Chapter II – Law Has No DNA?

In recent years frustration of the enduring Hart-Dworkin debate has grown.[20] Therefore there will be no deliberate rehashing of the debate here, but there will be a recounting of the relevant sections of Dworkin's arguments which may be reminiscent. As will be outlined in this part Dworkin's arguments as a whole can be summarised as proposing the following two overarching arguments. Firstly, Archimedean second order description of law is impossible because it would end up influencing the law, thereby making it first order participation and not descriptive, i.e. second-order, at all. Secondly, the only way to make sense of law as a distinct thing from other things is to do so interpretively, thus practices are distinguished from each other via the requirements of justification and fit – as such they can only conceivably be construed as political since one must make substantive claims about what it should or should not do.

To that end the subsequent sections of this chapter will address distinct problems in Dworkin's account, which will dispute the overarching argument. Section I is the setting out of Dworkin's position. Section II illustrates that Dworkin's account of interpretation suffers from a charge of *peritrope*, whereby the fact that it also partakes in the practices it aims to describe means that it can be construed as false and therefore the account is unsustainable. Similarly, Dworkin's attempt to incorporate moral realism into interpretivism to surpass this charge is regarded as unsuccessful. In section III the different senses of

20 Andrei Marmor and Alexander Sarch, 'The Nature of Law' *The Stanford Encyclopedia of Philosophy* (Fall edn 2019) Ch 1.2 <https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/> accessed 13 May 2023.

law are explored explicating that Dworkin only referred to law in the sense of practice whereas Hart did so in the sense of legal systems. This difference provides Hart a way to avoid Dworkin's objections.

II.I.I – Law as Interpretation

The interpretivism introduced in *Law's Empire* (hereafter "*LE*") features prominently in the work of later Dworkin making its recollection an occupational necessity. The argument begins in earnest with the example of courtesy, that is, how is it that one can explain what courtesy is.[21] Dworkin gives an imagined example of a society wherein the notion of courtesy changes over time – this changing over time happens due to the adoption of an 'interpretive attitude'.[22] The adoption of this attitude assumes two things; the practice of courtesy has some reason, point or value for existing which can be stated independently from it, and the requirements of courtesy extend only insofar as allowed by its independent reason.[23] Dworkin then considers various competing ways of interpreting how the interpretive attitude operates, settling on the 'constructive account' of interpretation as a general account of interpretation.[24]

Importantly there are three stages of interpretation which refine constructive interpretation as an instrument for understanding law as a social practice (but also any other social practice); firstly the 'preinterpretive stage' where tentative rules of the practice are identified by the consensus of the community – which too requires a degree of interpretation, secondly the interpreter settles on a justification of the worthiness of the practice (which can be called the 'justification stage'), thirdly a 'postinterpretive stage' where the understanding of the requirements of the practice can be adjusted in view of its justi-

21 Ronald Dworkin, *Law's Empire* (Hart Publishing 1986) 47.
22 ibid.
23 ibid, 47–8.
24 ibid, 53–65.

fication.[25] Another vital point about justification is that it must 'fit' the practice rather than invent something new, and the substantive convictions underlying fit and justification must be independent of each other, otherwise convictions about fit would be overridden by justification.[26] Dworkin distinguishes between a concept and conceptions of it, wherein, for example, the concept of courtesy of the imagined community could be considered a matter of respect and conceptions of courtesy are competing conceptions about what respect requires.[27] Thus at the preinterpretive stage emerges the practice of courtesy, which is justified at the justification stage by respect (which already has independent substantive convictions grounding its importance) giving rise to the concept of courtesy, however disagreement in the postinterpretive stage will give rise to various conceptions of what is required by the concept of courtesy.

This allows for interpretation to be localised, that is, different groups of people may be at different interpretive stages in relation to their practices and may hold different substantive convictions about their worth.[28] According to Dworkin all of this means that there can be no 'defining feature' of courtesy since in the imagined society courtesy is originally connotated with respect but over time with other things, and therefore one cannot search for such a feature in virtue of the word 'courtesy'.[29] Similarly, paradigm cases are mutable and can be disproven like the original paradigm cases of respect and courtesy.[30] Dworkin's reason, in essence, for concluding such a position is due to what he calls the 'semantic sting', wherein the predominant view of disagreement is that participants of a discussion can only be said to be genuinely or sensibly disagreeing if they share the same criteria for

25 ibid, 65–6. See also, Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP 2011) 131–2.
26 Dworkin, *Law's Empire* (n. 21) 67–8.
27 ibid, 70–1.
28 This is clearly inferred from the hypothetical question Dworkin poses for the philosopher attempting to outline the concept of courtesy so as to account also for the practices in neighbouring or distant societies, see, ibid, 69.
29 ibid, 71–2.
30 ibid, 72.

when their claims apply – otherwise they are not really talking about the same thing at all.[31] Dworkin opposes this view of disagreement, holding that this paints a shallow picture of the disagreements that lawyers actually have since it can only account for empirical disagreement in the law, but not theoretical disagreement.[32]

Suppose one wanted to know if something, a proposition, was legally true (or valid) then it would only be true in virtue of the grounds of law which have the ability to make such propositions valid – the grounds of law may vary but are typically taken to be things like statute or past judicial decisions.[33] An empirical disagreement, for example, would be if lawyers disagreed about whether there was in fact a statute passed to the effect of making a relevant proposition valid – but all are agreed about what makes propositions valid, in this example statutes.[34] A theoretical disagreement is where all are not agreed, for example, that statutes are the relevant instrument for deciding on the validity of a proposition and suggest that other things like past judicial decisions are also relevant.[35]

Thus, the crux of Dworkin's argument is this: in order to avoid the semantic sting and account for theoretical disagreement in law, law should be understood as being an interpretive concept.[36] Dworkin continues in the rest of *LE* to consider the best interpretive concept of law that he can render, i.e. portraying law in its best light. Eventually concluding that the "courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets".[37] Dworkin's description of what law is, can be summed in the following:

31 ibid, 45.
32 ibid, 46.
33 ibid, 4–5.
34 ibid.
35 ibid.
36 ibid, 87–8.
37 ibid, 407.

> "Law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is. General theories of law, for us, are general interpretations of our own judicial practice."[38]

II.I.II – Dworkin's Later Work and Response to Hart

Following Hart's postscript Dworkin found it necessary to address and clarify his own position in response, especially those of *LE*. Since the postscript has been the receipt of much attention in other works and because the purpose of this paper is not to be a work about what others have said there will be no summary of the postscript given here nor of all of Dworkin's responses to it, only those pertinent to understanding the core objections. Dworkin's most substantive responses to Hart can be found in essays titled 'Hart's Posthumous Reply' which is a section by section response by Dworkin to Hart's postscript,[39] and in 'Hart's Postscript and the Character of Political Philosophy' which presented some new arguments.[40] The former essay was not published by Dworkin while he was alive apparently because he thought it would be unkind to Hart to publish a response to which Hart could not reply, but later began to consider publishing a substantive reply.[41] Ironically this response also ended up being posthumously published. Before addressing the arguments it would be better to acknowledge clarifications and modifications on Dworkin's part.

The theories of law that Dworkin originally called semantic in *LE* he would now call 'Archimedean',[42] by which Dworkin means that they purport to be second-order inquiries that are neutral and *about* law,

38 ibid, 410.
39 Ronald Dworkin, 'Hart's Posthumous Reply' (2017) 130(8) Harvard L Rev 2096.
40 Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24(1) Oxford J of L Studies 1.
41 Nicos Stavropoulos, 'The Debate That Never Was' (2017) 130(8) Harvard L Rev 2082, 2093–94.
42 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2105.

but not *part* of law.[43] Additionally, he holds that legal theory cannot be Archimedean – 'describing law is doing law' such that 'in the way that ordinary legal reasoning is normative legal theory is normative too'.[44] Dworkin puts legal positivism and especially Hart's theory in this camp as clear examples of Archimedean legal philosophy which he is dedicated to disputing.[45] Thus Dworkin qualifies the disagreement between him and Hart as the connection between legal theory and legal practice – wherein if he is right that legal practice is interpretive and that doing legal theory is to take part in the practice, then Hart's theory must be regarded as interpretive and not descriptive.[46]

Another vital clarification that Dworkin reiterates about his theory, apart from addressing Archimedeanism, is that it is only directed at developing law in the sense of what makes propositions within legal adjudication true or false, not law in the other sense of legal systems as a type of social institution.[47] Dworkin did make this qualification in *LE*, saying that his project 'centres on formal adjudication, on judges in black robes' and acknowledging that a 'more complete study of legal practice would attend to legislators, police and so on'.[48]

What Dworkin is trying to dismantle is Hart's position that his theory can be 'general and descriptive', of which Hart needs both in order for his position to be coherent. Recall that Hart sought for his theory to be able to account for all the varieties of legal systems, thus to avoid the failure of previous positivist accounts which were parochial. Descriptive theory does a great deal if not the most amount of work here in ensuring that this is possible, since if Hart was to justify certain systems or practices in the process this would obscure the generality of the analysis, for instance like how Bentham and Austin

43 ibid, 2097. See also, Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25(2) Philosophy & Public Affairs 87, 89; Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 40) 2.
44 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2097.
45 For instance, Dworkin, *Law's Empire* (n. 21) 34–5.
46 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2098.
47 ibid, 2105.
48 Dworkin, *Law's Empire* (n. 21) 11–2.

conflate law with the legislature.[49] By doing so they implicitly justified legislative perspectives of law to the expense and detriment of other legal systems which emphasise other aspects, like judicial power or federalism. Dworkin is trying to show that Hart is guilty of the same sort of error. However, Dworkin is not just trying to argue that Hart's account is parochial but rather that it is not possible to construct a theory which does not end up trying to justify certain practices, thus descriptive theory would be impossible. Running alongside this objection is of course the classic objection against positivism that by not including morality in its accounts it is over-inclusive of legal phenomena. Dworkin's ambitious goal is this trifecta; that Hart's theory does justify practices contrary to claiming to be descriptive, legal theory is not possible as a descriptive enterprise, and *a fortiori* positivists have therefore always been wrong about the classic problem of morality and law.

The arguments against Archimedeanism are predominantly employed against Hart's methodology and are therefore the subject of present interest. In dismissing this view Dworkin considered if Hart meant for the content of his theory, i.e. his understanding of law, to be taken analogously to what philosophers call a 'natural kind', but here Dworkin argues nothing shows 'how Hart's claims could be seen as different from ordinary legal claims, so that the former could be descriptive while the latter are interpretive.'[50] In a deeper elaboration of this claim Dworkin explored the difficulties, in his view, of political Archimedeanism, finding three fatal flaws. Firstly, descriptive accounts of values are contested and the means to refute them is solely by reference to evaluative conceptions of those values, which would mean making evaluative arguments – thus making them the same thing, i.e. first order.[51] Secondly, Dworkin considered if non-natural phenomena may still form kinds, e.g. political kinds, that are open to a descriptive

49 HLA Hart, 'The New Challenge to Legal Positivism (1979)' Andrzej Grabowski (tr) (2016) 36(3) Oxford J of L Studies 459, 463.
50 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2102.
51 Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 40) 9.

but non-normative discovery, concluding: "No. That is nonsense. We might pretend to such an idea."[52] Finally, description in the sense of historical generalisation is insufficient to distinguish descriptive political philosophy from social history or political anthropology.[53]

In order to chart a position for himself Dworkin elucidates that the 'deep structure' of natural kinds is physical and the deep structure of political values is normative – thus one can explain the 'concrete manifestations' of political values by 'exposing their normative core'.[54] The process of exposing the normative core is itself normative.[55] This importantly is not mere assertion, it is a position which logically does not fall foul of the three fatal flaws Dworkin just identified. In this connection Dworkin is trying to justify and show that legal theory has to be normative and so too does Hart's theory. Dworkin clarifies that political values are akin to natural kinds in that they are equally real: 'the value of freedom does not depend on anyone else's belief, invention or decision' – to justify this Dworkin says "[this] is, I know, a controversial claim: many philosophers dispute it. But I shall assume that it is true."[56] Law, then, according to Dworkin, is a political concept – this is so because people use it to form claims of law, that is, with regard to the social consequences of law.[57]

With the foregoing in mind Dworkin moved to consider whether Hart's descriptive project could succeed, granting as proponents have argued that description is normative in *some* sense.[58] Nonetheless Dworkin held that the flaws of political Archimedeanism could not be escaped by Hart – "If liberty has no DNA, neither does law".[59] Since political concepts are concepts of value there needs to be a concept which engages with the puzzles of legal philosophy, Dworkin therefore

52 ibid, 11.
53 ibid, 11–2.
54 ibid, 12–3.
55 ibid, 13.
56 ibid, 12.
57 ibid, 19.
58 ibid, 20.
59 ibid, 20–3.

proposes the interpretive concept of legality and that Hart's theory should be considered a conception of legality.[60] In order to create a coherent set of values that do not conflict with each other Dworkin argues that political values should be interpreted holistically in order to create a web of convictions.[61]

II.II – *Peritrope*, Natural Law & Interpretivism

Let it be assumed for the sake of argument that Dworkin's account of interpretation is correct.[62] All social practices are subject to interpretation, in view of the fact that the account applies generally. But that means that Dworkin's account of interpretation would itself be open to the same interpretative exercise, Dworkin poked fun at this feature of interpretation saying, 'you are interpreting me as you read this text'.[63] It is this feature of interpretation that leads Dworkin to say that everything involved in interpretation must be first-order. Dworkin concedes this clearly by saying that only a comparative legal project could disprove his account and that describing norms is to take part in them.[64] As Dworkin later put it: 'interpretation is therefore interpretive… all the way down.'[65]

Supposing then the account is open to interpretation, it *could* be interpreted such that it is incorrect, as Dworkin admits. Thus, interpretation as an enterprise would not be possible. It might not be that obvious why this is problematic but this construction of interpretation suffers from *peritrope*. Anything guilty of this charge is said to be self-refuting or self-defeating. This type of logical criticism was famously

60 ibid, 23–5.
61 ibid, 17–8, 26; Dworkin, *Justice for Hedgehogs* (n. 25) 162–3.
62 Note others deeply dispute the account, for instance, Jon Mahoney, 'Objectivity, Interpretation, and Rights: A Critique of Dworkin' (2004) 23(2) L and Philosophy 187; David Plunkett and Timothy Sundell, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' (2013) 13 L Theory 242.
63 Dworkin, *Justice for Hedgehogs* (n. 25) 123.
64 Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 40) 36.
65 Dworkin, *Justice for Hedgehogs* (n. 25) 131, 162.

employed by Plato, Aristotle, and other Socratic philosophers against Protagoras' view that 'man is the measure of all things'.[66] The counter-argument goes that if man is the measure of all things then man *could* measure that man is not the measure of all things – since it admits the possibility of being false according to its own terms the whole idea is false *ipso facto*. Another famous use of this principle was already mentioned in chapter I in Kant's critique of Hume's empiricism. This objection can be applied *mutatis mutandis* to Dworkin's interpretivism because nothing precludes one engaged in an interpretive enterprise from dismissing interpretivism as an endeavour – the mere existence of this possibility, in whichever stage of interpretation one considers, is enough to invoke this objection. Now one could try to argue that this form of logical criticism is not sound in view of the debates entertaining that very possibility.[67] But this need not be done because Dworkin relies heavily on this principle in order to tackle scepticism.[68] Thus it is obvious that if the principle's use was disapproved of the account would fail anyway for it would not address the sceptical challenge.

If one objects to this and says, 'of course interpretivism does not allow that it could be wrong, that would be absurd'. Then interpretivism is similarly doomed for if it does not apply to itself then it would not be true that 'all socially constructed things are subject to interpretation' – it would not be entirely first order, nor would it be 'interpretive all the way down'. There would also be worries that this is mere assertion and not argument. More importantly however Dworkin conceded that interpretivism does function in this way. Remember, all of this results from Dworkin's insistence that it is not possible to do second order

66 Mauro Bonazzi, 'Protagoras' *The Stanford Encyclopedia of Philosophy* (Fall edn 2020) Ch 2.2 <https://plato.stanford.edu/archives/fall2020/entries/protagoras/> accessed 30 July 2023.

67 See for instance the discussion here, ibid.

68 Dworkin deploys a vast array of considerations against scepticism which cannot be recounted here but eventually the crux of his argumentative strategy is to turn scepticism against itself, specifically this is how Dworkin manages to turn external scepticism into internal scepticism which he can then deal with as a moral argument, see, Dworkin, *Law's Empire* (n. 21) 76–86; Dworkin, *Justice for Hedgehogs* (n. 25) Chs 3, 5.

inquiry in legal theory without it becoming first order participation. Thus arriving at the conclusion that interpretation is interpretive and normative, and therefore first order.

It can be observed that Dworkin's interpretation is contingent on individuals' beliefs in the three stages of interpretation. This is clear particularly in the preinterpretive stage where tentative rules of any practice are reached through consensus – interpretivism would be correct only insofar as there is consensus and justification for it. This however presents another problem, regarding the origin of values and interpretivism. Recall that in the preinterpretive stage the practice requires consensus on its worth (since there is some degree of interpretation at this stage too), then in the justification stage for a practice to be justified it must be justified by other values which are already independently justified – in the example courtesy was justified by respect which already had pre-existing convictions grounding it. But if social practices are only justified by pre-existing values, which in turn are justified by other pre-existing values, how can there be a first value? Humanity has not existed infinitely into the past, at some point in time there was the first society, or societies, which established the first social practices and from which all other practices must have originated from. They, however, could not have had other pre-existing values or norms before then since they are the origin. Dworkin thus set out to defend his account from these sorts of objections by relying on moral realism. Can this move save the account from the charge of *peritrope*? This is the consideration motivating and in the background of further discussion on Dworkin's construction of value.

> "We defend a conception of justice by placing the practices and paradigms of that concept in a larger network of *other* values that sustains our conception. We can in principle continue this expansion of our argument exploring other values, until, as I said, the argument meets itself. The circularity, if any, is global across the whole domain of value."[69]

69 Dworkin, *Justice for Hedgehogs* (n. 25) 162–3.

This structure creates a risky all or nothing gambit for Dworkin. Either values are justified as a holistic whole, or they are not justifiable at all. Remember however that in order to show the deep structure of a practice's underlying values, or worth, one can expose its normative core. This too is done normatively. Thus excluding private prescriptions or personal idiosyncrasies – values are social, not individual. Therefore, if one personally thought that keeping a person locked up was an example of liberty they would be corrected by the general consensus of others responding, 'look, we might not all agree exactly or at all times what liberty is, can be justified by, or requires, but locking someone up clearly is not it'. Suppose such an individual persisted in their belief, arguing that if there was not a 'correct answer' showing theirs to be wrong then surely everyone else's must equally be wrong, the response to them would be to distinguish indeterminacy from uncertainty.[70]

This presents a challenge to values, relativism. What if a society is mistaken in thinking that the concept of a value is shared with another society when really they are talking about different values? Here there cannot be recourse to norms as there was in the case of the individual. Dworkin answers the challenge: either they share the concept but they profoundly misunderstand it – 'no justification of justice approves gender discrimination', or they do not have the concept but nonetheless violate it – 'one acts unjustly even if they do not have the concept of justice'.[71] These two answers can be effectively treated as being the same thing in substance since the basic point is that if one does not act in accordance with the concept they violate it. Thus Dworkin holds there is no relativism.

The irony of this position now must be appreciated. In trying to dismiss second-order inquiry in favour of first-order interpretivism Dworkin, in his response to the challenge, has given the same response that Aquinas gave. The objection faced by Aquinas was that the natural law is not the same in all people because not all people follow the Gospel, and the related objection that if natural law is all that people

70 See, ibid, 148–9.
71 ibid, 171.

are inclined to by their nature that different individuals have different natures and thus the natural law cannot be the same for all.[72] Aquinas answered that the general principles of knowledge and reason were the same for all, but that truth or the conclusions of knowledge may not be known to all or they may be subverted by passions or an "evil" disposition or habit – the example given is that even though it is contrary to natural law stealing was not considered wrong among the Germans (as documented by Caesar).[73] Thus Aquinas' answer is the same as Dworkin's, by not acting in accordance with the concept they violate it.

Dworkin even mirrors Aquinas in that first principles of natural law cannot be changed – gender discrimination is incompatible with justice as stealing is incompatible with the natural law.[74] Indeed this answer presupposes that value has a DNA or 'realness' beyond its normative core, because a whole society and their norms can supposedly violate values like justice even if they do not share it. But Dworkin absolutely refused to grant Hart the idea that people could be acting according to the rule of recognition even if they did not know about it, or as Dworkin put it 'this is preposterous, Hart's theory was original not old hat, few actually thought of law that way before Hart'.[75] In other words if values can exist beyond the normative core then why not also theories about law qua inquiry, i.e. as second-order claims? The response against relativism must be rejected because it is simply the natural law, not interpretivism at all. Conversely if it were granted then it would have to be granted for Hart too, defeating the project on two fronts.

The conflict here is between interpretation as a normative exercise and the non-normative values presupposed by the notion that a society can violate a value. Dworkin in this response is arguing that a whole society can violate a value like justice, therefore *ex hypothesi* all societies

72 Thomas Aquinas, *Summa Theologiae* (written c.1265–1274) I-II, 94.4.
73 ibid.
74 See, ibid, I-II, 94.5.
75 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2100.

that have ever existed and still exist may not have ever acted in accordance with justice. But this directly conflicts with interpretivisms *modus operandi* of 'best justifying' a practice in light of its justification. One could succeed in an interpretive exercise of best justifying a practice in light of justice but still fail to have acted in accordance with the 'objective' concept of justice.[76] This has the effect that the interpretive exercise is unsuccessful. Thus the defence is just natural law to the detriment of interpretivism – nothing about it is interpretive. Trying to strike off this natural law component would have no benefit either for if things were restated in terms of 'best justification' then it would fall foul of Hart's past criticism of that theory, illustrated by the example that 'killing an innocent man without torturing him is morally justified to some extent because killing him with torture would be worse'.[77]

Nothing in the account provides that the interpretivism itself is supported by any of the realism advanced by Dworkin, it remains the case that interpretivism could be decided to be false by a community acting in the way outlined by interpretivism. It is therefore quite sufficient to regard that the charge of *peritrope* holds. It is important to stress that nothing in this argument is against moral realism *per se* but rather of Dworkin's attempt to integrate it into interpretivism. Not only is it an unsuccessful and harmful integration but it also does nothing to save the account from itself. All of these problems could be avoided by Dworkin by presenting the account as a second-order one but likewise that would permit Hart to continue with his general and descriptive project.

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76 When this argument is read alongside the alternative introduction to the section on discretion in Hart's postscript which is set out in the notes it seems that Hart was about to make this very point against Dworkin's notion that there is a 'right answer' to legal disputes which objective values would amount to but the sentence ends in the middle of making it, this is obviously very unfortunate for legal theory but nevertheless suggests that this argument is what Hart would likely have done and that he would support it, HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) 306–7.

77 HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) 151. See also, Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 475.

II.III – Which Sense of Law?

We can therefore take as a hypothetical what Dworkin's account would argue about law if one were to take it as a second-order account. To pre-empt objection and to demarcate the scope of his project Dworkin qualifies the sense of law which he is addressing, which is law in legal practice or in adjudication. As opposed to law as the whole legal practice or as describing what a legal system is. As noted in section I of this chapter Dworkin first iterated this in *LE* and later again in 'Hart's Posthumous Reply'. On the other hand, Hart's theory is dedicated to law in the sense of legal systems. As such this section is dedicated to explicating the effects of this difference of sense.

As was mentioned in chapter I Hart explicitly stated that his theory did not seek to outline or define the precise boundaries of the word 'law'.[78] According to Hart, moral iniquity in laws belonging to a system with the union of primary and secondary rules ought not be deprived the title of valid law, to do so would confuse theoretical inquiry and not accord with usage.[79] Hart then examined the issue of international law, i.e. whether international law is 'law'. After some discussion of the state of international law Hart found that it is not comprised of the union of primary and secondary rules but is merely an arrangement of primary rules between states – thus meaning there is no legal system and therefore cannot be regarded as law.[80] Hart's argument in both cases is, in effect, that law in the sense of legal systems is prior to law in the sense of practice – 'legal' practice comes from legal systems. Reading Hart's theory as meaning law in the sense of legal systems is therefore necessary, attempting to read it in the other sense of legal practice is contrary to the argument.

This is vital because when Dworkin finds his own account in danger he distinguishes himself as using law in the sense of legal practice, not legal systems, but when criticising Hart Dworkin refuses to read Hart

78 Hart, *The Concept of Law* (n.76) 17, 213.
79 ibid, 213–4.
80 ibid, 232–7.

as describing law in the sense of legal systems and not practice. In *LE* Dworkin identifies Hart and all of legal positivism as using law in this sense.[81] In another place he discusses a hypothetical case claiming that Hart's theory takes sides in it which, again, is a forced reading of Hart as making claims about practice.[82] In perhaps the clearest instance of this, Dworkin acknowledges that Hart's theory is about the structure of legal systems but then holds that it is better to understand Hart as 'agreeing with any lawyer who asserts, as a matter of law, that all valid rules are valid in virtue of a fundamental master rule'.[83] Reframing Hart's view from the point of view of the lawyer making a claim 'as a matter of law' is yet again a forced reading of Hart as making claims about practice.

But why does Dworkin maintain his sense of law over Hart's in spite of their numerous engagements? Effectively it comes to disagreement over the rule of recognition. In his postscript Hart tried to clarify that there is a misconception that the rule of recognition is meant to provide criteria for settling the correct legal answer in cases or disputes, saying rather 'its function is to determine only the general conditions which correct legal decisions must satisfy'.[84] In response to this Dworkin supposed that in America the general conditions could be the 'tests imposed by the Constitution, interpreted in the right way to interpret it'.[85] Following this Dworkin asked how then could there be general conditions if there was disagreement over the right way to interpret the Constitution?[86] Now Dworkin here has done absolutely nothing wrong in reaching this conclusion based on what Hart said, in fact it seems quite reasonable. The real question is why Hart framed the rule of recognition in this way. In light of the nature of the publication of the postscript it seems fair that an adjustment of the rule based on what

81 Dworkin, *Law's Empire* (n. 21) 33–44.
82 Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 40) 3–5, 19–20, 23–4.
83 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2100–1.
84 Hart, *The Concept of Law* (n.76) 258.
85 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2118–9.
86 ibid, 2119.

Hart had said originally is appropriate. More so still since Hart said that he was restating what the rule was, not making a change to it, but basically Hart did change it and Dworkin noticed this too.[87]

When Hart constructed his account of secondary rules he stated that the rule of recognition was a remedy to the defect of uncertainty,[88] a defect which arises,

> "if doubts arise as to what the [primary] rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative."[89]

This construction of the rule of recognition as that which is taken to 'settle doubts as to what the primary rules are' is a much better and truer description of the rule than the 'general conditions' that Hart spoke of in the postscript.[90] Now the resources to quantify Dworkin's position in Hart's terms becomes much more apparent. When Dworkin suggests that there are doubts or disagreement over the 'right way' to interpret the Constitution this implies that there is no way to settle doubts as to what the legal rules, what the legal obligations, actually are. But this implication is mistaken. There clearly is a rule of recognition in operation in America, i.e. an authoritative way by which doubts are settled, and that is ultimately the US Supreme Court. Though many may disagree with decisions of that court or a decision may be controversial among the citizenry it still stands as a decision by which the doubt is settled. Even if it is a decision that is decided by one vote or hated universally by everyone else it matters not as long as it is followed, obeyed, and still regarded as the proper way to settle doubt about what the rules are. Certainly nothing in the rule of recognition requires a 'right answer' or 'right way' for the dispute to be settled, only that there is an agreed way of settling disputes.

87 ibid, 2119–20. Dickson shares this view as well, Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) Oxford J of L Studies 373.
88 Hart, *The Concept of Law* (n.76) 94.
89 ibid, 92.
90 See, ibid, 94–5

Now of course the only way the Supreme Court comes to be authoritative, as Dworkin would probably say, is because the Constitution says that it is. How can it be authoritative when the Constitution itself is in doubt? This can be formulated more precisely, the reason that the Constitution can be regarded as expressing *inter alia* a rule of recognition is because it contains a 'system of subordination' that puts the Supreme Court (roughly) at the top of the system of settling doubts as to what the rules are.[91] But when Dworkin formulates his issue as doubts about the construction of the Constitution Dworkin fails to abide by his own arguments. As mentioned briefly earlier, when addressing sceptics of communication Dworkin said that one must be careful to distinguish uncertainty from indeterminacy.[92] Clearly when formulating his concern against the 'right way' to interpret the Constitution Dworkin is conflating uncertainty with indeterminacy, for it does not follow that uncertainty about part of the Constitution unrelated to the system of settling doubts means *ipso facto* that the whole Constitution including the system of settling doubts is indeterminate or that there is disagreement about settling doubts over the rules.

Dworkin refuses to grant opponents as reading law in the sense of legal systems but this needs to happen since in order to understand 'judges in black robes' as being part of 'legal practice' one needs to understand whether they are in a 'system for settling doubts' that makes them 'judges' with authority to 'formally adjudicate' and not merely individuals declaring their personal beliefs in fancy gowns. Really Dworkin's work is about how legal disputes are settled, which obviously *requires* an agreed method of settling those disputes, i.e. the judge in the courtroom. In other words Dworkin requires that there be a rule of recognition, which he has always implied in his work via formal adjudication. Even still Dworkin's work on formal adjudication

91 Just to be clear the rule of recognition is a social rule but nothing stops it from *also* being expressed in legal sources which are socially accepted as such, the reason Hart emphasises that the rule of recognition is social is because Hart wants to avoid resemblance to Kelsen's *grundnorm* and Hart wants to be able to account for unwritten constitutions, see, ibid, 101, 292–3.

92 Dworkin, *Justice for Hedgehogs* (n. 25) 148–9.

is insufficient as a general account for it ignores many other crucial parts of other legal systems. Even Dworkin acknowledges that 'judges are not the only or most important actors in the legal drama' when he narrows his project to law in the sense of practice.[93] Nonetheless the account is inadequate in this way due to its insistence on understanding law through practice alone.

In some legal systems formal adjudication has a prominent position, as it does in the United States due to the implementation of the doctrine of the separation of powers. There the federal courts have the power to declare acts of the executive as unlawful or pieces of congressional legislation as unconstitutional. In the United Kingdom the courts have much less power than those of the United States. There the courts cannot declare the invalidity of legislation unless empowered to do so by another piece of legislation or where the maxims of equity require. It is only in recent times that the courts of the United Kingdom have successfully intervened against the actions of the government and royal prerogatives through judicial review without legislative backing.[94]

Dworkin argues interpretivism explains law because in theoretical disagreement there is nothing swaying the decision either way. This error was not lost on Hart who contended that other parts of legal practice mitigate this, giving the example that in the Swiss system there is a statute that requires where there is an absence of a provision judges must decide in accordance with customary law and where this too is lacking they must decide as the legislator would.[95] The legislator can therefore prevent theoretical disagreements of some kinds and this denies wholesale interpretivism in formal adjudication. Other clear instances exist, for instance when it comes to statutory interpretation in common law countries it is routine for there to be an act of the legislature setting out how statutes should be interpreted and this is

93 Dworkin, *Law's Empire* (n. 21) 12.
94 *R (Miller) v Prime Minister* [2019] UKSC 41.
95 Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 472.

the case in Ireland,[96] the United Kingdom,[97] Canada,[98] Australia,[99] and New Zealand,[100] among others. This legislative practice of restricting interpretation goes back at least as far the United Kingdom Interpretation Act 1889.

If one were to take Dworkin's interpretivism in theoretical disagreements as applying to all such cases or as the way judges decide all cases then it is clearly false. For if the judiciary took to developing their own methods of statutory interpretation in the jurisdictions listed contrary to the mentioned statutes then it would be a blatant disruption and challenge to the legal system. To be fair to Dworkin he did not argue this exactly, he sought to show that in some cases doubts arose seemingly in this way. But the point stands nonetheless that the legislature can pre-emptively settle those kinds of doubts in which case the decision-making process of judges cannot be acting in this interpretivist way – it would apply to an empty domain. Of course, in some of those jurisdictions constitutional challenge is possible, however the broad sweeping changes that can happen in such instances are significantly less in general than in America. None of this, in fact, *even considers or acknowledges* the civil law tradition which is quite repugnant to the idea generally of such sweeping changes, and powers, being in judicial hands – it goes against the spirit of codification espoused by that tradition. One must stand back and appreciate the irony of the state of legal theory for a moment. Under the early positivist theories of Bentham and Austin law was viewed as the explicit or tacit legislation of the legislator.[101] This was bluntly criticised by American jurists as being entirely parochial, applying only to the United Kingdom.

96 Interpretation Act 2005.
97 Interpretation Act 1978.
98 Interpretation Act 1985.
99 Acts Interpretation Act 1901.
100 Legislation Act 2019.
101 Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 463.

> "The general acceptance by English jurists of Blackstone's definition of the law, and of the irrational theory founded upon it by Bentham and Austin, and the long continued dominion established by the theory over the English mind, is one of the most curious and instructive phenomena presented in the history of mankind. Nor is it possible to estimate fully the deleterious consequences that have thus resulted. Briefly, it may be said that it has eradicated from English jurisprudence… the very notions of justice and reason, and has thus effectually isolated the English jurists from those of other ages and countries."[102]

On reverse footing, Hart points out that American legal theory attributes exaggerated importance to the point of view of the judge, including American legal positivists.[103] Take for instance Holmes' well known locution – "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[104] As such these sorts of simplistic reductions of law were something Hart sought to avoid, thus insisting on his theory being general. Besides, it has always been a caveat of the American legal system that it is quite allergic to referenda.[105] As a result of that handicap the Supreme Court there holds a massive power to set out the definitive terms of the meaning of the constitution. Thus Hart is right to say that European jurists and philosophers may find the American preoccupation with adjudication surprising, it is.[106]

All of which, though especially the points about international law, reaffirm the general point that 'every law necessarily belongs to a legal system'.[107] Therefore, it is clear that the use of law in the sense of practice is *necessarily* subordinate to law in the sense of legal system,

102 George H Smith, 'The Theory of the State' (1895) 34(148) Proceedings of the American Philosophical Society 182, 207.
103 Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 462–3.
104 OW Holmes, 'The Path of Law' (1897) 10(8) Harvard L Rev 457, 461.
105 For instance, Richard Albert, 'The World's Most Difficult Constitution to Amend?' (2022) 110 California L Rev 2005.
106 Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 462.
107 Joseph Raz, *The Concept of a Legal System* (2nd edn, Oxford UP 1980) 1.

because this shows how to identify the practice as 'legal'. Dworkin tried to use law in the sense of judicial practice to show law as a branch of politics and morality but with this sense of law being embedded within the legal system it is difficult to see this attempt as anything other than a parochial description of the American legal system. For as was discussed other legal systems cannot use interpretivism in this way and thus the subsequent argument of politics and morality can only be construed, if it is to be applied at all, as applying only to the legal systems interpretivism can apply to.

When Dworkin restricts the sense of his arguments to being about practice and not about what makes or counts as a legal system it seals the fate of the argument. Hart and Dworkin are talking about law in different senses. Furthermore, Dworkin actually is supporting the existence of the rule of recognition by documenting in such detail how individuals, both citizens and officials alike, are committed to using the courts in order to resolve disputes and settling doubts as to what the legal rules are, even in the somewhat drastic circumstances he has demonstrated over the course of his works. Now Dworkin could have tried to apply his interpretivism to the rest of legal practice, but then a definition of 'legal' practice would be required rather than working from the assumption that 'formal adjudication' is legal in the first place – an assumption which seems, somewhat ironically, to stem from shared semantic or conceptual criteria of what makes it formal or adjudication.

Obviously if one took the rule of recognition to be a rule that settles what the 'right answer' is in legal disputes then it would be an evaluative argument as Dworkin alleged all along. However Hart did not argue for such a rule and thus the arguments given in this section in particular are precisely why Hart finds it difficult to understand the exact reasons Dworkin has for rejecting his project,[108] and likewise dismisses being labelled a semantic theorist in *LE*.[109] For the sake of argument Hart takes Dworkin to be describing certain or perhaps all

108 Hart, *The Concept of Law* (n.76) 242.
109 ibid, 246–51.

judges and lawyers as settling legal propositions in this interpretive or evaluative way, holding even if true 'this would be something for the general descriptive theorist to record'.[110] This makes perfect sense, Hart is simply saying that if Dworkin is right that this is how practice functions then when describing legal systems (which is the focus of a general and descriptive theory), one would need to account for it. Thus, Hart cautions that describing interpretation or evaluation as part of legal systems does not mean one is interpreting or evaluating and no longer talking about law is the sense of legal systems – 'description may be description, even when what is described is an evaluation'.[111]

II. IV – Conclusion

Concluding this section it must be held, as Dworkin held of Hart, that Dworkin was 'wrong clearly when he was clearly wrong'.[112] In order to object to Archimedeanism, Dworkin tried to insist on interpretivism being entirely first-order and that anything other than an explanation of law in this way was not possible. But this is not possible, an argument or account cannot permit its own falsity, thus the charge of *peritrope* was made against interpretivism. Dworkin's attempt to incorporate moral realism into his account was shown to be both unsuccessful and harmful to interpretivism since it is simply natural law and thus the charge of *peritrope* is not escaped.

Even if one took interpretivism hypothetically as a second-order account advocating for understanding law in the sense of practice over law in the sense of legal systems, it cannot succeed. Here crucially the notion of the rule of recognition as supplying all the correct legal answers to disputes was dismissed in order to elucidate the proper character of the rule as agreement over the way to resolve disputes. It was thus shown that Dworkin actually has supported and endorsed the rule of recognition in all his work by showing how legal practices

110 ibid, 244.
111 ibid.
112 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2096.

are capable of resolving disputes. It was also highlighted however that Dworkin's focus and insistence on discussing adjudication is perhaps misplaced and certainly as a general account of how judges handle disputes it is too narrow because it ignores how other parts of the legal system may interact with judicial functions. Notably the account does not function much if at all in civil law jurisdictions and it fails to consider other common law jurisdictions where other branches of government may have stronger legal powers relative to the judiciary.

Where does this leave Hart? Now that the ability to engage in second-order inquiry has been reclaimed and the character of the rule of recognition has been clarified this leaves Hart's account in a much better position than before. Similarly, Dworkin's challenges to elucidating law as an independent domain have dissipated. Hart's enterprise of general and descriptive legal theory seems secure. But issues still lurk and remain to be explored. For instance the exact relationship between the rule of recognition and the way in which legal practice operates, particularly in judicial decision making, remains to be fully elucidated and this was conceded by Hart himself.[113] In his work Greenberg examines this aspect of legal theory alleging that Hart's theory cannot remain descriptive. Thus the next chapter seeks to explore this link between secondary rules comprising legal systems and the features of practice elucidated by Greenberg.

113 Hart, *The Concept of Law* (n.76) 272.