideals" on legal systems is undeniable,[18] the important distinctness of these two systems (whether we are distinguishing positive law from the 'accepted' positive or customary morality or whether we are distinguishing positive law from a 'wider' critical/objective morality) is undeniable too.

The two-system picture of law and morality is made even more definite and mutually exclusive (at least, analytically speaking) by exclusive legal positivists like Joseph Raz and Andrei Marmor. For Raz, the ultimate rule of recognition is:

> the point (one such point) at which—metaphorically speaking—law ends and morality begins. It is the fact that enables us to separate legal from moral facts. . . . Because we can identify a social fact of the judicial recognition of the law by the courts, we can establish that there is a law in a certain country and establish its content even if it is a morally bad and illegitimate system of law. The rule of recognition, being a social fact, enables us to identify the law without recourse to morality.[19]

Both Raz and Marmor characterize this ultimate customary practice as a 'constitutive rule' or an ultimate customary social practice (which is a social fact) that constitutes a distinct system of norms that can be identified as legally valid

17. Hart, *supra* note 13 at 193ff.

18. *Ibid* at 204. Hart states, "The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process" (*ibid* at 203-04). He makes clear his inclusive version of legal positivism even before his later Postscript, when he adds, "In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature, its legislation may yet no less scrupulously conform to justice or morality" (*ibid* at 204).

19. Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 323 at 334. Joseph Raz's exclusive legal positivism sees the rule of recognition as a customary practice of officials that theoretically cannot include any reference to moral principles as criteria for valid law.

independently of moral reasoning and a moral perspective. In other words, both embrace a more extreme version of the Separation Thesis due, in part, to their embrace of what Marmor refers to as the Social Thesis.[20]

The Social Thesis is described by Marmor and Sarch as particularly important in seeing how law is,

> profoundly, a social phenomenon, and that the conditions of legal validity consist of social—that is, non-normative—facts. . . . One way of understanding the legal positivist position here is to see it as a form of reduction: legal positivism maintains, essentially, that legal validity is reducible to facts of a non-normative type, that is, facts about people's conduct, beliefs and attitudes.[21]

Exclusive legal positivists like Marmor and Raz then see the Separation Thesis as a "negative implication" of the Social Thesis: "properly understood, [it] pertains only to conditions of legal validity. It asserts that the conditions of legal validity do not depend on the moral merits of the norms in question. What the law is cannot depend on what it ought to be in the relevant circumstances."[22] Of course, so construed, many inclusive legal positivists (including Hart) would not accept this more extreme version of the Separation Thesis (and Marmor and Sarch both explicitly acknowledge this). But, for our purposes, it is crucial to see that the orthodox two-system picture of law and morals is reinforced by the exclusive legal positivist's emphasis on the Social Thesis: valid legal norms are identified by reference to non-normative and so non-moral facts, while valid moral norms are not. A legal system, consisting of valid legal norms and authoritative processes for creating and applying these valid legal norms, is clearly distinct from morality. Morality represents a significantly different 'vantage point' from which to view legal rules and determine our obligations in relation to them; the vantage point of law is completely independent of this moral perspective.[23]

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20. See Andrei Marmor & Alexander Sarch, "The Nature of Law" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2019) at §1.1, online: https://plato.stanford.edu/entries/lawphil-nature/. Stavropoulos's characterization of 'the orthodox view' fits best with Raz or Marmor's exclusive legal positivism, which emphasizes the Social Thesis and a more extreme version of the Separation Thesis. Stavropoulos acknowledges the orthodox view as reflected in Hart but "developed in its strongest form in Raz 1994." Stavropoulos, *supra* note 2 at §2.

21. Marmor & Sarch, *supra* note 20 at §1.1.

22. *Ibid.*

23. Andrei Marmor, "Law as Authoritative Fiction" (2018) 37:5 Law & Phil 473 at 474. Although this article is reinforcing an exclusive legal positivism with an analogy to fiction, Marmor also makes clear Raz's views on the difference between the vantage point of morality (or even religion) and the vantage point of a specific legal order. He states, "statements about the content of any given law [and claims of legal obligation] can only [be] made and articulated from the vantage point of some particular legal order. . . . You may not have this obligation from a different normative vantage point, such as morality or religion, and you may not have this obligation in a different jurisdiction or according to a different legal system. Furthermore, as Raz famously argued, a speaker who asserts a legal proposition from the vantage point of a given legal order need not endorse that vantage point, normatively speaking; one can make 'detached' statements about what the law in *S* requires or permits without necessarily seeing oneself committed to the normative force of *S*." *Ibid* at 474-75. Such detached statements are purely descriptive of social facts relevant to the determination of valid legal norms in a given legal system. In this article, Marmor also emphasizes the fact that law's saying so makes it so;

Dworkin explicitly rejects this orthodox or classical two-system picture of law and morals. He states that interpretivism:

> denies that law and morals are wholly independent systems. It argues that law includes not only the specific rules enacted in accordance with the community's accepted practices but also the principles that provide the best moral justification for those enacted rules. . . . Interpretivism, in other words, treats legal reasoning as I have argued in this book we must treat all interpretive reasoning. It treats the [doctrinal] concept of law as an interpretative concept.[24]

He will provide a further explanation of his view that law is a branch of political morality (his own tree structure picture) and how legal rights are distinct from political rights; but what is Dworkin's criticism of the two-system picture of law and morals?

The most explicit and obvious argument is made right after his characterization of "the classical view" in his description of "The Fatal Flaw."[25] He describes the 'fatal flaw' in the two-system view of law and morality in the following way: "Once we take law and morality to compose separate systems of norms, there is no neutral standpoint from which the connections between these supposedly separate systems can be adjudicated."[26] If we assume that each system has its own set of norms with its own 'logic' or vantage point for determining its content, then we seem to be required to either treat the question of the "connection between law and morality" (and thus questions about the plausibility of interpretivism versus legal positivism) from either a legally based perspective or a morally based perspective.[27] However, Dworkin argues that each perspective would beg the question of whether interpretivism or legal positivism is correct (and thus provide a 'circular argument' for conclusions about connections between law and morality).[28] It is crucial to see that Dworkin's argument here

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this is a point emphasized by Stavropoulos in his characterization of the orthodox viewpoint. See Stavropoulos, *supra* note 2 at §2.

24. Dworkin, *supra* note 2 at 402. Dworkin states that philosophy treats law as an interpretative concept in the "doctrinal sense we use to report what the law is on some subject," rather than a sociological sense (or, more generally, an explanatory sense characteristic of many of the social sciences) or an aspiration sense (when we celebrate aspects of a legal system like the rule of law) (*ibid*).

25. *Ibid* at 402ff.

26. *Ibid* at 402.

27. *Ibid* at 403. Of course, Dworkin will also consider the possibility of understanding the connection from a meta-ethical or detached sociological/philosophical perspective (one that focuses on "conceptual analysis," *ibid* at 404). Arguably, this detached theoretical or conceptual approach is how many legal positivists would see their own approach or methodology in defending the Separation Thesis.

28. Robert Rodes represents Dworkin's argument in the following way: "The problem with having two systems, as he sees it, is that the question of the relation between them cannot be assigned to either." Robert E Rodes, Jr, "Justice for Hedgehogs", Book Review of *Justice for Hedgehogs* by Ronald Dworkin (2011) 56:1 Am J Juris 215 at 221. He suggests that this argument is like one that would conclude that morality and plumbing represent a single system because moral considerations can figure in the decision making of plumbers in a similar way that they figure in the decision-making of legal practitioners. Rodes sees no problem in separating the legal question/plumbing question (of what part moral considerations comes into legal/plumbing decision-making) and the moral question (or what our moral obligations are with respect to legal and plumbing practices). However, Rodes is not really addressing

assumes the two-picture viewpoint; thus, for the sake of argument, he represents interpretivism and legal positivism as assuming this two-system picture. His own view of interpretivism (in this book and arguably elsewhere) represents a version of interpretivism that rejects this two-system picture and must be understood and characterized as such.

If we assume the two-system view of law and morality, and if we treat this from a legally-based perspective (or a legal vantage point), then whether or not we include justifying principles in our determinations of the content of 'law' would clearly beg the question of whether interpretivism or exclusive legal positivism is more plausible.[29] But how can we have a stance on what the 'law' is on any matter (a stance that is crucial to characterizing a legal perspective or vantage point as a legal one) without presupposing some theory of what constitutes the content of law and how this content is connected (or not) to morality? Some assumptions must be made to characterize the legal vantage point as a legal one, and this involves some assumptions about what determines the 'law' on some matter. To assume that the content of valid law can be determined independently of justifying moral principles in one's characterization of the legal vantage point is already to assume what one is trying to prove or support: namely, the conclusion that exclusive legal positivism is plausible or defensible and that valid law is determinable from a non-normative detached legal perspective. To assume that the content of valid law can be determined by justifying principles but only if these principles are deemed criteria of validity by the ultimate rule of recognition is to already assume what one is trying to prove as well: namely, that the connection between law and morality is a contingent one as understood by inclusive legal positivism. Finally, to assume that the content of valid law must include justifying moral principles in any interpretation of the 'law' on some matter is also to reinforce this basic assumption of interpretivism, rather than provide any independent support for a conclusion on the connection between law and morality. In this way, from a strictly legal perspective or vantage point, no conclusion about the connection between law and morality (or no conclusion about

Dworkin's reasons for why each perspective begs questions about competing theories regarding the connections between law and morality. Dworkin's main point about the circularity of the arguments in each perspective (the legal versus the moral) relate to conclusions about the validity of interpretivism versus legal positivism and how we can support arguments for each assuming a two-system perspective. Rodes' appeal to a "technical (and criterial) element that defines it [the legal or plumbing practice] for most of its practitioners" (*ibid* at 221) assumes as an uncontested truth that legal positivism is the correct theory for defining the legal perspective as such.

29. The mere presence of justifying principles in the U.S. legal system (for example) does not undermine Hart's version of the Separation Thesis, since he acknowledges that justifying principles can be criteria of validity in some legal systems (when so identified by a rule of recognition). In this way, Dworkin's argument here is presented to apply more directly to exclusive legal positivism. However, the way justifying principles figure into the determination of law (i.e., whether they can be identified by a rule of recognition and whether they only come into the picture in penumbral 'hard' cases) differs significantly for Hart and Dworkin. Thus, if the way in which justifying principles function in a legal system must still be assumed in order to characterize the legal vantage point as a 'legal' one, then Dworkin's conclusion still follows for inclusive legal positivism.

the plausibility of exclusive legal positivism versus inclusive legal positivism versus interpretivism) can be supported without begging the question about this connection between law and morality.

However, it is equally circular to approach this question of the connection between law and morality from a moral perspective (again assuming a two-system picture of law and morality). Dworkin argues that, from this perspective, "we beg the question in the opposite direction."[30] How so? Assuming that morality forms a separate and distinct system (with its own logic and its own distinct vantage point on our obligations), how one characterizes the connections between this system and a legal system from a purely moral vantage point can only beg the questions we are trying to prove (about which account of the connection between law and morality, interpretivism or legal positivism, is more plausible). Does morality or political morality require a legal viewpoint on valid law that maintains a Separation Thesis or denies it? If political morality is seen as requiring the Separation Thesis for determining valid law (say, justice is better promoted by the determination of valid law independently of morality), then we are already assuming that valid law can be determined in separation from justificatory moral principles. If political morality requires an appeal to moral principles to determine valid law (and thus legal norms become a subset of moral norms), we are already begging the question of determining valid law with justifying moral principles. If each position is presented as a viewpoint on the connection (or lack thereof) between two distinct systems of morality and law, then there is no way to argue in support of a position from a vantage point that already presupposes a characterization of this connection.

Clearly Dworkin came to see that it is the two-system view of law and morality that is at the heart of a current stalemate in philosophical jurisprudence between versions of legal positivism and anti-legal positivists like himself, a debate that has been going on since Hart proposed his more contemporary version of legal positivism in 1961. If we try to look at what 'fits' legal practice (from a strictly 'legal' perspective, which assumes a two-system view), we cannot provide evidence, in a non-question-begging way, for the truth of legal positivism versus interpretivism or even the truth of inclusive legal positivism versus exclusive versions. Whether we try to look at legal participants' views on their own practice or what their practice indicates about their underlying views, we end up with a diversity of legal participants with a diversity of evidence that could be used to support different theories.[31] How we characterize the evidence and

30. Dworkin, *supra* note 2 at 403.

31. This diversity of evidence can be seen in the diversity of legal participants and the diversity of their views within the law. See Gerald J Postema, "Jurisprudence as Practical Philosophy" (1998) 4:3 Leg Theory 329, wherein Postema criticizes Hart's appeal to the 'internal' point of view (the view of committed participants, often legal officials) as arbitrarily discounting the perspectives of all sorts of 'external' legal participants like Holmes' 'bad' or practical man, an actual malefactor, and even the victims of crime (*ibid* at 338-39). Clearly, many legal positivists must appeal to some theoretical value (or the theoretical value in elucidating a concept) to provide independent support for views on which participants' beliefs and practices are significant or central to understanding the concept of law.

practices as 'legal' already begs the question in favor of legal positivism or interpretivism. And the situation is no better if we look to provide moral arguments (assuming again a moral vantage point or system distinct from a legal vantage point or system) for interpretivism or legal positivism. Thus, "the two-systems picture therefore faces an apparently insoluble problem: it poses a question that cannot be answered other than by assuming an answer from the start."[32]

As a result, analytical jurisprudence, according to Dworkin, has attempted to solve this dilemma by attempting to detach the theorist from both a purely legal approach/vantage point and a purely moral one, and instead emphasize a meta-ethical, second-order philosophical approach, one that focuses on conceptual analysis or the elucidation of the concept of law.[33] From this outside, observer-theoretical perspective, we can "excavate the nature or essence of that concept without making any prior legal or moral assumptions."[34] Dworkin raises questions about how we should understand conceptual analysis in this more detached philosophical approach. He describes Hart's approach in *The Concept of Law* as one where conceptual analysis "consists in making evident the hidden convergent speech practices of ordinary users of the language."[35] But, Dworkin adds right away, "there are no convergent practices to expose."[36] And, of course, according to Hart, the mere converging patterns or predictable regularities, whether in practices or speech, cannot by themself yield the notion of a legal "norm" and legal "obligation" (a notion crucial to understanding a legal system and legal practice).[37] To understand social behaviors as meaningful, we need to see them as more than merely converging or predictable patterns (like making marks on a piece of paper); we need to see them as rule-governed social activities (like voting in an election).[38] Thus, Hart also models his philosophical analysis of concepts on the methods of a descriptive sociology (like that of Winch's version of a Wittgenstein idea of social philosophy)[39] and attempts to describe the rule-governed social practices in a way

32. Dworkin, *supra* note 2 at 403.

33. Winch also emphasized the importance in philosophy of the notion of "elucidating a concept" in Winch, *supra* note 5 at 11. He believes that important theoretical issues pertaining to social practices "belong to philosophy rather than to science and are, therefore, to be settled by *a priori* conceptual analysis rather than by empirical research" (*ibid* at 17). As an example, he states that "the question of what constitutes social behaviour is a demand for an elucidation of the concept of social behaviour" (*ibid* at 18, [emphasis removed]).

34. Dworkin, *supra* note 2 at 404.

35. *Ibid.*

36. *Ibid.*

37. Hart, *supra* note 13 at 83-84.

38. Again, I see Hart's 'sociological' approach as influenced by Winch. Winch himself uses this example of making marks on a paper versus casting a vote; he writes: "What he does is not *simply* to make a mark on a piece of paper; he is *casting a vote*. And what I want to ask is, what gives his action *this* sense, rather than, say, that of being a move in a game or part of a religious ritual. More generally, by what criteria do we distinguish acts which have a sense from those which do not?" Winch, *supra* note 5 at 49 [emphasis in original]. His account of "meaningful behaviour" is an explicit extension to other areas of human action of Wittgenstein's account of what it is to follow a rule in the elucidation of language (*ibid* at 45ff).

39. Winch acknowledges that although philosophical issues do turn on the correct use of linguistic expressions, the "elucidation of a concept is, to a large extent, the clearing up of linguistic confusions. Nevertheless, the philosopher's concern is not with correct usage as such and not all linguistic confusions are equally relevant to philosophy. They are relevant only in

that helps us (the observer legal philosopher) "*understand* [the] understandings" of legal participants.[40]

But can such a detached philosophical perspective yield anything of value by assuming a two-system view of law and morality? Clearly, Dworkin had earlier in *Justice for Hedgehogs* challenged philosophers who appeal to such a 'meta-ethical' stance to approach ethical and moral questions to justify this approach. Although he acknowledged explicitly the value of such second-order, somewhat detached perspectives of the social sciences (like historical, sociological, or psychological interpretations of our moral and ethical life), he also argued that there are "no distinctly philosophical questions of that kind" (unless we count the question of whether meta-ethics is itself a metaethical question).[41] Thus, Dworkin does, in part, rely on his earlier arguments to at least raise suspicions about the value of such a detached, second-order observer-theorist approach for philosophy. But can additional reasons be provided for rejecting this second-order philosophical two-system view on law and morality?

2. Additional reasons for rejecting an observer-philosophical approach that assumes the orthodox two-system picture of law and morals

Let me add more reasoning in support of his view that this detached, second-order observer-philosophical approach is especially problematic with the two-system picture of law and morality. My argument is based on Winch's expressed regrets about promoting a misleading account of rule-governed social practices. I will argue that this misleading account contributed to the orthodoxy of the two-system view of law and morality, and an analysis of why this account is misleading exposes the problems with this two-system picture for understanding 'law' and legal obligation.

In the Preface to the second edition of *The Idea of a Social Science and its Relation to Philosophy*, Winch expresses regret about some passages in the first edition of this book; in particular, he has some regrets about how he characterized

so far as the discussion of them is designed to throw light on the question how far reality is intelligible and what difference would the fact that he could have a grasp of reality make to the life of man." *Ibid* at 11 [footnotes omitted].

40. Postema, s*upra* note 31 at 332 [emphasis in original]. Postema describes both Hart and Raz as adopting a sociological descriptive approach which not only reports facts about participant's beliefs and practices, but also attempts to "*understand* these understandings" (*ibid*). In this article, Postema attributes this phrase "understand these understandings" to Joseph Raz; but it is clear that both Hart and Raz would agree that the task of legal theory involves elucidating and explaining facts about a participant's beliefs and practices (and not merely reporting these facts). The 'observer-theorist' might appeal to meta-theoretic values like simplicity or comprehensiveness or even greater explanatory power (as Hart often does) and the theorist might describe the moral beliefs or values of participants, but it is crucial, on this sociology-inspired philosophical approach to conceptual analysis, to maintain a firm distinction between understanding/explaining a social practice with its distinctive norms and morally justifying it.

41. Dworkin, *supra* note 2 at 67.

Wittgenstein's discussion of rule-following as it applied to language and to other kinds of social practices. Winch states, "unfortunately, I was far from sufficiently careful in the way I expressed the relevance of the notion of a rule, both to language and to other forms of behaviour."[42] For instance, he had claimed that "all behaviour which is meaningful (therefore all specifically human behaviour) is *ipso facto* rule-governed."[43] He argues that this is not the case either for him or for Wittgenstein, and that it encourages a distortive picture of human behaviour. He quotes Wittgenstein's *Philosophical Investigations* at length to explain his mistake. Wittgenstein states that "in philosophy, we often *compare* the use of words with games and calculi which have fixed rules, but cannot say that someone who is using language *must* be playing such a game."[44] Here Wittgenstein is distinguishing the philosopher's use of analogies to understand a social practice (whether this is the analogy of language users and rules of a game or the more contemporary analogy of legal practice and fiction or role-playing) with the committed participant's actual actions and beliefs.[45] It is clear that the analogy is just an analogy; attributing all the characteristics or elements of a game or a fiction to law distorts the actual practice of law.

Again, Winch quotes Wittgenstein at length to raise questions about his initial characterization of social practices as rule-governed (with clearly defined constitutive and procedural rules like those in games). Wittgenstein asks what is the 'rule' by which a language user proceeds and makes a number of suggestions to answer to this question. He asks whether the rule is:

> The hypothesis that satisfactorily describes his use of words, which we observe; or the rule which he looks up when he uses signs; or the one which he gives us in reply if we ask him what his rule is?—But what if observation does not enable us to see any clear rule, and the question brings none to light?—For he did indeed give me a definition when I asked him what he understood by "N", but he was prepared to withdraw and alter it.—So how am I to determine the rule according to which he is playing? He does not know it himself.—Or, to ask a better question: What meaning is the expression "the rule by which he proceeds" supposed to have left to it here?[46]

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42. Winch, *supra* note 5 at xiii.
43. *Ibid* at 51-52.
44. Ludwig Wittgenstein, Philosophical Investigations, 3rd ed translated by GEM Anscombe (Basil Blackwell, 1986) Part I at § 81 [emphasis in original].
45. See Marmor & Sarch, *supra* note 20 at § 1.2. Here, they describe a "growing frustration" with the traditional debate between versions of legal positivism and anti-positivists like Dworkin and one of the "new avenues" to pursue involves exploring connections between law and fiction (*ibid*). Marmor himself explores the analogy between law and fiction to support a two-system picture of law and morality (see e.g. Marmor, *supra* note 23). Other philosophers go further than merely comparing law to fiction and argue that law is best understood as "imaginary," and in this way, contemporary legal science can benefit from "pretense theory—[which] explains and analyses how people act upon a belief that something fictional is the case." Olaf Tans, "Staging Law's Existence: Using Pretense Theory to Explain the Fiction of Legal Validity" (2016) 29:1 Ratio Juris 136 at 136.
46. Wittgenstein, *supra* note 44, Part I at § 82.

This passage by Wittgenstein is relevant since it pertains to an 'observer-theorist' looking at a rule-governed social practice (in this case, the use of language by a language user) from the outside, seeking to 'understand the understandings' of language users. By comparing the use of language by language users to the moves in a game by players (a comparison often made by philosophers), we give the impression not only of a clearly defined set of rules constituting and governing a practice, but also the impression that people are actually following and governed by these clearly defined rules. However, Wittgenstein raises doubts about the meaning of the 'rule' by which a language user or committed participant proceeds (i.e., whether it is the rule that I, the observer-theorist, am attributing to the practice or whether it is the rule a participant says or believes they are following or whether it is the rule that is somehow discernable or expressed in their practice regardless of what they may say or believe). If there is no consensus among committed participants or if committed participants are willing to withdraw or alter their views when questioned, how can we (the observer-theorist) give any meaning to the expression 'the rule by which he proceeds'?

Clearly, legal positivists like Hart and Raz see law as a rule-governed activity comparable to rules of a game; both kinds of social practices consist of a set of valid norms identified as such by an ultimate constitutive rule or constitutive set of rules. This ultimate rule of recognition (which is often construed as a customary practice of recognition by officials and a 'social fact' of the beliefs and practices of officials) is itself a 'constitutive rule' which both governs the practice of officials and constitutes the system of valid legal norms generated by authoritative law-making and law-applying processes. Ehrenberg sums up contemporary legal positivism's view of this ultimate and constituting rule in the following way: "According to Hart and those who follow his general lead, collective acceptance and application of this basic validity rule by key officials determines what counts as legally binding within a given jurisdiction."[47] But is there really some "collective acceptance and application" of the same unambiguous ultimate rule of recognition (or ultimate set of rules) by legal officials in any legal system? If there is a rule that truly governs the customary practice of officials (i.e., the ultimate rule is not a mere regularity or predictable pattern, but a meaningful/rule-governed way of proceeding), how can an observer-theorist in any unarbitrary way decide the 'rule' by which different officials proceed when these officials

47. Kenneth M Ehrenberg, "The Institutionality of Legal Validity" (2020) 100:2 Philosophy & Phenomenological Research 277 at 279. In this article, Ehrenberg is concerned with bringing together Hart and Searle and dealing with a very specific difficulty that might come from attempting to harmonize their views (i.e., Searle's reliance on codification of the constitutive rules for an institutional practice and the ultimate rule of recognition's customary practice status). He believes that this attempt at harmonizing their views is promising since Searle's views on collective intentions for institutional facts might help solve a problem with legal positivism's appeal to the rule of recognition. Thus, Ehrenberg suggests: "The question, which Searle's theory holds out the promise of answering, is how to get from the fact of collective acceptance of the jurisdiction's basic validity rule on the part of key officials, to the normativity of law—its apparently binding character on the rest of us" (*ibid*). Wittgenstein seems to be challenging the idea of 'collective acceptance' of any rule by which participants proceed, including this ultimate constituting rule.

would provide different accounts of this ultimate rule and especially if they are prepared to change their minds when challenged?[48]

Ehrenberg acknowledges that, for "collective acceptance and application" of this basic rule, the basic rule must be the "object of collective intentionality" and "[k]ey legal officials must operate with the same rule in order to have a coherent legal system."[49] He adds that key officials must "follow the rule because it is the rule that the group accepts (although they may also have other reasons upon which they rely, and they need not be fully psychologically self-aware in their use of the rule)."[50] Ehrenberg also distinguishes the differing psychological motives of legal officials with respect to following this basic constitutive rule from the 'content of the intention' in this respect. These qualifications—both acknowledging that some officials are not "fully psychologically self-aware" of the rule that governs their own practice and that different motivations for following the same rule are possible—help to explain some of the differing psychological beliefs, statements, and actions of, for example, different U.S. Supreme Court Justices with respect to the U.S. Constitution and the ultimate sources for validity. But it still does not show that the observer-theorist can unambiguously identify the same content in the ultimate rule of recognition, a content that is collectively intended—and actually used by—different legal officials as a rule for proceeding.

Ehrenberg acknowledges in a footnote that some philosophers (like Dworkin and Adler) "raise doubts" about whether officials actually share the content of this basic validity rule, but he believes that these doubts do not "threaten its status

48. This is especially clear in the U.S. debate over the United States Constitution (which many key officials would claim is the ultimate basis for identifying authoritative law-making and law-making practices and yet even current U.S. Supreme Court justices 'say' and 'believe' very different things about the U.S. Constitution and 'act' differently on these beliefs). Although Raz is clear that the U.S. Constitution, strictly speaking, cannot be the ultimate rule of recognition given the fact that it is subject to statutory amendment: "[M]ost constitutions may be amended or even repealed and replaced by others in accordance with procedures that they themselves provide. This means that they can be amended or repealed by enactment. The rule of recognition cannot be repealed or amended by an enactment. It can change only as the practices that it is changes." Raz, *supra* note 19 at 333). Clearly, the rule of recognition is and must always be for Raz a customary practice of officials (a practice that involves the recognition of the U.S. Constitution as an important source for determining authoritative law-making and law-applying functions); but is this customary practice a mere convergence of behaviours and beliefs or is it itself rule-governed? If it is a mere convergence of practices and beliefs, how can this be the source of a legal duty or legal obligation for legal officials? If it must itself be rule-governed, in what sense is there 'collective acceptance' of some rule discernable in the customary practice and beliefs of diverse legal officials, especially when they say and do significantly different things and if they are willing to change their minds when challenged?

49. Ehrenberg, *supra* note 47 at 279, 288 [footnotes omitted].

50. *Ibid* at 288. Ehrenberg states that one is "self-aware" when one has "psychological access to the semantic content of the rule" (*ibid* at 290 [footnotes omitted]). This means that judges lack 'self-awareness' when they mistakenly say that the U.S. Constitution (the written document) is itself the ultimate rule of recognition when the ultimate rule is and must be customary practices of officials (at least as Raz explicitly construes it). Thus, Ehrenberg sees Hart and Raz as committed to the view that although legal officials "use the basic validity rule to make explicit and conscious determinations of legal validity[,] they are just not usually aware they are using an unwritten basic rule to do so." *Ibid* at 291.

as an object of collective intention."[51] In this way, Ehrenberg is saying that a rule can be an object of collective intention without agreeing about its content. This is true so far as it goes. For instance, people can collectively intend to invalidate a specific rule without agreeing about its content (and with significant disagreement about even paradigm cases). However, it is difficult to see how one could say that a given rule actually governs a practice (i.e., that the rule governs how committed participants proceed) without some agreement about its content (at least in paradigm cases).[52] Thus, if the content of this ultimate rule is significantly different for different U.S. Supreme Court Justices (as it seems to be for originalists and for those who challenge originalism, for instance), then there is no way for us (the observer-theorist) to unambiguously say X is the rule by which legal officials proceed.

Winch's takeaway from these passages from Wittgenstein is a need to avoid "the impression sometimes given in this book of social practices, traditions, institutions etc. as more or less self-contained and each going its own, fairly autonomous, way."[53] In other words, he sees that the emphasis on conceiving of meaningful social practice as rule-governed (analogous with clearly rule-defined games) gives the mistaken impression that different social practices are self-contained and independent from each other. This emphasis mistakenly characterizes each social practice as containing its own principles of development (i.e., having its own 'logic' and distinct vantage point for discerning not just the content of valid norms but authoritative processes and procedures for developing and applying this system of norms). If we see law as a system of valid norms created and applied by properly legal processes so-identified by an ultimate constituted rule (and all of this, like a game of football, proceeding according to a definitive and authoritative rulebook), then it gives the impression that law is distinct and essentially self-contained both from other social practices and from morality (conceived here, with this two-system picture, as itself a rule-governed social practice with its own distinct vantage point and clear principles of development).

In the first edition of his book, Winch did try to address the problem of portraying all these rule-governed practices as distinct and autonomous systems by emphasizing the overlap between different social practices (as Hart does

51. *Ibid* at 288, n 46.

52. Ehrenberg later argues that the ultimate validity rule must be itself a "rule-governed" practice rather than merely "rule-described" in order for this basic validity rule to be a source of norms and obligations for legal officials (*ibid* at 294). However, so understood, he says that Hart leaves it "mysterious how we get from practice description to the normativity of a rule" (*ibid* at 295 [footnote removed]). In other words, "[t]here is something that remains mysterious about the way in which the mere description of other officials' validity practice becomes a reason for action in conformity with those practices" (*ibid* at 298). Ehrenberg attempts to address this mystery by focusing on the "self-identifying" and constitutive character of the basic validity rule, but it is unclear how this appeal to a "self-identifying institutional fact" does anything except mystify what it means for officials to proceed according to some basic rule or set of basic rules (*ibid*).

53. Winch, *supra* note 5 at xiv-xv.

himself with his minimum content shared between law and morality).[54] However, Winch adds:

> [T]he suggestion that modes of social life are autonomous with respect to each other was insufficiently counteracted by my qualifying remark … about the 'overlapping character of different modes of social life'. Different aspects of social life do not merely overlap: they are frequently internally related in such a way that one cannot even be intelligibly conceived as existing in isolation from others.[55]

Thus, the main problem with the two-system picture of law and morality is that it represents these systems as merely overlapping in substantive content, rather than seeing the complexity of the interdependence of law and morality. As we shall see, Dworkin's emphasis on the structural features and processes of law and the complex relationship between legal rights and political rights assumes a one-system picture that can acknowledge a complex interdependence of law and morality. As a result, this represents Dworkin's one-system view of law and morality in a significantly different way than as characterized by some critics like Dindjer.

3. Dindjer's characterization of the one-system view versus Dworkin's one-system view of law and morality

In his article "The New Legal Anti-Positivism," Dindjer characterizes the "one-system" view of law and morality (in fairness, focusing directly on the more "detailed" accounts of the one-system view given by Greenberg and Hershovitz) in terms of an "Identity Thesis" and a "Correspondence Thesis."[56] Since Greenberg and Hershovitz focus on the content of legal norms and affirm that legal norms are a subset of moral norms, Dindjer believes he can, at least at the start, put aside all discussion of the systematic or procedural/structural aspects of both law and morality and focus instead on the claim that legal norms are a subset on moral norms.[57] This approach has the merit of enabling him to deal with

54. See Hart, *supra* note 13 at 189-95 (a section entitled "The Minimum Content of Natural Law"). See also section V of HLA Hart, "Positivism and the Separation of Law and Morals" in *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983) 49 at 78ff, where Hart explicitly describes an 'overlap' in content between morality and law as a 'natural' or contingent necessity. He states, "At present, and until such radical changes supervene, such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules at all. Such rules overlap with basic moral principles vetoing murder, violence, and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points, the statement that this is, in this sense, necessarily so. And why not call it a 'natural' necessity?" *Ibid* at 80.

55. Winch, *supra* note 5 at xv-xvi.

56. Dindjer, *supra* note 1 at 182, 183, 184-85. Dindjer's characterization of the one-system view may have great validity when it comes to the views of Greenberg and Hershovitz. In this way, I am not assessing his arguments in relation to the views of Greenberg and Hershovitz. My focus here is on whether this characterization of the one-system view captures Dworkin's account in *Justice for Hedgehogs*.

57. Dindjer later discusses "'content-independent' considerations, such as democracy, fairness, solving coordination problems, and the vindication of legitimate expectations" (*ibid* at 194). Of course,

a diversity of one-system views that all share the same core commitment. Thus, he writes: "The convenience of the 'one-system' label notwithstanding, it will not be important for our purposes whether morality and law are *systemic* in any interesting (or unified) sense. What matters is that any one-system view holds that legal norms (obligations, rights, etc.) are a subset of moral norms."[58] Dindjer explicitly treats the one-system view of law and morality as having a 'core commitment' that can be isolated from and treated independently from other parts of the one-system view (other aspects like Dworkin's interpretivism, for instance). This 'core commitment' can be characterized in terms of its stance on legal norms (i.e., focusing on the content of valid legal norms in isolation and independently from the context of a system of institutional or structural practices and political principles). At its core, the one-system position, according to Dindjer, is committed to the view that each legal norm is a 'type' or 'subset' of moral norms (again, understanding moral norms also in isolation and independently from any larger ethical and moral theory).[59]

Dindjer further analyzes this core commitment in terms of an Identity Thesis and a Correspondence Thesis. The Identity Thesis states: "Necessarily, every legal obligation (privilege, power, etc.) is a moral obligation (privilege, power, etc.)."[60] Dindjer describes this Identity Thesis as asserting "a metaphysical relationship between legal and moral norms" (and thus the former norms are just "a type of" the latter norms).[61] The Correspondence Thesis basically states that "wherever one has a legal obligation, there exists a moral obligation with the same content. If this were false, the Identity Thesis could not be true."[62] To clarify this notion of correspondence, Dindjer adds the following:

> Notice that asking whether legal and moral obligations correspond, in the relevant sense, does not assume they are separate entities whose content is independently knowable. For legal and moral obligations to correspond is just for them to have the same content. Every norm corresponds to itself, since it has the same content

Dworkin sees some of these (like democracy and fairness) as principles of political morality. The claim that the 'content' of legal norms can be determined independently of justifying political principles is a claim Dworkin explicitly denies.

58. *Ibid* at 184 [emphasis in original].

59. *Ibid* at 181ff. In a footnote here, Dindjer describes his assumption about morality in the following way: "I assume that moral norms, facts, etc., are 'robustly normative,' in the sense that they are (or give) genuine reasons concerning what one ought to do *sans phrase*. A skeptic about this thesis might nevertheless accept much or all of the following argument, but that will depend on the variety of skepticism." *Ibid* at 184, n 21. Of course, Dindjer's arguments also rely on some of our common sense intuitions about morality and what counts as 'morally defective' or not. In this article, he explicitly focuses not on evil laws and evil legal systems like those of Nazi Germany, but on mundane and familiar legal "normative incidents"—including not just "obligations," but also power and privileges (*ibid* at 182). With such a focus, he attempts to show a disconnect between legal norms and moral norms. For example, strict liability cases deny what we commonly believe morality requires for blameworthiness (namely, intentionally doing wrong), and many laws allow people to do what we commonly believe morality does not (for example, laws that allow companies to pollute the earth).

60. *Ibid* at 184.

61. *Ibid* at 185.

62. *Ibid*.

> as itself. If legal obligations were moral obligations, they would correspond to them by being them.[63]

Dindjer is clearly aware that his focus on the content of legal norms versus the content of moral norms and his talk of a 'correspondence' between legal norms and moral norms makes it seem as if he is assuming a two-system view of law and morality.[64] However, by explicitly acknowledging that this would be a mistaken view of his characterization of the one-system's core commitment (as represented in both the Correspondence and Identity Theses) and by emphasizing that legal norms and moral norms are metaphysically the same (regardless of any 'systemic' account of law or any larger ethical or moral theory), he hopes that readers will avoid this rather obvious (and question-begging) misinterpretation of the Identity and Correspondence Theses.

With this characterization of the one-system position, Dindjer proceeds to consider counterexamples. We are implicitly encouraged by Dindjer's approach to trust our common-sense moral views or intuitions, in abstraction from any ethical or political theory, and then assess areas of disconnect between what our moral intuitions say about our obligations and duties and what common or mundane legal practices say about our obligations, powers, and privileges (like those legal practices that allow for strict liability or those that allow companies to pollute the earth). He will later bring in "'content-independent' considerations, such as democracy, fairness, solving coordination problems, and the vindication of legitimate expectations" to argue that none of these content-independent considerations, either considered by themselves or in some patchwork combination, are "sufficiently reliable" to vindicate the Correspondence Thesis.[65] All of this sets the stage for Dindjer's more detailed outline of counterexamples against the one-system position (i.e., to support the conclusion that legal normativity is not subsumable into morality or into any "otherwise robust normativity") and in support of the conclusion that the one-system version of anti-positivism has taken a "wrong turn."[66]

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63. *Ibid*.

64. He will later deal explicitly with the objection that his appeal to counterexamples to the one-system view's Identity and Correspondence Theses is "question-begging" (*ibid* at 210ff). His response is to ask, "But in what way? The argument does not assume the truth of legal positivism, and … there is nothing question-begging in asking whether legal and moral norms correspond, for correspondence, in the relevant sense, is just for them to have the same content—and that is a necessary condition for the one-system view to hold" (*ibid*). He goes on to defend *reductio ad absurdum* arguments in general as "legitimate and frequently important" (*ibid*).

65. *Ibid* at 194. Dindjer relies on Laura Valentini's work to distinguish "content-dependent moral considerations" from "content-independent" considerations that include some moral considerations, like democracy and fairness (*ibid*). See Laura Valentini, "The Content-Independence of Political Obligation: What It Is and How to Test It" (2018) 24:2 Leg Theory 135. Dindjer proceeds to isolate each kind of consideration and argues that each by itself is insufficiently reliable to produce a match between common legal obligations, powers, and privileges, and moral ones. Further, a "patchwork" of these content-independent moral mechanisms "does little to motivate the idea that reasons will systemically combine in this way" (Dindjer, *supra* note 1 at 197). Dindjer dismisses attempts to systematically combine disparate moral and political principles, but this is exactly what Dworkin attempts to do in *Justice for Hedgehogs*.

66. *Ibid* at 212.

It is true that if we abstract out this core commitment as Dindjer characterizes it from Dworkin's general views on interpretation and morality, we do get a seemingly easy position to refute. Dworkin himself acknowledges that many will find his claim that law is a branch or part of political morality as "absurd" or "paradoxical," given that "[i]t seems to suggest, idiotically, that a community's law is always exactly what it should be."[67] In other words, the claim that law is a branch of morality seems to suggest that legal norms are moral norms (or a subset of moral norms); this, in turn, portrays all legal norms as being as they morally ought to be and legal obligations (as well as powers and privileges) as corresponding to moral obligations (as well as powers and privileges). It is not hard to find counterexamples (as Dindjer amply provides). On the surface, it seems like Dworkin's claim about law as a branch of morality is, at best, seriously confused (or a 'wrong turn' for anti-positivism). However, I will argue that if we take seriously both Dworkin's views on law and morality, as well as his interpretative approach to both, his one-system view can be represented in a defensible and sensible way.

Dindjer's account of the one-system view, especially in terms of its opening characterization of the 'core commitment,' seems very far from Dworkin's own interpretative approach to law or his 'tree structure' picture of law and morality from *Justice for Hedgehogs*. Instead of building law up into a branch of a complex moral and ethical tree picture (a picture that assumes his arguments about the metaphysical independence of value and a vision of mutually supporting ethical and moral principles), Dindjer's account of the core commitment breaks down this 'one-system' picture into specific pieces and legal contents, representing the 'systemic' part of the one-system view as incidental or irrelevant to an assessment of its 'core' commitment.[68] In this way, Dindjer represents the tail of the one-system view as wagging the dog; the insistence that legal obligations are a subset of moral obligations is portrayed here as more important or central than the justification and explanation of a larger system of moral principles that might make sense of this very insistence.

Further, Dindjer's emphasis on the 'substance' of law's norms (again, understood independently of the structural or institutional processes and procedures that created them or any appeal to a system of mutually supportive principles of political morality) fails to address Dworkin's explicit comments about how this emphasis on substance versus process is reinforced by a two-system picture of law and morals. Dworkin states explicitly that the two-system picture "created an important distinction between process and substance: between the procedures through which law is created and the content of the law that is created. The long

67. Dworkin, *supra* note 2 at 405.

68. Stavropoulos and Greenberg make a similar point about the explanation of law being "atomistic" on the orthodox two-system approach, while the nonhybrid interpretative approach "inherits the holistic structure of morality: the whole of morality confronts the whole of institutional practice and determines its effect, which interpretation purports to identify." Stavropoulos, *supra* note 2 at §4. The atomism of Dindjer's characterization of the one-system viewpoint is very explicit and due to the separation of legal contents from systemic aspects.

debate about law and morals concentrated on substance. . . . The debate left process largely alone."[69] In other words, the two-system view of law and morality encourages us to distinguish two distinct vantage points: a legal vantage point from which to discern legal norms, and a moral vantage point from which to morally evaluate these legal norms and discern moral norms. These distinct vantage points are characterized, at least in part, by a distinct approach or distinct processes for identifying norms in each system (the conditions for legal validity consist of non-normative social facts about properly 'legal' processes and procedures for making and applying law, while the conditions for moral validity are decidedly different). As a result of this two-system picture, an observer-theorist seeking to 'compare' or 'connect' these two disparate systems is encouraged to abstract from these distinct processes and procedures (discernable in each vantage point) and focus only on a comparison of the substance or content of norms (i.e., what results from these distinct processes and distinct vantage points). But if we reject this two-system picture of law and morality and see law as 'systematically' interdependent with political morality, we must turn our attention to the processes and structural parts of law in order to understand this interdependence. Thus, Dworkin states, "once we reject the two-systems model, and count law a distinct part of political morality, we must treat the special structuring principles that separate law from the rest of political morality as themselves political principles that need a moral reading."[70]

If this reading of Dworkin is correct, then any adequate critical analysis of Dworkin's 'one-system' picture should focus on the moral reading of the 'structural features' of law, rather than just the 'substance' or content of legal norms. The structural features of law are, for Dworkin, what he means by the "phenomenon of institutionalization" that distinguishes law from other parts of political morality.[71] Only a moral reading of these structural features enables us to see the interdependences of law and morality implicit in Dworkin's interpretative approach. It is the neglect of these basic processes or structural elements that

69. Dworkin, *supra* note 2 at 413.

70. *Ibid*. Of course, a principle of precedent would also be another example of a structuring principle. One might view rule of law principles as structuring principles too.

71. *Ibid* at 405. Dworkin distinguishes ethics from morality and then distinguishes personal morality from political morality. Thus, although he is describing a mutually supporting system of value, he also emphasizes that ethics is not reducible to morality (and vice versa). He also emphasizes the distinctness of 'branches.' In this way, political morality is a distinct branch of morality (distinguishable from both ethics and from other branches of morality). He states: "Ethics studies how people best manage their responsibility to live well, and personal morality what each as an individual owes other people. Political morality, in contrast, studies what we all together owe others as individuals when we act in and on behalf of that artificial collective person." *Ibid* at 327-28. Thus, political obligation is, for Dworkin, the part of morality that pertains to a specific kind of "associational obligation" (tied to the bonds of citizens as members of the 'artificial collective community') distinct from both performative relationships/obligations (like making a promise to another creating a moral obligation to keep the promise) and other associational relationships (like those obligations due to bonds of a family, kinship, or partnership in a joint enterprise) (*ibid* at 319). Again, legal rights are related to political rights, but they are not identified with them.

is reinforced by an oversimplistic two-system picture of law and morality. Further, the reduction of these structural features to some non-normative social facts about legal practice (arguably what Hart and Raz do with the law-making and law-applying processes) represents legal structures as unchallengeable aspects of a legal system from a legal vantage point.[72] However, with a moral reading of these structural features impacting on law-making and law-applying (a moral reading implicit in an interpretative approach to 'law' and 'legal practice'), we must see how these structural principles fit into an overall justificatory picture of political morality.

As an illustration of a "special structuring" principle, Dworkin gives the example of a principle of parliamentary supremacy in Britain.[73] In this passage, he points out how, some 50 years before the publication of *Justice for Hedgehogs*, law schools in England treated this structuring principle as an unchallengeable 'social fact' of Britain's legal system. However, if one is aware of the history, it is clear that this structuring principle was not always considered an unchallengeable fact (see, for example, Lord Coke's appeal to natural rights in the 17th century).[74] Further, with the recognition of the importance of human rights, it is not considered an unchallengeable fact today. Dworkin's point is that these structural principles should always be seen not as some unchallengeable social fact determining a strictly legal vantage point, but as principles in need of continual justification in the context of a system of other principles of political morality and new circumstances in life.

Clearly, Dworkin's own one-system approach introduces a dynamic or temporal element into the striving for justifications for these special structural principles of law.[75] This means that the structural principles of different legal systems

72. Of course, such processes and structures are challengeable from a moral vantage point (but not from a strictly legal one), and legislators can appeal to outside moral considerations to alter some of these law-making and law-applying processes or structures. However, since the ultimate rule of recognition is itself deemed a customary practice, change of this ultimate rule or rules of recognition can only happen gradually and beyond the control of any particular legislator. Thus, the most basic structures affecting the identification of sources for valid law (crucial to both law-making and law-applying) seem, on the two-system viewpoint, de facto unchangeable and unchallengeable by legislators at a given time and place.

73. *Ibid* at 413-14.

74. Here, Dworkin cites the writings of Sir Edward Coke, "Edward Coke's Reports" in *The Selected Writings of Sir Edward Coke, Vol I* (Liberty Fund, 2003).

75. Postema brings a very interesting account of the temporality of law. He focuses on how law orders time in how it normatively guides rational agents. In the process, he describes how many legal theorists neglect the temporal dimension of law, and this is certainly the case with many versions of legal positivism. With respect to Dworkin, he states: "Dworkin's thought helpfully directs our attention to law's temporality, but, like many who discuss the role of time in law, he calls attention only to law's apparent obsession with the past, ignoring law's wider involvement in time's flow. Moreover, his proposition does little to explain, let alone justify, time's role in law's ordinary mode of operating." Gerald J Postema, "Time in Law's Domain" (2018) 31:2 Ratio Juris 160 at 161. Postema is no doubt correct that Dworkin does not focus on the structuring features of law related to law's normative guidance of rational beings; instead, Dworkin focuses much more of his attention on how judges or legal officials applying the law in cases are part of a dynamic and continuing process of justifying the use of coercion to enforce rights. Dworkin's account should focus on structural elements not just crucial to the application of law by judges, but also structural elements (striving for rule of law principles,

may differ from one to another (and change at different times in terms of their relation to other principles of political morality); but the striving to justify the coercion used by the 'artificial collective body' with reference to justice, equality, and liberty is intrinsic to law and its institutionalization of political morality. His point is not that 'morality' is relative to a time and place (a point he explicitly denies with his arguments for the metaphysical independence of value), but that the striving to justify our use and practices of coercion by the 'artificial collective person' is compatible with a rethinking and reshaping of structural processes and principles (for instance, the principle of parliamentary supremacy) in the context of other political principles over time.

Finally, the fact that social facts and conventions, no doubt, shape our legal practices and legal obligations does not, by itself, distinguish law from morality (as some versions of the two-system view would maintain); social facts and conventions shape our personal moral obligations, too.[76] In this way, particular customary practices and traditions can be seen as realizations of more general moral and ethical principles in a similar way that a particular institutionalization of law is a way of realizing more general political principles. Dworkin's comparison of the moral dynamics within a family (with its story of conflicts, the use of coercion, and the relevance of family history) to the institutionalization of law is meant to bring out a number of comparisons between law and personal morality (and thus to deny some versions of the orthodox two-system view).

Both cases involve attempts to justify the use of coercion by some authority. Both cases involve appeal to past practice or what was done in the past as relevant for determining what is 'fair' now in dealing with a present conflict. In this way, the appeal to facts about past practice is an appeal to a moral reason and not merely frustrated expectations.[77] Both represent a "dynamic morality," since, like law, "as pronouncements are made and enforced on concrete occasions, that special family morality shifts."[78] In this way, both cases involve 'structuring principles' and a mutually supporting system of general ethical and moral principles

for instance) for the guidance of people. I do not see anything in Dworkin's approach that should make this expanded view of structural features problematic.

76. Dworkin goes into detail about how conventions and social facts can shape our moral obligations (but conventions or mere social facts do not magically create obligations independently of a more general moral or ethical responsibility). See Dworkin, *supra* note 2 at ch 14. In this way, he sees David Lewis' famous account of conventions (as both arbitrary and self-perpetuating, as well as a source of obligations due to the expectations that result) as incomplete (see *ibid* at 302). He argues: "Not all expectations give rise to rights: we need to know why those generated by a particular vocabulary or role have special moral power" (*ibid*). Whether we are dealing with the case of performative relationships (like the datable and voluntary promises made to another) or the case of associational relationships (like those of a family or political bonds of citizenship), the fact that certain facts and conventions shape our obligations does not mean that these facts/conventions by themselves (independently of more general moral and ethical principles) could generate obligations.

77. Dworkin states that "the reasons that you and other members of the family have for deferring to this history are themselves moral reasons. They draw on principles of fairness that condition coercion—principles about fair play, fair notice, and a fair distribution of authority, for instance, that make your family's distinct history morally pertinent." *Ibid* at 408-09.

78. *Ibid* at 408.

that are the basis for justifying the use of coercion. But, most fundamentally for Dworkin's one-system view, both cases are interpretative in how they treat these structuring principles and general moral principles in application to specific cases. Thus, Dworkin acknowledges: "The best interpretation of the structuring principles may well require that some decision now regretted nevertheless be followed as a precedent. Fresh interpretation of these principles might well mitigate the difference between family and more general morality. But it cannot erase the difference."[79] Thus, he explicitly acknowledges the possibility of a divide between what a family's morality (or institutional law) may require at a given time and what it ought to require. He sometimes describes this divide as a divide between integrity and justice.[80] But for our purposes, Dworkin is not saying that the law always is as it ought to be (any more than he is claiming that a family's morality always is as it ought to be). However, he concludes: "The family story nicely illustrates how a distinction between what law is and what it ought to be can arise as a complexity within morality itself."[81]

Although there are challenges for anyone defending Dworkin's one-system view of law and morality (and I do not claim to have dealt with all the objections that could be raised against his views on morality and his interpretative approach), I hope that I have shown that it is not as easily refutable as Dindjer makes it seem. I also hope to have shown that there are good reasons for rejecting the orthodox two-system view of law and morality. I do believe that the problems with this orthodox two-system view of law and morality are significant and have undermined attempts to move forward from old debates within the philosophy of law. Dworkin's interpretative approach has the merit of refocusing the debate in legal theory on the structural features of law—whether we are referring to the reliance on precedent, or the separation of powers, or the striving for rule of law principles crucial for the guidance of rational beings. Although Dworkin's interpretative approach deals with these structural features of law with an unabashedly moral and political viewpoint, it holds the promise of justifying changes to these structural features that will make law a better realization of what it could be.

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79. *Ibid* at 409.
80. *Ibid* at 486, n 10.
81. *Ibid* at 408.